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 *AMICUS CURIAE* THE MIAMI INTERNATIONAL ARBITRATION SOCIETY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Miami International Arbitration Society ("MIAS") promotes international arbitration and mediation as well as parties selecting Miami and Florida as the situs for international arbitration proceedings related to resolving transborder commercial and investment disputes. Comprised of arbitrators, practitioners, and law firms, the MIAS membership includes former Florida appellate judges, world-renown arbitrators and practitioners, and academics. The MIAS works to maintain and enhance the extensive infrastructure developed to encourage parties engaging in international arbitration to select the United States and in particular Miami, Florida as the venue by (1) supporting legislation in Florida and the United States aimed at promoting international arbitration, (2) assisting Florida universities in delivering academic programs involving international arbitration, (3) hosting international arbitration conferences in Florida, (4) attracting distinguished members of the international arbitration community to speak at conferences in Florida, and (5) providing training and legal education to its members on the latest developments in international arbitration. The MIAS also provides a forum for the international arbitration community to exchange ideas and information.

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented in writing to the filing of this brief.

In sum, the MIAS advocates to ensure that the United States and in particular Miami and Florida continue to become the most viable and attractive venue for parties to resolve disputes through international arbitration. As part of its advocacy, the MIAS seeks to ensure that parties remain empowered to enforce international arbitration agreements and arbitral awards in Florida and the United States, under the broad parameters set forth in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") as codified in Chapter 2 of the Federal Arbitration Act. Maintaining access for parties to arbitrate disputes and to enforce awards encourages parties to choose the United States and Florida in particular as the venue and law governing their arbitration, domestic or international.

MIAS believes that the Eleventh Circuit's decision in this proceeding decreases access to arbitration. The holding misconstrues the New York Convention's applicability to non-signatories to arbitration agreements and is inconsistent with this Court's precedent, decisions from sister national courts, and federal arbitration law. If the decision stands, it will discourage parties from choosing Florida and the United States generally as a viable and attractive venue for international arbitrations and a means to enforce international arbitral awards.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit's decision misconstrues the applicability of the New York Convention to non-signatories to arbitration agreements. Reversal is necessary so that parties may fairly and uniformly enforce international arbitration agreements and arbitral awards in the Circuit.

Under the Federal Arbitration Act ("FAA"), federal courts routinely allow non-signatories to enforce arbitration agreements against a signatory on estoppel grounds. *See, e.g.*, *Sourcing Unlimited, Inc. v. Asimno Int'l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008) ("Federal courts 'have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'"). Although the same statutory rationale applies in the international arbitration context, the Eleventh Circuit held that the Convention bars non-signatory parties from enforcing arbitration agreements under the Convention. Pet.App.16a.

The Eleventh Circuit's decision hinges on two misinterpretations of the Convention. First, the decision incorrectly interprets Article II(2) as requiring a written and signed agreement for a party to compel arbitration under the Convention. The court's reasoning conflicts with Article VII(1) of the Convention, and the broad text and structure of Article II. MIAS posits instead that Article II sets a "floor" that forces Contracting States to recognize certain arbitration agreements and arbitral awards. Second, the lower decision improperly defines the term "parties" to include only those parties signatory to an arbitration agreement. These interpretations of the Convention are inconsistent with decisions from sister national courts, and federal arbitration law.

If the decision stands, non-signatories who entered into valid business arrangements expecting to benefit from an underlying arbitration agreement will be significantly disadvantaged. Requiring that every conceivable party

be a signatory to an arbitration agreement drastically will increase the cost and complexity of international arbitration agreements, undermining the very purpose of arbitration itself. This added uncertainty, cost, and complexity will discourage parties from choosing the United States as their international arbitration venue and undermine international trade. Thus, for the reasons stated in more detail below, the Eleventh Circuit's decision should be reversed.

ARGUMENT

I. The Lower Decision's Restrictive View of Article II Ignores the Text and Purpose of the Convention, and is Belied by International Legal Authorities

The New York Convention is the lynchpin of the world's international arbitration system. The Convention accomplishes two objectives: (i) it guarantees access for parties to invoke international arbitration agreements that conform to Article II of the Convention, and (ii) it streamlines the enforcement procedures for binding international arbitration awards in the national courts of its 160 member states. This case involves the first prong.

