

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.)

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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

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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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19 APPEARANCES:
20 SHAY DVORETZKY, ESQ., Washington, D.C. ;
21 on behalf of the Petitioner.
22 JONATHAN Y. ELLIS, Assistant to the Solicitor General,
23 Department of Justice, Washington, D.C. ;
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 -- if you and I have an agreement to
15 arbitrate, and even if you tell me, you know, I
16 -- I might have Mr. Hacker do most of the work
17 under it, and I just want to make that clear to
18 you, and then you do hire Mr. Hacker to do all
19 the work in it.

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

1 going to arbitrate all our disputes, he's not
2 bound to arbitrate?

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

12 That was the same sort of factor --

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

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

1 by domestic law.

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

11 JUSTICE ALITO: Well, what if the --

12 MR. DVORETZKY: The question --

13 JUSTICE ALITO: What if the law of the
14 jurisdiction whose law would be chosen permits
15 arbitration without any consent whatsoever? I
16 guess you'd have to say that that's -- that's
17 okay, right?

18 MR. DVORETZKY: That -- the Convention
19 doesn't prevent that. That's simply not the
20 problem that the Convention was trying on solve.
21 The purpose of the Convention was to address the
22 problem of under-enforcement of arbitration
23 agreements. If there is some country out there
24 or some state that is compelling arbitration in
25 the way that you're describing, the Convention

1 doesn't directly deal with that, except perhaps
2 in Article V, which would provide a public
3 policy backstop for the country in which
4 enforcement of an award is sought to say we're
5 not enforcing that award because it contravenes
6 our public policy.

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

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

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

24 And to be sure, the Convention does
25 not require any country to recognize forced

1 arbitration, so to speak. The -- the premise of
2 the Convention is that the floor, the minimum,
3 that other countries are agreeing to do, is to
4 recognize valid arbitration agreements.

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

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

17 JUSTICE KAGAN: But you don't --

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

25 Now, I thought this is quite narrow or

1 could be. What actually either seller did is I
2 agreed, I signed a party and said I'll go to
3 arbitration. And -- but the -- when you use the
4 word "seller," which I think maybe was me; is
5 that right, your opponent, that includes
6 subcontractors in this contract.

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

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

25 I don't want to make my argument for

1 you. I want you to tell me quite
2 straightforward -- and I'll -- in a few seconds,
3 is that a possible argument in this case? We
4 just send it back.

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

9 JUSTICE BREYER: And --

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

20 So you're going to send it back for --
21 I mean, if someone is going to adopt such a
22 radical proposition it probably should be us,
23 rather than send it back to the Eleventh Circuit
24 and say, well, if you want to go against all --
25 all of our precedents in arbitration, fine, but

1 we're not going to do it.

2 MR. DVORETZKY: So, Mr. Chief Justice

3 --

4 CHIEF JUSTICE ROBERTS: Not to suggest
5 I have a view either way.

6 (Laughter.)

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

14 JUSTICE GINSBURG: Can you --

15 MR. DVORETZKY: -- precisely --

16 JUSTICE GINSBURG: Can you -- can we
17 -- can we understand why Respondent should be
18 equitably estopped? This case is going in the
19 brief, and so far in the oral argument on a
20 level once -- once removed from the basic facts
21 on the ground.

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

24 MR. DVORETZKY: Let me make two points
25 on that. One is the point that I think Justice

1 Breyer was making.

2 On these particular facts, GE energy
3 is defined under the contract as a party. The
4 term "parties" is defined to include buyer and
5 seller, "seller" is defined to include
6 subcontractor, and GE is listed in the contract
7 as one of the subcontractors that the parties
8 contemplated using.

9 And so we are actually a party to the
10 contract, even though we didn't put -- even
11 though we didn't ink the contract with our
12 signature. In addition --

13 JUSTICE GINSBURG: And -- and -- even
14 though at the time the contract was made, the
15 subcontractors hadn't been picked, so there were
16 -- GE was on a list of potential subcontractors,
17 but was not, in fact, a subcontractor at the
18 time of the arbitration agreement?

19 MR. DVORETZKY: I don't believe that
20 it had been picked, but there were active and
21 extensive discussions, including with the
22 Respondents, about using GE as a subcontractor,
23 so it was certainly contemplated.

24 And if you -- if you follow the
25 definitions of seller and -- and -- buyer and

1 seller and parties in the contract that GE is
2 actually a party to the agreement. As a -- on a
3 more doctrinal level in terms of equitable
4 estoppel, equitable estoppel is a way of
5 inferring consent from conduct.

6 And if the Respondents sue us, as they
7 did in this case, on a theory that depends on
8 the duty of care arising out of the contract,
9 they are in essence suing us on the contracts.
10 They can't cherry-pick to invoke the duty of
11 care from the contract but to avoid their
12 agreement to arbitrate disputes under that
13 contract.

14 That -- that would be the doctrinal
15 basis for an equitable estoppel theory.

16 JUSTICE GORSUCH: Counsel --

17 MR. DVORETZKY: And this --

18 JUSTICE GORSUCH: -- we're going well
19 down this rabbit hole on whether equitable
20 estoppel applies in this case. But I -- I had
21 -- I had proceeded on maybe on the mistaken
22 assumption that the question whether equitable
23 estoppel is recognized as a viable theory under
24 the Federal Arbitration Act isn't before us.
25 The only question before us is whether anything

1 in the convention precludes an argument like
2 that to be made under the Federal Arbitration
3 Act, whether or not it might succeed.

4 Am I -- but I -- am I mistaken?

5 MR. DVORETZKY: No, that -- that's
6 correct, Justice Gorsuch. And I think that goes
7 to Justice Breyer's point as well. The actual
8 question presented here is quite narrow. And
9 that is whether there is anything in the New
10 York Convention that prohibits the application
11 of equitable estoppel.

