

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

GE ENERGY POWER CONVERSION FRANCE)
SAS, CORP., fka CONVERTEAM SAS,)
Petitioner,)
v.) No. 18-1048
OUTOKUMPU STAINLESS USA, LLC,)
ET AL.,)
Respondents.)

Pages: 1 through 66
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3 GE ENERGY POWER CONVERSION FRANCE)
4 SAS, CORP., fka CONVERTEAM SAS,)
5 Petitioner,)
6 v.) No. 18-1048
7 OUTOKUMPU STAINLESS USA, LLC,)
8 ET AL.,)
9 Respondents.)
10 - - - - -

11 Washington, D.C.
12 Tuesday, January 21, 2020

13
14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the United
16 States at 11:09 a.m.

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18
19 APPEARANCES:
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21 on behalf of the Petitioner.
22 JONATHAN Y. ELLIS, Assistant to the Solicitor General,
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24 for the United States, as amicus curiae,
25 supporting the Petitioner.

1 JONATHAN D. HACKER, ESQ., Washington, D.C.;

2 on behalf of the Respondents.

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P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-1048, GE Energy Power Conversion France versus Outokumpu.

Mr. Dvoretzky.

ORAL ARGUMENT OF SHAY DVORETZKY

ON BEHALF OF THE PETITIONER

MR. DVORETZKY: Mr. Chief Justice, and may it please the Court:

If this case involved a domestic arbitration agreement, GE Energy could enforce it, as long as it could satisfy domestic non-signatory enforcement doctrines like equitable estoppel. The question here is whether the New York Convention prohibits that same result for international arbitration agreements. It does not.

The Convention is simply silent about enforcement by non-signatories. That silence is consistent with the convention's design, which sets a floor, not a ceiling, for enforcing arbitration agreements and awards. The Convention says that states must do certain things to promote arbitration. It doesn't say

1 they can't to do more than the Convention
2 requires.

3 Moreover, Article II, the principal
4 provision about arbitration agreements, is
5 especially short. It is not a comprehensive
6 scheme that displaces all sovereign authority to
7 enforce domestic laws about arbitration
8 agreements.

9 All relevant sources of meaning
10 understand the Convention this same way. Other
11 contracting states are close to unanimous that
12 the Convention does not preempt domestic law
13 allowing non-signatory enforcement. The United
14 States, the Restatement, UNCITRAL, and leading
15 commentators agree. In allowing doctrines like
16 equitable estoppel serves the Convention's
17 overriding purpose, to overcome widespread
18 resistance to arbitration.

19 The Eleventh Circuit nevertheless
20 interpreted the definition of "agreement in
21 writing" to preclude non-signatory enforcement.
22 This Court should not make the United States an
23 outlier by adopting that position.

24 Article II(2) just specifies the kinds
25 of agreements that states at a minimum must

1 recognize. It doesn't limit who can enforce
2 them.

3 Respondents themselves don't defend
4 the Eleventh Circuit's signature-based rule.
5 They concede that all kinds of non-signatory
6 enforcement doctrines, including even some kinds
7 of equitable estoppel, are okay. Just not the
8 particular type of equitable estoppel here.

9 That incoherent project of parsing
10 some non-signatory enforcement doctrines from
11 others has no basis in any of the tools of
12 treaty interpretation.

13 CHIEF JUSTICE ROBERTS: Mr. Dvoretzky,
14 if you and I have an agreement to arbitrate, and
15 even if you tell me, you know, I -- I might have
16 Mr. Hacker do most of the work under it, and I
17 just want to make that clear to you, and then
18 you do hire Mr. Hacker to do all the work in it.

19 He can't be compelled to arbitrate
20 with me if I don't like the quality of his work,
21 right? He's not a signatory to our arbitration
22 agreement. Maybe he doesn't even know about it.
23 But the fact that you and I think -- no, you're
24 going to get him to do it, and we think we're
25 going to arbitrate all our disputes, he's not

1 bound to arbitrate?

2 MR. DVORETZKY: I think whether he
3 could arbitrate would depend on the domestic
4 doctrine about non-signatory enforcement. And
5 on the facts that you've posited, I think on an
6 equitable estoppel theory, if you were to sue
7 him, rather than me, for claims that are
8 intertwined with our contract, the contract that
9 you and I have, under an equitable estoppel
10 theory, he could be compelled to arbitrate.

11 That was the same sort of factor --

12 CHIEF JUSTICE ROBERTS: I thought it
13 was one of the central propositions of our
14 arbitration precedents that arbitration is based
15 on agreement. And here somebody who never
16 agreed to arbitration is being forced into
17 arbitration, even though he has a clear right to
18 take his dispute to court.

19 MR. DVORETZKY: Arbitration is, of
20 course, a matter of consent. But as long as you
21 and I have a valid arbitration agreement, that's
22 the key, consent. Then the scope of that
23 arbitration agreement is another question, and
24 that's determined in the Chapter 1 context by
25 domestic law.

1 That was the situation the Court faced
2 in Arthur Andersen, and the Court saw no
3 inconsistency between Chapter 1 and an equitable
4 estoppel theory. There was no consent problem
5 with what -- with remanding for the lower court
6 in Arthur Andersen to consider whether the
7 requirements of equitable estoppel were
8 satisfied to allow a non-signatory to compel
9 arbitration in a domestic context.

10 JUSTICE ALITO: Well, what if the --
11 what if the law of the jurisdiction whose law
12 would be chosen permits arbitration without any
13 consent whatsoever? I guess you'd have to say
14 that that's -- that's okay, right?

15 MR. DVORETZKY: The Convention doesn't
16 prevent that. That's simply not the problem
17 that the Convention was trying on solve. The
18 purpose of the Convention was to address the
19 problem of under-enforcement of arbitration
20 agreements. If there is some country out there
21 or some state that is compelling arbitration in
22 the way that you're describing, the Convention
23 doesn't directly deal with that, except perhaps
24 in Article V, which would provide a public
25 policy backstop for the country in which

1 enforcement of an award is sought to say we're
2 not enforcing that award because it contravenes
3 our public policy.

4 JUSTICE KAGAN: So you're saying that
5 when the United States entered into the
6 Convention and when it then implemented the
7 Convention through the FAA, Congress didn't
8 understand arbitration to mean voluntary
9 arbitration? The, you know -- my -- my question
10 I guess is the same as Justice Alito's.

11 It seems odd that Congress would have
12 passed the implementing legislation on the view
13 that another contracting state could compel
14 arbitration without any consent whatsoever.

15 MR. DVORETZKY: Justice Kagan, I think
16 this goes to the core question of what the
17 Convention is trying to do. The Convention is
18 trying to set forth minimum standards by which
19 other countries will recognize and enforce
20 arbitration agreements.

21 And to be sure, the Convention does
22 not require any country to recognize forced
23 arbitration, so to speak. The -- the premise of
24 the Convention is that the floor, the minimum,
25 that other countries are agreeing to do, is to

1 recognize valid arbitration agreements.

2 By the same token, it doesn't preempt
3 all domestic laws, including theoretically --
4 although there's no evidence this is a real
5 problem -- the kind of forced arbitration that
6 you're positing.

7 In the situation that we have here and
8 in the Chief Justice's hypothetical, there's no
9 question of forced arbitration. There is
10 indisputably a valid arbitration agreement. The
11 only question is can domestic law supply
12 non-signatory enforcement doctrines in order to
13 allow, again, a non-signatory --

14 JUSTICE KAGAN: But, you know --

15 JUSTICE BREYER: The fact is, you
16 started out very broadly, and suddenly I get
17 worried, are some people who -- the seller
18 agrees that I'll go to arbitration, I agree with
19 you, okay? Now I don't want to go. And it's
20 not against you; it's against him. I didn't
21 agree to that or did I?

22 Now, I thought this is quite narrow or
23 could be. What actually either seller did is I
24 agreed, I signed a party and said I'll go to
25 arbitration. And -- but the -- when you use the

1 word "seller," which I think maybe was me; is
2 that right, your opponent, that includes
3 subcontractors in this contract.

