No. 18-1048

In The

Supreme Court of the United States

GE ENERGY POWER CONVERSION
FRANCE SAS, CORP., FKA CONVERTEAM SAS,

Petitioner,

v.

OUTOKUMPU STAINLESS USA, LLC, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* PROFESSOR BENJAMIN G. DAVIS AND PROFESSOR NADER M. IBRAHIM, PH.D. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are leading scholars of international commercial arbitration. Benjamin G. Davis is a Professor of Law at the University of Toledo College of Law. He is a prominent scholar and practitioner of international arbitration law, international law, and dispute resolution.

Nader M. Ibrahim is an Egyptian academic, holder of a Ph.D. in International Commercial Arbitration with honors from the Law School of Alexandria University in 1998. From 1995 to 2016 he taught at the Arab Academy for Science, Technology and Maritime Transport, Alexandria Egypt rising to Dean (2013-2016). Since 2017, he is Professor of Commercial Law for the College of Law of Qatar University. He is one of the leading arbitration scholars and practitioners in the Middle East.

Amici are writing in this case because the judgment of the Court of Appeals is the proper interpretation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention). 21 U.S.T., 330 U.N.T.S. 38. To decide otherwise would create havoc in international commercial arbitration by allowing United States federal courts to use equitable estoppel to coerce

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

parties into arbitration. The pro-international commercial arbitration answer in this case to the question presented must therefore be "no." This Court should affirm the Court of Appeals' decision.

Professor Davis's experience in international commercial arbitration is deep. For ten years Professor Davis was the American Legal Counsel at the Secretariat of the International Chamber of Commerce International Court of Arbitration in Paris, France.

As the American Legal Counsel, Professor Davis directly supervised daily over the ten years a total of approximately 1,000 arbitrations (approximately 150 international commercial arbitration cases at any one time with approximately 100 new cases started and cases closed in a given year).

Professor Davis commented on drafts of proposed arbitration laws in places like India as those countries evolved their international commercial arbitration in the context of their varying histories with international commercial arbitration. He prepared submissions on behalf of the International Chamber of Commerce for courts around the world and has been an expert on International Chamber of Commerce International Court of Arbitration in a United States court. At the ICC Institute of World Business Law, Professor Davis worked closely with some of the greatest international arbitration practitioners and trained hundreds of practitioners of international commercial arbitration.

Professor Davis is also the former Chair of the American Bar Association Section of Dispute Resolution (2017-2018) home to over 10,000 Alternative Dispute Resolution professionals.[2] Over the 19 years of his work in the Section of Dispute Resolution, Professor Davis served as Assistant Reporter for the ABA Task Force on Electronic Commerce and Alternative Dispute Resolution, on the Council of the Section, headed various committees, and served as Vice-Chair, Chair-Elect, and Past-Chair. Professor Davis is a Fellow of the National Center for Technology and Dispute Resolution of the University of Massachusetts ("National Center"). The National Center supports and sustains the development of information technology applications, institutional resources, and theoretical and applied knowledge for better understanding and managing conflict.[3] Professor Davis is a founding member of the International Council for Online Dispute Resolution ("ICODR"). ICODR is an international nonprofit, incorporated in the United States, that drives the development, convergence, and adoption of open standards for the global effort to resolve disputes and conflicts using information and communications technology.[4]

Since coming into academia in 2000, Professor Davis continues to study, teach, write and speak about

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[2] THE AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/dispute_resolution/ (last visited November 19, 2019).

[3] NATIONAL CENTER FOR TECHNOLOGY AND DISPUTE RESOLUTION, http://odr.info/ (last visited November 20, 2019).

[4] INTERNATIONAL COUNSEL FOR ONLINE DISPUTE RESOLUTION, https://icodr.org/ (last visited November 20, 2019).

aspects of this field[5] for which he recently received an award from Arbitral Women (an international NGO bringing together female ADR practitioners).[6]

Professor Ibrahim's experience in international arbitration is also deep. He served as a visiting professor to Alexandria (Law and Commerce Colleges, 2010-2012) and Nantes Universities (France, Summer 2010), and was in secondment to the Imam Muhammad Ibn Saud Islamic University in Riyadh, Saudi Arabia (Academic Year 2012-2013). He taught courses of introduction to law, business law, international