Article II requires that a Contracting State respect certain international arbitration clauses, even if its national law imposes more stringent requirements on its domestic arbitration agreements. Article II(1) and (2) provide:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration

> all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

The Eleventh Circuit commits two related but independent errors in its analysis of Article II. First, the court interprets Article II(2) as a strict requirement by assuming that "a party may compel arbitration under the Convention *only if* [] there is an agreement in writing within the meaning of the Convention…." Pet.App.14a. Second, the Eleventh Circuit in its decision confuses the meaning of "parties" in Article II(2) by declaring that the parties signatory to an arbitration agreement are the *only* parties that can enforce an arbitration agreement. These conclusions are betrayed by the text of the Convention and "'the postratification understanding' of signatory nations" which this Court must consult when interpreting treaties. *Medellin v. Texas*, 552 U.S. 491, 506-07 (2008) (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)).

Because Petitioner was a subcontractor that did not "actually sign" the arbitration agreement, the Eleventh Circuit reasons, Petitioner is barred from invoking the arbitration clause even though the signatory parties specifically included subcontractors in the arbitration

clause and Petitioner consented implicitly to the agreement through its performance. Pet.App.16a. The court even admits that Chapter 1 of the Federal Arbitration Act allows a party to compel arbitration through estoppel, but insists that Petitioner cannot avail itself of this doctrine because it "conflicts" with the Convention.

The Eleventh Circuit misreads the text and purpose of the Convention. Article II does not impose strict requirements, but sets a "floor" that Contracting States must respect. In other words, States must enforce arbitration agreements that track the Article II elements, even if the State's own national law treats domestic arbitration matters more restrictively. No part of Article II (or the Convention generally) was intended to reduce access to international arbitration when the State otherwise imposes fewer restrictions in its national arbitration law.

There are at least three reasons supporting this reading. First, the Eleventh Circuit's interpretation of Article II conflicts with Article VII(1) of the Convention, which the court did not reference in its decision. Article VII provides that Contracting States must not "deprive *any interested party of any right* he may have to avail himself of an arbitral award *in the manner and to the extent allowed by the law or the treaties of the country* where such award is sought to be relied upon." Conv. art. VII(1) (emphasis supplied). Because the rights of parties to enforce arbitral awards run parallel to their rights to invoke arbitration agreements, the Convention guarantees that parties are entitled to *all* protections and rights to enforce arbitral agreements under the national law of the forum (here, the FAA). This reading also fits with the

purpose of the Convention—to maximize the enforcement of certain arbitration agreements and awards. The Convention contemplates that certain jurisdictions, including the United States, employ a broad policy favoring arbitration, and that courts should not construe the Convention to infringe on those rights.

Second, Article II provides that "the term 'agreement in writing' *shall include* an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." (emphasis supplied). The clause "shall include" is illustrative, and is less restrictive than terms such as "shall only include" or "shall consist solely of." Indeed, many court decisions from other Contracting States share the view that the Convention allows courts to apply a more favorable national law when recognizing international arbitration agreements.[2]

Third, the United Nations Commission on International Trade Law ("UNCITRAL") has affirmed and recommended this expansive view of Articles II(2)

2. *See, e.g.*, *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors*, (Civil Appeal No. 7134 of 2012 with Civil Appeal Nos. 7135-7136 of 2012, 28 September 2012) (India) (recognizing that Section 45 of the Indian Arbitration Act 1996 applies to international arbitration agreements and intentionally broadens the scope of Art. II(3) of the Convention); Decision 4A_646/2018, Swiss Supreme Court (Switzerland) (holding that the formal requirements of Article II(2) were not a bar to a tacit prolongation of the agreement and its arbitration clause); *see also* Born, International Commercial Arbitration at 673, n.210 (2d ed. 2014) ("Born") (collecting German cases).

and VII(1).[3] UNCITRAL observes that although Article II contains a non-exhaustive list of elements that can form a valid arbitration agreement, it does not define the *subjective scope* of those arbitration agreements, including whether non-signatories can or cannot enforce them. The tenth recital of the UNCITRAL Recommendation confirms this view by referring to "domestic legislation, as well as case law, more favourable than the Convention *in respect of form requirement* governing arbitration agreements." *Id.* at 2 (emphasis supplied). In this same vein, the International Council for Commercial Arbitration's ("ICCA") Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges agrees that binding a non-signatory to an arbitration agreement does not conflict with the Article II writing requirement. "The question of formal validity is independent of the assessment of the parties to the arbitration agreement, a matter that belongs to the merits and is not subject to form requirements. Once it is determined that a formally valid arbitration agreement exists, it is a different step to establish the parties which are bound by it." *Id.* at 59.

