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GE ENERGY V. OUTOKUMPU: NON-SIGNATORIES CAN NOW ENFORCE INTERNATIONAL COMMERCIAL ARBITRATION AGREEMENTS ON EQUITABLE ESTOPPEL GROUNDS

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I. Introduction

The recent unanimous decision of the United States Supreme Court ("Supreme Court" or "Court") in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*[1] ("*Outokumpu*") resolves a relatively straightforward question: whether a non-signatory to an international commercial arbitration agreement can enforce it on the basis of the equitable estoppel doctrine. The United States Courts of Appeals for the Eleventh[2] and Ninth[3] Circuits had categorically ruled out the availability of equitable estoppel in this context. In contrast, the First[4] and Fourth[5] Circuits had applied the doctrine to enforce international commercial arbitration agreements by or against non-signatories. Answering the question in the affirmative and reversing the Eleventh Circuit, the Supreme Court has now resolved this split among the circuit courts. Its decision also brings much-needed clarity and predictability to the enforcement of international commercial arbitration agreements in the United States. However, in its narrow judgment the Supreme Court left unresolved two related and equally contentious questions: first, whether international commercial arbitration agreements must be signed to be valid and enforceable in the

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[1] GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S.Ct. 1637, 1640 (2020).

[2] Outokumpu Stainless USA, LLC v. GE Energy Power Conversion Fr. SAS, Corp., 902 F.3d 1316, 1326 (11th Cir. 2018) ("to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities."), rev'd 140 S.Ct. 1637 (2020).

[3] Yang v. Majestic Blue Fisheries, LLC, 876 F.3d 996, 1001 (9th Cir. 2017) ("the Convention Treaty does not allow non-signatories or non-parties to compel arbitration", including on the grounds of equitable estoppel).

[4] Sourcing Unlimited, Inc. v. Asimco Int'l, Inc., 526 F.3d 38, 40 (1st Cir. 2008) (the court found that a signatory to the arbitration agreement in this case was equitably estopped from refusing to arbitrate with a non-signatory, noting that "[t]he fact that the defendants are not signatories is not a basis on which arbitration may be denied.").

[5] Aggarao v. MOL Ship Mgmt. Co., Ltd., 675 F.3d 355, 375 (4th Cir. 2012) ("the doctrine of equitable estoppel applies" to claims raised by a signatory to the arbitration agreement against a non-signatory).

United States,[6] and second, how the equitable estoppel doctrine is to be formulated in this context and whether state or federal law governs its application.[7]

A brief introduction to international commercial arbitration in the United States will set the stage for further discussion of *Outokumpu* and these lingering questions. Congress enacted the Federal Arbitration Act ("FAA" or "Act")[8] to govern the enforcement of arbitration agreements falling within its jurisdiction. Chapter 1 of the Act governs domestic arbitration agreements, while Chapter 2 incorporates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention"),[9] which governs the enforcement of international commercial arbitration agreements and awards. Chapter 1 of the FAA also applies to actions and proceedings brought under Chapter 2 to the extent that Chapter 1 is not "in conflict" with Chapter 2 or the New York Convention.[10]

The Supreme Court has consistently interpreted the FAA as embodying a "liberal federal policy favoring arbitration agreements,"[11] and as creating "a body of federal substantive law"[12] that requires arbitration agreements to be placed "upon the same footing as other contracts."[13] Moreover, "[t]he goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and . . . enforced in the signatory countries."[14] In line with this pro-arbitration approach, the Supreme Court in *Outokumpu* held that non-signatories can rely on the equitable estoppel doctrine to enforce international commercial arbitration agreements under the Convention. However, two related questions that have long been the subject of contradictory circuit court decisions remain unresolved in the Court's opinion.

The first question is antecedent to the equitable estoppel issue and relates to the "in writing"[15] requirement of Article II(1) of the New York Convention. Article II(1) provides that the "[c]ontracting State shall recognize an [arbitration] agreement in writing."[16] The term "in writing"[17] is in turn defined in Article II(2) as including "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Circuit courts have not consistently interpreted the Convention's "in writing" requirement. The

[6] Tamar Meshel, *Caught Between the FAA and the New York Convention: Non-Signatories to International Commercial Arbitration Agreements and the 'In Writing' Requirement*, 22 U. PA. J. BUS. L 677 (2020).

