No. 18-1048

In The
Supreme Court of the United States

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

v.

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

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

BRIEF OF *AMICUS CURIAE* THE NORTH AMERICA BRANCH OF THE CHARTERED INSTITUTE OF ARBITRATORS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Chartered Institute of Arbitrators ("CIArb"), founded more than a century ago, is a global organization of counsel and advocates, neutrals, academics, experts, and other professionals engaged in the practice, promotion, facilitation, and development of all forms of private dispute resolution.[1] Headquartered in London, CIArb is a non-profit charity incorporated by Royal Charter, with over 16,000 members located across 133 countries.

CIArb works through an international network of 39 branches, including the North America Branch, which has over 500 members in the United States.[2] This Brief is submitted by CIArb's North America Branch, which provides its members with globally recognized certification programs, alternative-dispute resolution ("ADR") training, and a forum for the exchange of ideas and in-depth examination of ADR topics.

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

[2] CIArb's North America Branch does not include the states of New York, New Jersey or Connecticut, which are represented by a separate branch of CIArb (the "New York Branch"). This *amicus curiae* does not purport to speak on behalf of the New York Branch or the larger CIArb organization.

CIArb's North America Branch has an interest in ensuring that the legal regime for international arbitration in the United States facilitates the fair, efficient and effective resolution of cross-border disputes. CIArb members often serve as neutrals in arbitrations in which non-signatory joinder issues arise and have a specific interest in obtaining guidance from the Court that helps resolve those issues in a fair, efficient and effective manner.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Is it ever possible for a party to consent to arbitration through conduct—including, for example, actions that would trigger an estoppel—even though that party never signed the arbitration agreement? In the context of domestic arbitrations—which are governed by Chapter 1 of the Federal Arbitration Act ("FAA")—the answer is "yes." *See, e.g., Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009).[3] Using estoppel in this way is entirely consistent with the fundamental principle that "[a]rbitration under the [FAA] is a matter of consent, not coercion," *Volt Information Scis. v. Bd. of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 47 (1989), although with estoppel, consent is not determined from a signature to the arbitration agreement, but

[3] In domestic cases governed by FAA Chapter 1, common-law contract principles are applied to determine whether non-signatories may enforce or be joined to arbitration cases. *Arthur Andersen*, 556 U.S. at 630. These principles include "'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel.'" *Id.* at 631 (quoting 21 WILLISTON ON CONTRACTS § 57:19 (4th ed. 2001)).

rather implied from a party's conduct. "[I]mplied consent involves a non-signatory that should reasonably expect to be bound by (or benefit from) an arbitration agreement signed by someone else, perhaps a related party. In such circumstances, no unfairness results when arbitration rights and duties are inferred from behaviour." William W. Park, *Non-Signatories and the New York Convention,* 2 DISP. RESOL. INT'L 84, 86 (2008); *see also* MARTIN DOMKE, DOMKE ON COMM. ARB. § 6:01, 73 (Gabriel M. Wilner rev. ed. 1984) ("Numerous court decisions show the tendency to accept any manifestation of the intent of the parties to be bound by an arbitration clause without signing it.").

The same principle would logically also hold true in U.S.-seated arbitrations having an international element, which are governed by Chapter 2 of the FAA. Indeed, because international business transactions often involve chains of agreements requiring performance by parties that have not signed the contract containing the arbitration clause, disputes involving non-signatories are perhaps even more common in international arbitration than in domestic arbitration.

Yet for arbitrations in the United States having some international connection, the lower court's holding would narrowly limit the allowable forms of arbitral consent to the following circumstances: 1) where a party has signed an arbitration agreement or a contract containing an arbitration clause; or 2) where a party agreed to arbitrate in an exchange of letters or telegrams. *See* Pet. App. 16a-17a. Nothing else will suffice. The Eleventh Circuit leaves no room for establishing consent through a party's conduct.

The Eleventh Circuit reached this result based on a narrow reading of Article II(2) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or "Convention"), which defines the term "agreement in writing" as "*includ[ing]* an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." 21 U.S.T. 2517, Art. II(2) (emphasis added).