In sum, the decision below relies on an erroneous interpretation of Article II that contradicts the text and purpose of the Convention, and that conflicts with many foreign and transnational authorities. Just as the Eleventh

3. *See* 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, Done in New York, 10 June 1958, Adopted by the United Nations Commission on International Trade Law on 7 July 2006 at Its Thirty-Ninth Session, Issued in Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17), annex II, at 3 (the "UNCITRAL Recommendation").

Circuit must apply the exceptions to the FAA of allowing non-signatory parties to compel domestic arbitration through estoppel, so, too, must it apply the same rule to international arbitration agreements governed by the Convention.

II. Fellow Convention Member Courts Recognize That Non-Signatories May Enforce Arbitration Agreements.

The Eleventh Circuit's narrow view of Article II is an outlier among the courts of the Convention's Contracting States charged with enforcing international arbitration agreements and awards. The decision below concedes that the Convention applies when a party's privy signs an agreement, but the international consensus provides far more expansive rights to non-signatories. These sister national courts instead embrace the generally applicable rules of contract and agency law, which ordinarily may bind a person to an arbitration agreement under many circumstances.

First, a non-signatory may become a party to an arbitration agreement by implied consent, i.e., by non-explicit declarations or conduct, such as the performance of obligations under the contract by the non-signatory. *See, e.g.*, *DD, S.A.E. & EE, CO v. BB, S.A. & CC, S.A.*, Supreme Court of Justice of Portugal, Case No. 28/14.3TBOHP. C1.S1, 15 January 2019 (arbitration agreement bound the two signatories, as well as two companies held by those signatories, because the commercial reality and the claims of the parties showed their implied consent to arbitrate); *Dima Distribución Integral, S.A., y Gelesa Gestión Logística, S.L. v. Logintegral 2000,*

S.A.U., Superior Court of Justice of Madrid (68/2014, 16 December 2014) (Spain) (implied consent applies when the non-signatory assumes contractual obligations and has a "key intervention" during the business relationship); *see also* Judgment of 28 November 1989, 1990 Rev. arb. 675 (Paris Cour d'appel) (party's performance of contractual obligations of another entity constituted consent to underlying agreement, including arbitration clause) (*cited in* Born § 10.02(c) n.118).

Second, a court may invoke the doctrine of equitable estoppel to prevent fraud or injustice when, for instance, a party has made a statement or acted in a particular way, then seeks to take a contrary position to prevent enforcement of an arbitration agreement. *See, e.g.*, *Yehoyachin Yosef Hadad v. Gabriel Dadon and Abante Holdings Limited*, Supreme Court of Israel, 1030/15 (Aug. 18, 2015) (confirming that international arbitration agreements may bind non-signatories when, among other reasons, a party cannot evade an arbitration to which it had substantively agreed by relying on formalistic arguments); *Jiangxi Provincial Metal and Minerals Import and Exp. Corp. v. Sulanser Company Ltd.*, High Court MP 887, 6 April 1995, 2 HKC 373 [1995] (Hong Kong) (enforcing estoppel against defendant who first invoked an arbitration clause, then later challenged the tribunal's jurisdiction because the international arbitration agreement was unsigned); *CE Int'l Res. Holding v. Yeap Soon Sit*, (2013 BCSC 1804) (Canada) (binding non-signatory to international arbitration agreement on estoppel grounds because he knowingly accepted the benefits of the agreement which contained an arbitration clause).

Third, a court may find that a non-signatory is the alter ego of the signing party, so that piercing the corporate veil is warranted to enforce an arbitration agreement or award. *See, e.g.*, *GMR Energy Ltd. v. Doosan Power Sys. India Private Ltd. et al.*, Bombay High Court (14 Nov. 2017) (India) (non-signatory could be compelled to arbitration under the Convention because it and the signatory co-mingled corporate funds, they were run by members of the same family, and they had common directors); *Pan Liberty Navigation Co. Ltd. v. World Link (H.K.) Resources Ltd.*, (2005 BCCA 206, 8 April 2005) (Canada) (non-signatory alter ego was a party clearly within the scope of the arbitration agreement governed under the Convention); *see also* Judgment of 10 November 2006, Case No. LJN:AY4033 (Dutch Hoge Road) (Netherlands) (80% shareholding and board of directors position of non-signatory party subjects the latter to the signatory's arbitration agreement) (*cited in* Born § 10.02 n. 160).