4 And, by the way, you're a
5 subcontractor. And you were listed. So it
6 isn't exactly involuntary. Or you and I agree
7 and I say our contract, including arbitration,
8 is for the benefit of Mr. Johnson, who is a
9 third-party beneficiary for everything including
10 arbitration. And then the question is: Can Mr.
11 Johnson bring me in?

12 He didn't sign it. You signed it.
13 Now, can't we decide it on a narrow ground like
14 that by indeed leading up to the lower court all
15 those questions about whether it's really true,
16 whether it really isn't true that a third-party
17 beneficiary can or the person listed in the
18 seller's side can, and just say it doesn't limit
19 it to where you're the one who wants to bring me
20 into arbitration. They're well established
21 legal doctrines.

22 I don't want to make my argument for
23 you. I want you to tell me quite
24 straightforward -- and I'll -- in a few seconds,
25 is that a possible argument in this case? We

1 just send it back.

2 MR. DVORETZKY: Yes, Your Honor. The
3 -- the Eleventh Circuit held -- the Eleventh
4 Circuit held that only the signatories to the
5 arbitration agreement could enforce it.

6 JUSTICE BREYER: And --

7 CHIEF JUSTICE ROBERTS: Which is a
8 fairly basic proposition of law. So if we're
9 going to send it back to say why don't you see
10 if you can enforce arbitration against somebody
11 who didn't sign the agreement, or who wasn't --
12 it's one thing to say, okay, your parent company
13 or your subsidiary or whatever, and the fact
14 that you might say or subcontractors, doesn't
15 mean that any particular subcontractor wants to
16 arbitrate.

17 So you're going to send it back for --
18 if someone is going to adopt such a radical
19 proposition it probably should be us, rather
20 than send it back to the Eleventh Circuit and
21 say, well, if you want to go against all our
22 precedents in arbitration, fine, but we're not
23 going to do it.

24 MR. DVORETZKY: So, Mr. Chief Justice
25 --

1 CHIEF JUSTICE ROBERTS: Not to suggest
2 I have a view either way.

3 (Laughter.)

4 MR. DVORETZKY: I -- I don't think
5 this is contrary to all of this Court's
6 precedents on arbitration. Just the opposite.
7 In Arthur Andersen the Court remanded for the
8 lower court to consider whether an equitable
9 estoppel theory would allow a non-signatory to
10 compel arbitration. So that's precisely --

11 JUSTICE GINSBURG: Can you -- can you
12 -- can we understand why Respondent should be
13 equitably estopped? This case is going in the
14 briefs, so far in the oral argument, on a level
15 once removed from the basic facts on the ground.

16 So what is it in this case that makes
17 the doctrine of equitable estoppel appropriate?

18 MR. DVORETZKY: Let me make two points
19 on that. One is the point that I think Justice
20 Breyer was making.

21 On these particular facts, GE energy
22 is defined under the contract as a party. The
23 term "parties" is defined to include buyer and
24 seller, "seller" is defined to include
25 subcontractor, and GE is listed in the contract

1 as one of the subcontractors that the parties
2 contemplated using.

3 And so we are actually a party to the
4 contract, even though we didn't put -- even
5 though we didn't ink the contract with our
6 signature. In addition --

7 JUSTICE GINSBURG: And -- and -- even
8 though at the time the contract was made, the
9 subcontractors hadn't been picked, so there were
10 -- GE was on a list of potential subcontractors,
11 but was not, in fact, a subcontractor at the
12 time of the arbitration agreement?

13 MR. DVORETZKY: I don't believe that
14 it had been picked, but there were active and
15 extensive discussions, including with the
16 Respondents, about using GE as a subcontractor,
17 so it was certainly contemplated.

18 And if you -- if you follow the
19 definitions of seller and -- and -- buyer and
20 seller and parties in the contract that GE is
21 actually a party to the agreement. As a -- on a
22 more doctrinal level in terms of equitable
23 estoppel, equitable estoppel is a way of
24 inferring consent from conduct.

25 And if the Respondents sue us, as they

1 did in this case, on a theory that depends on
2 the duty of care arising out of the contract,
3 they are in essence suing us on the contracts.
4 They can't cherry-pick to invoke the duty of
5 care from the contract but to avoid their
6 agreement to arbitrate disputes under that
7 contract.

8 That -- that would be the doctrinal
9 basis for an equitable estoppel theory.

10 JUSTICE GORSUCH: Counsel --

11 MR. DVORETZKY: And this --

12 JUSTICE GORSUCH: -- we're going well
13 down this rabbit hole on whether equitable
14 estoppel applies in this case. But I -- I had
15 -- I had proceeded maybe on the mistaken
16 assumption that the question whether equitable
17 estoppel is recognized as a viable theory under
18 the Federal Arbitration Act isn't before us.
19 The only question before us is whether anything
20 in the convention precludes an argument like
21 that to be made under the Federal Arbitration
22 Act, whether or not it might succeed.

23 Am I -- but I -- am I mistaken?

24 MR. DVORETZKY: That's correct,
25 Justice Gorsuch. And I think that goes to

1 Justice Breyer's point as well. The actual
2 question presented here is quite narrow. And
3 that is whether there is anything in the New
4 York Convention that prohibits the application
5 of equitable estoppel.

6 JUSTICE GORSUCH: If it exists,
7 without prejudging whether it exists.

8 MR. DVORETZKY: Correct.

9 JUSTICE GORSUCH: Okay.

10 MR. DVORETZKY: And that -- much the
11 same as the posture in Arthur Andersen where the
12 Court sent the case back for the lower courts to
13 determine whether equitable estoppel exists
14 under the applicable law and, if so, whether it
15 could be satisfied.

16 JUSTICE KAGAN: But Mr. Dvoretzky,
17 that is the question. So let's take a look at
18 Article II, and specifically the third sentence
19 because the third sentence says the court of a
20 contracting state -- and then I am going to skip
21 some words -- shall at the request of one of the
22 parties, refer the parties to arbitration.

23 And I have to tell you, I think that
24 the best understanding of the term "parties"
25 looking at the three sentences of Article II,

1 let's just assume that the best understanding is
2 the parties to the agreement.

3 So this says the parties to the
4 agreement are requesting the arbitration. And
5 that's when the court should refer the
6 arbitration. Now, that raises the question
7 who's the party?

8 I'm with the Chief Justice. If you're
9 talking about an alter ego or something like
10 that, or a successor in interest, maybe that
11 person counts as a party, even though it is not
12 the signatory but there is some limit, isn't
13 there, that is imposed by that language of "the
14 parties"?

15 MR. DVORETZKY: Justice Kagan, I think
16 the key point is that Article III does not say
17 "only the parties." In other words, the bear
18 minimum the contracting states agree to do is to
19 refer a case to arbitration if the parties --
20 whether you think that's to be --

21 JUSTICE KAGAN: Well let me read you a
22 few sentences, Mr. Dvoretzky and you tell me
23 whether you always have to say "shall only" if
24 you say "shall." If I say federal courts shall
25 have jurisdiction over federal questions, would

1 this statute also permits those courts to
2 exercise jurisdiction over state questions?

3 MR. DVORETZKY: No, and Justice Kagan,
4 I -- I --

5 JUSTICE KAGAN: I'm going to give you
6 one more just to prove the point.

7 (Laughter.)

8 JUSTICE KAGAN: Shareholders shall
9 appoint two directors to the board. Does that
10 mean shareholders can appoint 20 directors to
11 the board?

12 MR. DVORETZKY: No.

13 JUSTICE KAGAN: Because shall means
14 shall only in many circumstances, right?

15 MR. DVORETZKY: It -- it depends on
16 context.

17 JUSTICE KAGAN: It does.

18 MR. DVORETZKY: And the context here
19 based on the purpose of the Convention, based on
20 how this Convention has been nearly understood
21 by contracting states, which is a key factor in
22 this Court's treaty interpretation
23 jurisprudence, is that this -- this provision,
24 Article II (3), like the rest of the Convention,
25 is just setting a floor on what contracting

1 states agree to do.