As argued by the Petitioner, the Eleventh Circuit's holding is based on an overly restrictive interpretation of Article II(2) of the New York Convention. Although this *amicus curiae* brief will also touch briefly on that point, the primary purpose of this submission is to emphasize: 1) the negative practical consequences of a flat proscriptive rule against enforcement of arbitration agreements by or against non-signatories in cases falling under the New York Convention; and 2) that affirming the Eleventh Circuit's holding would place the United States out of step with the emerging international consensus regarding the proper interpretation and application of Article II(2).

The principle that consent to arbitration may be proved by the conduct of the parties should apply not only in wholly domestic arbitration cases, but also in arbitrations having an international element. Establishing implied consent to arbitrate through estoppel and third party beneficiary theories is no less useful, appropriate, and fair in cross-border disputes than in domestic cases. Consistent with the rulings of numerous courts in other jurisdictions, the New York Convention should not be interpreted to foreclose a party's conduct as a means of establishing consent.

ARGUMENT

I. The Eleventh Circuit's Signature Requirement Is Contrary to an Emerging International Consensus that Arbitration Agreements May be Extended to Non-Signatories Based on Conduct

The Eleventh Circuit's holding bucks the "general trend" in courts throughout the world "in favor of extending arbitration agreements to non-signatories" where there is evidence that "an arbitration agreement was concluded by the parties *either* expressly *or impliedly*." M.P. Bharucha et al., *The Extension of Arbitration Agreements to Non-Signatories – A Global Perspective*, 5 INDIAN J. ARB. L. 35, 62 (2016) (emphasis added) (citing developments in France, the United Kingdom, Singapore, Germany, and India). As stated by a prominent commentator on the New York Convention, Bernard Hanotiau, "the leading legal systems agree on the major constituents of consent, and also agree that consent, including consent to arbitration, may be proved by the conduct of the parties." Bernard Hanotiau, *Consent to Arbitration: Do We Share a Common Vision?* 27 ARB. INT'L 539, 552 (2011).

Of course, this does not mean that there is complete uniformity regarding *how* consent to arbitrate may be proved by the conduct of the parties. As noted in an overview of several European jurisdictions, there is "*general* agreement" that a non-signatory's conduct "can be taken as evidence of *implied* consent to arbitrate," but with variations, with some national courts interpreting the

"circumstances that may reveal *implied* consent in a *strict* way," while "others show a more *relaxed* approach and are willing to find consent more easily." Eduardo Romero & Luis Velarde Saffer, *The Extension of the Arbitral Agreement to Non-Signatories in Europe: A Uniform Approach*, 5 AM. U. BUS. L. REV. 371, 372 (2015) (emphasis in original).

Nevertheless, the Eleventh Circuit approach goes beyond even a "strict" approach to determining consent by insisting on a signature (or an exchange of letters and telegrams) to the exclusion of *any* evidence of consent based on conduct. The only wiggle room allowed by Eleventh Circuit appears in the following statement referring to "privities" of signatories: "to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court *or their privities*." Pet. App. 16a (emphasis added). In an accompanying footnote, the court elaborated that "[n]othing in this opinion" disturbs the court's prior "holdings that an arbitration agreement is 'signed by the parties' when signed by a party's privy or incorporated by reference in an arbitration agreement." *Id.* at n.1. The court did not explain the meaning of "privities" in this context, except to make clear that the term does not extend to third party beneficiaries. Pet. App. 17a (Arbitration cannot be compelled "through a third-party beneficiary theory because, again, the Convention requires that the agreement to arbitrate be signed by the parties (or exchanged in letters or telegrams)."). While there is considerable ambiguity around the Eleventh Circuit's carve-out for enforcement of arbitration agreements against "privies" of signatories, one point seems clear: the carve-out leaves no room for establishing consent by conduct.

The formality of a signature by a party or its "privy" is mandatory. Pet. App. 15a ("Private parties … cannot contract around the Convention's requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration.") (emphasis in original).

As discussed below, this singular insistence on a signature would impact arbitrations arising from a broad swathe of commercial relationships in this country.