Fourth, a non-signatory third-party beneficiary may be bound to an international arbitration agreement when the third party asserts a right under the contract. *See, e.g.*, *Dickson Valora Group (Holdings) Co Ltd v. Fan Ji Qian* [2019] HKCFI 482, High Court of Hong Kong, Court of First Instance, Miscellaneous Proceedings No. 1954 of 2018, 20 February 2019 (non-signatory seeking to enforce a success fee after closing a land development deal was subject to that deal's arbitration agreement because it was bound by any conditions integral to the exercise of its contractual right); *Simin Ltd. v. Int'l Trade Exch. Ltd.*, Ctrl. Magis. Ct. of Israel, 31228-06-13 (Nov. 5, 2014) (arbitration agreement may bind a non-signatory if (i) it had substantial proximity to the matter, (ii) it had

taken part in the proceedings, or (iii) its interest was represented in the proceedings); *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors*, (Civil Appeal No. 7134 of 2012 with Civil Appeal Nos. 7135-7136 of 2012, 28 September 2012) (India) (recognizing theory of third-party beneficiaries, among others, that may bind a non-signatory to an arbitration agreement, as they rely on the discernable intentions of the parties and on the principle of good faith).

Fifth, the non-signatory guarantor of a contract may be subject to an arbitration agreement entered into by other parties. *See, e.g.*, *Stellar Shipping Co LLC v. Hudson Shipping Lines*, (Hamblen J: [2010] EWHC 2985 (Comm): 18 November 2010) (U.K.) (non-signatory was subject to the original parties' international arbitration clause because it agreed to undertake all obligations not performed by the contracting party); *Former Soviet Republic v. A Co. (Israel) & B Co. (Israel)*, Svea Court of Appeals (16 May 2002) (Sweden) (confirming the general rule that the guarantor also should be obligated to take part in an arbitration requested by the creditor, unless special circumstances should prompt another assessment); *X. Ltd. v. Y and Z Spa.*, Swiss Fed. Sup. Ct. (4A_128/2008, Judgment of August 19, 2008, First Civil Law Division) (Switzerland) (asserting that parent companies that guarantee its subsidiaries' performance of a contract containing an arbitration agreement will be found to have acceded to that arbitration agreement if the parent shows intent to be bound to arbitrate).

Sixth, an arbitration agreement may bind a non-signatory if it shares a special agency relationship with the signatory. *See, e.g.*, *2019 Hu 01 Min Zhong No. 5542*,

(2019 Hu 01 Min Zhong No. 5542) (China) (affirming that a principal should be bound by the arbitration clause concluded between its agent and a third party, where it was aware of the principal-agency relationship).

The above referenced grounds empowering (or in some cases, subjecting) non-signatories to arbitration agreements under the Convention are non-exhaustive. A leading commentator has identified even more grounds justifying the enforcement of arbitration agreements by or against non-signatories including, but not limited to, the group of companies doctrine,[4] succession,[5] assignment of rights,[6] subrogation,[7] and ratification.[8]

In addition to the above referenced decisions, foreign courts have recognized the rights of non-signatories to compel arbitration in circumstances similar to those of Petitioner. *See, e.g.*, Judgment of 17 April, 2019, No. 4A_646/2018 (Swiss Supreme Court) (allowing non-signatory to enforce arbitration clause against a signatory party); *Société Alcatel Bus. Sys. ABS et al. v. Amkor Technology et al.*, (Cass 1e civ., Mar. 27, 2007, JCP [2007] I 168, No. 11) (France) (similar).

This Court should follow the reasoning shared by fellow national courts bound by the Convention, and reverse the decision below in favor of petitioner.

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4. Born § 10.02(E).

5. *Id.* § 10.02(H).

6. *Id.* § 10.02(I).

7. *Id.* § 10.02(J).

8. *Id.* § 10.02(L).

III. International Arbitration in the United States Will Suffer if Non-Signatories Cannot Enforce International Arbitration Agreements Consistent with Other Contracting States.