12 JUSTICE GORSUCH: If it exists,
13 without prejudging whether it exists.

14 MR. DVORETZKY: Correct.

15 JUSTICE GORSUCH: Okay.

16 MR. DVORETZKY: And that -- much the
17 same as the posture in Arthur Andersen where the
18 Court sent the case back for the lower courts to
19 determine whether equitable estoppel exists
20 under the applicable law and, if so, whether it
21 could be satisfied.

22 JUSTICE KAGAN: But Mr. Dvoretzky,
23 that -- that is the question. So let's take a
24 look at Article II, and specifically the third
25 sentence because the third sentence says, "The

1 court of a contracting state" -- and then I'm
2 going to skip some words -- "shall, at the
3 request of one of the parties, refer the parties
4 to arbitration."

5 And I have to tell you, I think that
6 the best understanding of the term "parties"
7 looking at the three sentences of Article II,
8 let's just assume that the best understanding is
9 the parties to the agreement.

10 So this says the parties to the
11 agreement are requesting the arbitration. And
12 that's when the court should refer the
13 arbitration. Now, that raises the question
14 who's the party?

15 I -- I'm with the Chief Justice. If
16 you're talking about an alter ego or something
17 like that, or a successor-in-interest, maybe
18 that person counts as a party, even though it is
19 not the signatory but there is some limit, isn't
20 there, that is imposed by that language of "the
21 parties"?

22 MR. DVORETZKY: Justice Kagan, I think
23 the key point is that Article III does not say
24 "only the parties." In other words, the bear
25 minimum the contracting states agree to do is to

1 refer a case to arbitration if the parties --
2 whether you think that's to be --

3 JUSTICE KAGAN: Well, let me read you
4 a few sentences, Mr. Dvoretzky and you tell me
5 whether you always have to say "shall only" if
6 you say "shall." If I say federal courts shall
7 have jurisdiction over federal questions, would
8 this statute also permits those courts to
9 exercise jurisdiction over state questions?

10 MR. DVORETZKY: No, and Justice Kagan,
11 I -- I --

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

14 (Laughter.)

15 JUSTICE KAGAN: Shareholders shall
16 appoint two directors to the board. Does that
17 mean shareholders can appoint 20 directors to
18 the board?

19 MR. DVORETZKY: No.

20 JUSTICE KAGAN: Because "shall" means
21 "shall only" in many circumstances, right?

22 MR. DVORETZKY: It -- it depends on
23 context.

24 JUSTICE KAGAN: It does.

25 MR. DVORETZKY: And the context here

1 based on the purpose of the Convention, based on
2 how this Convention has been nearly universally
3 understood by contracting states, which is a key
4 factor in this Court's treaty interpretation
5 jurisprudence, is that this -- this provision,
6 Article II(3), like the rest of the Convention,
7 is just setting a floor on what contracting
8 states agree to do.

9 So at a minimum, they agree that they
10 shall -- the courts shall refer cases to
11 arbitration when requested by the parties, but
12 not that they shall only do so. You can of
13 course come up with examples where "shall" does
14 mean "shall only," but it does -- it doesn't
15 mean that here. And --

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

1 I mean, so if it's a matter of
2 voluntary consent, and everybody thinks that
3 that's what arbitration is, shouldn't we read
4 "the parties" to be, you know, the parties?
5 Nobody else.

6 MR. DVORETZKY: And again I would take
7 you back to Arthur Andersen. Certainly under
8 domestic law it is understood to be a matter of
9 voluntary consent but the Court saw no issue
10 with the possibility of an equitable estoppel
11 theory that would allow a non-party to enforce.

12 The Convention does not contain an
13 independent consent requirement. It just
14 doesn't -- it just doesn't say that. And it
15 would be inconsistent with its purpose to have
16 that because, again, the backdrop to the
17 Convention was there was widespread mistrust of
18 arbitration agreements. Agreements were not
19 being enforced.

20 The Convention set out to remedy that
21 problem and to provide for more enforcement of
22 arbitration, not less than that.

23 JUSTICE GORSUCH: Counsel, we often --

24 MR. DVORETZKY: But, moreover --

25 JUSTICE GORSUCH: -- we often -- I'm

1 sorry.

2 JUSTICE ALITO: Is it -- is it
3 necessary to go so far as to say that the
4 Convention says nothing about what the relevant
5 law of a particular jurisdiction says about who
6 can enforce an arbitration agreement or could it
7 say -- could it perhaps go beyond strictly the
8 signatories to the agreement and encompass some
9 other non-parties that have a sufficient -- that
10 have a close connection, as would be the case
11 with somebody who was equitably estopped?

12 MR. DVORETZKY: If I may answer?

13 CHIEF JUSTICE ROBERTS: Sure. Sure.

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

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Ellis.

2 ORAL ARGUMENT OF JOHNATHAN Y. ELLIS

3 FOR THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE PETITIONER

5 MR. ELLIS: Mr. Chief Justice and may
6 it please the Court:

7 The New York Convention place an
8 important but limited role in the recognition of
9 international arbitration agreements. It
10 requires contracting states to recognize and
11 enforce those agreements in certain
12 circumstances, but it does not, as my friend
13 says, establish a comprehensive set of rules for
14 arbitration.

15 For two fundamental reasons, the
16 Eleventh Circuit has wrong to read into the
17 writing requirement of Article II a categorical
18 prohibition on compelling international
19 arbitration on the basis of estoppel principles.
20 First, the Convention as a whole only ever
21 requires contracting states to enforce
22 arbitration agreements; it never prohibits them
23 -- them from doing so.

