No. 18-1048

IN THE

Supreme Court of the United States

GE ENERGY POWER CONVERSION FRANCE SAS, CORP., F/K/A 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 PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in issues concerning the enforcement of mandatory predispute arbitration agreements, and it has appeared as amicus curiae in many cases involving such issues in this Court and other federal and state courts.

SUMMARY OF ARGUMENT

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also called the New York Convention, provides for the enforcement of international commercial arbitration agreements and awards. Under its plain terms, the Convention applies only when the parties to an agreement undertake to arbitrate disputes *with each other*. In addition, the Convention authorizes courts to direct arbitration only when a case involves parties who have made such an agreement with one another. The terms of the Convention are incompatible with enforcement of an arbitration agreement by or against a *nonparty* to that agreement.

The requirements of the Convention differ markedly from those of Chapter 1 of the Federal Arbitration Act (FAA), which governs domestic arbitration

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

agreements. Under Chapter 1, agreements to arbitrate are enforceable to the same extent as other contracts under state law, and the statute's terms do not expressly limit enforcement to the parties to such agreements. The language of the relevant provisions of Chapter 1 thus led this Court to conclude in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009), that if state-law doctrines such as equitable estoppel permit enforcement of other types of contracts by or against nonparties, then arbitration agreements must likewise be enforceable by or against nonparties under the same circumstances. The Court recognized, however, that if Chapter 1 limited courts to enforcing arbitration agreements in "disputes between parties to a written arbitration agreement," *id.* at 631—as the New York Convention does—enforcement against nonparties would be a different matter.

Because the Convention's provisions for compelling arbitration apply only to disputes between parties to an arbitration agreement, its terms rule out the invocation of equitable estoppel to compel a nonparty to arbitrate. Equitable estoppel is not a doctrine used to identify the parties to an agreement, but one employed to bind nonparties to an agreement. The doctrine therefore cannot apply where arbitration is invoked under the Convention, which binds only parties.

Invocation of federal policy supporting arbitration of international disputes cannot justify expanding the Convention's scope beyond what its terms allow. Federal policy favors arbitration only where parties have consented to it. Adhering to the plain terms of the Convention comports with that policy. By contrast, importing expansive notions of equitable estoppel into the Convention threatens to force international businesses, as well as American workers and consumers,

to resolve grievances before foreign tribunals in the absence of their consent to do so.

ARGUMENT

I. The New York Convention does not authorize courts to compel arbitration by or at the behest of persons who are not parties to an arbitration agreement.

A. The Convention's plain terms exclude enforcement of an agreement against nonparties to the agreement.

The New York Convention, to which the United States is a party, requires U.S. courts to enforce arbitration agreements that are subject to the Convention's terms. Chapter 2 of the FAA, 9 U.S.C. §§ 201–208, provides the domestic law mechanism for carrying out the requirements of the Convention. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). By their plain terms, Chapter 2 and the Convention empower courts to compel arbitration between parties to agreements that fall under the Convention. Neither authorizes courts to compel arbitration at the behest of or against a person or entity that is *not* a party to an arbitration agreement.

Chapter 2 of the FAA begins by stating that it sets forth the means for *enforcing the Convention*—not for taking actions that fall outside the requirements of the Convention. As this Court has recognized, "Congress passed Chapter 2 … to implement the Convention." *Scherk*, 417 U.S. at 520 n.15. Specifically, 9 U.S.C. § 201 provides that "[t]he Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." The

mechanism by which courts enforce the Convention with respect to the obligation to engage in arbitration under an agreement subject to the Convention is provided by 9 U.S.C. § 206, which states that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement."

These provisions cannot, of course, "operate without reference to the contents of the Convention"; rather, they "direct [courts] to the treaty" that Chapter 2 implements to determine whether it requires enforcement of an agreement. *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 724–25 (5th Cir. 2009). The terms of that treaty—the Convention—in turn define with specificity the agreements that are subject to its requirements, as well as the enforcement obligations of nations that have agreed to the Convention. And "[i]n construing a treaty, as in construing a statute, we first look to its terms to determine its meaning." *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992); *accord Medellín v. Texas*, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text.").