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[5] Recent speeches by Professor Davis include the keynote speech on September 26, 2019 at Debevoise and Plimpton in New York on *Diversity in International Arbitration* at the Young International Council of Commercial Arbitration (Young ICCA) and Blacks in the American Society of International Law (BASIL) joint conference (video available at https://event.on24.com/wcc/r/2070148/512A7318E6794475506FD9DA8DE04FBB (CLE) http://pm.on24.com/utilApp/download?path=http://pm.on24.com/media/cv/events/20/70/14/8/rt/1_fhvideo1_1570747803402.mp4&filename=2070148_debvoiseplimpton_v2.mp4 (entire program)); Speaker, October 24, 2019, The Many Faces of Diversity in International Arbitration, Fifth Sarajevo Arbitration Day, Association Arbitri, Sarajevo, Bosnia; Speaker, November 1, 2019, Mediation, Arbitration, Transparency and Diversity panel, Achieving Access to Justice Through ADR: Fact or Fiction?, The Fordham Law Review and the Conflict Resolution and ADR Program and the National Center for Access to Justice, November 1, 2019, New York and (forthcoming) March 10, 2020, Dispute Resolution Conference in Columbus, Ohio sponsored by the Supreme Court of Ohio on International Arbitration and Domestic Courts.

[6] ARBITRAL WOMEN, https://www.arbitralwomen.org/honourable-men/) (last visited November 20, 2019) (describing Champion of Change Award presented to Professor Davis on November 8, 2018).

business law, insurance law, transportation law, international contracts and arbitration. He has a regular consultancy and arbitration practice. He is on the Cairo Regional Centre for International Commercial Arbitration ("CRCICA") List of Arbitrators, where he has served in 11 cases (Alexandria Branch, Cases: 23/2008; 25/2009 & 31/2011; Cairo Main Office, Cases: 265/2001; 700/2010; 1001/2014; 1008/2014; 1009/2014; 1010/2014; 1021/2015 & 1034/2015). In some of these cases he presided over the panel, administering procedure in English.[7] He is currently a claimant's co-arbitrator in CRCICA case 1307/2019. He is also familiar with International Chamber of Commerce (Paris) and International Centre for Settlement of Investment Disputes (ICSID) (Washington) Arbitration Rules. He is a previous ICC Intern (1994), and ICSID's Projects' Assistant (1996). His research focuses on International Arbitration.

SUMMARY OF ARGUMENT

Amici submit this *amicus* brief to make four discrete points in response to the claims of Petitioner and its *amici*, and urges this Court to affirm the judgment of the Eleventh Circuit in order to preserve the certainty and predictability market participants expect in international commercial arbitration.

[7] THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION, https://crcica.org/ (last visited November 20, 2019).

First, the United States analyzes the word "parties" in Articles II(1) and II(3) of the Convention to mean two contradictory things—parties to the arbitration agreement and parties to the litigation, respectively. That reading is incorrect. Article II is clear that only a party to the arbitration agreement can request the competent court to refer an action to arbitration. Those provisions of Article II must be interpreted consistently. It is undisputed that Petitioner has not signed an arbitration agreement with Respondents.

Second, the *Amici* Professors in support of Petitioner refer to a 2006 Recommendation of the United Nations Commission on International Trade Law (UNCITRAL) to buttress their view that non-signatories may compel arbitration.[8] However, the UNCITRAL recommendation has nothing to do with the question before this Court as to equitable estoppel. Article VII of the Convention, on which the 2006 Recommendation depends, refers to arbitration *awards*, not arbitration *agreements*. In the rare circumstances where U.S. Courts have interpreted Article VII, they have consistently applied it only to arbitration awards and *not* to arbitration agreements both before and after the UNCITRAL recommendation.

Third, *Amicus* The North American Branch of the Chartered Institute of Arbitrators (the "Institute Brief") makes assertions about the nature of the ICC

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[8] This refers to the Brief of *Amici Curiae* Professor George A. Bermann, R. Doak Bishop, Professor Andrea K. Bjorklund, Douglas Earl McLaren, Professor Alan S. Rau, Professor W. Michael Reisman, and John M. Townsend in support of Petitioner.

International Court of Arbitration and its multi-party caseload that are inaccurate. *Amici* write to emphasize that the *prima facie* review of that body is administrative in nature. Any decisions made by that body about the scope of arbitration cannot be relied upon like the decisions of a national court. Moreover, multi-party and non-signatory issues are analytically distinct. The ICC Court's increased *multi-party* caseload does not indicate an increased diet of *non-signatory* cases.

Fourth, departing from the fundamental principle of consent to arbitrate to have court-coerced equitable estoppel applied in favor of a non-signatory is anathema for international commercial arbitration and deprives an American party of the benefits of the United States judicial system. Contrary to what is indicated by Petitioner's *amici*, moreover, there is no international consensus that non-signatories may compel arbitration.