24 And, second, Article II, section 2, is
25 a rule of presumptive validity. It speaks to

1 when a court must recognize an arbitration
2 agreement as valid. It does not speak to the
3 scope of valid agreements, including who may be
4 bound or who may invoke those agreements.

5 Now, Respondents provide a series of
6 alternative grounds for refusing to compel
7 arbitration in this case, but there's no reason
8 for this Court to pass on those grounds in the
9 first instance.

10 Just as the Court did in -- in Arthur
11 Andersen for the FAA, the Court should make
12 clear that the Convention does not categorically
13 prohibit enforced --

14 JUSTICE SOTOMAYOR: Excuse me --

15 MR. ELLIS: -- compelling arbitration
16 on estoppel grounds.

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

1 MR. ELLIS: Yes.

2 JUSTICE SOTOMAYOR: That's odd,
3 indeed, because as Justice -- as the Chief
4 Justice noted and Justice Kagan noted, it seems
5 always that a signed written agreement
6 respecting consent is a minimum requirement. Or
7 another way to get to where you want to go,
8 another reading, is that Article II does not
9 allow contracting states to compel arbitration
10 whenever it wants, even without a written
11 agreement but that they can compel it if someone
12 is a party, that that's undefined.

13 And that seems to be how most other
14 contracting states have read this, which is that
15 there's a lot of leeway for states to determine
16 who's a party to that written agreement. And
17 they can do that through normal principles of
18 privity or normal principles of contract
19 interpretation, including alter ego and veil
20 piercing and all the other things that your
21 adversary accepts can be done.

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

25 MR. ELLIS: That's right.

1 JUSTICE SOTOMAYOR: So there's common
2 ground, but I do think within that common
3 ground, there has to be a limiting principle
4 established somewhere. And I don't think it can
5 be that you can have an oral agreement or a
6 state could say, with respect, no essence of
7 consent whatsoever, that we're just going to let
8 anybody -- if you signed an arbitration
9 agreement about the manufacturer of this thing,
10 equitable principles are always going to let
11 anybody come in and sue -- and let --

12 MR. ELLIS: Sure.

13 JUSTICE SOTOMAYOR: -- let them be
14 sued.

15 MR. ELLIS: Sure.

16 JUSTICE SOTOMAYOR: So assuming we're
17 on common ground or I am, that we have some,
18 some basis to say that contracting states can
19 pick who parties are, what's the limiting
20 principle after that? What's the limiting
21 principle of equitable estoppel? It can't be
22 every single type of equitable estoppel is okay.

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

25 JUSTICE SOTOMAYOR: And, by the way,

1 on this case, it's easy to win.

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

4 JUSTICE SOTOMAYOR: And very -- on
5 this case, no matter what the theory of
6 equitable estoppel is, a seller who's defined
7 within the contract to include suppliers that
8 include GE, that seems like a fairly
9 straightforward case to me.

10 MR. ELLIS: So -- so we haven't taken
11 a position on -- on the ultimate resolution, but
12 we agree -- and it sounds like you agree -- that
13 the Eleventh Circuit's rule is just wrong, that
14 it's not categorically limited to signatories.
15 That's enough to resolve this case.

16 Now, as for limiting principles, I
17 think there are limiting principles. I think
18 there are two types to be -- to consider. The
19 first limiting principle is to consider when --
20 what's the limit on when a contracting state is
21 required to compel arbitration? And I think
22 there certainly are limits. I think section --
23 Article II, section 3, is the relevant
24 provision, not Article II, section 2. And the
25 question there says that the parties before the

1 -- have to have made an agreement. So I think
2 the question, can you -- does the domestic law
3 consider the parties to have made an agreement
4 to this written agreement?

5 Now, the -- the other limiting
6 principle is -- is -- is whether states are then
7 prohibited from, under their own -- under the
8 domestic law, to recognize other types of
9 arbitration agreements. I -- I -- I just don't
10 think the contract -- the Convention can be read
11 to impose those limits. That doesn't mean that
12 you can then say -- enforce an -- require
13 another state to enforce an oral arbitration
14 agreement under the Convention. It would not be
15 clearly, not be under the Convention, but a --
16 but a -- a contracting state --

17 JUSTICE SOTOMAYOR: But that's going
18 --

19 MR. ELLIS: -- has not given up its
20 right to enforce the --

21 JUSTICE SOTOMAYOR: -- much further
22 afield than I think other contracting states
23 have and it's reading Article VII into Article
24 II, which to me is illogical.

25 MR. ELLIS: We don't think you have to

1 read Article VII on its text to do that. I will
2 say that it's fairly uniform that -- that
3 Article VII at least should inform the scope of
4 Article II, the same sort of most favorable
5 rules should apply to -- to enforcing
6 arbitration agreements as a --

7 JUSTICE SOTOMAYOR: That -- that seems
8 contrary to the very strict requirements that
9 you need a written agreement between the
10 parties.

11 MR. ELLIS: Absolutely, Your Honor.

12 JUSTICE SOTOMAYOR: I think that's a
13 very different argument than saying you have
14 some play in the joints with respect to who
15 parties are and that domestic law can inform
16 that.

17 MR. ELLIS: I -- I -- and -- and I
18 want to be clear. The Convention does not apply
19 to -- to arbitration agreements that are not
20 written or that don't meet the presumptive --
21 the validity requirements in Article II at -- at
22 least insofar as -- as -- there's this debate
23 between whether Article II, Section 2, was
24 exhaustive or non-exhaustive. But either way,
25 the Convention isn't going to apply and,

1 therefore, isn't going to require the
2 enforcement of agreement that doesn't meet the
3 requirements of the Convention.