Here, the "most natural reading" of the text, *Medellin*, 552 U.S. at 507, indicates that the Convention does not provide for enforcement of arbitration agreements by or against nonparties. Most fundamentally, Article II of the Convention provides that "[e]ach Contracting State shall recognize an agreement in writing under which *the parties* undertake to submit to arbitration all or any differences which have arisen or which may arise *between them*[.]" N.Y. Conv., Art. II(1) (emphasis added). By its plain terms, Article II(1) requires that countries that have subscribed to the Convention give effect to an agreement that requires

the parties to that agreement to arbitrate disputes between each other. The plain terms do not provide for recognizing an agreement that purportedly requires arbitration of disputes with persons who are not parties to the agreement.

Article II of the Convention goes on to require that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which *the parties have made an agreement* within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." N.Y. Conv., Art. II(3) (emphasis added). Article II(3) is unambiguous in requiring only enforcement of agreements *made by the parties* to the matter before the court. That is, the parties to the *action* must also be the parties to the *arbitration agreement* that one of them seeks to enforce against the other.

Reading Article II(3) in tandem with Article II(1) reinforces this conclusion. Together, the two paragraphs unambiguously require courts of contracting states to order arbitration only of disputes between parties to an arbitration agreement. Thus, Article II(3) applies only when a court is hearing a dispute that is subject to "an agreement within the meaning of this article"—that is, Article II. And, as explained above, Article II(1) provides that the agreements that are subject to Article II are written agreements in which "the parties undertake to submit to arbitration … differences … between them." Thus, Article II(3) does not provide for courts to order arbitration under agreements that purportedly bind parties to arbitrate against someone other than another party to the agreement.

Finally, Article II(2) confirms that the "parties" to a written arbitration agreement are the persons or entities who have signed the agreement or have entered into it through an exchange of writings between them. That provision states that an "agreement in writing" to arbitrate for purposes of Article II "shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." N.Y. Conv., Art. II(2). Article II(2) thus further limits the scope of the agreements that the "parties" may enforce in matters arising between themselves. Not only must the parties to the agreement be the parties as between whom arbitration is sought, but they must either have signed the agreement or concluded it by an exchange of writings.

B. The Convention's provisions differ significantly from those of Chapter 1 of the FAA, which permit enforcement of arbitration agreements by or against nonparties if and when allowed by state contract law.

The Convention's provisions limiting the obligation of courts to enforce an arbitration agreement to matters arising between the parties to the agreement notably differ from the terms of Chapter 1 of the FAA, 9 U.S.C. §§ 1–16, which governs domestic arbitration agreements. As construed by this Court, Chapter 1's terms allow enforcement of arbitration agreements by or against nonparties under circumstances where general principles of state contract law permit a contract to bind nonparties. The Convention's terms do not.

Section 2 of the FAA, which is the key substantive provision of Chapter 1, provides that "[a] written provision in … a contract evidencing a transaction

involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2's language does not explicitly limit its application to parties to the agreement or provide expressly that the agreement is "enforceable" only as between parties. Indeed, section 2 makes no reference to parties or signatories to the arbitration agreement.

Rather, section 2 provides that an agreement to arbitrate is enforceable to the same extent as "any contract." It thus incorporates general principles of contract law, applicable under the law of the relevant state, that define when and by whom contracts may be enforced. *See, e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). In other words, Chapter 1 of the FAA does not "purport[] to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen*, 556 U.S. at 630.

Chapter 1's enforcement provisions reinforce its reliance on state-law contract principles to determine who may compel arbitration and who may be compelled to arbitrate under an agreement that is enforceable under section 2. For example, Chapter 1's stay provision, section 3, states that when an action is brought in court involving an "issue referable to arbitration under an agreement in writing for such arbitration," the court shall stay the action "until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. Section 3 neither requires that the issue be referable to arbitration under an agreement *between the parties*, nor says explicitly that the arbitration must be between parties to the

arbitration agreement. Rather, it provides that the arbitration must be had "in accordance with the terms of the agreement." The only use of the term "parties" in section 3 is the statement that the court must stay an action upon application of "one of the parties" to the action. That statement refers to the parties to the action, not the parties to the agreement.