For these reasons, the pro-international commercial arbitration answer in this case to the question presented must be "no" and this Court should affirm the Eleventh Circuit's decision.

ARGUMENT

I. The United States misinterprets the word "parties" in Article II of the Convention.

The United States (and various of Petitioner's other *amici*) read the word "parties" to mean two completely different things in the *very same* provision of

the Convention. According to them, the word "parties" in Article II(1) means a "party" to the agreement and yet the very same word in Article II(3) means a "party" to the litigation. This atextual reading of the Convention should be rejected. Article II is clear that only a party to the arbitration agreement can request the competent court to refer an action to arbitration. That basic understanding resolves this case.

Article II(1) of the Convention says that "each Contracting State shall recognize an agreement in writing under which the *parties* undertake to submit to arbitration" their dispute. *See* Convention art. II(1) (emphasis added). Article II(3) uses the same term when describing what a court must do when confronted with an arbitration agreement: "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" (emphasis added). *Compare* Convention art. II(1) with art. II(3).

The Vienna Convention on the Law of Treaties (Vienna Convention) sets forth the generally accepted international rules of treaty interpretation. *See* 1115 U.N.T.S. 331, T.S. No. 58 (1980). Most important, Articles 26, 31, and 32 of the Vienna Convention state that the treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of

its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Under those well-established rules, the word "parties" must be interpreted consistently in Article II(1) and Article II(3) of the Convention to mean parties to the arbitration agreement. There is simply no reason to assume that the signatories were doing anything different. And indeed, as Respondents' brief explains at length, the context of the entire Convention confirms that the word parties is intended to refer to "parties to the written arbitration agreement itself." Resp. Br. at 23.

Even though recourse to supplementary materials under Article 32 of the Vienna Convention is unnecessary, this reading is further confirmed by definitive contemporaneous sources (including the *travaux préparatoires* to the Convention). As made clear by the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (2016 Edition) (the "Guide"), a "party request [is] necessary" in order to trigger an arbitration. The Guide further states that because "an arbitration, by *definition*, is premised on consent," the *parties* may waive their right to arbitration. *See* Guide at 60. There is no hint in any of that text that a *non*-party to the arbitration—with whom *no one* has consented to arbitrate—may compel arbitration with the

actual parties to the agreement or waive a right to arbitration. Such a conclusion would clash directly with the understanding of the Contracting States.

The central importance of *consent* to arbitrate was further emphasized when the Convention was submitted for Senate advice and consent:

> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies only when parties to a dispute have agreed in writing to submit to arbitration any or all differences arising out of their legal relationship. This means that there is nothing in the convention which imposes any burden on an individual which he had not voluntarily agreed to assume. (Emphasis added).[9]

Nor can any of the non-textual forms of interpretation described in Article 31 of the Vienna Convention be brought to bear in Petitioner's favor. There is no contemporaneous "agreement relating to the treaty" between all the Contracting States or instrument accepted by those states. *See* Vienna Convention art. 31(a), (b). There are no "subsequent agreements" between the Contracting States regarding the interpretation of Article II or the application of its provisions, *see id.* at art. 31(3)(a), no "subsequent practices" under Article II that establish the agreement of the Contracting States regarding its interpretation, *see id.* at art. 31(3)(b), or any "relevant rules of international law

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[9] S. EXEC. REP. NO. 90-10, at 3 (1968) (statement of Richard D. Kearney, Ambassador, Office of the Legal Adviser: Accompanied by Robert Dalton, Department of State).

applicable in the relations between the state parties" to consider. *See id.* at art. 31(3)(c). Nor is there any identified special meaning of the term in Article II that could possibly disturb the ordinary meaning of the term "parties."

The United States takes the position the word "parties" should be read differently depending on where in Article II of the Convention it appears. Thus, in the view of the United States, the word "sometimes refers to parties to an arbitration agreement," and "sometimes refers to litigants in court seeking to compel arbitration" and "sometimes to the individuals or entities who participated in arbitration." U.S. Br. at 18. In sum, the United States appears to argue that the results of a contextual analysis under Article 31 of the Vienna Convention requires the Court to have recourse to Article 32 supplementary means of interpretation.