4 But the Convention doesn't further
5 then say that a -- a contracting state cannot
6 enforce beyond that. And -- and that's what you
7 have --

8 JUSTICE GORSUCH: Counsel --

9 MR. ELLIS: -- to conclude --

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

11 MR. ELLIS: -- to support the Eleventh
12 Circuit's rule.

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

1 So you -- you can distinguish these
2 successors in interest, maybe assignors,
3 privity-like people from this equitable
4 estoppel, which is not universally embraced by
5 our treaty partners.

6 MR. ELLIS: Yes, Your Honor. That --
7 I mean, the Respondent has argued that estoppel,
8 equitable estoppel, is an outlier. I think
9 that's a bit of an overstatement.

10 I think that there are very comparable
11 doctrines around the world that look a lot like
12 U.S. equitable estoppel principles. The Titan
13 Unity decision from Singapore adopts U.S.
14 estoppel principles by name, by citing to U.S.
15 courts. And then there is the *venire contra*
16 *factum proprium* in civil law countries that look
17 a lot like equitable estoppel.

18 JUSTICE GINSBURG: But that has been
19 described as the -- the Latin phrase you just
20 used, as akin to traditional estoppel as opposed
21 to this equitable estoppel.

22 MR. ELLIS: Sure, that's fair enough.
23 I guess the -- the overarching point is that
24 nothing in the Convention draws the sort of line
25 that Respondent is trying to do. It can't be

1 the party line that they've pointed to.

2 I -- I don't know why traditional
3 estoppel or venire contra factum proprium would
4 more akin to a party than not. It can't be the
5 consent principle that they point to, for the
6 reasons that my friend says. Piercing the
7 corporate veil is -- is -- is at least based on
8 equity and fairness and then contrary to sort of
9 formal express consent, as any equitable
10 estoppel principle is.

11 And so at the bottom, what you -- our
12 view is that the -- the Convention simply
13 doesn't speak to those principles and what other
14 domestic law principles that apply.

15 JUSTICE GORSUCH: Counsel --

16 JUSTICE GINSBURG: Before your time
17 runs out, I'd like you to answer specifically,
18 in the Public Citizens' brief, they cite a case
19 called Todd v. Steamship Mutual Underwriting
20 Association. They say a U.S. worker who was
21 injured by his employer in Louisiana sued that
22 insolvent insurer's -- employer's insurer under
23 Louisiana's Direct Action Statute, and was
24 required to arbitrate his personal injury claim
25 before an arbitration panel in London.

1 That sounds like a real horrible -- is
2 -- is that the result of the position that you
3 are pressing?

4 MR. ELLIS: So I -- I apologize. I'm
5 not familiar with the facts of that particular
6 case and exactly how they got to that result. I
7 -- I -- I will say that there are, I think the
8 Convention itself does not limit contracting
9 states from enforcing arbitration. There may be
10 other limits. There may be other limits in the
11 FAA itself that don't need to -- the court below
12 didn't reach and this Court doesn't need to get
13 into.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch has a question.

16 JUSTICE GORSUCH: Counsel, I'm -- I
17 understand that different countries may have
18 different views about equitable estoppel or
19 other kinds of non-signatory, non-strict consent
20 arbitrations.

21 Is there any disagreement among
22 countries about how to read the Convention
23 itself with respect to whether it creates a
24 floor or a ceiling?

25 MR. ELLIS: Not that I'm aware of.

1 The only -- at least not of any -- any
2 significance. The only one that I'm aware of is
3 this Javor decision from the British Columbia
4 courts that reads Article II, Section 2 in the
5 way the Eleventh Circuit does, but we have cited
6 cases from Germany, France, and Switzerland on
7 26 to 28 of our brief. The Bremen brief has
8 collected cases from 21 to 30 of their brief.

9 The UNCITRAL recommendation is -- is
10 inconsistent with Eleventh Circuit's decision.
11 That represents the views of about 60 different
12 countries. The model -- the implementing
13 legislation from Peru, from Singapore, from
14 Australia, are -- are contrary to the Eleventh
15 Circuit's view of the Convention, and even the
16 Javor case from British Columbia has not been
17 followed by subsequent British Columbia courts
18 and it has been criticized.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Hacker.

22 ORAL ARGUMENT OF JONATHAN D. HACKER ON
23 BEHALF OF THE RESPONDENTS

24 MR. HACKER: Mr. Chief Justice and may
25 it please the Court:

1 GE cannot compel Outokumpu to
2 arbitrate its tort claim with GE because there
3 is no written arbitration agreement between
4 them.

5 I agree that would generally not be an
6 obstacle in a domestic arbitration case because,
7 as this Court held in Arthur Andersen, Chapter
8 1's agreement enforcement provision, FAA Section
9 3, does not limit enforcement to "parties to a
10 written agreement."

11 But the lack of a written agreement is
12 decisive here because the Convention's
13 enforcement provision, Article II, Section 3, is
14 limited to the parties to a written arbitration
15 agreement. Because that provision controls over
16 Chapter 1's conflicting enforcement provision,
17 non-parties cannot enforce agreements in cases
18 under the Convention. That rule is subject to
19 two important corollaries that have already been
20 discussed this morning.

21 First, the Convention does not
22 prohibit contracting states from enacting other
23 domestic laws that can mandate international
24 arbitration on other terms, including oral
25 agreements or absent consent. But as the

1 commentators agree, and as the United States
2 agreed this morning, arbitrations under such
3 statutes do not proceed under the Convention,
4 meaning that the resulting awards will not
5 receive the benefit of the Convention and its
6 near automatic enforcement provisions, as
7 Justice Ginsburg warned.