The United States is the fourth most popular venue for international arbitrations worldwide.[9] It enjoys a diverse arbitrator population, accounts for nearly one-third of the world's GDP, and promotes a pro-arbitration policy. Edna Sussman, Int'l Arb. in the U.S. 212 (Kluwer 2017).

The United States' current position as a desired destination for international arbitration is vital to the health and prosperity of the United States' economy. International trade supports nearly 39 million U.S. jobs or one in every five jobs. *Trade & American Jobs*, The Impact of Trade on U.S. and State-Level Empyt. (2019). In fact, total international trade, both exports and imports, constituted nearly 30% of the U.S. gross domestic product between 2011 and 2017. *Id.* Given the vitality of international trade to the U.S. economy, the rules and laws surrounding international trade are crucial to the continued success and growth of trade.

Yet international trade is only part of the picture that drives a need for orderly and fair dispute resolution offered by arbitration. Investment is another component.

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9. *See* Int'l Chamb. of Comm., *ICC Dispute Resolution 2018 Statistics*, *available at* http://files-eu.clickdimensions.com/iccwboorg-avxnt/files/web_icc_disputeresolution2018statistics.pdf?m=11.6.2019%2011:46:22&_cldee=bWFraWIwMDFAZml1LmVkdQ%3d%3d&recipientid=contact-8ac64473badbe911a812000d3abaad31-5a450ece97f547aa83a83482119216e1&esid=e508fb24-2819-4e21-9bdd-1e79c7247d97.

U.S. direct investment abroad (USDIA), and foreign direct investment in the United States (FDIUS) comprise much of the U.S. economy[10] and create many complex business relationships that drive innovation, jobs, and growth. These effects inevitably create disputes. Indeed, international commercial arbitration promotes foreign direct investment, and its concomitant benefits, by enabling companies to enforce contracts by allowing them to avoid inefficiencies that arise from domestic courts.[11]

If the Court affirms the Eleventh Circuit's decision and applies its holding nationwide, the framework of international arbitration in the United States would suffer.

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10. The International Trade Administration (ITA) measures and reports on Foreign Direct Investment levels involving the USA. According to the Bureau of Economic analysis, the combined historical positions of U.S. direct investment abroad and foreign direct investment in the United State surpassed ten trillion dollars at year end 2018. https://apps.bea.gov/scb/2019/08-august/0819-direct-investment-positions.htm

11. *See, e.g.*, A. Myburgh & J. Paniagua, *Does International Commercial Arbitration Promote Foreign Direct Investment?*, 59 J. OF LAW AND ECON. 597 (2016).

A. The Eleventh Circuit's Decision Decreases Efficiency in Drafting and Enforcing Arbitration Agreements.

a. Parties Relying on Arbitration Agreements Drafted Prior to the Eleventh Circuit's Decision are Subject to Greater Uncertainty.

The purpose of arbitration agreements is to ensure predictability and efficiency in resolving complex commercial disputes. Since the enactment of the FAA in 1925, there has been a well-established "national policy favoring arbitration[.]" *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). This policy is furthered by placing "arbitration agreements on equal footing with all other contracts[.]" *Id.* Given this pro-arbitration policy, federal courts consistently have allowed non-signatories to a domestic arbitration agreement to compel arbitration of a dispute with a signatory under several circumstances.[12]

12. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009) (non-signatory to an arbitration agreement could seek a stay case pending arbitration); *Crawford Prof. Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249 (5th Cir. 2014) (allowing non-signatory to compel arbitration under the state law-doctrine of equitable estoppel); *Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 9-10 (1st Cir. 2014) (applying principles of agency to find that employees, acting within the scope of their employment, can invoke arbitration provision adopted by their employer); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008) ("Federal courts 'have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has

Despite the well-settled practice of allowing non-signatories to enforce an arbitration agreement against a signatory in a purely domestic dispute, here the Eleventh Circuit has barred those rights from non-signatory parties to a contract that merely touches on international issues.[13] This stance flouts this Court's precedent that the federal policy favoring arbitration applies "with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth*, 473 U.S. 614, 631 (1985); *see also David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 248 (2d Cir. 1991) ("The policy in favor of arbitration is even stronger in the context of international business transactions. Indeed, this Court has stated that one of the primary purposes of signing the New York Convention 'was to encourage the recognition and enforcement of commercial arbitration agreements

signed.'") (quoting *Thomson-SCF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995)); *Am. Bankers Ins. Group, Inc., v. Long*, 453 F.3d 623, 627 (4th Cir. 2006) ("It is well-established, however, that a nonsignatory to an arbitration clause may, in certain situations, compel a signatory to the clause to arbitrate the signatory's claims against the nonsignatory despite the fact that the signatory and nonsignatory lack an agreement to arbitrate."); *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798-800 (8th Cir. 2005) ("Under the circumstances involved in this case, it is clearly appropriate to allow the nonsignatories to enforce the arbitration agreement against signatory C.D. Partners."); *Int'l Paper Co. v. Schwabedissen Maschienen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) ("[A] party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.").