2 So at a minimum, they agree that they
3 shall -- the courts shall refer cases to
4 arbitration when requested by the parties, but
5 not that they shall only do so. You can of
6 course come up with examples where shall does
7 mean shall only, but it does -- doesn't mean
8 that here.

9 JUSTICE KAGAN: Right. So I guess
10 that brings us back to the question that Justice
11 Alito started us off with, because I think that
12 that's relevant to the context in which we're
13 viewing this Convention, which is the assumption
14 on the part of the United States Congress when
15 it passed the FAA and surely the -- those who
16 entered into the Convention, the Convention was
17 a matter of -- excuse me -- that arbitration was
18 a matter of voluntary consent.

19 I mean, so if it's a matter of
20 voluntary consent, and everybody thinks that
21 that's what arbitration is, shouldn't we read
22 the parties to be, you know, the parties?
23 Nobody else.

24 MR. DVORETZKY: And again I would take
25 you back to Arthur Andersen. Certainly under

1 domestic law it is understood to be a matter of
2 voluntary consent but the Court saw no issue
3 with the possibility after an equitable estoppel
4 theory that would allow a non-party to enforce.

5 The Convention does not contain an
6 independent consent requirement. It just
7 doesn't -- it just doesn't say that. And it
8 would be inconsistent with its purpose to have
9 that because, again, the backdrop to the
10 Convention was there was widespread mistrust of
11 arbitration agreements. Agreements were not
12 being enforced.

13 The Convention set out to remedy that
14 problem and to provide for more enforcement of
15 arbitration, not less than that.

16 JUSTICE GORSUCH: Counsel, we often --

17 MR. DVORETZKY: But, moreover --

18 JUSTICE GORSUCH: -- we often -- I'm
19 sorry.

20 JUSTICE ALITO: Is it -- is it
21 necessary to go so far as to say that the
22 Convention says nothing about what the relevant
23 law of a particular jurisdiction says about who
24 can enforce an arbitration agreement or could it
25 say -- could it perhaps go beyond strictly the

1 signatories to the agreement and encompass some
2 other non-parties that have a sufficient -- that
3 have a close connection, as would be the case
4 with somebody who was equitably estopped?

5 MR. DVORETZKY: If I may answer.

6 CHIEF JUSTICE ROBERTS: Sure. Sure.

7 MR. DVORETZKY: I think that's right
8 and it's not just equitable estoppel. There are
9 a number of non-signatory doctrines including
10 alter ego and veil piercing, for example, that
11 the other side points to as valid under the
12 Convention, even though those can't be thought
13 of as consensual; just the opposite, an
14 alter-ego theory and the veil-piercing theory
15 are disregarding the consent of the parties and
16 holding them to the agreement any way.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Ellis.

20 ORAL ARGUMENT OF JOHNATHAN Y. ELLIS
21 FOR THE UNITED STATES, AS AMICUS CURIAE,
22 SUPPORTING THE PETITIONER

23 MR. ELLIS: Mr. Chief Justice and may
24 it please the Court:

25 The New York Convention place an

1 important but limited role in the recognition of
2 international arbitration agreements. It
3 requires contracting states to recognize and
4 enforce those agreements in certain
5 circumstances, but it does not, as my friend
6 says, establish a comprehensive set of rules for
7 arbitration.

8 For two fundamental reasons, the
9 Eleventh Circuit has wrong to read into the
10 writing requirement of Article II a categorical
11 prohibition on compelling international
12 arbitration on the basis of estoppel principles.
13 First, the Convention as a whole only ever
14 requires contracting states to enforce
15 arbitration agreements; it never prohibits them
16 -- them from doing so.

17 And, second, Article II, section 2, is
18 a rule of presumptive validity. It speaks to
19 when a court must recognize an arbitration
20 agreement as valid. It does not speak to the
21 scope of valid agreements, including who may be
22 bound or who may invoke those agreements.

23 Now, Respondents provide a series of
24 alternative grounds refusing to compel
25 arbitration in this case, but there's no reason

1 for this Court to pass on those grounds in the
2 first instance.

3 Just as the Court did in Arthur
4 Andersen for the FAA, the Court should make
5 clear that the Convention does not categorically
6 prohibit enforced --

7 JUSTICE SOTOMAYOR: Excuse me --

8 MR. ELLIS: -- compelling arbitration
9 on estoppel grounds.

10 JUSTICE SOTOMAYOR: -- so there are
11 two ways to reach your result. One is to read
12 Article II and say what you seem to be saying,
13 which is that it only requires or compels
14 arbitration in one circumstance but a
15 contracting state can compel arbitration in any
16 way that it wants, even without a written
17 agreement. That seems to be the essence of your
18 argument, correct?

19 MR. ELLIS: Yes.

20 JUSTICE SOTOMAYOR: That's odd,
21 indeed, because as Justice -- as the Chief
22 Justice noted and Justice Kagan noted, it seems
23 always that a signed written agreement
24 respecting consent is a minimum requirement. Or
25 another way to get to where you want to go,

1 another reading, is that Article II does not
2 allow contracting states to compel arbitration
3 whenever it wants, even without a written
4 agreement but that they can compel it if someone
5 is a party, that that's undefined.

6 And that seems to be how most other
7 contracting states have read this, which is that
8 there's a lot of leeway for states to determine
9 who's a party to that written agreement. And
10 they can do that through normal principles of
11 privity or normal principles of contract
12 interpretation, including alter ego and veil
13 piercing and all the other things that your
14 adversary accepts can be done.

15 You don't need, as I think the circuit
16 below wrongly required -- it seemed to say you
17 need that party's signature on the agreement.

18 MR. ELLIS: That's right.

19 JUSTICE SOTOMAYOR: So there's common
20 ground, but I do think within that common
21 ground, there has to be a limiting principle
22 established somewhere. And I don't think it can
23 be that you can have an oral agreement or a
24 state could say, with respect, no essence of
25 consent whatsoever, that we're just going to let

1 anybody -- if you signed an arbitration
2 agreement about the manufacturer of this thing,
3 equitable principles are always going to let
4 anybody come in and sue -- and let --

5 MR. ELLIS: Sure.

6 JUSTICE SOTOMAYOR: -- let them be
7 sued.

8 MR. ELLIS: Sure.

9 JUSTICE SOTOMAYOR: So assuming we're
10 on common ground or I am, that we have some,
11 some basis to say that contracting states can
12 pick who parties are, what's the limiting
13 principle after that? What's the limiting
14 principle of equitable estoppel? It can't be
15 every single type of equitable estoppel is okay.

16 MR. ELLIS: Sure. So -- so a couple
17 points, Your Honor. And I'm happy to --

18 JUSTICE SOTOMAYOR: And, by the way,
19 on this case, it's easy to win.

20 MR. ELLIS: Right. And we're happy to
21 win on -- on either ground.

22 JUSTICE SOTOMAYOR: And very -- on
23 this case, no matter what the theory of
24 equitable estoppel is, a seller who's defined
25 within the contract to include suppliers that

1 include GE, that seems like a fairly
2 straightforward case to me.

3 MR. ELLIS: So we haven't taken a
4 position on -- on the ultimate resolution, but
5 we agree -- and it sounds like you agree -- that
6 the Eleventh Circuit's rule is just wrong, that
7 it's not categorically limited to signatories.
8 That's enough to resolve this case.

9 Now, as for limiting principles, I
10 think there are limiting principles. I think
11 there are two types to be -- to consider. The
12 first limiting principle is to consider when --
13 what's the limit on when a contracting state is
14 required to compel arbitration? And I think
15 there certainly are limits. I think section --
16 Article II, Section 3, is the relevant
17 provision, not Article II, Section 2. And the
18 question there says that the parties before the
19 -- have to have made an agreement. So I think
20 the question, can you -- does the domestic law
21 consider the parties to have made an agreement
22 to this written agreement?