The Court should reject the United States' invitation. To muddy the interpretation of the word "parties" to mean "the parties to the litigation" as the United States would like is to misread Article II. To try to bootstrap in uses of the word "parties" in other parts of the Convention is disingenuous in the face of this clear understanding of the meaning to be given to its use in Article II. To take a usage from Chapter 2 of the FAA would be to confuse this court with an internal U.S. law term as opposed to the treaty language, risking clarity as to the United States compliance in its performance of its international obligations in good faith. Finally, to make analogies to the use of the word "party" or

"parties" in Chapter 1 of the FAA to understand the use of that word in Chapter 2 risks seriously confusing the law of the Convention. The United States' incorrect textual reading of Article II should be rejected.

II. Any reliance on the 2006 UNCITRAL Recommendation is misplaced.

The *Amici* Professors supporting Petitioner assert that a 2006 Recommendation of UNCITRAL about the Convention buttresses Petitioner's position. Professors Br. at 19. This is because, first, the UNCITRAL recommendation "clarifies" that Article II(2) of the Convention is not exhaustive, and, second, that the Recommendation's interpretation of Article VII(1) of the Convention shows that "any interested party" may enforce an arbitration agreement. *Id. See also* Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Recommendation).

The Recommendation should be understood for what it is: a non-binding document intended solely to reconcile the Convention's form requirements developed in 1958 with the "wide use of electronic commerce" over the past decades. *See* Professors Br. at App. 9-10. Further, the Recommendation specifically refers to the 1985 Model Law on International Commercial Arbitration, as revised, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations

Convention on the use of Electronic Communications in International Contracts. It also specifically refers to "enactments of domestic legislation, as well as case law, more favourable" than the Convention in respect of form requirements governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards. *See id.* at 9-10.

With the explosion of electronic commerce, writing and signing requirements in the Convention and national laws (e.g., statute of frauds) came up against the reality that so much of contracting, proceedings, and awards were increasingly being done and would likely be done in the future in an electronic format. This reality created potential uncertainty as to whether such electronic writings or signatures would comply with the Convention or national laws. Moreover, with the emergence of online dispute resolution possibilities, the possibility of online proceedings with virtual hearings and electronic awards was a clear concern at the time. *See* Benjamin G. Davis et al., *Addressing Disputes In Electronic Commerce: Final Recommendations and Report, American Bar Association Task Force on Electronic Commerce and Alternative Dispute Resolution*, 58 BUS. LAW. 415 (2002).

A new international conference to revise the Convention for this electronic environment simply was not possible, given the speed of technological development. By its terms, the non-binding Recommendation was an effort to support the development of international electronic commerce while protecting the Convention form requirements developed long before electronic

commerce had blossomed. Contrary to the claims of Petitioner's *amici*, the Recommendation therefore has nothing to do with allowing a non-signatory to use equitable estoppel.

Nor could *any* interpretation of Article VII make any difference to this case—that provision applies only to *enforcement* of arbitration *awards*, not arbitration agreements. Whatever the word "parties" means in that context, it does not mean the same thing in Article II. A review of a collection of U.S. caselaw freely available at the UNCITRAL web site, whether decided before or after the Recommendation,[10] shows that the United States courts have applied Article VII rarely. In those rare circumstances, they have only applied it with respect to arbitration awards, not arbitration agreements at this Article II stage. The fact that the UNCITRAL Recommendation expansively interprets Article VII has nothing to do with Article II.

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[10] *See* UNCITRAL, http://newyorkconvention1958.org/ (last visited November 20, 2019). *See also Nat'l Aluminum Co. v. Peak Chem. Corp., Inc.*, 132 F. Supp. 3d 990 (N.D. Ill. 2015); *Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, 997 F. Supp. 2d 214 (S.D.N.Y. 2014), *aff'd*, 864 F.3d 172 (2d Cir. 2017); *Travelport Glob. Distribution Sys. B.V. v. Bellview Airlines Ltd.*, No. 12 CIV. 3483 DLC, 2012 WL 3925856 (S.D.N.Y. Sept. 10, 2012); *Fed. Ins. Co. v. Bergesen d.y. ASA Oslo*, No. 12 CIV. 3851 PAE, 2012 WL 3886887 (S.D.N.Y. Sept. 7, 2012); *TermoRio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87 (D.D.C. 2006), *aff'd sub nom. TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007); *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999); *Matter of Arbitration Between Chromalloy Aeroservices, a Div. of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996).

In sum, Article VII of the Convention as applied consistently by United States courts provides support for Respondents' position. The UNCITRAL Recommendation is irrelevant to these proceedings. Commercial parties' settled expectations about the meaning of Article II should not be upended by a non-binding document purporting to interpret a treaty acceded to by the United States thirty-six years before.

