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

REPLY BRIEF FOR PETITIONER

Shay Dvoretzky
Counsel of Record
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

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

Counsel for Petitioner

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INTRODUCTION

GE Energy's Petition made a straightforward case for certiorari: The Courts of Appeals are divided 2-2 on the question presented, its resolution is important for the viability of international arbitration agreements, and the Eleventh Circuit's decision is wrong.

Respondents (collectively, "Outokumpu") fail to refute any of that. Outokumpu complains that the cases on opposite sides of the split do not cite each other. But it does not dispute the crucial points: that the First and Fourth Circuits have adopted a different rule than the Ninth and Eleventh, and that those different rules yield different outcomes on the same facts. As for importance, Outokumpu counts several dozen decisions citing the cases in the split, a number it considers too low to justify this Court's intervention. But that counting exercise does not undermine GE Energy's account—echoed by the National Association of Manufacturers ("NAM")—of the significance of this issue to international commerce. And on the merits, Outokumpu's only response is to cling to a single canon of statutory interpretation that it claims turns the Convention's definition of "agreement in writing" into a prohibition of equitable estoppel. But that definition (which speaks to *when* an arbitration agreement exists) has nothing to do with the question here (which concerns *who* may enforce it); in any event, even Outokumpu's preferred canon does not comport with its interpretation of the Convention.

Finally, the supposed "vehicle" problems that Outokumpu identifies are illusory. *First*, Outokumpu points to two issues that would remain

for remand if this Court were to grant certiorari and reverse. That is no reason to deny certiorari (and Outokumpu is wrong about the merits of those issues anyway). *Second*, Outokumpu contends that the question presented was inadequately aired in the Court of Appeals. That is a strange suggestion, since the parties devoted an entire round of briefing to the question, it was Outokumpu's primary point at oral argument, and it was the basis for the Eleventh Circuit's decision.

This is a clean vehicle for resolving an undisputed circuit split on an important issue. Certiorari should be granted.

ARGUMENT

I. THE COURTS OF APPEALS ARE SPLIT ON THE QUESTION PRESENTED.

Outokumpu all but acknowledges the 2-2 split that GE Energy detailed in its Petition. Outokumpu affirmatively argues that the Ninth and Eleventh Circuits "have both held that a party who has not signed the arbitration agreement may not enforce it under the Convention using the doctrine of equitable estoppel." Opp.6–7; *see id.* at 8 (explaining that the courts' analyses were "basically the same"). And Outokumpu does not dispute that the First and Fourth Circuits have endorsed the opposite rule in decisions that would bind future panels. *See* Pet.12–14; Insurers' Supp. Br. 5–6 (Ct. App. Dkt. Feb. 2, 2018) (acknowledging circuit court "opinions in which equitable estoppel was used in a Convention context").

Outokumpu's only quibble appears to be that the First and Fourth Circuits did not expressly refute

the *reasoning* endorsed by the Ninth and Eleventh Circuits, and vice versa. Opp.2. It is hard to fault the First and Fourth Circuits for failing to discuss cases that would be decided years later. In any event, the First Circuit's opinion in *Sourcing Unlimited, Inc. v. Asimco Int'l*, *Inc.*, 526 F.3d 38 (1st Cir. 2008), did address the Convention's "agreement in writing" requirement and found that it was no bar to equitable estoppel. *Id.* at 47 n.7. The Fourth Circuit likewise rejected the argument that the Convention "requires United States courts to enforce international arbitration agreements" only when both parties to the arbitration are "parties to 'an agreement in writing'" under the Convention. *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 n.7 (4th Cir. 2000) (quoting Art. II ¶ 1). Relying on its prior precedent, the court reaffirmed that "the estoppel doctrine also applies to nonsignatories to arbitration agreements governed by the Convention." *Id.*

As for the Ninth and Eleventh Circuits, their drafting choice not to cite the First and Fourth Circuit's contrary rulings does not undermine the circuit conflict. Nor does it suggest that these courts were unaware they were creating and deepening a circuit split. To the contrary, the relevant First and Fourth Circuit rulings were cited in the briefs before both courts.[1]

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[1] *See* Outokumpu's Supp. Br. 6 n.5 (Ct.App.Dkt. Feb. 2, 2018); Insurers' Supp. Br. 6 (Ct.App.Dkt. Feb. 2, 2018); Appellee's Supp. Br. 6–7 (Ct.App.Dkt. Jan. 19, 2018); Appellant's Br. 14–15, 23–25, Dkt. 25, *Yang v. Majestic Blue Fisheries, LLC* (9th Cir. No. 15-16881); Appellant's Supp. Br. 6,

In the end, Outokumpu recognizes that four Courts of Appeals have definitively answered, and divided evenly on, the question presented. And it does not dispute that under current law, the First and Fourth Circuits would compel arbitration under the Convention where the Ninth and Eleventh would not—including in this very case. This Court should resolve the conflict.