23 Now, the other -- the other limiting
24 principle is -- is -- is whether states are then
25 prohibited from, under their own -- under the

1 domestic law, to recognize other types of
2 arbitration agreements. I just don't think the
3 contract -- the Convention can be read to impose
4 those limits. That doesn't mean that you can
5 then say -- enforce an -- require another state
6 to enforce an oral arbitration agreement under
7 the Convention. It would not be clearly, not be
8 under the Convention, but a -- but a -- a
9 contracting state --

10 JUSTICE SOTOMAYOR: But that's going
11 --

12 MR. ELLIS: -- has not given up its
13 right to enforce the --

14 JUSTICE SOTOMAYOR: -- much further
15 afield than I think other contracting states
16 have and it's reading Article VII into Article
17 II, which to me is illogical.

18 MR. ELLIS: We don't think you have to
19 read Article VII on its text to do that. I will
20 say that it's fairly uniform that -- that
21 Article VII at least should inform the scope of
22 Article II, the same sort of most favorable
23 rules should apply to -- to enforcing
24 arbitration agreements as an --

25 JUSTICE SOTOMAYOR: That seems

1 contrary to the very strict requirement that you
2 need a written agreement between the parties.

3 MR. ELLIS: Absolutely.

4 JUSTICE SOTOMAYOR: I think that's a
5 very different argument than saying you have
6 some play in the joints with respect to who
7 parties are and that domestic law can inform
8 that.

9 MR. ELLIS: I -- I -- and -- and I
10 want to be clear. The Convention does not apply
11 to -- to arbitration agreements that are not
12 written or don't meet the presumptive -- the
13 validity requirements in Article II at least
14 insofar as -- as -- there's this debate between
15 whether Article II, Section 2, was exhaustive or
16 non-exhaustive. But either way, the Convention
17 isn't going to apply and, therefore, isn't going
18 to require the enforcement of agreement that
19 doesn't meet the requirements of the Convention.

20 But the Convention doesn't further
21 then say that a -- a contracting states cannot
22 enforce beyond that. And -- and that's what you
23 have --

24 JUSTICE GORSUCH: Counsel --

25 MR. ELLIS: -- to conclude --

1 JUSTICE GINSBURG: Can -- can we go --

2 MR. ELLIS: -- to support the Eleventh
3 Circuit's rule.

4 JUSTICE GINSBURG: -- back to -- to a
5 question Justice Kagan raised? There are these
6 privity-like people and then there's this
7 doctrine of equitable estoppel, which we're told
8 that many of our treaty partners do not
9 recognize. So what you're suggesting is that we
10 should recognize this equitable estoppel, even
11 though our treaty partners would not, which
12 could yield divergent results and give you a
13 real problem at the enforcement end because a
14 country that doesn't recognize equitable
15 estoppel will hesitate to enforce an award that
16 was based on that theory.

17 So you can distinguish these
18 successors in interest, maybe assignors,
19 privity-like people from this equitable
20 estoppel, which is not universally embraced by
21 our treaty partners.

22 MR. ELLIS: Yes, Your Honor. The -- I
23 mean, the Respondent has argued that estoppel,
24 equitable estoppel, is an outlier.

25 I think that's a bit of an

1 overstatement. I think that there are very
2 comparable doctrines around the world that look
3 a lot like U.S. equitable estoppel principles.
4 The Titan Unity decision from Singapore adopts
5 U.S. estoppel principles by name, by citing to
6 U.S. courts. And then that is venire contra
7 factum proprium in civil law countries that look
8 a lot like equitable estoppel.

9 JUSTICE GINSBURG: But that has been
10 described as the -- the Latin phrase you just
11 used, as akin to traditional estoppel as opposed
12 to this equitable estoppel.

13 MR. ELLIS: Sure, that's fair enough.
14 I guess the overarching point is that nothing in
15 the Convention draws the sort of line that
16 Respondent is trying to do. It can't be the
17 party line that they've pointed to.

18 I don't know why traditional estoppel
19 or venire contra factum proprium would more akin
20 to a party than not. It can't be the consent
21 principle that they point to, for the reasons
22 that my friend says. Piercing the corporate
23 veil is -- is -- is at least based on equity and
24 fairness and, contrary to sort of formal express
25 consent, as any equitable estoppel principle is.

1 And so at the bottom, what you -- our
2 view is that the -- the Convention simply
3 doesn't speak to those principles and what other
4 domestic law principles would apply.

5 JUSTICE GORSUCH: Counsel --

6 JUSTICE GINSBURG: Before your time
7 runs out, I'd like you to answer specifically,
8 in the Public Citizens' brief, they cite a case
9 called Todd v. Steamship Mutual Underwriting
10 Association. They say a U.S. worker who was
11 injured by his employer in Louisiana sued that
12 insolvent insurer's -- employer's insurer under
13 Louisiana's direct action statute, and was
14 required to arbitrate his personal injury claim
15 before an arbitration panel in London.

16 That sounds like a real horrible -- is
17 that the result of the position that you are
18 pressing?

19 MR. ELLIS: So I -- I apologize. I'm
20 not familiar with the facts of that particular
21 case and exactly how they got to that result. I
22 -- I -- I will say that there are, I think the
23 Convention itself does not limit contracting
24 states from enforcing arbitration. There may be
25 other limits. There may be other limits in the

1 FAA itself that don't need to -- the court below
2 didn't reach and this Court doesn't need to get
3 into.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch has a question.

6 JUSTICE GORSUCH: Counsel, I
7 understand that different countries may have
8 different views about equitable estoppel or
9 other kinds of non-signatory, non-strict consent
10 arbitrations.

11 Is there any disagreement among
12 countries about how to read the Convention
13 itself with respect to whether it creates a
14 floor or a ceiling?

15 MR. ELLIS: Not that I'm aware of.
16 The only -- at least not of any -- any
17 significance. The only one that I'm aware of is
18 the Jhovar decision from the British Columbia
19 courts that reads Article II, Section 2 in the
20 way the Eleventh Circuit does, but we have cited
21 cases from Germany, France, and Switzerland on
22 26 to 28 of our brief. The Bremen brief has
23 collected cases from 21 to 30 of their brief.

24 The UNCITRAL recommendation is -- is
25 inconsistent with Eleventh Circuit's decision.

1 That represents the views of about 60 different
2 countries. The model -- the implementing
3 legislation from Peru, from Singapore, from
4 Australia, are contrary to the Eleventh
5 Circuit's view of the Convention, and even the
6 Jhovar case from British Columbia not followed
7 by subsequent courts and it has been criticized.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Hacker.

11 ORAL ARGUMENT OF JONATHAN D. HACKER ON
12 BEHALF OF THE RESPONDENT

13 MR. HACKER: Mr. Chief Justice and may
14 it please the Court:

15 GE cannot compel Outokumpu to
16 arbitrate its tort claims with GE because there
17 is no written arbitration agreement between
18 them.

19 I agree that would generally not be an
20 obstacle in a domestic arbitration case because,
21 as this Court held in Arthur Andersen, Chapter
22 1's agreement enforcement provision, FAA Section
23 3, does not limit enforcement to "parties to a
24 written agreement."

25 But the lack of a written agreement is

1 decisive here because the Convention's
2 enforcement provision, Article II, Section 3, is
3 limited to the parties to a written arbitration
4 agreement. Because that provision controls over
5 Chapter 1's conflicting enforcement provision,
6 non-parties cannot enforce agreements in cases
7 under the Convention. That rule is subject to
8 two important corollaries that have already been
9 discussed this morning.

10 First, the Convention does not
11 prohibit contracting states from enacting other
12 domestic laws that can mandate international
13 arbitration on other terms, including oral
14 agreements or absent consent. But as the
15 commentators agree and as the United States
16 agreed this morning, arbitrations under such
17 statutes do not proceed under the Convention,
18 meaning that the resulting awards will not
19 receive the benefit of the Convention and its
20 near automatic enforcement provisions, as
21 Justice Ginsburg warned.