[7] Tamar Meshel, *Of International Commercial Arbitration, Non-Signatories, and American Federalism: The Case for a Federal Equitable Estoppel Rule*, 56(2) S. J. INT'L. 123 (2020).

[8] 9 U.S.C.A. §§ 1 *et seq*.

[9] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 2, Jun. 10, 1958, 21.3 U.S.T. 2517, 330 U.N.T.S. 3; *see also* 9 U.S.C.A. § 201 ("[t]he Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."); 9 U.S.C.A. § 203 ("[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.").

[10] 9 U.S.C.A. § 208.

[11] Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[12] *Id.*

[13] Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 (2009).

[14] Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.15 (1974).

[15] *Supra* note 10.

[16] *Id.*

[17] *Id.*

Second,[18] Third,[19] Ninth,[20] and Eleventh[21] Circuits have found that the Convention requires an actual signature for an international commercial arbitration agreement to be valid. The First,[22] Fourth,[23] and Fifth[24] Circuits, in contrast, have not insisted on a strict signature requirement and have enforced international commercial arbitration agreements on the basis of various contract and agency principles. The Supreme Court's decision in *Outokumpu* may be interpreted as effectively siding with the latter circuit courts on this question. After all, how can courts continue to impose a strict signature requirement when the Supreme Court has allowed non-signatories to rely on equitable estoppel under the Convention? Nonetheless, the Court explicitly declined to decide "whether Article II(2) requires a signed agreement."[25]

The second question, which the Supreme Court left to the Eleventh Circuit to determine on remand, arises from the Court's holding that non-signatories can enforce international commercial arbitration agreements on the basis of equitable estoppel. This question relates to the specific formulation of the equitable estoppel doctrine in this context and to "which body of law"[26] governs its application—federal or state law. In her concurring opinion, Justice Sotomayor noted the varied formulations of the doctrine across jurisdictions, but she would leave lower courts to determine the matter "on a case-by-case basis."[27] The general understanding has been that courts are to apply "ordinary state law principles that govern the formation of contracts"[28] to the enforcement of *domestic* arbitration agreements under Chapter 1 of the FAA. However, circuit courts have divided as to whether federal common law or state law governs the application of equitable estoppel in the *international* context. The First,[29] Second,[30] and Fourth[31] Circuits have applied federal law to

[18] Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., 186 F.3d 210, 218 (2d Cir. 1999) ("the Convention requires that 'an arbitral clause in a contract' be 'signed by the parties or contained in an exchange of letters or telegrams.'").

[19] Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 449 (3d Cir. 2003) ("the plain language [of the Convention] provides that an arbitration clause is enforceable only if it was contained in a signed writing or an exchange of letters.").

[20] Yang v. Majestic Blue Fisheries, LLC, 876 F.3d 996, 1001 (9th Cir. 2017) ("the Convention Act requires . . . that the litigant prove the agreement is in writing and 'signed by the parties.'").

[21] Outokumpu Stainless USA, LLC, 902 F.3d at 1318.

[22] Sourcing Unlimited, Inc. v. Asimco Int'l, Inc., 526 F.3d 38, 45 (1st Cir. 2008) ("We do not read anything in the language of Chapter 2 to suggest that a party seeking an appeal from an order denying international arbitration must have signed a written arbitration agreement firsthand.").

[23] Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000) ("a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause.").

[24] Todd v. Steamship Mut. Underwriting Ass'n (Bermuda) Ltd., 601 F.3d 329, 336 n.11 (5th Cir. 2010) ("an arbitration clause in a contract provides an 'agreement in writing' that satisfies the Convention, even when the party being forced to arbitrate has not signed the contract.").

[25] GE Energy Power Conversion France SAS, Corp., 140 S.Ct. at 1648, n.3.

[26] *Id*. at 1648.

[27] *Id*. at 1649 (Sotomayor, J., concurring).

[28] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

[29] InterGen N.V. v. Grina, 344 F.3d 134, 143 (1st Cir. 2003) ("As between state law and federal common law, we conclude that uniform federal standards are appropriate.").