13. *E.g.*, a non-U.S. party, foreign subject matter, performance abroad, or any combination of these factors.

in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.'" *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1970)).

Non-signatory parties involved in international business deals with arbitration provisions expect to invoke U.S. law (i.e., the FAA) if a dispute arises in the Eleventh Circuit. Now, these parties cannot determine whether their existing arbitration agreements remain valid. This is particularly troubling because "[d]isputes involving non-signatories are inevitable in the context of modern international business transactions that typically involve complex webs of interwoven agreements, multilayered legal obligations and the interposition of numerous, often related, corporate and other entities." James M. Hosking, *Non-Signatories & Int'l Arbitration in the U.S.: the Quest for Consent*, 20 Arb. Int'l 289, 289 (2004).

Affirming the decision below will cause both signatory and non-signatory parties to lose access to arbitration that should be left undisturbed. The loss of arbitration will spike the costs of dispute resolution, as well as the costs related to negotiating future contracts that touch on international concerns. As a result, foreign entities may be discouraged from doing business in the United States given the increased cost and new uncertainty surrounding access to international arbitration and enforcement of arbitral awards.

b. Future Arbitration Agreements Would Be More Complex and Costly, by Requiring the Participation and Pre-Approval of Every Conceivable Party.

Disputes in the international business context are increasingly complex. This Court has stated that "[t]he controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity." *Mitsubishi*, 473 U.S. at 638. Often, businesses that enter into a written contract later subcontract the work to individuals and entities with more specific and tailored expertise. Indeed, any chain of international commerce linking several subsidiaries or third-party beneficiaries will inevitably lead to (i) disputes and (ii) signatories and non-signatories desiring to adjudicate their disputes through arbitration. Williston on Contracts § 57:19.

The decision below makes it impossible for parties subject to the Convention to enjoy the same breadth of arbitration rights and protections ordinarily afforded under the FAA. Forcing parties to collect signatures from every conceivable individual and entity who should be subject to arbitration under contract and agency law is unfeasible and costly, undermining the speed and efficiency benefits of arbitration as compared to litigation. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011).

A review of the facts from the cases making up the present circuit split show the complexity of modern international business transactions and the unworkability of the Eleventh Circuit's requirement that every

potential party sign an arbitration agreement. In the decision below, GE Energy was the subcontractor of the selling entity. Pet.App.4a. This situation is common. International construction projects often involve "webs of independent contractual relationship between parties of different nationalities." Schwartz, *Multiparty Disputes & Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma*? 22 Case W. Res. J. Int'l L. 341, 344 (1990).

Aggarao v. MOL Ship Mgmt. Co., Ltd., 675 F.3d 355 (4th Cir. 2012), provides another illustration of the complexity surrounding international business transactions. There, Aggarao, a citizen of the Philippines, entered into an employment contract (the "POEA Contract") with Magsaysay Mitsui O.S.K., which contained a mandatory arbitration clause. *Id.* at 360. Under the POEA Contract, Magsaysay Mitsui was the agent of defendant MOL, a Japanese company that managed the officers and crew of the Asian Spirit, an ocean-going vessel. *Id.* at 361. "Aggarao was hired as a crewman of the Asian Spirit, which was chartered by defendant Nissan, a Japanese entity. Under the terms of its charter agreement with [defendant] World Car, Nissan was responsible for instructing the ship on its destination and cargo." *Id.* Neither Nissan nor World Car were signatories to the POEA Contract. *Id.* at 373. After Agarrao was involved in a devastating accident aboard the Asian Spirit, he sued all defendants, and on appeal the court held that the non-signatory defendants could compel arbitration under the POEA Contract. *Id.*