22 That kind of distinct extra Convention
23 statute is not at issue in this case, because
24 the United States has not enacted one. Chapter
25 2 instead makes the Convention itself

1 controlling in all international arbitration
2 cases. Chapter 1 applies only where the
3 Convention does not supply a different rule,
4 such as FAA Section 6 and 7 which govern motions
5 and witnesses.

6 The Convention, however, does provide
7 its own rule for enforcing arbitration
8 agreements and, therefore, that rule controls.

9 The second corollary also discussed is
10 that enforcement by a party under the Convention
11 includes its privities, under principles
12 well-known to and even discussed by the
13 Convention drafters.

14 Those principles differ categorically
15 from the broad modern estoppel doctrines GE is
16 trying to invoke here.

17 JUSTICE GORSUCH: Mr. Hacker, I'm
18 sorry to interrupt you, but I did want to spin
19 back a little bit. Did I understand you to say
20 as a matter of domestic law you would agree that
21 this contract could be enforced by GE under
22 equitable estoppel or did I mishear you?

23 MR. HACKER: I -- I hope you misheard
24 me.

25 JUSTICE GORSUCH: Okay.

1 MR. HACKER: I definitely did not
2 believe this contract can be enforced by GE.
3 The arbitration clause cannot be enforced by GE
4 because GE is not a party to the contract and is
5 not a party to the arbitration clause. And this
6 goes to Justice Breyer's question, I think,
7 about the sort of more narrow ground.

8 JUSTICE GORSUCH: I thought you said
9 at the first part Arthur Andersen and, yes,
10 there would be a real question here but no real
11 question here because of the Convention.

12 MR. HACKER: That's -- in a domestic
13 arbitration case Arthur Andersen would -- would
14 control. You'd ask whether the controlling
15 state law allowed for equitable estoppel.

16 JUSTICE GORSUCH: Okay.

17 MR. HACKER: This is not a domestic
18 arbitration.

19 JUSTICE GORSUCH: Okay. Under
20 domestic arbitration rules, there would be a
21 real live question here?

22 MR. HACKER: You'd look to do --
23 applicable state law, there's no applicable
24 state law here, it's German law and you would
25 have to determine whether or not equitable

1 estoppel applied here. This case is governed by
2 the Convention which applies its own rule --

3 JUSTICE GORSUCH: But -- but for the
4 Convention, despite the international character
5 of this agreement, we would have a choice of law
6 problem undoubtedly but we'd find some choice of
7 law, look and see whether equitable estoppel is
8 a permissible argument to be made in an
9 arbitration case like this?

10 MR. HACKER: In a domestic case,
11 that's correct. This is a Convention case --

12 JUSTICE GORSUCH: If it weren't
13 governed by the Convention, but for the
14 Convention --

15 MR. HACKER: Right.

16 JUSTICE GORSUCH: -- it would be a
17 choice of law problem?

18 MR. HACKER: That would be the first
19 question, choice of law. The second question
20 would be whether the law authorizes. This is a
21 Convention case --

22 JUSTICE SOTOMAYOR: Would this be a
23 question under regular estoppel rules? Forget
24 about equitable estoppel. Would they have a
25 potential claim under estoppel rules?

1 MR. HACKER: No.

2 JUSTICE SOTOMAYOR: Why not?

3 MR. HACKER: Because traditional --

4 JUSTICE SOTOMAYOR: They are defined
5 as sellers in the contract. Why wouldn't
6 estoppel rules, not equitable rules, but mere
7 estoppel rules make them a seller?

8 MR. HACKER: So --

9 JUSTICE SOTOMAYOR: You signed a
10 contract. You agreed to arbitrate with the
11 sellers. Sellers were defined as a list of sub
12 -- subcontractors or sub-suppliers. They --
13 they were among those. Why wouldn't estoppel
14 stop you, normal estoppel rules?

15 MR. HACKER: If I can separate that
16 out. Two questions. First of all, they are not
17 a party to that arbitration clause. And when I
18 show you why they're not a party to the
19 arbitration clause, that's going to answer the
20 question why --

21 JUSTICE SOTOMAYOR: Why?

22 MR. HACKER: -- they're not a party to
23 the arbitration clause, because as we know,
24 under international law, arbitration clauses are
25 separable from the rest of the contract. You

1 don't look to the contract generally to
2 determine who is a party to the arbitration
3 clause; you have to look to the clause itself.

4 Look at -- start with commonsense
5 about what's going on in that contract. If
6 subcontractors are defined for all purposes and
7 defined for purposes of the arbitration clause,
8 as parties to the arbitration clause, it's a
9 bilateral agreement. Right? You've got a
10 thousand subcontractors on site including local
11 dry-wallers, paint suppliers, maintenance guys.
12 If all of them are agreeing implicitly --

13 JUSTICE SOTOMAYOR: When seller -- I'm
14 reading the contract. When seller is mentioned,
15 it shall be understood as subcontractors, and a
16 million or not, included, except if expressly
17 stated otherwise.

18 Where in the arbitration clause are
19 they expressly stated otherwise?

20 MR. HACKER: They're not stated
21 otherwise in the arbitration clause, except that
22 the arbitration clause is separable. And
23 remember, Your Honor, remember, this is so
24 important, Your Honor --

25 JUSTICE SOTOMAYOR: So what? Where

1 does it say that subcontractors are not sellers
2 for purposes of the arbitration clause?

3 MR. HACKER: It doesn't say it in the
4 arbitration clause but we know, we know, Your
5 Honor, that "seller" doesn't actually mean
6 subcontractor everywhere in the contract. The
7 next paragraph, literally after the one you're
8 quoting, says that the seller has to construct
9 the whole mill. That can't be all the
10 subcontractors.

11 Article 6 of the agreement says that
12 the seller receives all kinds of payments from
13 Outokumpu. We know that not all the
14 subcontractors receive all the payments.

15 JUSTICE GORSUCH: I understand --
16 these are good arguments, but it seems to me
17 that it's one thing to say we're going to force
18 all these suppliers into arbitration, compel
19 them without their consent. That -- that would
20 be one -- one thing.

21 But it's quite another to say that you
22 -- you agreed to this contract, where they can
23 -- they can bring arbitration against you. And
24 there's no consent problem there, it seems to
25 me.

1 You -- you've consented -- this is the
2 scope of your consent, we have to address, but
3 the idea that you consented to something seems
4 hard to dispute, isn't it, as a matter of
5 domestic law?

6 MR. HACKER: Well, I --

7 JUSTICE GORSUCH: I think that's
8 Justice Sotomayor's point.

9 MR. HACKER: -- let me -- first of
10 all, domestic law -- domestic law is not at
11 issue here. It's the Convention, which requires
12 a written agreement between the parties to
13 arbitrate. So the question is where is the
14 written agreement between us and GE and the
15 local paint guy to arbitrate claims between us?

16 JUSTICE BREYER: Here is where. And
17 to do this, I want your reaction.

18 A. James Casner, who was my property
19 professor, and a great man would also often use
20 the word -- if we look at the sentence 3 of
21 Article II, of course that word "parties" does
22 not mean the parties in court. It means the
23 parties who sign the agreement.

24 And what the third says is that the
25 court shall, at the request of one of the

1 parties, emphasize, refer the matter to
2 arbitration.

3 But you, yourself, say sometimes a
4 person who is not a party can force you to go to
5 arbitration. That person you call a privity, a
6 word full of obscurity.

7 (Laughter.)

8 JUSTICE BREYER: So the words that he
9 used are not privity. He would say in a thing
10 like this, it's one of the parties or someone
11 who stands in the shoes of a regular party, of
12 -- of an ordinary party.