III. There is no empirical support for claims that the number of non-signatory ICC arbitrations is increasing.

Petitioner's *Amicus*, The North American Branch of the Chartered Institute of Arbitrators ("Institute Brief"), asserts that deciding this case in Respondents' favor will "impair the utility of international arbitration" and "hinder international trade." Institute Br. at 10. It bases this hyperbolic prediction in part on assertions about the nature of the ICC International Court of Arbitration and its multi-party caseload that are inaccurate.

To start, increases in the multi-party caseload of the ICC Court do not necessarily show that the number of non-signatories in ICC arbitrations are rising. As even the Institute *Amicus* admits, "[t]he ICC data are not broken down to indicate how many of multi-party cases involve non-signatories." *Id.* at 11. What the increasing number of multi-party arbitrations indicates is the growing scope of international trade and

disputes, not anything about the need to impose equitable estoppel in international arbitration.

There is no question that *multi-party* arbitration has long been increasing. As far back as 1992, the French *cour de cassation* intervened to protect the rights of multi-party arbitration in the famous *Siemens v. BKMI and Dutco* case. But all of the parties in *Dutco* were signatories to the arbitration agreement. *See* Jean-Louis Delvolve, *Multipartism: The* Dutco *Decision of the French Cour de Cassation*, 9 ARB. INT'L 197-202 (1993). The Institute's brief attempts to conflate the issues of non-signatories seeking to avail themselves of an arbitration agreement with the complexities of multi-party arbitration under the ICC Rules of Arbitration (or international commercial arbitration more broadly). This Court should reject that effort.

Moreover, the Institute's claim that something can be gleaned from the fact that the International Court of Arbitration has instituted procedures for "the preliminary screening of requests for joinder from non-parties" misunderstands the nature of that process. *See* Institute Br. at 11. That court's *prima facie* review is administrative in nature, not judicial. Nothing about international law can be taken from its actions.

As noted by Article 1(2) of the current ICC Rules, the ICC International Court of Arbitration does not itself resolve disputes.[11] Courts and arbitral tribunals

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[11] *See* INTERNATIONAL CHAMBER OF COMMERCE, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/, (Article 1(2) ICC Rules of Arbitration).

resolve disputes. As part of the ICC Court's role in administering arbitrations, it carefully scrutinizes the parties' arguments but that scrutiny is limited to the documents submitted. Parties to the arbitration do not appear before the ICC Court.

Thus, the ICC Court's decision to initiate an arbitration is not a judgment equivalent to any court decision or arbitral award. Reasons for such administrative decisions are not provided to the parties or arbitrators and would most likely only be divulged when a competent court has requested them. The Institute brief does not carefully highlight this crucial distinction between the process for the administrative decision of the ICC Court under its *prima facie* standard and the standards of any national court.

IV. Departing from consent to arbitrate is anathema for international commercial arbitration.

Petitioner's position strikes at the "first principle" of this Court's arbitration decisions, that "arbitration is strictly a matter of consent." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019). If Petitioner is right, American parties to an arbitration agreement can be forced into international commercial arbitration in foreign places with foreign arbitrators against entities with which they never agreed to arbitrate. Replacing arbitration-by-consent with arbitration-by-court-coercion through equitable estoppel is thus anathema for international commercial arbitration.

Further, as *amici* know from their deep experience in the field, Petitioner's argument would deprive an American party of the many substantial benefits of the United States judicial system. This Court should refuse to take the dangerous step of depriving American litigants of the benefits of an American forum.

A. This Court should reject Petitioner's attempt to conflate equitable estoppel with other issues.

Petitioner attempts to create a parade of horribles by asserting that deciding this case in Respondents' favor would also mean that a whole host of other doctrines—such as "incorporation by reference; assumption; agency; alter ego; and third-party beneficiary"—would fall if Respondents prevail. Pet. Br. at 54. This Court should not conflate discussion of multi-party arbitration issues and other non-signatory issues with the present case of a non-signatory seeking to avail themselves of equitable estoppel. This case will not affect those other doctrines.

B. Forcing companies like Respondents into arbitration will disadvantage them in litigation and create uncertainty.

The federal policy favoring arbitration should not prevent a U.S. company that has not agreed to arbitrate disputes with seller's subcontractor from litigating in a U.S. court. Forcing Respondents into arbitration

when they have not consented would impose a serious disadvantage for Respondents on several levels.