8 That kind of distinct extra Convention
9 statute is not at issue in this case, because
10 the United States has not enacted one. Chapter
11 2 instead makes the Convention itself
12 controlling in all international arbitration
13 cases. Chapter 1 applies only where the
14 Convention does not supply a different rule,
15 such as FAA Section 6 and 7 which govern motions
16 and witnesses.

17 The Convention, however, does provide
18 its own rule for enforcing arbitration
19 agreements and, therefore, that rule controls.

20 The second corollary also discussed is
21 that enforcement by a party under the Convention
22 includes its privities, under principles
23 well-known to and even discussed by the
24 Convention drafters.

25 Those principles differ categorically

1 from the broad modern estoppel doctrines that GE
2 is trying to invoke here.

3 JUSTICE GORSUCH: Mr. Hacker, I'm
4 sorry to interrupt you, but I did want to spin
5 back a little bit. Did I understand you to say
6 as a matter of domestic law you would agree that
7 -- that this contract could be enforced by GE
8 under equitable estoppel or did I mishear you?

9 MR. HACKER: I -- I hope you misheard
10 me.

11 JUSTICE GORSUCH: Okay.

12 MR. HACKER: I definitely did not --
13 did not believe this contract can be enforced by
14 GE. The arbitration clause cannot be enforced
15 by GE because GE is not a party to the contract
16 and is not a party to the arbitration clause.
17 And this goes to Justice Breyer's question, I
18 think, about the sort of more narrow ground.

19 JUSTICE GORSUCH: I thought you said
20 at the first part Arthur Andersen and, yes,
21 there would be a real question here but it's --
22 there's no real question here because of the
23 Convention.

24 MR. HACKER: That's -- in a domestic
25 arbitration case Arthur Andersen would -- would

1 control and you'd ask whether the controlling
2 state law allowed for equitable estoppel.

3 JUSTICE GORSUCH: Okay.

4 MR. HACKER: This is not a domestic
5 arbitration.

6 JUSTICE GORSUCH: Okay. So under
7 domestic arbitration rules, there would be a
8 real live question here?

9 MR. HACKER: You'd look to do --
10 applicable state law, there's no applicable
11 state law here, it's German law and you would
12 have to determine whether or not equitable
13 estoppel applied here. This case is governed by
14 the Convention which it supplies its own rule --

15 JUSTICE GORSUCH: But -- but for the
16 Convention, despite the international character
17 of this agreement, we would have a choice of law
18 problem undoubtedly but we'd find some choice of
19 law, look and see whether equitable estoppel is
20 a permissible argument to be made in an
21 arbitration case like this?

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

24 JUSTICE GORSUCH: If it weren't
25 governed by the Convention, but for the

1 Convention --

2 MR. HACKER: Right.

3 JUSTICE GORSUCH: -- it would be a
4 choice of law problem?

5 MR. HACKER: Yes.

6 JUSTICE GORSUCH: Okay.

7 MR. HACKER: That would be the first
8 question, choice of law. The second question
9 would be whether the law authorizes. This is a
10 Convention case --

11 JUSTICE SOTOMAYOR: Would this be a
12 question under regular estoppel rules? Forget
13 about equitable estoppel. Would they have a
14 potential claim under estoppel rules?

15 MR. HACKER: No.

16 JUSTICE SOTOMAYOR: Why not?

17 MR. HACKER: Because traditional --

18 JUSTICE SOTOMAYOR: They are defined
19 as sellers in the contract. Why wouldn't
20 estoppel rules, not equitable rules, but mere
21 estoppel rules make them a seller?

22 MR. HACKER: All right. So --

23 JUSTICE SOTOMAYOR: You signed a
24 contract. You agreed to arbitrate with the
25 sellers. Sellers were defined as a list of sub

1 -- subcontractors or sub-suppliers. They --
2 they were among those. Why wouldn't estoppel
3 stop you, normal estoppel rules?

4 MR. HACKER: If I can separate that
5 out. Two questions. First of all, they are not
6 a party to that arbitration clause. And when I
7 show you why they're not a party to the
8 arbitration clause, that's going to answer the
9 question why --

10 JUSTICE SOTOMAYOR: Why?

11 MR. HACKER: -- they're not a party to
12 the arbitration clause, because as we know,
13 under international law, arbitration clauses are
14 separable from the rest of the contract. You
15 don't look to the contract generally to
16 determine who is a party to the arbitration
17 clause; you have to look to the clause itself.

18 Look at -- start with common sense
19 about what's going on in that contract. If
20 subcontractors are defined for all purposes and
21 defined for purposes of the arbitration clause,
22 as parties to the arbitration clause, it's a
23 bilateral agreement. Right? You've got a
24 thousand subcontractors on site including local
25 dry-wallers, paint suppliers, maintenance guys.

1 If all of them are agreeing implicitly --

2 JUSTICE SOTOMAYOR: When seller -- I'm
3 reading the contract. When "seller" is
4 mentioned, it shall be understood as
5 subcontractors, and a million or not, included,
6 except if expressly stated otherwise.

7 Where in the arbitration clause are
8 they expressly stated otherwise?

9 MR. HACKER: They're not stated
10 otherwise in the arbitration clause, except that
11 the arbitration clause is separable. And
12 remember, Your Honor, remember, this is so
13 important, Your Honor --

14 JUSTICE SOTOMAYOR: So what?

15 MR. HACKER: Because --

16 JUSTICE SOTOMAYOR: Who are the
17 parties -- where does it say that subcontractors
18 are not sellers for purposes of the arbitration
19 clause?

20 MR. HACKER: It doesn't say it in the
21 arbitration clause but we know, we know, Your
22 Honor, that "seller" doesn't actually mean
23 subcontractor everywhere in the contract. The
24 next paragraph, literally after the one you're
25 quoting, says that the seller has to construct

1 the whole mill. That can't be all the
2 subcontractors.