13 Now most of what you say is consistent
14 with that. And if you use those vaguer words,
15 you pick up what we said in Andersen because
16 sometimes such a person who is a non-signatory
17 would stand in the shoes because of assumption
18 of a contract, because it went through
19 bankruptcy, because we pierced the corporate
20 veil, because of this theory of alter ego,
21 because there's an incorporation by reference,
22 third-party beneficiary theories, waiver, and,
23 he says, estoppel.

24 So it sounds what we're really arguing
25 about is this the kind of estoppel and are these

1 the circumstances of estoppel that will put your
2 adversary in the shoes of a party? If I am
3 right -- and you're nodding your head, which is
4 a good sign --

5 MR. HACKER: Nodding only that I
6 understand your question.

7 JUSTICE BREYER: Oh, okay.

8 (Laughter.)

9 MR. HACKER: I don't think I'm going
10 to agree with where you're heading.

11 JUSTICE BREYER: Then you can say --
12 all right. Then you can say it's not right.
13 But I -- I -- I thought that that's a question
14 which I don't know the answer to and that,
15 really, the Eleventh Circuit didn't use this
16 wonderful expression, "stand in the shoes of"
17 and thereby pick up the Arthur Andersen or at
18 least some of them.

19 Since they didn't, we could send it
20 back and say the district court seemed to think
21 they should, but here they're making an
22 excellent argument on both sides. Now, you've
23 got my question. It's what to do with this
24 case, depends on an assumption. What do you
25 think?

1 MR. HACKER: So the answer is I don't
2 think "stand in the shoes" is any more clear
3 than --

4 JUSTICE BREYER: Oh, no, it isn't but
5 it doesn't purport to be.

6 (Laughter.)

7 MR. HACKER: Right. Privity --
8 privity explains all -- almost all of the
9 situations in you -- which you need to be
10 concerned about whether or not a non-party,
11 non-signatory, by which I mean somebody who's
12 not literally named, actually is standing in the
13 shoes of a signatory. That explains almost all
14 of the international cases that don't involve
15 traditional estoppel.

16 JUSTICE ALITO: What do we --

17 MR. HACKER: And that is a very easy
18 and clear line.

19 JUSTICE ALITO: What do we have to
20 decide? I mean, the Eleventh Circuit said a
21 non-signatory can never enforce, right?

22 MR. HACKER: Not quite, no.

23 JUSTICE ALITO: It said a
24 non-signatory cannot enforce.

25 MR. HACKER: It -- it said

1 non-signatories include their privities. It
2 said it twice, and so we know from the Eleventh
3 Circuit's rule that that includes privities.
4 And so this Court could be clearer about that,
5 but the Eleventh Circuit was absolutely correct.

6 It also emphasized the importance of a
7 signature, which may look like an overstatement
8 because we know Article II includes documents
9 exchanged, letters, and telegrams. But, of
10 course, the Eleventh Circuit was only talking
11 about a signature because GE was not pointing to
12 any sort of separate document exchanged in a
13 letter or telegram.

14 The question was whether there was a
15 written agreement or they were -- they should
16 have been whether they were privity with a --

17 JUSTICE ALITO: Well, How does this --

18 MR. HACKER: -- party to the
19 agreement.

20 JUSTICE ALITO: How does this concept
21 of privity, which is, as far as I'm -- as far as
22 I'm aware, is a feature of Anglo-American law,
23 become the -- become the controlling standard
24 under this international agreement?

25 MR. HACKER: Well, I -- it's not

1 limited to Anglo-American law. There are
2 different types of privity doctrines recognized
3 throughout the world.

4 JUSTICE ALITO: Okay, well, what's the
5 doctrine of privity under German law?

6 MR. HACKER: I -- I don't know what
7 the German word is, but I'm sure it's extremely
8 long.

9 (Laughter.)

10 MR. HACKER: But it's going to mean
11 some version of the same thing.

12 JUSTICE ALITO: What is it under
13 Japanese law?

14 MR. HACKER: The question -- the
15 question being asked under whatever, you know,
16 privity rules you're invoking are, is this party
17 the same party for some reason as a signatory?
18 That's not the question that is raised by the
19 equitable estoppel claim that GE is raising.
20 It's a fundamentally different question about I
21 agree, I am not a signatory, I am not in privity
22 with a signatory; I just want to make them
23 enforce -- make them arbitrate with me
24 because... because it's more convenient to, it
25 seems efficient, it seems fair, whatever rules,

1 you know, the local jurisdiction might invoke.
2 They want to say those local rules, the
3 equitable, fairness, justice principles of a
4 given state, can trump what the Convention says,
5 at least in a Convention-governed arbitration,
6 the Convention says is supposed to be a written
7 agreement between the parties.

8 JUSTICE GORSUCH: I think -- I think
9 the argument on the other side would be that --
10 that equitable estoppel or estoppel, whatever
11 you want to -- however you want to describe it
12 here, is -- is -- is that your client
13 effectively did consent. That's the way in
14 which it would be rephrased to --

15 MR. HACKER: I understand.

16 JUSTICE GORSUCH: So -- so what do you
17 do about -- do about that, Number 1? And Number
18 2, and a completely different line -- and take
19 them as you choose, okay -- normally when we
20 interpret treaties to bind domestic law, we
21 require a pretty clear statement when we're
22 staying Congress's hand in an area.

23 And if the FAA, hypothetically -- and
24 I'm not passing on it; we don't need to -- were
25 to allow equitable estoppel doctrine and the

1 Convention didn't allow domestic law to do that,
2 wouldn't we require a clearer statement than
3 what we have here?

4 MR. HACKER: Let me answer the first
5 question, which I think I'll actually answer by
6 the Convention. The Convention rule is not
7 effectively consent. That's not the principle
8 of -- the Convention adopts and requires for
9 Convention-governed agreements. It requires a
10 written agreement between the parties who are --
11 and it requires a court to enforce an agreement
12 between the parties. It has to be the parties
13 to the agreement are the only parties that could
14 obtain enforcement under the Convention.

15 So I think that's the clear answer.

16 JUSTICE GORSUCH: Except for the fact
17 -- except for -- I'm sorry to interrupt. Except
18 for the fact that you've admitted that there are
19 other doctrines that allow third parties to be
20 brought in as privities --

21 MR. HACKER: Because there are --

22 JUSTICE GORSUCH: -- who may not have
23 strictly consented. Alter-ego theory,
24 veil-piercing theory. It's a fiction to call
25 that consent.

1 MR. HACKER: I disagree, Your Honor,
2 because what you have is a consent -- a written
3 agreement between parties. And the counterparty
4 in that situation is agreeing to arbitrate with,
5 you know, Fives. Whoever Fives is defined as,
6 they're arbitrating with Fives and whoever
7 stands in Fives' shoes. That is a fundamental
8 -- there's consent there, there's a written
9 agreement there, and the doctrines that
10 international law recognizes for determining who
11 properly stands in these shoes.

12 There is no universally recognized
13 doctrine of international law that allows
14 somebody who is not Fives in any sense to come
15 in and say, even though you never agreed to
16 arbitrate with me, you're suing me -- and let's
17 be clear about this -- you're suing me in tort
18 outside the contract. These are not claims that
19 are based on a -- the contractual duty between
20 Outokumpu and Fives. These are tort claims
21 governed by Alabama tort standards, and you
22 never agreed with me in a written agreement to
23 arbitrate those kinds of claims. Nevertheless,
24 I'm going so say that, you know, I -- I think
25 it's fairer for me to do that. I want to invoke

1 your agreement.

2 JUSTICE KAGAN: Mr. Hacker, sorry, did
3 you --

4 MR. HACKER: No, go ahead.

5 JUSTICE KAGAN: Your argument here
6 does rest on reading Article II and especially
7 sentence 3 as not just a floor; as a -- as a --
8 as a ceiling -- as a floor and a ceiling, both.

9 MR. HACKER: That's correct.

10 JUSTICE KAGAN: So where do you get
11 that understanding from? Because Mr. Dvoretzky,
12 the solicitor general, says the parties to the
13 Convention were just concerned about people not
14 enforcing arbitration agreements. They didn't
15 have it in mind to draw up a whole set of rules
16 about when to and when not to.