[30] Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc., 198 F.3d 89, 96 (2d Cir. 1999) ("When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable.").

[31] Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 420 n.4 (4th Cir. 2000) ("Because the determination of whether International Paper, a nonsignatory, is bound by the . . . contract presents no state law question of contract formation or validity, we look to the 'federal substantive law of arbitrability' to resolve this question.").

address this question, while the Fifth[32] and Eight[33] Circuits have held that state law governs the enforcement of international arbitration agreements on the basis of doctrines such as equitable estoppel. The Supreme Court's opinion in *Outokumpu* is ambiguous on this question.

This Note will next summarize the facts of the *Outokumpu* case and the lower courts' judgments. It will then turn to the opinion of the Supreme Court and discuss both the questions the Court decided and the questions that it left unanswered or ambiguous.

II. Facts and the Lower Courts' Judgments

The respondent, Outokumpu—a steel plant operator in Alabama—entered into three contracts with Fives—an American subsidiary of a French corporation—to provide it with three cold rolling mills (the "Contracts"). Each mill required three motors, and Fives subcontracted with petitioner GE Energy—a foreign entity—to design, manufacture, and supply all nine motors. The Contracts defined Outokumpu as the "Buyer" and Fives as the "Seller" and referred to them collectively as the "Parties." The Contracts further provided that "[w]hen Seller is mentioned it shall be understood as Sub-contractors included, except if expressly stated otherwise,"[34] and "Sub-contractor" was defined as "any person (other than the Seller) used by the Seller for the supply of any part of the Contract Equipment, or any person to whom any part of the Contract has been sub-let by the Seller[.]"[35] Appended to the Contracts was a subcontractor list that enumerated the "mandatory" vendors from which Fives could select suppliers, including GE Energy. Each Contract also contained an arbitration clause providing that "[a]ll disputes arising between both parties in connection with or in the performance of the Contract . . . shall be submitted to arbitration for settlement."[36] Any arbitration was to "take place in Dusseldorf, Germany in accordance with the Rules of Arbitration of the International Chamber of Commerce," and in accordance with the substantive law of Germany.[37]

The mill motors failed, and Outokumpu sued GE Energy in the Circuit Court of Mobile County, Alabama. GE Energy removed the suit to the federal district court pursuant to § 205 of the FAA, which permits the removal of an action from state to federal court if the action "relates to an arbitration agreement . . . falling under the Convention."[38] GE Energy then moved to dismiss and compel arbitration on the basis of the arbitration agreement in the Contracts between Outokumpu and Fives.

The District Court noted that it must be "mindful that the [FAA] generally establishes a strong presumption in favor of arbitration of international commercial disputes."[39] Accordingly, in determining whether to compel arbitration under the FAA, "a district court conducts 'a very limited inquiry'"[40] as to whether or not an international arbitration agreement falls under the New York

[32] Todd v. Steamship Mut. Underwriting Ass'n (Bermuda) Ltd., 601 F.3d 329, 336 (5th Cir. 2010) ("the Supreme Court made clear that state law controls whether an arbitration clause can apply to nonsignatories.").

[33] Reid v. Doe Run Resources Corp., 701 F.3d 840, 846 (8th Cir. 2012) ("State contract law determines which claims are enforceable under § 3" of the FAA).

[34] Outokumpu Stainless USA, LLC, 902 F.3d at 1321.

[35] *Id*. at 1320.

[36] *Id*. at 1320-21.

[37] *Id*. at 1321.

[38] *Id*. at 1322. 9 U.S.C. § 205.

[39] Outokumpu Stainless USA, LLC v. Converteam SAS, No. 16-00378-KD-C, 2017 WL 480716, at *3 (S.D. Ala. Feb. 3, 2017) (quoting Escobar v. Celebration Cruise Operator Inc., 805 F.3d 1279, 1285 (11th Cir. 2015)).