II. The Eleventh Circuit's Holding Will Foreclose Arbitration in a Broad Swathe of Cases and Lead to Anomalous Results Under the FAA

Although styled as the "United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards," the scope of the Convention extends well beyond the enforcement of "foreign" arbitral awards. In implementing the New York Convention in the United States, Congress provided in Chapter 2 of the FAA that any arbitration agreement arising out of "a legal relationship, whether contractual or not, which is considered as commercial … falls under the [New York] Convention" unless it is "entirely between citizens of the United States." 9 U.S.C. § 202. And even if all the parties are American, an arbitration agreement falls under the Convention if "that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." *Id.*; *see also Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 933-34 (2d Cir. 1983); *Lander Company, Inc. v. MMP*

Investments, Inc., 107 F.3d 476, 477 (7th Cir. 1997), *cert. denied*, 522 U.S. 811 (1997).[4]

Thus, the Eleventh Circuit's decision would deny the possibility of proving consent to arbitrate from a party's conduct not only where a non-U.S. party is involved in the dispute, but also if the underlying "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202. The volume of business transactions "involv[ing] property located abroad, envisag[ing] performance or enforcement abroad, or ha[ving] some other reasonable relation with one or more foreign states" is enormous. In 2018, the United States exported over $2.5 trillion in goods and services and imported over $3.1 trillion. U.S. direct investment abroad in 2018 came to $5.95 trillion. Foreign direct investment in

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[4] Article I(1) of the New York Convention invites signatories to apply the terms of the Convention not only to "foreign" awards, but also "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." *See* New York Convention, Art. I(1). The U.S. legislation implementing the New York Convention—Chapter 2 of the FAA—accepted that invitation, providing that the New York Convention applies not only to foreign arbitrations, but also arbitrations conducted in the United States, even between U.S. citizens, provided the underlying contractual relationship has an international character. *See* 9 U.S.C. § 202; Gerald Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW.U.L.REV. 1, 16 (1971) (Under the FAA, the New York Convention should apply "where a foreign person or corporation is a party to an agreement involving foreign performance, or where the business deal has some other 'reasonable relation with one or more foreign states.'")

the U.S. in 2018 totaled $4.34 trillion.[5] All this business activity generates arbitrations in this country that fall within the scope of the New York Convention. Under the Eleventh Circuit's holding, consent to arbitrate in those cases cannot be established by conduct.

In addition to foreclosing arbitration in a wide range of cases, inconsistent approaches to non-signatories in Chapter 1 and Chapter 2 cases will lead to anomalous results and foster litigation gamesmanship. One rule could apply to establishing arbitral consent in a case between U.S. parties involved in a deal to manufacture products for export to, say, Canada. Another rule could apply with the same parties if those products are destined to be sold in, say, Alaska. Non-signatories could seek to thwart U.S.-seated arbitrations with court actions alleging that underlying commercial relationship has "some … reasonable relation with one or more foreign states"—a relatively low threshold in today's global economy—thereby triggering Article II(2)'s purported signature requirement. The converse will also occur, with signatories who would be estopped from refusing to arbitrate with a non-signatory seeking to avoid arbitration by alleging an international element of some sort in the underlying commercial relationship.

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[5] The data in this paragraph are drawn from the following pages on the U.S. Department of Commerce, Bureau of Economic Analysis website: U.S. International Trade in Goods and Services Statistics, *available at* https://www.bea.gov/data/intl-trade-investment/international-trade-goods-and-services; Direct Investment by Country and Industry, *available at* https://www.bea.gov/system/files/2019-07/fdici0719-fax.pdf.

III. Denying Any Possibility of Arbitration Where Consent is Based on Conduct Will Impair the Utility of International Arbitration and Hinder International Trade

Beyond leading to anomalous results under the FAA, the Eleventh Circuit's restrictive interpretation of Article II(2)—denying any possibility of arbitration where assent is manifested in behavior, rather than a signature on a page—impairs the utility of arbitration in resolving disputes with an international element. This, in turn, stands to inhibit international commerce, which has come to depend on international arbitration as the primary means of resolving cross-border commercial disputes.