Likewise, Chapter 1's provision authorizing courts to compel arbitration, section 4, states that when a "controversy between … parties" is pending in a federal court concerning a matter subject to a written arbitration agreement, one of the parties to the case may petition for an order directing that the case be arbitrated "in the manner provided for in [the] agreement." 9 U.S.C. § 4. Section 4's references to "parties" describe the parties to the proceeding, as opposed to the agreement, and the section uses the passive voice when referring to the issues dispositive of whether the court must compel arbitration: It provides that whether the court must compel arbitration depends on a jury's resolution of any fact dispute as to whether "an agreement in writing was made" and whether "there is a default in proceeding thereunder."

For these reasons, this Court held in *Arthur Andersen* that Chapter 1 of the FAA does not by its terms make arbitration agreements enforceable solely by or against parties to those agreements. Rather, although contract law generally limits enforcement of contracts to parties, Chapter 1 of the FAA provides that arbitration agreements are enforceable under circumstances where "background principles of state contract law" applicable to contracts other than arbitration agreements "allow[] a contract to be enforced by or against nonparties to the contract." *Arthur Andersen*, 556 U.S. at 631. Accordingly, where permitted by state law, the

FAA provides for application of the doctrine of equitable estoppel by or against nonparties if the requirements for invoking the doctrine are satisfied. *Id.*

In so holding, *Arthur Andersen* emphasized that the plain language of section 3 is not limited to enforcement of arbitration agreements by or against parties to them: "It says that stays are required if the claims are 'referable to arbitration under an agreement in writing.' If a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute's terms are fulfilled." *Id.* However, the Court recognized that the matter would be different "if § 3 mandated stays only for disputes *between parties to a written arbitration agreement*." *Id.* (emphasis added).

The New York Convention provides just that. As explained above, unlike Chapter 1 of the FAA, the Convention covers only an agreement in writing providing for arbitration of disputes *between the parties* to that agreement. N.Y. Conv., Art. II(1). And it mandates judicial enforcement only when the parties to a case have *made* an agreement providing for arbitration of disputes between them. *Id.*, Art. II(3). It underscores the point by equating the parties to an agreement with the persons who have signed it or exchanged the writings constituting it. *Id.*, Art. II(2). Thus, in sharp contrast to Chapter 1 of the FAA, the requirement of Chapter 2 that courts enforce the New York Convention by requiring parties to agreements that fall under the Convention to arbitrate, 9 U.S.C. §§ 202, 206, does not provide for enforcement of arbitrations by or against nonparties to those agreements.

The provision of Chapter 2 calling for "residual application" of provisions of Chapter 1 in "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," 9 U.S.C. § 208, is not to the contrary. Chapter 1's provision that arbitration agreements are enforceable by and against nonparties to the extent provided by generally applicable principles of domestic contract law is fundamentally incompatible with the Convention's more limited mandate that agreements providing for disputes between the parties thereto be enforced in litigation between those parties. Applying provisions of Chapter 1 to enforce agreements that the Convention does not make enforceable would not supplement Chapter 2 by helping to carry out its purpose of enforcing the Convention's requirements; it would displace the Convention's requirements with entirely different ones. Thus, provisions of Chapter 1 that allow for enforcement of arbitration agreements against nonparties conflict with the Convention's provisions limiting its application to agreements requiring arbitration between their parties.

The distinction between FAA Chapters 1 and 2 in this regard is heightened by the fact that, where the Convention applies, the grounds for resisting arbitration are more limited than under Chapter 1. Where the Convention applies, arbitration must be ordered except when a court finds that the agreement "is null and void, inoperative or incapable of being performed." N.Y. Conv., Art. II(3); *see Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543 (11th Cir. 2016). Courts have held that this language limits reliance on state-law defenses to enforcement. *See, e.g.*, *Suazo*, 822 F.3d at 551–56; *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186–87 (1st Cir. 1982). Under FAA Chapter 1, by contrast, arbitration-neutral state contract law

determines not only what parties are bound by a domestic arbitration agreement, but what defenses to its enforcement are available. *See Kindred*, 137 S. Ct. at 1426. Seeking to expand the applicability of the Convention through importation of state-law principles of non-party enforcement from Chapter 1 of the FAA while retaining the advantage of the arguable limits on state-law defenses to enforcement under the New York Convention and Chapter 2 would blend fundamentally incompatible schemes of arbitration.