[40] *Id.*

Convention. The District Court held, on the basis of generally accepted principles of contract law, that GE Energy was a "party" to the Contracts since "Seller" included "Subcontractors," and therefore that Outokumpu and GE Energy had an agreement "in writing" within the meaning of Article II(2) of the Convention. The District Court accordingly granted GE Energy's motion to compel arbitration. Having found that both Outokumpu and GE Energy were "parties" to the Contracts containing the arbitration agreement, the Court did not address GE Energy's argument that it could enforce the agreement on the basis of equitable estoppel.

The Eleventh Circuit reversed the District Court's order compelling arbitration, finding that it wrongly decided that GE Energy was a "party" to the Contracts. Moreover, the Eleventh Circuit noted that GE Energy "cannot avoid U.S. and international arbitration law that require that the parties sign an agreement to arbitrate the dispute between them."[41] "Private parties," the Court of Appeals noted, "cannot contract around the Convention's requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration."[42] Since the Contracts were signed by Outokumpu and Fives at a time when GE Energy was "at most, a potential subcontractor," the Eleventh Circuit concluded that GE Energy was "undeniably not a signatory to the Contracts."[43] It also rejected GE Energy's equitable estoppel argument. The Court of Appeals recognized that non-signatories could rely on equitable estoppel to enforce *domestic* arbitration agreements under Chapter 1 of the FAA. But since Article II(2) of the Convention requires parties to sign international arbitration agreements, the Eleventh Circuit found that it prohibits their enforcement on equitable estoppel grounds. To allow GE Energy to enforce the arbitration agreement on such grounds under Chapter 1 of the FAA would thus be "in conflict" with the Convention.[44] GE Energy appealed the Eleventh Circuit's decision to the Supreme Court.[45]

III. The Supreme Court's Opinion

The question addressed by the Supreme Court was "whether the Convention . . . conflicts with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories."[46] On June 1, 2020, the Court issued a brief unanimous opinion in the case, delivered by Justice Thomas, with Justice Sotomayor filing a concurring opinion.

The Court first recalled that Chapter 1 of the FAA does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)."[47] These "traditional principles of state law"[48] include "doctrines that authorize the enforcement of a contract by a nonsignatory,"[49] such as equitable estoppel. Moreover, so long as Chapter 1 is not "in conflict" with Chapter 2 of the FAA or the New York Convention, it applies

[41] Outokumpu Stainless USA, LLC, 902 F.3d at 1326.
[42] *Id*.
[43] *Id*.
[44] 9 U.S.C. § 208.
[45] *See generally* Petition for Writ of Certiorari, GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637 (2020) (No. 18-1048).
[46] GE Energy Power Conversion France SAS, Corp., 140 S. Ct. at 1642 .
[47] *Id*. at 1643 (quoting Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 (2009)).
[48] *Id*.
[49] *Id*.

to actions brought under Chapter 2.[50] The Court then turned to examine the New York Convention and its requirements.

The Court noted that the Convention "focuses almost entirely on arbitral awards,"[51] with only Article II addressing international arbitration agreements. The Court proceeded to apply "familiar tools of treaty interpretation"[52] to determine whether the application of equitable estoppel under Chapter 1 of the FAA conflicts with Article II of the New York Convention.

Beginning with the text of the Article, the Court noted that it is silent on the issue of nonsignatory enforcement. Article II(3), the only provision addressing the enforcement of arbitration agreements, provides that courts of a contracting state "'shall . . . refer the parties to arbitration' when the parties to an action entered into a written agreement to arbitrate," but the Court noted that it "does not restrict contracting states from applying domestic law to refer parties to arbitration in other circumstances."[53] Since this provision "does not prevent the application of domestic laws that are more generous in enforcing arbitration agreements," the Court found that "it would be unnatural to read Article II(3) to displace domestic doctrines in the absence of exclusionary language."[54] Examining Article II as a whole, the Court further found that it contemplates "the use of domestic doctrines to fill gaps in the Convention," rather than the displacement of domestic law.[55] Therefore, the Court concluded that the Convention could not be read to "prohibit the application of domestic equitable estoppel doctrines," and nothing in its text "'conflict[s] with'[56] the application of [such] doctrines permitted under Chapter 1 of the FAA."[57]