II. THE QUESTION PRESENTED IS IMPORTANT.

GE Energy's Petition explained the significance of the question presented given the "emphatic federal policy in favor of arbitral dispute resolution" and the reliance of the international business community on the arbitrability of these kinds of disputes. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see* Pet. 16–19. NAM's amicus brief underscores those points. *See* NAM Br. 15–17 (explaining that granting the petition is "critically important" to preserve the benefits of international arbitration).

Outokumpu makes two points in response. First, Outokumpu is apparently underwhelmed by the citing references for the cases that comprise the split. *See* Opp.11–12. To begin with, Outokumpu's count ignores that "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." Michael P.

(continued…)

Dkt. 59, *Yang v. Majestic Blue Fisheries, LLC* (9th Cir. No. 15-16881).

Daly, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95, 103 (2007). In any event, counting citations is a poor (and inherently underestimating) proxy for the significance of an issue. That the First and Fourth Circuits' decisions were discussed in the Ninth and Eleventh Circuit briefing and simply omitted from those opinions, *see supra* 3 n.1, is proof of that. And even taking Outokumpu's numbers at face value, dozens of citing references involving a burgeoning 2-2 circuit split on an issue affecting international commerce are more than enough to warrant this Court's review. *Cf., e.g.*, *Sveen v. Melin*, 138 S. Ct. 542 (2017) (granting certiorari where there were fewer than two dozen citing references over twenty-six years).

Outokumpu also suggests that this Court should decline to intervene because subcontractors like GE Energy can negotiate their own arbitration agreements. *See* Opp.13. But that is not how subcontracting works. Subcontractors are subcontractors because they have contracts with the prime contractor (here, Fives), not with the owner (here, Outokumpu). *Cf., e.g.,* Or. Rev. Stat. Ann. § 87.005(11) (defining "subcontractor" as "a contractor that has no direct contractual relationship with the owner"). If the only way a subcontractor can protect its interests is to enter a separate contract with the owner, the whole enterprise falls apart: Subcontractors are no longer subcontractors, and owners lose the benefits of dealing with one contractor instead of many. Moreover, subcontractors are rarely in the room when a prime

contract is negotiated. And when *that* contract is used as a sword against the subcontractor, equitable estoppel is supposed to provide the shield. *See* 21 R. Lord, Williston on Contracts § 57:19, 183 (4th ed. 2001) (explaining that equitable estoppel prevents a signatory from "cherry-pick[ing] beneficial contract terms while ignoring other[s]").

III. THE SUPPOSED VEHICLE PROBLEMS OUTOKUMPU PRESSES ARE ILLUSORY.

The Eleventh Circuit definitively and comprehensively answered the question presented, and that answer disposed of GE Energy's bid for arbitration. Outokumpu does not dispute either point. And it identifies no jurisdictional or other issue that could even conceivably prevent this Court from answering the question presented and resolving the circuit split. The three supposed "vehicle problems" Outokumpu identifies are just background noise.

1. Outokumpu first complains that, in its view, GE Energy would not ultimately benefit from the doctrine of equitable estoppel even if the Convention countenanced its application.

That is an issue for remand, not a vehicle problem. The parties fully briefed the merits of this issue in the Eleventh Circuit. *See* Appellee's Br. 45–50 (Ct.App.Dkt. June 30, 2017) (section of brief arguing that "GE Energy is Entitled to Enforce [the Arbitration Clause] Under the Doctrine of Equitable Estoppel"); Insurers' Reply Br. 17–24 (Ct.App.Dkt. Aug. 7, 2017) (section of brief arguing that "[GE Energy's] Equitable Estoppel Argument Fails"); Outokumpu's Reply 27–30 (Ct.App.Dkt. July 26,

2017) (arguing that equitable estoppel does not apply). Because the Eleventh Circuit held that equitable estoppel is categorically unavailable in suits under the Convention, it had no occasion to resolve that dispute and decide whether, on these facts, equitable estoppel supports arbitration. If this Court were to hold that equitable estoppel is consistent with the Convention, it would simply remand for the lower courts to decide, in the first instance, whether the requirements of that doctrine are satisfied here. This Court does that all the time. *See, e.g.*, *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 922 (2017) (remanding for consideration of an argument "never confronted" below and "any other still-live issues"); *Sturgeon v. Frost*, 136 S. Ct. 1061, 1072 (2016) (similar).