First, imposing arbitration would force Respondents into an ICC arbitration with a non-signatory in Dusseldorf, potentially under foreign law they have not chosen. If a party disputes the application of foreign law, it faces the risk that the arbitral tribunal will fail to apply U.S. law. There is no question that a party in that position will be at a disadvantage if forced to participate in an arbitration in Dusseldorf or some other foreign city under substantive law it has not chosen.

Second, the result of that arbitration would not be subject to review. Even clearly erroneous arbitral awards are enforceable, making the risk to U.S. companies even greater. As this Court knows, an error of fact or law, or mistaken choice of law, by an arbitration panel is not a basis to set aside the award at either place of award (Germany) or place of enforcement under Article V of the Convention. *See* Jonathan Hill, *Do arbitral errors on the law governing the merits of a dispute referred to arbitration justify setting aside or non-enforcement of the award?*, THE UNIVERSITY OF BRISTOL LAW SCHOOL BLOG, (https://legalresearch.blogs.bris.ac.uk/2018/01/do-arbitral-errors-on-the-law-governing-the-merits-of-a-dispute-referred-to-arbitration-justify-setting-aside-or-non-enforcement-of-the-award/) (Last visited November 20, 2019).

Next, it is certain, from *Amicus* Professor Davis's experience, that the chair appointed by the ICC International Court of Arbitration will not be a U.S. lawyer

familiar with U.S. statutes and public policy. The likely choice is a German, Austrian or Swiss lawyer. Such an arbitrator would have little familiarity with the U.S. context of the transaction at issue or with U.S. law. A company in Respondents' position could therefore be exposed to considerable extra costs to prove the content of U.S. public policy principles (product liability, the Alabama Extended Manufacturer's liability) through testimony of experts, both in writing (expert witness testimonies) and orally (the expert witness must be present at the main hearing in Dusseldorf). Or in the worst case, the tribunal will disregard the U.S. context and law if applicable and apply familiar principles from German practice.

Third, if this Court decides that Respondents can be forced into arbitration, Respondents and the thousands of companies like Respondents will not be able to rely on US-style discovery. Respondents presumably sued Petitioner in the United States to be certain of full discovery.

But the rules available for discovery in international arbitration provide for much more limited exchange of materials than in U.S. Courts. Where the parties have chosen arbitration, that may be a benefit. But when a business has not chosen to arbitrate, it is a serious disadvantage. The leading international rules for discovery—which a tribunal under the ICC rules could choose—The International Bar Association Rules for Taking of Evidence in International Arbitration (the "IBA Rules"), *available at* https//www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6

(last visited November 22, 2019), offers much more limited discovery than under U.S. civil procedure. Hellwig Toggler et al., *Handbuch Schiedsgerichtsbarkeit Deutschland, Osterreich, Schweiz*, 367 (2d Ed. Vienna, 2017). According to Bernard Hanotiau, a Belgian scholar, for example, requests for production of "all documents relating to . . . " are often dismissed out-of-hand. Moreover, documents whose production is requested must be clearly identified and their relevance to the case must be established." *See* Bernard Hanotiau, *The conduct of the hearings*, in THE LEADING ARBITRATORS GUIDE TO INTERNATIONAL ARBITRATION, 363, 359-379 (New York 2nd Ed. 2008).

Another option that some tribunals have adopted (and ICC Tribunals are permitted to adopt), the so-called "Inquisitorial Rules on the Taking of Evidence in International Arbitration" (the "Prague Rules") provide even less scope for discovery. *See* Inquisitorial Rules on the Taking of Evidence in International Arbitration ("The Prague Rules"), *available at* http://www.praguerules.com/upload/medialibrary/697/697f654d36c0275b310cb3ccc1e0e9f3.pdf (last visited November 19, 2019). In fact, that was their purpose—the Prague Rules were offered by civil law proponents as a less-discovery friendly alternative to the International Bar Association rules, which those advocates felt were too liberal. *See* Markus Altenkirch and Malika Boussimadh, *The Prague Rules—Inquisitorial Rules on the Taking of Evidence in International Arbitration*, *available at* https://globalarbitrationnews.com/the-prague-rules-inquisitorial-rules-on-the-taking-of-evidence-in-international-arbitration/ (last visited November

19, 2019). The Prague Rules strictly limit document production. For example, at Article 4.1, they provide that the arbitral tribunal shall *avoid* extensive production of documents, including any form of e-discovery.