The Court then turned to examine the New York Convention's negotiation and drafting history. The Court first rejected Outokumpu's argument that the Convention's drafting history establishes a mandatory "rule of consent evidenced by a written agreement"[58] that "displace[s] varying local laws" and requires party consent to arbitration to be evidenced in writing.[59] Finding that Outokumpu was "cherry-pick[ing] 'generalization[s]'" from the Convention's negotiating and drafting history, the Court held that "nothing in the text of the Convention imposes a 'rule of consent' that displaces domestic law—let alone a rule that allows some domestic-law doctrines and not others."[60] The Court then proceeded to find that the Convention's drafting history "shows only that the drafters sought to impose baseline requirements on contracting states" to prevent them from declining to enforce arbitration agreements "on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements."[61] The Court therefore concluded that "[n]othing in the drafting history suggests that the Convention sought to prevent contracting states from applying domestic law that permits nonsignatories to enforce arbitration agreements in additional circumstances."[62]

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[50] *Id*. at 1644.
[51] *Id*.
[52] *Id*. at 1645.
[53] *Id*.
[54] *Id*. at 1645.
[55] *Id*.
[56] *Id.*
[57] *Id*.
[58] Joint Brief for Respondents at 17, GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S.Ct. 1637 (2020) (No. 18-1048).
[59] GE Energy Power Conversion France SAS, Corp., 140 S.Ct. at 1646.
[60] *Id*.
[61] *Id.* (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974)).
[62] *Id.*

Finally, the Court examined the "'postratification understanding'[63] of other contracting states,"[64] noting that judicial decisions and domestic legislation of such states, as well as a recommendation issued by the United Nations Commission on International Trade Law, all suggest that non-signatories are permitted to enforce international arbitration agreements under the Convention. The Court pointed out that these developments "occurred decades after the finalization of the New York Convention's text in 1958" and that it has not "previously relied on UN recommendations to discern the meaning of treaties."[65] Notwithstanding that these faults diminished "the value of these sources as evidence of the original shared understanding of the treaty's meaning,"[66] the Court concluded that they confirm its finding that the New York Convention "does not prohibit the application of domestic law addressing the enforcement of arbitration agreements."[67]

Turning to the decision of the Eleventh Circuit in this case, the Supreme Court found that the Court of Appeals erred in analyzing whether "Article II(1) and (2) include a 'requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration,'" rather than "whether Article II(3) of the New York Convention conflicts with equitable estoppel."[68] The Court explained that Article II(1) and (2) address "the recognition of arbitration agreements, not who is bound by a recognized agreement[,] . . . [whereas] [o]nly Article II(3) speaks to who may request referral under those agreements, and it does not prohibit the application of domestic law."[69] Since in the present case the Contracts were "both written and signed,"[70] the Court did not address the question, answered in the affirmative by the Eleventh Circuit, "whether Article II(2) requires a signed agreement."[71]

Concluding that "the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines" and reversing the Eleventh Circuit on this point, the Court remanded the case for further proceedings to determine "whether GE Energy could enforce the arbitration clauses under principles of equitable estoppel or which body of law governs that determination."[72]

In a concurring opinion, Justice Sotomayor agreed that the New York Convention "does not categorically prohibit the application of domestic doctrines, such as equitable estoppel, that may permit nonsignatories to enforce arbitration agreements."[73] She cautioned, however, that the application of such domestic doctrines is subject to "an important limitation: Any applicable domestic doctrines must be rooted in the principle of consent to arbitrate."[74] Recalling that "[a]rbitration under the [FAA] is a matter of consent, not coercion,"[75] Justice Sotomayor found that this principle "governs the FAA on the whole," and "constrains any domestic doctrines under

[63] *Id.* (quoting *Medellin v. Texas* 552 U.S. 491, 507 (2008)).
[64] *Id.*
[65] *Id.* at 1647.
[66] *Id.*
[67] *Id.* at 1646.
[68] *Id.* at 1647–48.
[69] *Id.* at 1648.
[70] *Id.*
[71] *Id.* at 1649, n.3.
[72] *Id.* at 1648.
[73] *Id.* (Sotomayor, J., concurring).
[74] *Id.*
[75] *Id.* (quoting Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