Cross-border transactions often involve performance by parties that are not signatories to the contract containing the arbitration clause, such as subcontractors, sureties, and third party beneficiaries. "Disputes involving nonsignatories are inevitable in the context of modern international business transactions that typically involve complex webs of interwoven agreements, multilayered legal obligations and the interposition of numerous, often related, corporate and other entities." James M. Hosking, *Non-Signatories and International Arbitration in the United States: the Quest for Consent*, 20 ARB. INT'L 289, 289 (2004)*; see also* Park, *Non-Signatories and the New York Convention,* 2 DISP. RESOL. INT'L, at 91-92 & nn.18-24 (collecting international arbitration awards involving non-signatories); José Ricardo Feris & Živa Filipič, *Jurisdictional Issues in Construction Arbitration: The ICC Experience*, 4 ICC DISP. RESOL. BULL. 25 (2017) (ICC commentary observing that international construction arbitrations "often arise

out of complex projects involving multiple contracts and multiple parties," including non-signatories to the arbitration agreement).

According to data from the International Chamber of Commerce ("ICC") International Court of Arbitration ("ICC Court"), over a third of the cases filed for arbitration with that institution in 2017 (37%) involved multiple parties. *See 2017 ICC Dispute Resolution Statistics,* 2 ICC DISP. RESOL. BULL., 51, 52 (2018). Reflecting the growing complexity of international commercial transactions, that figure has been steadily increasing. In 1998, only 10% of ICC arbitrations involved multiple parties. *See* Manuel Carrion, *Joinder of Third Parties: New Institutional Developments*, 31 ARB. INT'L 479, 479 (2015). By 2011, the figure had reached 30%. *Id.*

The ICC data are not broken down to indicate how many of these multi-party cases involve non-signatories, but it is evident that many of them do—to the point that the ICC Court has established a formal process for the preliminary screening of requests for joinder of non-signatory parties. *See* Feris & Filipič, *Jurisdictional Issues*, 4 ICC DISP. RESOL. BULL., at 25-26. In making a *prima facie* determination whether a non-signatory is bound to arbitrate, the ICC Court examines, among other factors, whether that party:

- participated in the negotiation, performance or termination of the contract;
- is the successor, assignee, or has been subrogated into the rights of a signatory party;

- is a member of a consortium or joint venture which has signed the contract; [or]

- is an affiliate of a signatory and the contract purports to bind such affiliate.

Id. at 26. If the ICC Court's preliminary screening process results in a *prima facie* finding of jurisdiction over the non-signatory, the matter proceeds, and the arbitral tribunal, once constituted, must then decide on its jurisdiction. *See* Feris & Filipič, *Jurisdictional Issues,* 4 ICC DISP. RES. BULL., at 25-26; *see also* ICC Rules of Arbitration, Arts. 6(3) & 6(5).

The ICC factors do not line up precisely with the considerations that would be applied in a U.S. court's estoppel analysis, but there is considerable overlap. For example, ICC commentary providing an overview of some of the ICC Court's decisions includes a case relating to the construction of a power plant in which the claimant (the prime contractor on the project) filed a request for arbitration based on a subcontract (the "Subcontract") that it had signed with a direct subcontractor and which contained an arbitration clause. The claimant alleged that the direct subcontractor subsequently entered into a sub-subcontract with a secondary contractor, which was to carry out certain obligations undertaken by the primary contractor under the Subcontract. The secondary subcontractor objected that it was not a signatory to the Subcontract or otherwise bound by the arbitration clause in the Subcontract. The ICC Court made a *prima facie* finding that the non-signatory secondary subcontractor was bound to arbitrate, in part because it had initiated parallel

proceedings in the domestic courts based in part on the Subcontract containing the arbitration provision. *Id.* at 27. Although the ICC Court did not expressly invoke the principle of estoppel, the ICC Court's conclusion was consistent with the outcome urged by the Petitioner here.

The rules of other major international arbitral institutions also contemplate joining parties that may be bound by an arbitration agreement without having signed it. For example, the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce ("Swiss Rules") regarding joinder of third parties do not reference signatories, but instead provide that:

> Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, *taking into account all circumstances it deems relevant and applicable*.