17 That's left up to the states. What --
18 what's your best argument to the contrary?

19 MR. HACKER: So a couple points. Let
20 me start with the text in where I think the
21 United States agrees with us, which is the
22 Convention does make it a ceiling that you have
23 to have a written agreement. That's required.
24 You can't proceed under the Convention absent a
25 written agreement.

1 That comes out of Article II(1), which
2 says the contracting states shall recognize a
3 written agreement. It's the same language then
4 in Article II(3). The court seized of an action
5 shall -- shall, at request of one of the
6 parties, refer the parties to arbitration.

7 It all fits together with Article II.
8 Those are all mandatory requirements in order to
9 trigger the protections of the Convention.

10 JUSTICE KAGAN: What -- why is it so
11 clear that the first one is a mandatory
12 requirement?

13 MR. HACKER: Well, the United States
14 concedes it. And they're right to do that for
15 the reason you say, Your Honor. "Shall"
16 sometimes is a -- a mandatory requirement. The
17 examples you gave are good ones. The United
18 States Constitution says the -- the legislative
19 power shall be vested in a Congress. Nobody
20 thinks that means it could be elsewhere.

21 JUSTICE KAGAN: Right. So I think
22 everybody agrees the question is context.

23 MR. HACKER: Correct.

24 JUSTICE KAGAN: And what in the
25 context do you think indicates that this is a

1 ceiling?

2 MR. HACKER: Because it's what's
3 required to trigger the protections of -- the
4 requirements of Article IV and Article V for
5 enforcement.

6 JUSTICE GORSUCH: But counsel --

7 MR. HACKER: You have to have an
8 agreement under Article --

9 JUSTICE GORSUCH: -- I think that's --
10 that's a non sequitur. I think what Justice
11 Kagan is trying to get at, and what I would like
12 to get at, is, fine, that may be what's required
13 to trigger the Convention, but that may just be
14 the floor of -- of what's available to states
15 domestically, and domestically they may choose
16 to enforce more than that.

17 MR. HACKER: Yes. I -- I agree with
18 that.

19 JUSTICE GORSUCH: I think that's the
20 question Justice Kagan is asking, and if you
21 could address that.

22 MR. HACKER: I -- I meant to be
23 answering within the confines of the Convention,
24 because that's all it takes here.

25 JUSTICE GORSUCH: Forget about within

1 the context of the Convention.

2 MR. HACKER: Right.

3 JUSTICE GORSUCH: Is there a universe
4 of arbitration agreements a domestic law that
5 might enforce that might not be enforceable
6 under the Convention?

7 MR. HACKER: Yes. Yes, that's Arthur
8 Andersen. Those -- that definitely says that --

9 JUSTICE BREYER: Here --

10 JUSTICE GORSUCH: I'm sorry, I'm --
11 I'm sorry, and I apologize. Isn't that the end
12 of the case? If there are some universe of
13 agreements that could be only domestically
14 enforceable but are not enforceable under the
15 Convention, then what?

16 MR. HACKER: Because they can't
17 proceed under the Convention -- under domestic
18 law under U.S. law. Chapter 2 makes
19 international arbitration -- the Convention the
20 sole source of law governing international
21 arbitration agreements. You cannot proceed
22 under Chapter 1, for example, and get
23 enforcement of an arbitration agreement
24 overseas.

25 Chapter 2 is the only place you can

1 go. And Chapter 2 says the Convention
2 proscribes the controlling law, you know, unless
3 Chapter 1 -- so long as it is conflicting. And
4 we know that, the Convention is conflicting with
5 Chapter 1 because the Convention proscribes,
6 requires for Convention-governed agreements, a
7 written agreement, that can be enforced only by
8 the parties to the written agreement. It
9 differs from Chapter 1 in that respect. There
10 is no Chapter 1 here.

11 JUSTICE GINSBURG: Can you tell us
12 what is going on in this -- in this very case?
13 I mean, the party that you call Fives has to
14 arbitrate, it has a written agreement, and there
15 is an arbitration in Berlin; is that right,
16 going on?

17 MR. HACKER: Dusseldorf.

18 JUSTICE GINSBURG: Going on in the
19 dispute. But then there is also this proceeding
20 in the Alabama Supreme -- in Alabama state trial
21 court. Is that proceeding going forward?

22 MR. HACKER: Yes.

23 JUSTICE GINSBURG: So you have two
24 cases, which in the best of all possible worlds
25 because of their length would be heard in the

1 same forum, one going to an arbitration panel in
2 Berlin and the other going to the state court in
3 Alabama, but that's the result of your view of
4 what the Convention requires?

5 MR. HACKER: Well, if we had prevailed
6 and didn't get before this Court, we would be
7 proceeding in Alabama as we should be. But
8 there is jurisdiction -- I mean, this Court has
9 jurisdiction to resolve the certiorari question
10 before it.

11 But in our view, this case should be
12 in Alabama state court on the tort claims that
13 we have asserted.

14 JUSTICE GINSBURG: What I mean is that
15 the relationship between the subcontractor and
16 the contractor, vis-à-vis the buyer, that
17 litigation ideally would be all one case.
18 Instead we have this split.

19 MR. HACKER: Well, again, it might be.
20 We had an action against Fives, decided not to
21 pursue it because Fives from the very outset
22 said it's not our problem, they supplied the
23 motors, they were the problem, GE screwed up.
24 GE will take care of it, don't talk to us, we
25 pursued it for a while with Fives. GE did begin

1 working with us to fix the motors and provide
2 housing for the motors. We basically had an
3 ongoing working relationship with GE after a
4 time, and it turned out not to be satisfactory.

5 The problems were not solved. And
6 their defective motors caused additional damage
7 to our facility which under Alabama law and, by
8 the way, U.S. federal common law in the maritime
9 context allows a party to assert a tort claim
10 outside the contractual relationship.

11 JUSTICE BREYER: I'm interested. You
12 want to read that sentence three as the ceiling.
13 You know what I am talking about as a ceiling.

14 MR. HACKER: The Article II -- Article
15 III well -- yes.

16 JUSTICE BREYER: Then the word privity
17 doesn't appear there, you know, so you say
18 almost a ceiling. No. Almost a party. No.
19 Party plus privity. And I say: Well, now, I am
20 sitting here, can I think of some cases that are
21 hard to squeeze into the term privity but it
22 sounds as if they should be able to stand in the
23 shoes of the party.

24 Smith makes a contract with Jones. He
25 says: You know, Jones, this is for the benefit

1 of my daughter when she is 35. This will help
2 her a lot. And I want her to be able to enforce
3 it.

4 And I want her to be able to go to
5 arbitration. I love arbitration. Jones writes
6 back to the letter: I agree with you, of course
7 you can enforce it in arbitration. I love
8 arbitration too.

9 (Laughter.)

10 JUSTICE BREYER: Don't worry. Go
11 ahead and sign. So he signs. And now the
12 daughter wants to go to arbitration after she's
13 35. Well, that's a pretty strong case for
14 estoppel.

15 And it's very hard to call the
16 daughter a privity. So I have tried to think of
17 a case where, does that sentence forbid that?
18 No. Because you can't either call the daughter
19 a privity, which sounds like a stretch, or you
20 could say that is not a ceiling but it does pick
21 up domestic law on this matter. And, by and
22 large, when the domestic law allows a
23 non-signatory to enforce an arbitration clause
24 against a signatory, this doesn't forbid it.

25 Now, what about that approach?

1 MR. HACKER: I think the problem is
2 what you -- what was described earlier as a
3 choice of law problem, which I think your
4 international commentators recognize that the
5 law has to be governed by universally recognized
6 international law principles because if you open
7 up the door to domestic law on what seems like
8 a, gee, that seems an eminently fair situation
9 and say domestic law gets to decide who gets to
10 enforce, that creates a huge problem under the
11 Convention because then states can begin
12 subjecting parties to arbitration, absent their
13 consent, unwilling parties when the Convention
14 clearly intends to be required to --

15 JUSTICE BREYER: We have a list about
16 a thousand miles long, it seemed to me, of
17 authorities, cases, professors, and others who
18 say all these other people have enforced that
19 particular sentence in a way that it allows at
20 least some, perhaps not all, of those who are
21 hard to call privities to enforce under certain
22 circumstances and this is one. What do you say?