Chapter 1 of the FAA that might 'appl[y]' to Convention proceedings."[76] Therefore, "[p]arties seeking to enforce arbitration agreements under Article II of the Convention . . . may not rely on domestic nonsignatory doctrines that fail to reflect consent to arbitrate."[77]

Justice Sotomayor recognized that:

> it is admittedly difficult to articulate a bright-line test for determining whether a particular domestic nonsignatory doctrine reflects consent to arbitrate. That is in no small part because some domestic nonsignatory doctrines vary from jurisdiction to jurisdiction. With equitable estoppel, for instance, one formulation of the doctrine may account for a party's consent to arbitrate while another does not.[78]

However, Justice Sotomayor would leave it to lower courts to determine "on a case-by-case basis, whether applying a domestic nonsignatory doctrine would violate the FAA's inherent consent restriction."[79]

Finally, on the facts of the present case, Justice Sotomayor seemed to agree with the holding of the District Court, noting that she is "skeptical that any domestic nonsignatory doctrines need come into play at all, because Outokumpu appears to have expressly agreed to arbitrate disputes under the relevant contract with subcontractors like GE Energy."[80]

IV. Analysis

The Supreme Court clearly answered in the negative the narrow question of "whether the Convention . . . conflicts with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories."[81] Its decision therefore opens the door for non-signatories to international commercial arbitration agreements falling under the Convention to enforce such agreements against signatories, and potentially also for signatories to enforce such agreements against non-signatories on the basis of the equitable estoppel doctrine. However, because the arbitration agreement in this case was "written and signed,"[82] the Court did not directly address the antecedent question of "whether Article II(2) requires a signed agreement."[83] The Court did distinguish between Article II(3) and Article II(2) of the Convention. Yet this distinction seems artificial, at first glance at least, for how can a non-signatory enforce an arbitration agreement on the basis of equitable estoppel under Article II(3) if that agreement must be "actually sign[ed]" by the parties under Article II(2)?[84]

There are at least two possible reasons for the Court's approach to this threshold signature question. It might be that the Court agreed with the District Court's finding that GE Energy was to be considered a party, *i.e.*, a signatory, to the Contracts in light of its designation as a "Subcontractor." Accepting this finding of fact would mean that the Article II(2) signature

[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 1649, n*.
[81] *Id.* at 1639, *2.
[82] *Id.* at 1648.
[83] *Id.* at n.3.
[84] *Id.* at 1642, *3, 1648.

question was moot in this case, leaving for the Court to determine only the narrower and hypothetical question of whether, in principle, Article II(3) of the Convention prohibits the application of equitable estoppel to enforce international arbitration agreement when these are invoked by non-signatories. This explanation, however, is unlikely. First, the Court's opinion does not explicitly accept this finding of fact, as Justice Sotomayor appears to do in her concurring opinion.[85] Second, at the oral argument the Justices seemed divided on GE Energy's standing to enforce the arbitration agreement, with Chief Justice Roberts and Justice Ginsburg doubting its ability to do so and Justice Sotomayor appearing amenable to it.[86] The reason for the Court's analysis of Article II(3) therefore likely lies elsewhere.

The Contracts in this case were indeed written and signed, but they were signed by Outokumpu and *Fives*. The Eleventh Circuit found this fact to be fatal to GE Energy's claim since it interpreted Article II(2) as requiring that the "parties" to the enforcement action before the court have a written and signed agreement. However, the relevant "parties" to consider in determining whether there is an arbitration agreement "in writing" for the purpose of Article II(2) are the *parties to the agreement*, in this case Outokumpu and Fives, and not the parties to the court action, Outokumpu and GE Energy. Once the Eleventh Circuit concluded that there was a valid arbitration agreement between Outokumpu and Fives, the question of whether GE Energy, as a non-signatory to that agreement, has a right to invoke it relates to the *scope* of the agreement. This question of scope is to be determined on the basis of contract and agency principle, including equitable estoppel. In other words, "[o]nce it is determined that a formally valid arbitration agreement exists, it is a different step to establish the parties which are bound by it."[87]