These strict limitations on discovery hurt parties like Respondents in particular. According to Professor William W. Park, "In a legally heterogeneous world, unfamiliar fact-finding techniques may leave litigants feeling short-changed or mistreated with respect . . . to cross-examination, witness statements, experts . . . , and the way law is proven." *See* William W. Park, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES, 447 (Oxford University Press 2006). The bottom line is that neither leading discovery regime in international commercial arbitration is a fair substitute for American litigation.

Fourth, *Amicus* The National Association of Manufacturers ("NAM") asserts that "arbitration agreements avoid the uncertainty that will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-law rules." *See* NAM *Amicus* at 11.

That argument flips the situation in this case on its head. Petitioner, (from France) is a sub-contractor to Fives (from the United States) providing equipment to be used by Respondents (also from the United States) in a factory in the United States. In that context, Petitioner should expect to be sued in the United States and Respondents should expect to litigate against Petitioner in the United States *unless* they

have agreed otherwise in a contract. All of the uncertainty is imposed on Respondents, not Petitioner.

In short, it is extraordinarily burdensome in money and personnel and consequently not reasonable and fair for U.S. companies like Respondents to be drawn into a potentially complex arbitration that they did not agree to in a foreign country under foreign procedure by a non-signatory.

C. There is no international consensus in favor of equitable estoppel.

Petitioners and their *amici* insist that there is an international consensus supporting their position. Not so. Views of Contracting States vary widely when considering non-signatory arbitration. Take, for example, the "Groups of Companies" theory of non-signatory arbitration. Under that theory, an arbitration agreement signed by a company belonging to a group of companies entitles the other member companies of such group to arbitration. If Petitioner were right, Group-of-Companies based arbitration would be well within the international consensus. Yet, views differ widely on the validity of that theory. In the leading article on the theory, for instance, the author noted eight different approaches that are partly disputed in the international legal community, only partly compatible with each other, and in other respects "they are dialectically in opposition to each other." *See* Otto Sandrock, *Arbitration Agreements and Groups of Companies*, 27 INT'L LAW 941, 946 (1993).

Drilling down to the country level reveals the same discord. Belgium is a principal arbitration center. *See* Herman Verbist & Hans van Houtte, *Belgium*, in PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION, 156, 162-165 (Bernd Weigand and Antje Baumann eds., 2019). Belgian law takes the position that the arbitration agreement only binds those who made the agreement. Third parties cannot be bound by the arbitration agreement, even if their dispute is *closely related* to a dispute between the parties to the arbitration agreement. Thus, the courts (and not arbitrators) have jurisdiction to decide a claim in such a case between the claimant and one of respondents, even if the claimant and all other respondents are bound by an arbitration agreement. *See id.*

The Non-Official Restatement Arbitration Draft on which Petitioner and its *amici* place so much weight only tangentially addresses the Groups of Companies and other theories and instead focuses on U.S. law.[12] None of that can be taken as a sign of any international consensus: "[o]ther doctrines may exist under foreign law, including for example the 'groups of companies' doctrine. This Section focuses on those theories and doctrines that exist under U.S. law." *See* NON-OFFICIAL

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[12] In any event, *amici* believe that the Restatement is in error to the extent that it interprets Article II(3) of the Convention to permit the enforcement of an arbitration agreement "against or in favor" of a non-party. RESTATEMENT § 2.3 As explained elsewhere, that does not square with either the text of the Convention or the consensus of international practice.

RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION (2019).[13]

There is no international consensus on the use of equitable estoppel for non-signatories to arbitration agreements. Recourse to estoppel is limited to the United States, and is unknown in civil law countries. Moreover, the courts of at least France, Switzerland, Germany, Holland, Sweden, England, the United States and India take divergent approaches. Bernard Hanotiau, *Non-Signatories, Groups of Companies and Groups of Contracts: Do We Share a Common Approach?* in LIBER AMICORUM 50 Years of Solutions Cepani 1969-2019 186, 188 (Wolters Kluwer 2019).

Nor is there the kind of broad consensus in favor of equitable estoppel that should comfort this Court in the international commercial arbitration community.

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[13] *Amici* note that although the Restatement has been approved, it is not yet final. As the American Law Institute website states with respect to this April 24, 2019 draft, "the draft was approved by the membership at the 2019 Annual Meeting, subject to the discussion at the Meeting and to the usual editorial prerogative. This material may be cited as representing the Institute's position until the official text is published." (emphasis added—(https://www.ali.org/publications/show/us-law-international-commercial-arbitration/). Given the nature of this document as an approved but non-official version that is still subject to whatever was discussed at the ALI meeting and "usual editorial prerogative," *amici* are uncertain to what extent what is cited will be in the official text whenever it comes out. If the official version is published while this case is under consideration, it would be prudent to review all references in all submissions by the parties to see whether there are any substantive changes that affect the reasoning of all concerned so as not to inadvertently mislead the Court.