23 MR. HACKER: The circumstance in which
24 it is widely and I would say essentially
25 universally recognized is only one. It's not

1 the one Your Honor describes. It is the
2 situation where a party begins or has even
3 completed arbitration and then -- or an entity
4 begins or completes arbitration and the later
5 says I wasn't a party, I don't want to be
6 subject to the results of this arbitration.

7 That's a situation where courts,
8 international decisions have recognized they can
9 be held to it but it is not really an
10 estoppel/contract doctrine. What Justice
11 Alito's opinion in the case in Minmetals
12 described it as a waiver doctrine or forfeiture
13 doctrine.

14 That's how the English Court in
15 Peterson Farms described it, that's how the UK
16 High Court in Dollar described it. It is really
17 forfeiture or waiver. It's not some opening the
18 door to all kinds of situations when it sort of
19 seems fair to let an unwilling party to force an
20 unwilling party to arbitrate.

21 Think about the consequences of doing
22 that. The Todd case that I believe Justice
23 Ginsburg raised exemplifies the problems that
24 you have if you just say -- if it's connected to
25 the contract in some way.

1 Remember we had the earlier discussion
2 from the earlier argument, the word "involves"
3 can, you know, extend to the limits of the
4 universe. Well, so can something that's related
5 to a contract can extend to no limit.

6 And that's what happened in the Todd
7 case where a sailer was injured while working on
8 a ship, couldn't recover against his immediate
9 employer because the employer went bankrupt or
10 in some way couldn't -- wouldn't pay the
11 employer for his personal injuries. And so he
12 went against the employer's principal, the
13 guarantor, and the guarantor said: Well, your
14 claim for injury on a ship is connected to this
15 contract I have with the ship owner. And that
16 contract has an arbitration agreement.

17 And so you have to arbitrate with me
18 overseas over your personal injury.

19 That's exactly the problem with
20 opening the door to U.S. modern equitable
21 estoppel that is divorced from the contract
22 terms and divorced from a situation when you're
23 really talking about a waiver where somebody has
24 engaged in arbitration.

25 That's the limited circumstance. It

1 is not any kind of gerrymander. It's simply
2 adhering to the same text of the Convention,
3 which for Convention-governed cases requires a
4 written agreement and limits enforcement of the
5 written agreement to the parties to the
6 agreement.

7 Let me make one other point about the
8 language of Article II, paragraph 3. Justice
9 Kagan's absolutely correct that parties, the
10 second use of parties, pretty clearly is
11 referring to the parties to the agreement. If
12 there is any doubt about that, look at the
13 Spanish versions of the Convention, look at the
14 French versions of the Convention, which you
15 will find at paragraphs or pages 11A and 20A of
16 our brief.

17 It actually says of them. It doesn't
18 say of the parties. It says of them,
19 immediately referring back to the parties to the
20 written agreement.

21 So there is really no ambiguity
22 whatsoever there. This, unlike FAA Section 3
23 addressed in Andersen limits enforcement to the
24 parties to the written agreement.

25 That's only in Convention-governing

1 cases, Justice Gorsuch. The point is it's
2 possible for a state to adopt a separate law,
3 like Peru did, and subject parties to
4 arbitration, unwilling parties to arbitration on
5 whatever terms a state feels like.

6 That's not what the United States has
7 done. And the consequence of doing that is that
8 you lose the automatic enforcement benefits,
9 virtually automatic enforcement benefits
10 promised by Article V.

11 The last two points that I would make
12 are recall that extension to non-parties, all
13 the commentators, I think the United States too,
14 says that extension of an arbitration agreement
15 to non-parties is supposed to be rare. It's
16 supposed to be the exception that you almost
17 never see.

18 Under the doctrine GE wants you to
19 adopt under U.S. law or under international law,
20 essentially all subcontractors would suddenly be
21 able to arbitrate, even absent a written
22 agreement with the subcontractor because
23 basically a claim between the subcontractor and
24 the principle is in some way going to be
25 connected to -- to involve the contract.

1 So you completely erase the idea that
2 this kind of enforcement is supposed to be rare,
3 supposed to be the exception, essentially be the
4 rule in all construction cases.

5 The other point I would remind the
6 Court about its own decision in the Scherk case.
7 It says the purpose of the Convention is to
8 "unify the standards" for recognizing agreements
9 and enforcing awards. I submit, Your Honors,
10 there is only one way to make the standards
11 uniform and that is to respect, adhere to, and
12 enforce the uniform textual words of the
13 Convention.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. Two minutes, Mr. Dvoretzky.

17 REBUTTAL ARGUMENT OF SHAY DVORETZKY

18 ON BEHALF OF THE PETITIONER

19 MR. DVORETZKY: Thank you. If I
20 could, let me make three points and then suggest
21 possible ways to resolve this case.

22 First, there's an international
23 consensus in favor of non-signatory enforcement
24 generally. And there are numerous international
25 cases that allow non-signatory enforcement on

1 facts like these.

2 The Titan Unity case from Singapore,
3 there are cases from France and Switzerland, all
4 of these are very similar. You have a situation
5 where A contracts with B and C actually performs
6 the contract. And in those situations because C
7 is involved in performing A and B's contract, C
8 can enforce the arbitration agreement if sued by
9 one of the parties to the contract.

10 So Singapore, France, Switzerland and
11 other cases cited in the briefs.

12 Justice Sotomayor, you were looking
13 for a limiting principle. I think there are
14 limiting principles to equitable estoppel under
15 domestic law but the Convention just doesn't
16 speak to them.

17 Third, Mr. Hacker argues that Congress
18 in effect adopts -- I'm sorry.

19 JUSTICE SOTOMAYOR: What are they?

20 MR. DVORETZKY: It would depend on the
21 contours of state law, but presumably state law
22 would not allow you to tag a random person on
23 the street with no connection to the contract
24 and say you're equitably estopped. There has to
25 be a factual basis for the estoppel. And here

1 there is for the reasons that we have been
2 discussing.

3 Mr. Hacker argues that Congress
4 adopted the Convention as both a floor and a
5 ceiling for U.S. law. That's simply not what
6 Congress did in Chapter 2.

7 It created federal jurisdiction where
8 the agreement falls under the Convention, and
9 then under 9 U.S.C. 206, if you have an
10 agreement that falls under the Convention, a
11 federal court exercising its jurisdiction can
12 compel arbitration.

13 It would do so by looking to domestic
14 principles about when enforcement is proper.

15 So in terms of how this case can be
16 resolved, there's the narrowest possible way, is
17 to simply hold that the Eleventh Circuit was
18 wrong to apply a signatory requirement, at
19 Petition Appendix 15A to 16A, the Eleventh
20 Circuit recounts the district court's finding
21 that we were parties but says the reason we
22 can't enforce is that we didn't actually sign.

23 I think that's demonstrably wrong and
24 the narrowest possible way is to send it back
25 for that reason. If the Court wants to provide

1 additional guidance, there are two ways to do
2 that, I think. One is to hold that the
3 Convention provides a floor, not a ceiling. I
4 think that follows from the text of the
5 Convention, and also from international
6 understanding.

7 CHIEF JUSTICE ROBERTS: Second?

8 MR. DVORETZKY: Second way to resolve
9 it, as Justice Sotomayor was suggesting, the
10 term parties in Article 2(3) is undefined.
11 Domestic law fills that gap, as it does for many
12 other things under the Convention, terms like
13 null and void, incapable of being performed.
14 Those are not defined by the Convention but the
15 Convention looks to domestic law, as it does for
16 parties.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 12:10 p.m., the case
20 was submitted.)

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