The Supreme Court recognized this important distinction when it noted that Article II(2) of the Convention addresses "the recognition of arbitration agreements, not who is bound by a recognized agreement," while "[o]nly Article II(3) speaks to who may request referral under those agreements."[88] The Court therefore rightly divorced the *validity* of international commercial arbitration agreements from their *scope*. It did not address the signature requirement in Article II(2) since this requirement goes to the *validity* of the arbitration agreement, while only the *scope* of the agreement under Article II(3) was at issue in this case. Accordingly, GE Energy may have the right to invoke the arbitration agreement contained in Outokumpu and Fives' Contracts if that agreement is otherwise valid, and its validity is entirely independent of GE Energy being a signatory to it. This is a welcome clarification by the Court of the relationship between Article II(2) and Article II(3) of the Convention, albeit without providing a complete answer to the more fundamental question of whether Article II(2) requires a signature for international arbitration agreements to be valid and enforceable.

An examination of "'the postratification understanding' of other contracting states"[89] regarding this issue, as the Supreme Court did regarding Article II(3), reveals that Article II(2)'s "in writing"

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[85] *Id.* at 1648.

[86] Ronald Mann, *Opinion analysis: Justices reject limitations on enforcement of arbitration agreements by nonsignatory businesses*, SCOTUSBLOG (Jun. 2, 2020, 10:59am), https://www.scotusblog.com/2020/06/opinion-analysis-justices-reject-limitations-on-enforcement-of-arbitration-agreements-by-nonsignatory-businesses/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+scotusblog%2FpFXs+%28SCOTUSblog%29.

[87] INT'L COUNCIL FOR COMMERCIAL ARBITRATION, GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES 59 (2011).

[88] GE Energy Power Conversion France SAS, Corp., 140 S.Ct. at 1648.

[89] *Id.* at 1646.

requirement has been interpreted liberally. Some jurisdictions, for instance, do not require international arbitration agreements to be written at all, and some national arbitration laws do not require them to be signed. Many national courts have also interpreted Article II(2) "expansively––readily accepting that there is an agreement in writing—or reading it as merely setting out some examples of what is an agreement 'in writing' within the meaning of Article II(1)."[90] As noted above, circuit courts have been split on Article II(2)'s "in writing" requirement, with some courts requiring a signature for international arbitration agreements to be valid while others willing to enforce such agreements on the basis of contract and agency principles. This split largely remains post-*Outokumpu*.

The Supreme Court also left unanswered the question that naturally arises from its holding that non-signatories can enforce international commercial arbitration agreements on the basis of equitable estoppel: whether state or federal law governs the application of this doctrine and what is its precise formulation.

In the Supreme Court's 2009 decision in *Arthur Andersen LLP* v. *Carlisle*—a domestic arbitration case—the Court conditioned the invocation of equitable estoppel by non-signatories on "whether the relevant state contract law recognizes equitable estoppel as a ground for enforcing contracts against third parties."[91] While some of the circuit courts that have recognized the applicability of equitable estoppel in the international context have continued to apply it as a matter of federal law post-*Carlisle*, other circuit courts have extended the *Carlisle* holding to international arbitration agreements, applying equitable estoppel pursuant to the relevant state law. The Supreme Court's decision in *Outokumpu* may be read as confirming this extension. The Court reiterated its holding in *Carlisle* that "Chapter 1 of the FAA permits a nonsignatory to rely on *state-law* equitable estoppel doctrines to enforce an arbitration agreement."[92] Its reference to "equitable estoppel doctrines"[93] further indicates the availability of multiple state doctrines, rather than one uniform federal doctrine. To the extent that these statements evidence the Court's extension of the *Carlisle* holding to the international context, this would call for the application of equitable estoppel as formulated under the relevant state law.