3 Article 6 of the agreement says that
4 the seller receives all kinds of payments from
5 Outokumpu. We know that not all the --

6 JUSTICE GORSUCH: I know --

7 MR. ELLIS: -- subcontractors receive
8 --

9 JUSTICE GORSUCH: I understand --

10 MR. ELLIS: -- all the payments.

11 JUSTICE GORSUCH: -- these are good
12 arguments, but it -- it seems to me that it's
13 one thing to say we're going to force all these
14 suppliers into arbitration, compel them without
15 their consent. That -- that would be -- that
16 would be one -- one thing.

17 But it's quite another to say that you
18 -- you agree -- you agreed to this contract,
19 where they can -- they can bring arbitration
20 against you. And there's no consent problem
21 there, it seems to me.

22 You've -- you've consented -- this is
23 the scope of your consent, we have to address,
24 but the idea that you consented to something
25 seems hard to dispute, isn't it, as a matter of

1 domestic law?

2 MR. HACKER: I -- Well, I --

3 JUSTICE GORSUCH: I think that's
4 Justice Sotomayor's point.

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

12 JUSTICE BREYER: Here is where. And I
13 -- to do this, I want your reaction.

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

20 And what the third says is that the
21 court shall, at the request of one of the
22 parties, emphasize, refer the matter to
23 arbitration.

24 But you, yourself, say sometimes a
25 person who is not a party can force you to go to

1 arbitration. That person you call a privity, a
2 word full of obscurity.

3 (Laughter.)

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

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

20 So it sounds what we're really arguing
21 about is this the kind of estoppel and are these
22 the circumstances of estoppel that will put your
23 adversary in the shoes of a party? If I am
24 right -- and you're nodding your head, which is
25 a good sign --

1 MR. HACKER: Nodding only that I
2 understand your question.

3 JUSTICE BREYER: Oh, okay.

4 (Laughter.)

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

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

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

22 MR. HACKER: So the answer is I don't
23 think "stand in the shoes" is any more clear
24 than --

25 JUSTICE BREYER: Oh, no, it isn't but

1 it doesn't purport to be.

2 (Laughter.)

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

12 JUSTICE ALITO: What do we --

13 MR. HACKER: And that is a very easy
14 and clear line.

15 JUSTICE ALITO: What do we have to
16 decide? The -- the Eleventh Circuit said a
17 non-signatory can never enforce, right?

18 MR. HACKER: Not quite, no.

19 JUSTICE ALITO: It said a
20 non-signatory cannot enforce.

21 MR. HACKER: It -- it said
22 non-signatories include their privities. It
23 said it twice, and so we know from the Eleventh
24 Circuit's rule that that includes privities.
25 And so this Court could be clearer about that,

1 but the Eleventh Circuit was absolutely correct.

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

10 The question was whether there was a
11 written agreement or they were -- they should
12 have been whether they were privity with a --

13 JUSTICE ALITO: Well, How does this --

14 MR. HACKER: -- party to the
15 agreement.

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

21 MR. HACKER: Well, I -- it's not
22 limited to Anglo-American law. There are
23 different types of privity doctrines recognized
24 throughout the world.

25 JUSTICE ALITO: Okay, well, what's the

1 doctrine of privity under German law?

2 MR. HACKER: I -- I don't know what
3 the German word is, but I'm sure it's extremely
4 long.

5 (Laughter.)

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

8 JUSTICE ALITO: What is it under
9 Japanese law?

10 MR. HACKER: The question -- the
11 question being asked under whatever, you know,
12 privity rules you're invoking are, is this party
13 the same party for some reason as a signatory?
14 That's not the question that is raised by the
15 equitable estoppel claim that GE is raising.
16 It's a fundamentally different question about --
17 I agree, I am not a signatory, I am not in
18 privity with a signatory; I just want to make
19 them enforce -- make them arbitrate with me
20 because... because it's more convenient to, it
21 seems efficient, it seems fair, whatever rules,
22 you know, the local jurisdiction might invoke.
23 They want to say those local rules, the
24 equitable, fairness, justice principles of a
25 given state, can trump what the Convention says,

1 at least in a Convention-governed arbitration,
2 the Convention says it's supposed to be a
3 written agreement between the parties.

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

11 MR. HACKER: I -- I understand.

12 JUSTICE GORSUCH: So -- so what do you
13 do about -- do about that, Number 1? And Number
14 2, in a completely different line -- and take
15 them as you choose, okay -- normally when we
16 interpret treaties to bind domestic law, we
17 require a pretty clear statement when -- when
18 we're staying Congress's hand in an area.

19 And if the FAA, hypothetically -- and
20 I'm not passing on it; we don't need to -- were
21 to allow equitable estoppel doctrine and the
22 Convention didn't allow domestic law to do that,
23 wouldn't we require a clearer statement than
24 what we have here?

25 MR. HACKER: Let me answer the first

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

12 So I think that's the clear answer.

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

18 MR. HACKER: Because they're --

19 JUSTICE GORSUCH: -- who may not have
20 strictly consented. Alter-ego theory,
21 veil-piercing theory. It's -- it's a fiction to
22 call that consent.

23 MR. HACKER: I disagree, Your Honor,
24 because what -- what you have is a consent -- a
25 written agreement between parties. And the

1 counterparty in that situation is agreeing to
2 arbitrate with, you know, Fives. Whoever Fives
3 is defined as, they're arbitrating with Fives
4 and whoever stands in Fives' shoes. That is a
5 fundamentally -- there's consent there, there's
6 a written agreement there, and the doctrines
7 that international law recognizes for
8 determining who properly stands in Fives' shoes.