In *amici*'s experience, international commercial arbitration specialists are (at most) split on this topic. And any consensus that *does* exist is—as *Amicus* Professor Davis has shown in his academic writing—an artifact of the non-diverse group that makes up the leading practitioners. *See* Benjamin G. Davis, *The Color Line in International Commercial Arbitration: An American Perspective*, 14 AM. REV. INT'L L. 461 (2004); Benjamin G. Davis, *International Commercial Online and Offline Dispute Resolution: Addressing Primacism and Universalism*, 4 J. AM. ARB. 79 (2005); Benjamin G. Davis, *American Diversity in International Arbitration 2003-2013*, 25 AM. REV. INT'L L. 255 (2014). In *amici*'s view, that a club of practitioners who are lacking in all respects the minimal diversity of nationality, race, gender and other attributes could come to a consensus on some points and then seek to foist their view on the rest of the international arbitration community is simply repugnant. We are well passed the time when assertions of consensus by narrow self-identifying groups should dictate international commercial arbitration's progress.

The problem of who are the parties to the contract and arbitration agreement bedevils every company negotiating and drafting their international commercial contracts. One must keep in mind the hundreds of thousands if not millions of international commercial contracts being drafted around the world each year with the crucial first question of defining who are the parties to the contract and the arbitration agreement.

Freedom of international contracting should be respected. To channel that freedom, parties to international contracts must be careful in their drafting in identifying each aspect of their contract. But if they are careful, courts should not upset what the contracting parties have done. Doctrines derived from specific national experiences like American equitable estoppel would inevitably upend that certainty. If the parties to an arbitration agreement want a non-signatory to be part of their contract arbitration procedure, they are free to draft appropriate language in the agreement to permit that. Or they can amend their agreement and agree with the sub-contractor to add it as a party. Either way, courts should not defy the choices the parties have made.

International contracting is complex enough as it is. Adding equitable estoppel to the list of issues complicating international arbitration and complicating the application of the Convention Article II is not warranted.

D. This Court should protect the future for electronic international commerce and arbitration.

The world of international commercial arbitration is changing from the classic one of hearings in physical rooms to one where dispute resolution is conducted through the use of technology. As active participants in

this fundamental transformation,[14] *amici* urge this Court not to add even more uncertainty by inserting the doctrine of equitable estoppel for non-signatories—none of whom may have ever met face-to-face in the fast-paced world of electronic international commerce.

To take an approach in this case where any Tom, Dick or Mary who supplies a widget as a seller's subcontractor under the seller's contract with the buyer can be turned into a party to an arbitration agreement between seller and buyer increases instability and unpredictability. The effect is to blindside the parties to the arbitration agreement after a dispute has arisen with third parties to the contract. Permitting this type of action inevitably increases the costs of international commercial arbitration and benefits only those entities who are willing to use clever lawyering on procedural matters to delay the adjudication of substantive disputes. The result would be an unwarranted increase in the leverage of these strangers in their disputes with the actual parties to the arbitration agreement.[15] Under the strong federal policy in favor of international

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[14] Professor Davis is a Fellow of the National Center for Technology and Dispute Resolution of the University of Massachusetts (the premier center on the intersection of technology and dispute resolution in all its forms) (odr.info) and a Founding member of the International Council for Online Dispute Resolution bringing a broad swath of persons developing the technological future of dispute resolution worldwide.(https://icodr.org/).

[15] Benjamin G. Davis, *The Stiffer Dilemma: Some Thoughts on Contract, Remedies and Dispute Resolution*, LIBER AMICORUM Samir Saleh (Forthcoming 2019).

commercial arbitration, this Court should protect international commercial arbitration by not allowing it to evolve in the direction of rewarding instability and lack of predictability for parties who seek certainty in their international contracts.

By affirming the Eleventh Circuit, this Court will send a message to current and future international contract drafters that the court supports stability and predictability in contractual relations, freedom of contract, and adherence to the Convention. That position, will in turn, encourage parties at the point of negotiation and drafting of the contract to be precise as the contracting parties were here. The Petitioner's approach, by contrast, adds uncertainty and expense to the process of international arbitration.

CONCLUSION

For these reasons, the pro-international commercial arbitration answer in this case to the question presented must be "no" and this Court should affirm the Eleventh Circuit's decision.

Respectfully submitted,

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