II. Equitable estoppel is a means of binding nonparties to a contract's requirements and therefore cannot provide a basis for compelling arbitration under the Convention.

Equitable estoppel is not a means of determining who qualifies as a party or signatory to an agreement, but a means of enforcing agreements against nonparties. That the Convention, and hence Chapter 2 of the FAA, limits enforcement of arbitration agreements to parties to such agreements thus forecloses petitioner's attempt to use the doctrine of equitable estoppel to compel arbitration under 9 U.S.C. § 206.

This Court recognized in *Arthur Andersen* that equitable estoppel is a means of binding "*nonparties*"—that is, "third parties" who are "strangers to the contract"—to a contract's terms. 556 U.S. at 630 n.5, 631, 632 (emphasis added). Federal appellate authority likewise uniformly recognizes that equitable estoppel is a doctrine aimed at allowing enforcement of a contract by or against a *nonparty*. *See*, *e.g.*, *A.D. v. Credit One Bank, N.A.*, 885 F.3d 1054, 1060 (7th Cir. 2018); *Waymo LLC v. Uber Technologies*, 870 F.3d 1342, 1345–46 (Fed. Cir. 2017); *White v. Sunoco, Inc.*, 870

F.3d 257, 262–63 (3d Cir. 2017); *In re Henson*, 869 F.3d 1052, 1060 (9th Cir. 2017); *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1353 (11th Cir. 2017); *Crawford Prof. Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249 (5th Cir. 2014); *Bank of Am., N.A. v. UMB Fin. Servs., Inc.*, 618 F.3d 906, 912 (8th Cir. 2010). Notably, petitioner itself concedes that, through its resort to equitable estoppel, it is invoking a "doctrine that sometimes allows *non-signatories* to enforce arbitration agreements." Pet. Br. 4 (emphasis added).

In this respect, equitable estoppel is distinct from other doctrines that may contractually bind persons who nominally appear to be nonparties but in fact are legally identified with or indistinct from the parties (as a result of privity, veil-piercing, alter ego doctrine, or relevant principal-agency relationships) or have expressly undertaken duties under the contract through assumption, assignment, or incorporation of its provisions by reference in another contract with the opposing party. Such doctrines seek to identify persons who are "deemed to have become a party through succession to[,] substitution for[,] or legal consolidation with a signatory party." 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, 604 (2002); *see also* 21 Williston on Contracts § 57:19 (4th ed.) (discussing contract-law bases for holding persons or entities subject to an arbitration agreement). When properly applied in cases involving arbitration, these common-law doctrines impose contractual duties only where "both parties have objectively manifested the intent to arbitrate." Alexandra Anne Hui, *Equitable Estoppel and the Compulsion of Arbitration*, 60 Vand. L. Rev. 711, 726 (2007).

By contrast, equitable estoppel (and some other doctrines as well) seek to impose contractual obligations on persons who are not otherwise parties bound by a contract, when a court concludes that principles of equity would render it unfair not to bind that party. *See*, *e.g., A.D.*, 885 F.3d at 1063 (considering estoppel theories after concluding that the plaintiff had not otherwise entered into a contractual relationship with the defendant).[2] Under the laws of various states, the criteria used to determine whether the circumstances give rise to estoppel may differ, but the essence of the doctrine is the imposition of contractual requirements "where no agreement to arbitrate exists" between the persons required to arbitrate. Hui, *supra*, at 726.