Sourcing Unlimited, Inc., v. Asimco Int'l., Inc., 526 F.3d 38 (1st Cir. 2008) provides a related example of the

complexity that can arise between a parent corporation and its subsidiaries. There, plaintiff Sourcing Unlimited, a manufacturer with facilities in the United States and China, executed an agreement with Asimco Technologies, Inc. ("ATL"), a Delaware corporation headquartered in China. *Id.* at 41. The Chairman and CEO of ATL, Perkowski, also served as the Chairman of Asimco International, Inc. ("Asimco"), which was not part of the Sourcing Unlimited-ATL agreement. *Id.* After a dispute arose, Sourcing Unlimited sued Asimco and Perkowski, alleging that together with the written agreement, Sourcing Unlimited had entered an oral agreement with Perkowski stating Asimco would deliver certain parts produced by the Sourcing Unlimited-ATL agreement and split those profits in accordance with that agreement's written terms. *Id.* at 42. The court held that Sourcing Unlimited could not evade its obligation to arbitrate by suing a non-signatory. *Id.* at 47.

These cases show the complexity and interconnectivity of international business transactions. International transactions often involve multiple parties, subsidiaries, and subcontractors, each with their own contracts and agreements. It would be impossible for parties to extend arbitration agreements to include every potential party as a signatory. The Eleventh Circuit's decision suppresses efficient international contracting by imposing such a requirement on agreements subject to the Convention. Should this Court affirm, international arbitration would lose favor as a viable dispute resolution mechanism.

c. Non-Signatories Would Be Deprived of Meaningful Relief if a Contracting Party's Assets are In the United States.

Parties with international arbitral awards rendered abroad may be unable to enforce them in the United States if courts apply the Eleventh Circuit's reasoning against an otherwise permissible non-signatory. Currently, "empirical studies and anecdotal evidence indicate that the percentage of voluntary compliance with awards exceeds 90% of international commercial arbitrations." Born at 2900 (collecting sources).[14] "The high degree of voluntary compliance with arbitral awards reflects the parties' contractual undertaking to arbitrate and to comply with the resulting arbitral award, the efficacy of the arbitral process (which leaves parties believing their dispute has been fairly resolved) and the likelihood that the award can be coercively enforced." *Id.*

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14. *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984); Michael Kerr, *Concord and Conflict in Int'l Arb.*, 13 Arb. Int'l 121, 127 (1997) (voluntary compliance plus successful court enforcement exceeds 98%); Lalive, Enforcing Awards, in ICC, 60 Years of ICC Arbitration 317, 319 (1984) (voluntary compliance with ICC awards exceeds 90%); Queen Mary, University of London, 2008 Int'l Arb. Survey: Corporate Attitudes and Practices 3 (2008) ("84% of the participating corporate counsel indicated that, in more than 76% of their arbitration proceedings, the non-prevailing party voluntarily complies with the arbitral award; in most cases, according to the interviews, compliance reaches 90%"); van den Berg, The N.Y. Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas, in M. Blessing (ed.), The N.Y. Convention of 1958 25 (ASA Spec. Series No. 9 1996) (only 5% of cases in national courts refuse enforcement or recognition of an award).

The high rate of voluntary compliance is largely because nearly every leading manufacturing country in the world is a signatory to the New York Convention. But, if a non-signatory cannot enforce an arbitration agreement against a signatory, as would be the case if the Court affirms the Eleventh Circuit, then it consequently cannot enforce an arbitral award either. Without the promise of effective and efficient enforcement of international arbitral awards, a non-signatory would inevitably resort to litigating its disputes in national, often foreign, courts.

Relying on national courts to adjudicate cross-border disputes, however, greatly decreases the likelihood of enforcing favorable rulings, because there is no equivalent fully ratified multinational treaty related to the recognition and enforcement of judgments. Gary B. Born & Peter R. Rutledge, Int'l Civil Litig. in U.S. Courts 1080 (5th Ed. 2011). "Unlike state judgments, foreign judgments are not governed by the Full Faith and Credit Clause." *Id.* A non-signatory with legitimate arbitrable claims may be forced to seek relief through domestic litigation, and even if victorious, it would face the inarguable hurdles of domesticating foreign judgments abroad. International arbitration will become a less flexible and reliable means of dispute resolution, thus burdening international commerce and future international business relations.

CONCLUSION

Amicus curiae respectfully requests that the Court reverse the lower court decision.

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