In any event, equitable estoppel, as GE Energy argued below, *does* authorize arbitration here. Outokumpu does not dispute the governing standard: Equitable estoppel applies (1) "when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting [its] claims" or (2) "when the signatory . . . raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories." *MS Dealer Serv. Corp.* v. *Franklin*, 177 F.3d 942, 947 (11th Cir. 1999). Both circumstances are present here.

First, Outokumpu "must rely on the terms of the written agreement" for its implied-warranty and negligence claims. *Id.* That is because the only possible source of any warranties or duties of care running from GE Energy to Outokumpu is the

Outokumpu-Fives contract. *See* Appellee's Br. 46–48 (Ct.App.Dkt. June 30, 2017). Outokumpu complains that the Complaint does not contain a claim labeled "breach of contract" or cite the Outokumpu-Fives contract. Opp.14. But equitable estoppel requires only that the plaintiff "must rely on the terms of the written agreement in asserting [its] claims." *MS Dealer Serv. Corp.*, 177 F.3d at 947. It does not require a particular kind of claim or citation. *See, e.g., Marubeni Corp. v. Mobile Bay Wood Chip Center*, No. 02-0914-PL, 2003 WL 22466215, at *12 (S.D. Ala. June 16, 2003) (equitable estoppel appropriate where plaintiffs necessarily relied on contract "as a basis for their fraud and misrepresentation claims").

Second and independently, Outokumpu has alleged "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *MS Dealer*, 177 F.3d at 947. Although Outokumpu's Complaint references "Fictitious Defendants A, B, C, D, and E," instead of naming Fives, D.Ct. Dkt. 1-2, ¶ 5, Outokumpu could have only meant to refer to Fives. Indeed, Outokumpu filed a separate suit against Fives, and its pleadings in that case refer to "Fictitious Defendants A, B, C, D, and E . . . , which comprise the 'consortium'" alleged to have acted jointly to Outokumpu's detriment. D.Ct. Dkt. 38-4, ¶ 4. A plaintiff cannot evade equity by filing two suits instead of one and refraining from using a known entity's name—any more than it can do so by failing to expressly cite a contract.

2. Outokumpu next suggests that this Court should stay its hand because, assuming the

Convention permits equitable estoppel, it is unclear whether the federal, Alabama, or German law of equitable estoppel would apply. At most, however, that is just another question for remand. The Eleventh Circuit never decided this question because it held that equitable estoppel—no matter its contours—is categorically unavailable under the Convention. If this Court holds otherwise, it would be for the lower courts to determine on remand which jurisdiction's version of that doctrine should apply.

In any event, the supposed choice-of-law question is a non-issue. As GE Energy argued below—and Respondents did not dispute—"there is no significant difference between federal and Alabama law concerning equitable estoppel." D.Ct. Dkt. 38, at 16 n.10. Indeed, the Alabama Supreme Court has adopted the same standard the Eleventh Circuit articulated in *MS Dealer*. *See Brown v. Denson*, 895 So.2d 882, 888–89 (Ala. 2004). As for Respondents' implication that German law might control the equitable estoppel analysis, Opp.15–16, they have never actually argued that it does. For good reason: Although the arbitration itself will be conducted under German law, Pet.App.4a, foreign law does not control federal courts' authority to compel parties to arbitrate in the first instance. *Cf., e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (explaining that there is "a body of federal substantive law of arbitrability"). In any event, Respondents do not contend that German law on equitable estoppel is any different.

3. Finally, Outokumpu suggests that the availability of equitable estoppel under the

Convention was somehow "inadequately" aired in the lower courts. Opp.16. Nonsense. As Outokumpu acknowledges, the parties engaged in a whole round of supplemental briefing in the Eleventh Circuit on the Convention issue alone, after the Ninth Circuit in *Yang* became the first Court of Appeals to split with the First and Fourth Circuits. *See* Opp.18 (discussing the supplemental briefing). And the Eleventh Circuit issued a detailed, published opinion definitively resolving the question.