Attempts to invoke equitable estoppel as the basis for compelling a person or entity to arbitrate under the Convention thus exceed the scope of the Convention's provisions requiring enforcement of arbitration agreements with respect to the *parties* to such agreements. That is, because equitable estoppel is a means of subjecting *nonparties* to the requirements of an agreement, the Convention neither requires nor authorizes its use to compel someone to arbitrate. For that same reason, equitable estoppel falls outside of the authority of the courts to enforce the Convention under Chapter 2 of the FAA.

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[2] Compelling arbitration by a third-party beneficiary of an agreement, by definition, also involves imposing arbitration on a nonparty.

III. Policy considerations cannot justify extending the Convention's reach beyond its terms.

Federal policy supporting arbitration in general, or international arbitration in particular, does not command a different result. As this Court has explained, the federal policy is not a generalized preference for arbitration over other types of dispute resolution, but rather a "commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989)). Thus, the Court has "never held that this policy overrides the principle that a court may submit to arbitration 'only those disputes … that the parties have agreed to submit,'" or "that courts may use policy considerations as a substitute for party agreement." *Id.* at 302–03 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)). Applying the Convention according to its terms to enforce arbitration agreements as between parties to those agreements is fully consistent with that fundamental policy.

This Court has noted that "federal policy in favor of arbitral dispute resolution … applies with special force in the field of international commerce." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). That statement accurately reflects certain features of the Convention and Chapter 2 of the FAA, which enforce arbitration agreements in ways that Chapter 1 would not permit. Most notably, Chapter 1 allows a United States court to compel arbitration only within the district where a

petition to compel arbitration is filed, *see* 9 U.S.C. § 4, while Chapter 2 permits courts to compel arbitration abroad where an agreement subject to the Convention so requires, *see* 9 U.S.C. § 206 (providing that a court may direct arbitration be held "at any place" provided in an agreement, "whether that place is within or without the United States"). In addition, courts have held that Chapter 2 is not limited by Chapter 1's exclusion of transportation workers. *See Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1284–85 (11th Cir. 2015) (citing cases). Moreover, the grounds provided in the Convention for declining to enforce an arbitration agreement and for vacating or modifying an arbitration award are stated differently than in comparable provisions in Chapter 1. *Compare* N.Y. Conv., Arts. II(3) & V, *with* 9 U.S.C. §§ 2, 10 & 11.

This Court's recognition of the "special force" with which Chapter 2 and the Convention support international arbitration agreements, however, does not suggest that the Convention must be read to require arbitration as broadly or more broadly than Chapter 1 in every respect. "[N]o legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987)—nor, in general, does a treaty. *See, e.g.*, *Maximov v. United States*, 373 U.S. 49, 55 (1963). Here, the terms of the Convention itself limit the application of its "pro-arbitration" policies to agreements that require their parties to arbitrate, and to disputes between the parties to such arbitration agreements. Applying a treaty consistently with its "literal language" does not contradict its purposes, but carries them out. *Sumitomi Shoji Am., Inc. v. Avagliano*, 457 U.S. 178, 189 (1982). Appeals to the policies underlying a treaty provide "no reason to depart from the

plain meaning of the Treaty language." *Id.* at 189. Rather, "[t]he language and purposes of the treaty are amply served by adhering to its clear import." *Maximov*, 373 U.S. at 56.

Moreover, the limitations imposed by the Convention's language sensibly correspond to the policy rationale for strong enforcement of international arbitration agreements. As this Court has noted, a central reason parties to international business transactions employ arbitration is to increase certainty about how disputes between them may be resolved. *Scherk*, 417 U.S. at 516. The Convention "promotes the smooth flow of international transactions" by providing that "[t]he parties may agree in advance as to how their disputes will be expeditiously and inexpensively resolved should their business relationship sour." *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 248 (2d. Cir. 1991).

The policy of allowing parties to an agreement to structure their own contractual relationship, however, does not extend to empowering a litigant to foist international arbitration on someone with whom it has no agreement to arbitrate. Arbitration before a tribunal in a foreign jurisdiction, with limited or perhaps no opportunity to contest whether the costs of such a proceeding render the arbitration agreement unconscionable, is an exceptionally weighty burden to impose on one who is not a party to an agreement requiring arbitration with his adversary.