Swiss Rules, Art. 4(2) (emphasis added). An approach that "tak[es] into account all circumstances [the arbitral tribunal] deems relevant and applicable"—as opposed to an analysis that begins and ends with whether the third party signed the arbitration agreement—is consistent with Swiss arbitration law, which allows the joinder of a non-signatory that "significantly intervened in the conclusion or

performance of the main contract." Harold Frey et al., *Arbitration Procedures and Practice in Switzerland: Overview*, PRACTICAL LAW (Sep. 1, 2016); *see also Introductory Rules: Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties (Art. 4),* SWISS RULES OF INT'L ARB.: COMMENTARY 36-44 (Tobias Zuberbühler et al., 2005) (commentary on Article 4(2) of the Swiss Rules, citing various theories by which non-signatories may be bound to arbitrate); Romero & Velarde Saffer, *Extension of the Arbitral Agreement to Non-Signatories in Europe*, 5 AM. U. BUS. L. REV., at 378-80 (noting that in Switzerland, "[n]on-signatories may be bound by an arbitration agreement based on their behavior").[6]

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[6] Switzerland has been cited as a jurisdiction that does not allow non-signatories to compel arbitration against signatories (as opposed to the opposite scenario—signatories compelling arbitration against non-signatories—the viability of which was not disputed). *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 52-53 (2d Cir. 2004) (weighing competing opinions of Swiss legal experts and concluding that Swiss law does not permit a non-signatory to invoke an arbitration agreement against a signatory). But to the extent there was any ambiguity on that point, it was eliminated by a decision of the Swiss Supreme Court earlier this year ruling that a non-signatory could compel arbitration where it was sued by a signatory to the contract containing the arbitration clause, and the signatory's claims were based on that contract. The Swiss Supreme Court also specifically held that Article II(2) of the New York Convention does not bar extending an arbitration agreement to non-signatories. *See* Bundesgericht [BGer] [Federal Supreme Court] Apr. 17, 2019, Decision 4A_646/2018 (Switz.). The case is discussed in Nathalie Voser & Luka Groselj, *Extension of Arbitration Agreement to Non-signatory Upheld under New York Convention (Swiss Supreme Court)*, PRACTICAL LAW UK (May 22, 2019).

Similarly, the Rules of the Singapore International Arbitration Centre ("SIAC") provide that:

> Prior to the constitution of the Tribunal, a party or non-party to the arbitration may file an application with the Registrar for one or more additional parties to be joined in an arbitration pending under these Rules as a Claimant or a Respondent, provided that any of the following criteria is satisfied: … the additional party to be joined is *prima facie bound* by the arbitration agreement….

SIAC Rules, Rule 7.1 (emphasis added). The language requiring that the additional party be "bound" by the arbitration agreement, as opposed to having signed it, is intentional, as parties may be bound through their conduct, regardless of whether they are signatories. This is consistent with Singaporean arbitration law, which "has followed a similar approach to the United States when enforcing awards with non-signatory parties," with "both Singapore and the United States plac[ing] a high value to principles found in contract law." Andrea Sesin-Tabare, *Extension of the Arbitration Agreement to Non-Signatories Landscape of Legal Theories and Jurisdictional Approaches,* 4 ICC DISP.

RESOL. BULL. 17, 23 (2017). These principles include equitable estoppel.[7]

In short, these international arbitral institutions recognize that the determination whether a party is bound to arbitrate should be based on "the nature and circumstances of each case." Feris & Filipič, *Jurisdictional Issues*, 4 ICC DISP. RES. BULL., at 26 (discussing the ICC Court's practice); *see also* Swiss Rules, Rule 4(2) (In deciding whether to join a party, the arbitral tribunal should "tak[e] into account all circumstances it deems relevant and applicable"). Whether or not the party signed the arbitration agreement is of course highly relevant, but the absence of a signature is not conclusive.

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[7] For example, *The Titan Unity*, [2014] SGHCR 4 (Feb. 4, 2014) involved the misdelivery of cargo under bills of lading. The holder of the bills of lading (Portigon) brought a lawsuit against the charterer and owner of the vessel based on the bills of lading, which was issued by the charterer. The bills of lading contained an arbitration agreement, and thus the Singapore High Court stayed Portigon's case against the charterer. The shipowner, which was not a party to the bills of lading, then sought to be joined as a party to the arbitration proceedings. The Singapore High Court held that by commencing a joint action against both the owner and charterer based on the bills of lading containing the arbitration provision, Portigon was estopped from challenging the shipowner as a party to the arbitration, stating that "in the arbitration context, a party may be estopped from asserting that an arbitration clause contained in a particular document is inapplicable when that same party simultaneously claims the direct benefit of that contract. This estoppel doctrine exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision." *Id.* ¶ 30 (quoting *S. Ill. Beverage v. Hansen Beverage Co.*, No. 07-CV-391-DRH, 2007 WL 3046273, at *11 (S.D. Ill. 2007)).