Why was the availability of equitable estoppel under the Convention not fully addressed until the supplemental briefs? Ask Outokumpu. The potential unavailability of equitable estoppel under the Convention was Outokumpu's argument to make, not GE Energy's. Indeed, it was Outokumpu's counsel that pressed the point as his primary argument before the Eleventh Circuit. *See* Oral Arg. Rec. 10:00–14:25. And when that issue became the focus of the parties' supplemental briefing, Outokumpu wholeheartedly embraced it. *See* Outokumpu's Supp. Br. 7–11 (Ct.App.Dkt. Feb. 2, 2018); Insurer-Appellants' Supp. Br. 1–6 (Ct.App.Dkt. Feb. 2, 2018). Any waiver argument has itself been long and thoroughly waived.

IV. THE ELEVENTH CIRCUIT'S DECISION IS WRONG.

GE's petition explained the errors in the Eleventh's Circuit's reasoning and showed that the text and purpose of the Convention (together with its implementing provisions in the FAA) incorporate the doctrine of equitable estoppel. The Convention's requirement that an arbitration agreement be in writing does not "conflict with" equitable estoppel; accordingly, that traditional, common-law doctrine

applies to international arbitration agreements—just as it does to domestic ones. In response, Outokumpu offers only a novel, convoluted analysis of the Convention's use of the word "parties."

1. The case for equitable estoppel under the Convention is straightforward. Equitable estoppel, like other "background principles of state contract law," applies to proceedings under Chapter 1 of the FAA, which governs domestic arbitration agreements. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009). Chapter 2 of the FAA, which implements the Convention and governs international arbitration agreements, provides that Chapter 1 applies to Chapter 2 cases absent a "conflict with" the Convention or its implementing provisions. 9 U.S.C. § 208. There is no conflict here because neither the Convention nor its implementing provisions address equitable estoppel or otherwise bar enforcement by non-parties under appropriate circumstances. The conclusion follows directly: Equitable estoppel applies to proceedings under the Convention.

That rule furthers the Convention's purpose of "encourag[ing] the recognition and enforcement of commercial arbitration agreements in international contracts and . . . unify[ing] the standards by which agreements to arbitrate are observed . . . in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). It is also consistent with this Court's recognition that the federal policy favoring arbitration "applies with special force in the field of international commerce." *Mitsubishi Motors*, 473 U.S. at 631.

2. Outokumpu does not dispute that equitable estoppel applies to domestic arbitration agreements under Chapter 1 of the FAA. And it admits that Chapter 1—including the background principles it incorporates—applies to international arbitration agreements under Chapter 2 absent a "conflict" with the Convention. Opp. 19 n.10. Outokumpu's sole defense of the decision below is that the Convention's definition of an "agreement in writing," New York Convention, Article II, § 2, somehow contains an implicit rejection of equitable estoppel.

Outokumpu relies on a single interpretive canon—namely, that terms are ordinarily presumed to carry the same meaning throughout a statute. Opp.20–23. But that canon (like any other) "is not an absolute [rule] and can assuredly be overcome by other indicia of meaning." *Lockhart v. United States*, 136 S.Ct. 958, 963 (2016) (internal quotation marks omitted). Indeed, Outokumpu's own interpretation of the "agreement in writing" requirement—whereby "parties" refers to "parties to the case"—does not itself comply with that canon given that Article V of the Convention specifically refers to "parties *to the agreement*." (emphasis added). And a party cannot benefit from a canon of interpretation when its own reading does not apply that canon consistently. *Cf. Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011).

Despite Outokumpu's efforts to complicate matters, Article II § 2 is just what it purports to be: A requirement that arbitration agreements be in writing (as opposed to in any other form). That provision says nothing about who can enforce such an agreement once it exists. And no amount of

interpretive gymnastics can overcome that plain meaning, which—unlike Outokumpu's preferred reading—accords with the Convention's purpose, the federal policy favoring arbitration, and the presumption that legislation incorporates common-law principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

June 4, 2019

Respectfully submitted,

Shay Dvoretzky
Counsel of Record
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

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

Counsel for Petitioner