Caution in imposing such obligations on nonparties through the device of equitable estoppel is particularly appropriate because of the uncertainty that importing that doctrine into cases under the Convention would bring with it. As explained in the brief of Public

Justice as amicus curiae in support of neither party, lower courts invoking equitable estoppel in cases under Chapter 1 of the FAA have in many cases expanded the doctrine far beyond its roots in traditional contract law. In so doing, courts have created special versions of the doctrine, not grounded in general state contract law, that are specific to arbitration agreements—in violation of the FAA's "equal-treatment principle," *Kindred*, 137 S. Ct. at 1426, under which arbitration agreements are supposed to be "as enforceable as other contracts, but not more so." *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 385, 404 n.12 (1967).

The confusion over the scope of equitable estoppel that has resulted would be compounded in cases under Chapter 2 by the likelihood of choice-of-law questions as to which state's version of equitable estoppel should apply, or whether state law would even be controlling given that Chapter 1's state-contract-law paradigm may not fully apply to cases under the Convention.[3] Expanding the Convention's application to include nonparties to arbitration agreements would thus create uncertainty and unpredictability over which nonparties would be bound, and under what circumstances.

The impacts of such uncertainty would not be confined to commercial entities engaged in international transactions, who have the ability to "agree in advance" about the structure of their relationships. *Threlkeld*, 923 F.3d at 248. Rather, the use of

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[3] In this case, for example, respondent's brief points out that the contract is governed by German law, which does not recognize contract enforcement theories similar to equitable estoppel. Resp. Br. 54–59.

equitable estoppel and other theories binding nonparties to arbitration agreements may sweep into foreign arbitration proceedings claims brought by or against individual workers and consumers that may touch on contracts whose parties agreed to arbitrate with each other. For example, in *Todd v. Steamship Mutual Underwriting Ass'n (Bermuda) Ltd.*, 601 F.3d. 329 (5th Cir. 2010), the Fifth Circuit wrongly concluded that the reasoning of this Court's decision in *Arthur Andersen* was applicable to the materially different terms of the New York Convention. The court of appeals thus held that an American worker who was injured by his insolvent employer while working on board a replica steamboat in Louisiana, and who filed suit against the employer's insurer under Louisiana's direct action statute, could be required to arbitrate his claim in London even though he had not signed and was not a party to any arbitration agreement. On remand, the district court invoked a version of equitable estoppel to hold that the worker was required to seek his relief in front of a London arbitration panel. *Todd v. S.S. Mut. Underwriting Ass'n, Ltd.*, 2011 WL 1226464 (E.D. La. 2011).

Consumers may also find themselves relegated to foreign arbitration panels if they engage in transactions with entities that are parties to arbitration agreements with foreign companies—transactions that are likely to be increasingly common in an age of e-commerce, where on-line sellers may be conduits for goods originating abroad.[4] *See* Catherine A. Rogers,

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[4] The United States agreed to the Convention with the reservation that is applicable only to arbitration arising out of relationships that are "commercial" under the law of the United States. *See* http://www.newyorkconvention.org/countries; *see*

(*Footnote continued*)

The Arrival of the "Have-Nots" in International Arbitration, 8 Nev. L.J. 341 (2007); Donna M. Bates, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 Fordham Int'l L.J. 823 (2003). Transnational claims pose challenges for consumers in any forum, but creating the possibility that consumers who have identified a viable defendant amenable to suit in a U.S. courtroom might be shunted to an international arbitration forum without ever having signed or otherwise been a party to an arbitration agreement would be unwarranted.

The best solution to these potential difficulties is adherence to the terms of the New York Convention, which require courts to order arbitration only when the parties to a case are also parties to an agreement to arbitrate with each other. The policies of the Convention are served by faithfulness to its text, not the adoption of expansive doctrines binding nonparties to foreign arbitration forums to which they never consented.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

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also 2 U.S.C. § 202. It is unclear whether U.S. courts would consider consumer relationships to be "commercial" within the meaning of the reservation, and in any event only a minority of countries that are parties to the Convention have embraced the commercial reservation.

Respectfully submitted,

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