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

24 JUSTICE KAGAN: Mr. Hacker, sorry --

25 MR. HACKER: Please.

1 JUSTICE KAGAN: Did you --

2 MR. HACKER: No, go ahead.

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

7 MR. HACKER: That's correct.

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

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

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

25 That comes out of Article II(1), which

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

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

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

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

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

22 MR. HACKER: Correct.

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

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

5 JUSTICE GORSUCH: But counsel --

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

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

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

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

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

24 JUSTICE GORSUCH: Forget about within
25 the context of the Convention.

1 MR. HACKER: Right.

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

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

8 JUSTICE BREYER: Here --

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

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

24 Chapter 2 is the only place you can
25 go. And Chapter 2 says the Convention

1 proscribes the controlling law, you know, unless
2 Chapter 1 -- so long as it is conflicting. And
3 we know that the Convention is conflicting with
4 Chapter 1 because the Convention proscribes,
5 requires for Convention-governed agreements, a
6 written agreement, that can be enforced only by
7 the parties to the written agreement. It
8 differs from Chapter 1 in that respect.

9 JUSTICE GINSBURG: Can you tell us
10 what is --

11 MR. HACKER: There is no Chapter 1
12 here that --

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

18 MR. HACKER: Dusseldorf.

19 JUSTICE GINSBURG: I see. But then
20 there is also this proceeding in the Alabama
21 Supreme -- in Alabama state trial court. And is
22 that proceeding going forward?

23 MR. HACKER: Yes.

24 JUSTICE GINSBURG: So you have two
25 cases, which in the best of all possible worlds

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

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

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

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

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

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

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

12 JUSTICE BREYER: I'm interested in --
13 you want to read that sentence 3 as the ceiling.
14 You know what I am talking about?

15 MR. HACKER: The Article II --

16 JUSTICE BREYER: Yeah, Article II --

17 MR. HACKER: -- paragraph 3.

18 JUSTICE BREYER: -- sentence 3 as a
19 ceiling. All right.

20 MR. HACKER: Well -- the whole --

21 JUSTICE BREYER: Yeah, but then the
22 word "privity" doesn't appear there, you know,
23 so you say almost a ceiling. No. Almost a
24 party. No. Party plus privity. And I say:
25 Well, now, I'm sitting here, can I think of some

1 cases that are hard to squeeze into the term
2 "privity" but it sounds as if they should be
3 able to stand in the shoes of the party?

4 Smith makes a contract with Jones. He
5 says: You know, Jones, this is for the benefit
6 of my daughter when she's 35. This will help
7 her a lot. And I want her to be able to enforce
8 it.

9 And I want her to be able to go to
10 arbitration. I love arbitration. Jones writes
11 back to the letter: I agree with you, of course
12 you can enforce it in arbitration. I love
13 arbitration too.

14 (Laughter.)

15 JUSTICE BREYER: Don't worry. Go
16 ahead and sign. So he signs. And now the
17 daughter wants to go to arbitration after she's
18 35. Well, that's a pretty strong case for
19 estoppel.

20 And it's very hard to call the
21 daughter a privity. So I've tried to think of a
22 case where, does that sentence forbid that? No.
23 Because you can't either call the daughter a
24 privity, which sounds like a stretch, or you
25 could say that is not a ceiling but it does pick

1 up domestic law on this matter. And, by and
2 large, when the domestic law allows a
3 non-signatory to enforce an arbitration clause
4 against a signatory, this doesn't forbid it.

5 Now, what about that approach?

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

20 JUSTICE BREYER: All right.

21 MR. HACKER: -- required to --

22 JUSTICE BREYER: He had a list about a
23 thousand miles long, it seemed to me, of
24 authorities, cases, professors, and others who
25 say all these other people have enforced that

1 particular sentence in a way that it allows at
2 least some, perhaps not all, of those who are
3 hard to call privities to enforce under certain
4 circumstances and this is one. What do you say?

5 MR. HACKER: The circumstance in which
6 it is widely and I would say essentially
7 universally recognized is only one. It's not
8 the one Your Honor describes. It is the
9 situation where a party begins or has even
10 completed arbitration and then -- or an entity
11 begins or completes arbitration and then later
12 says I wasn't a party, I don't want to be
13 subject to the results of this arbitration.

14 That's a situation where courts,
15 international decisions have recognized they can
16 be held to it but it is not really an
17 estoppel/contract doctrine. What Justice
18 Alito's opinion in the case in Minmetals
19 described it as is really a waiver doctrine or
20 forfeiture doctrine.

21 That's how the English Court in
22 Peterson Farms described it, that's how the UK
23 High Court in Dallah described it. It's really
24 forfeiture or waiver. It's not some opening the
25 door to all kinds of situations when it sort of

1 seems fair to let an unwilling party to force an
2 unwilling party to arbitrate.

3 And think about the consequences of
4 doing that. The Todd case that I believe
5 Justice Ginsburg raised exemplifies the problems
6 that you have if you just say -- if -- if it's
7 connected to the contract in some way.

8 Remember we had the earlier discussion
9 from the earlier argument, the word "involves"
10 can, you know, extend to the -- the limits of
11 the universe. Well, so can something that's
12 related to the -- you know, to a contract can
13 extend to no limit.

14 And that's what happened in the Todd
15 case where a sailor was injured while working on
16 a ship, couldn't recover against his immediate
17 employer because the employer went bankrupt or
18 in some way couldn't -- wouldn't pay the
19 employer for his personal injuries. And so he
20 went against the employer's principal, the
21 guarantor, and the guarantor said: Well, your
22 claim for injury on a ship is connected to this
23 contract I have with the -- the -- the ship
24 owner. And that contract has an arbitration
25 agreement.