The lower court's holding follows a contrary approach that simply bars arbitral joinder of non-signatory parties that do not qualify as "privities," leaving disputes to be litigated in one or more national courts that will be "foreign" to at least one of the parties or—perhaps worse—inefficient parallel arbitration and court proceedings, with the dispute being resolved piecemeal in different fora. This frustrates the promise of international commercial arbitration, which has the following advantages over cross-border litigation, as aptly summarized in the Federal Judicial Center's guide to international commercial arbitration for U.S. judges:

- an effective and reliable means of enforcing foreign arbitral awards through use of various international treaties (as opposed to international litigation, which requires U.S. parties to rely primarily on unpredictable principles of international comity, since the United States is not a party to any multilateral agreements on the enforcement of civil judgments);

- a faster route to the final determination of the matter as a result of limited judicial review (as opposed to international litigation, which can involve multiple appeals and the possible need for enforcement in various jurisdictions through the comity-based procedure noted above);

- a single forum in which to resolve disputes (as opposed to international

litigation, which can involve multiple proceedings in different jurisdictions, particularly in cases in which there is no enforceable choice of forum clause);

- neutral decision makers free from national or political prejudices (as opposed to international litigation, which can subject parties to bias (or perceived bias) from national courts that favor their own citizens);

- adjudication by persons with extensive experience in international law and commerce (as opposed to international litigation, which may not involve decision makers who are expert in complex commercial matters or international trade); and

- a purposeful and time-tested blend of common law and civil law procedures (as opposed to international litigation, which typically gives one party a home-court advantage in terms of procedure).

Federal Judicial Center, *Int'l Comm. Arb.: A Guide for U.S. Judges*, at 5-6 (2012).

Holding international arbitration agreements to a higher standard than domestic arbitration agreements is contrary to the "federal policy in favor of arbitral dispute resolution, a policy that applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

Indeed, the Court has held that an international arbitration clause may be enforced even if "a contrary result would be forthcoming in a domestic context." *Id.* The Eleventh Circuit's decision turns that policy on its head, holding that arbitration agreements that would be enforced in the domestic context may not be enforced in the international context.

Moving beyond the policy rationale for reversing the Eleventh Circuit's decision, the ruling below is founded on a misreading of the New York Convention.

IV. The Eleventh Circuit's Holding is Based on an Overly Restrictive Interpretation of Article II(2) of the New York Convention

In implementing the New York Convention, the United States did not impose any particular writing requirement for arbitration agreements beyond what is provided in Section 2 of the domestic FAA (Chapter 1). Section 2 refers to an "agreement in writing," but there is no requirement under Section 2 that the writing be signed. *See, e.g., Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co.*, 189 F.3d 289, 297 (2d Cir. 1999).[8] Consent to arbitrate in

[8] Section 2 of FAA Chapter 1 is incorporated into FAA Chapter 2 through the "residual savings clause" in 9 U.S.C. § 208, providing that "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." *See also* GARY B. BORN, INT'L COMM. ARB., 700 (2d ed. 2014) ("Section 2 should be applicable to international arbitration agreements, either via the 'residual' saving clauses of the second and third chapters, or in the event the arbitration agreement must be enforced directly under the first chapter of the FAA.").

accordance with the "agreement in writing" can be established by conduct, including through estoppel. *See, e.g., Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517 (5th Cir. 2006); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999).