1 And so you have to arbitrate with me
2 overseas over your personal injury.

3 That's exactly the problem with
4 opening the door to U.S. modern equitable
5 estoppel that is divorced from the contract
6 terms and divorced from a situation when you're
7 really talking about a waiver where somebody has
8 engaged in arbitration.

9 That's the limited circumstance. It's
10 not any kind of gerrymander. It's simply
11 adhering to the same text of the Convention,
12 which for Convention-governed cases requires a
13 written agreement and limits enforcement of the
14 written agreement to the parties to the
15 agreement.

16 Let me make one other point about the
17 language of Article II, paragraph 3. Justice
18 Kagan's absolutely correct that "parties," the
19 second use of "parties," pretty clearly is
20 referring to the parties to the agreement. If
21 there is any doubt about that, look at the
22 Spanish versions of the Convention, look at the
23 French versions of the Convention, which you'll
24 find at paragraphs or pages 11A and 20A of our
25 brief.

1 It actually says "of them." It
2 doesn't say "of the parties." It says "of
3 them," immediately referring back to the parties
4 to the written agreement.

5 So there is really no ambiguity
6 whatsoever there. This, unlike FAA Section 3
7 addressed in Andersen limits enforcement to the
8 parties to the written agreement.

9 That's only in Convention-governing
10 cases, Justice Gorsuch. The point is it's
11 possible for a state to adopt a separate law,
12 like Peru did, and subject parties to
13 arbitration, unwilling parties to arbitration on
14 whatever terms a state feels like.

15 That's not what the United States has
16 done. And the consequence of doing that is that
17 you lose the automatic enforcement benefits,
18 virtually automatic enforcement benefits
19 promised by Article V.

20 The last two points that I would make
21 are recall that extension to non-parties, all
22 the commentators, I think the United States too,
23 says the extension of an arbitration agreement
24 to non-parties is supposed to be rare. It's
25 supposed to be the exception that you almost

1 never see.

2 Under the doctrine GE wants you to
3 adopt under U.S. law or under international law,
4 essentially all subcontractors would suddenly be
5 able to arbitrate, even absent a written
6 agreement with the subcontractor because
7 basically a claim between the subcontractor and
8 the principle is in some way going to be
9 connected to -- to involve the contract.

10 So you completely erase the idea that
11 this kind of enforcement is supposed to be rare,
12 supposed to be -- be the exception, essentially
13 be the rule in all construction cases.

14 The other point I would remind the
15 Court about its own decision in the Scherk case.
16 It says the purpose of the Convention is to
17 "unify the standards" for recognizing agreements
18 and enforcing awards. I submit, Your Honors,
19 there is only one way to make the standards
20 uniform and that is to respect, adhere to, and
21 enforce the uniform textual words of the
22 Convention.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Two minutes, Mr. Dvoretzky.

2 REBUTTAL ARGUMENT OF SHAY DVORETZKY

3 ON BEHALF OF THE PETITIONER

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

7 First, there's an international
8 consensus in favor of non-signatory enforcement
9 generally. And there are numerous international
10 cases that allow non-signatory enforcement on
11 facts like these.

12 The Titan Unity case from Singapore,
13 there are cases from France and Switzerland, all
14 of these are very similar. You have a situation
15 where A contracts with B and C actually performs
16 the contract. And in those situations because C
17 is involved in performing A and B's contract, C
18 can enforce the arbitration agreement if sued by
19 one of the parties to the contract.

20 So Singapore, France, Switzerland and
21 other case -- cases cited in the briefs.

22 Justice Sotomayor, you were looking
23 for a limiting principle. I think there are
24 limiting principles to equitable estoppel under
25 domestic law but the Convention just doesn't

1 speak to them.

2 Third, Mr. Hacker argues that Congress
3 in effect adopts -- I'm sorry?

4 JUSTICE SOTOMAYOR: What are they?

5 MR. DVORETZKY: It would depend on the
6 contours of state law, but presumably state law
7 would not allow you to tag a random person on
8 the street with no connection to the contract
9 and say you're equitably estopped. There has to
10 be a factual basis for the estoppel. And here
11 there is for the reasons that we have been
12 discussing.

13 Mr. Hacker argues that Congress
14 adopted the Convention as both a floor and a
15 ceiling for U.S. law. That's simply not what
16 Congress did in Chapter 2.

17 It created federal jurisdiction where
18 the agreement falls under the Convention, and
19 then under 9 U.S.C. 206, if you have an
20 agreement that falls under the Convention, a
21 federal court exercising its jurisdiction can
22 compel arbitration.

23 It would do so by looking to domestic
24 principles about when enforcement is proper.

25 So in terms of how this case can be

1 resolved, there's -- the narrowest possible way,
2 is to simply hold that the Eleventh Circuit was
3 wrong to -- to apply a signatory requirement, at
4 Petition Appendix 15A to 16A, the Eleventh
5 Circuit recounts the district court's finding
6 that we were parties but says the reason we
7 can't enforce is that we didn't actually sign.

8 I think that's demonstrably wrong and
9 the narrowest possible way is to send it back
10 for that reason. If the Court wants to provide
11 additional guidance, there are two ways to do
12 that, I think. One is to hold that the
13 Convention provides a floor, not a ceiling. I
14 think that that follows from the text of the
15 Convention, and also from international
16 understanding.

17 CHIEF JUSTICE ROBERTS: The second?

18 MR. DVORETZKY: The second way to
19 resolve it, as Justice Sotomayor was suggesting,
20 the term parties in Article II(3) is undefined.
21 Domestic law fills that gap, as it does for many
22 other things under the Convention, terms like
23 "null and void," "incapable of being performed."
24 Those are not defined by the Convention but the
25 Convention looks to domestic law, as it does for

1 parties.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 12:10 p.m., the case
5 was submitted.)

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