Article II(2) of the New York Convention does not foreclose U.S. courts from applying the FAA's less demanding written form requirements. Contrary to the holding of the Eleventh Circuit, Article II(2) does not strictly limit the means of establishing arbitral consent to an agreement signed by the parties or contained in an exchange of letters or telegrams. Rather, Article II(2) merely states that an agreement in writing "shall *include* an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Id.* (emphasis added). As recently concluded in *The Restatement of the U.S. Law of International Commercial and Investor–State Arbitration,* "[i]n common understanding, enumerating items that are 'included' does not signal an intention to exhaust the possibilities." RESTATEMENT (THIRD) U.S. LAW OF INT'L COMM. & INVESTOR-STATE ARB. ("RESTATEMENT"), § 2.4, reporter's notes (2019). Thus, while "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams" are *included* among the means by which an agreement to arbitrate may be established, they are not the sole means. *Id.*

Accordingly, "Article II prescribes the 'maximum' form requirement that Contracting States are permitted to impose," not "the 'minimum' form requirement that Contracting States are required to

impose." GARY B. BORN, INT'L COMM. ARB., 667 (2d ed. 2014); *see also* S.I. Strong, *What Constitutes an "Agreement in Writing in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT'L L. 47, 77 (2012) ("The maximalist reading of article II(2) has found support in a number of court decisions that have upheld the validity of an arbitration agreement under domestic law, which would not have been considered as valid under the New York Convention.") (citations and internal quotes omitted); FINN MADSEN, COMM. ARB. IN SWEDEN 63-64 (Reuven Ben-Dor trans., 3d ed. 2007) (Swedish commentator observing that Article II(2) merely provides that a Contracting State "may not impose *more stringent* formal requirements than those stated in the Convention" and that there is "nothing to prevent Sweden" from enforcing arbitration agreements on the basis of the Swedish doctrine of implied consent) (emphasis in original).

Reading Article II(2) as establishing a "maximum" form requirement means that Contracting States cannot impose *additional* form requirements beyond a signature, including, for example, mandates that arbitration agreements be in bold type, or in a certain font size, or that they be notarized, or that they be set forth in a separate document, or other similar requirements. But Article II(2) does not establish any "minimum" form requirements that would preclude Contracting States from enforcing agreements to arbitrate that are evidenced by manifestations of consent other than affixing a signature to an arbitration agreement, including by means of estoppel.

That conclusion is reinforced by Article VII(1) of the New York Convention which provides that the Convention shall not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such an award is sought to be relied upon." Although this provision refers on its face only to "an arbitral award," courts in other countries have concluded that it logically also extends to motions to compel arbitration. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 21, 2005, XXXI Y.B. COMM. ARB. 679, 683 (Ger.) (determining local German law could apply under Article VII(1) in deciding whether an arbitration agreement existed between the parties); *see also* Strong, *What Constitutes an "Agreement in Writing?* 48 STAN. J. INT'L L., at 77 ("A number of states ... have concluded that the more favorable treatment provision can be extended to motions to compel arbitration, even though article VII(1) on its face only refers to [award] enforcement proceedings").

Consistent with the approach of these courts, the United Nations Commission on International Trade Law ("UNCITRAL") issued a recommendation in 2006 that national courts interpret Article VII(1) of the Convention to apply the most favorable provision of law available (whether it be domestic or international) so as to give effect to an arbitration agreement. *See* UNCITRAL, *Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. A/6/17 (July 7, 2006). Applying this most favorable treatment provision, parties seeking

to compel arbitration should be allowed to rely on provisions in national law—including, in the United States, the principle of equitable estoppel and third party beneficiary theories—that are more favorable than Article II(2) of the Convention.

Thus, Articles II(2) and VII(1) of the Convention permit courts to rely on more liberal national form requirements, such as those under Section 2 of the FAA, to establish an agreement to arbitrate. Doing so permits arbitration to continue to adapt to the economic reality of ever more complex, multi-party transactions and contracts in global commerce.

V. Conclusion

As stated in the Restatement, "no compelling policy supports maintaining more rigorous writing standards for international arbitration agreements than for agreements falling under FAA Chapter 1." RESTATEMENT, § 2.2, Comment a. Insisting on either a signature or "an exchange of letters or telegrams" as the only means of establishing consent to arbitrate will limit the utility of international arbitration and hinder efficient international trade.

Accordingly, the North America Branch of the Chartered Institute of Arbitrators, as *amicus curiae*, respectfully requests that the Court reverse the decision below.

Dated: September 24, 2019

Respectfully submitted,

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