Such a holding would hardly be surprising. After all, the *Erie*[94] doctrine prohibits the creation of "federal general common law," and the Supreme Court has recently reiterated that the instances in which federal courts may engage in common lawmaking are "few and far between."[95] At the same time, some lower courts have doubted whether *Carlisle* meant to overrule "federally created arbitration-by-estoppel precedent."[96] Moreover, in the *international* arbitration context, there may be good reasons for developing a uniform federal equitable estoppel standard, rather than subjecting parties to differing state doctrines. Circuit courts have noted, for instance, that applying differing state standards to international commercial arbitration agreements would be in tension with the "elemental purpose" of Chapter 2 of the FAA.[97] It has also been suggested that the FAA should generally be read "to authorize federal courts to create federal common law to govern the

[90] *Guide*, *supra* note 87, at 44.
[91] Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 (2009).
[92] GE Energy Power Conversion France SAS, Corp., 140 S.Ct. at 1644.
[93] *Id.* (emphasis added).
[94] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
[95] Rodriguez v. Fed. Deposit Ins. Corp., 140 S.Ct. 713, 716 (2020).
[96] In re Apple iPhone Antitrust Litig., 874 F. Supp. 2d 889, 895–96, 896 n.13 (N.D. Cal. 2012); Kingsley Cap. Mgmt., LLC v. Sly, 820 F. Supp. 2d 1011, 1022–23, 1022 n.6 (D. Ariz. 2011).
[97] InterGen N.V. v. Grina, 344 F.3d 134, 135 (1st Cir. 2003).

enforcement of covered arbitration agreements."[98] Indeed, "[i]f the federal statute in question demands national uniformity, federal common law provides the determinative rules of decision."[99]

The Supreme Court's decision in *Outokumpu* can also be read as ambiguous on whether or not the *Carlisle* holding extends to international arbitration agreements. The Court ultimately remanded the case to the Eleventh Circuit to decide "which body of law governs" whether GE Energy can enforce the arbitration agreement on the basis of equitable estoppel.[100] In its Reply Brief, GE Energy presented this choice-of-law question as between "federal, Alabama, or German law of equitable estoppel."[101] It remains to be seen, therefore, whether the Eleventh Circuit, and other lower courts, will interpret the Supreme Court's decision as foreclosing the possibility of federal law governing the application of equitable estoppel in the international arbitration context.[102]

The Supreme Court also did not address the formulation of the equitable estoppel doctrine, or doctrines, that are available to non-signatories in the international commercial arbitration context. As noted in Justice Sotomayor's concurring opinion, "one formulation of the [equitable estoppel] doctrine may account for a party's consent to arbitrate while another does not."[103] To the extent that this statement suggests that state law(s) of equitable estoppel should apply, it further begs the question whether a federal uniform equitable estoppel rule, rather than unpredictable state law standards, would be superior in the international arbitration context. Justice Sotomayor's concurrence suggests that equitable estoppel should be applied "on a case-by-case basis," but provides as a guiding light and sole limitation "the FAA's inherent consent restriction."[104] Questions remain, therefore, concerning how such consent is to be ascertained: in what circumstances should the courts allow a non-signatory to invoke an arbitration agreement on the basis of equitable estoppel? Would those circumstances differ if it were a *signatory* invoking such an agreement against a non-signatory? And what, if any, is the significance of the agreement being contained in an international contract?

Although, or perhaps *because*, the Court left these questions open, lower courts might continue to consider the body of law that federal courts have developed "concerning the application of estoppel to permit a nonsignatory to compel a signatory to arbitrate" in the international arbitration context.[105] While the circuits have not uniformly articulated the standards for applying equitable estoppel, their formulations contain common elements.[106] These common elements, moreover,

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[98] Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 734 (2012).

[99] InterGen N.V. v. Grina, 344 F.3d 134, 143 (1st Cir. 2003) (internal citation omitted).

[100] GE Energy Power Conversion France SAS, Corp., 140 S.Ct. at 1639.

[101] Reply Brief for Petitioner, GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S.Ct. 1637 (2020) (No. 18-1048), 2019 WL 7209865, at *9.

[102] At the time of writing, several lower courts have already interpreted the Supreme Court's decision to mean that "resolution of a third party's motion to compel arbitration is governed by state law." Heaster v. EQT Corporation, 2020 WL 5536078, *8 n.2 (W.D. Pa. 2020). *See also*, Jones v. United American Security, LLC, 2020 WL 4339330, *2 n.20 (N.D. Ohio 2020) (where the court relied on the Supreme Court's opinion in *Outokumpu* in finding that "[s]tate contract law applies to the enforcement of arbitration agreements."); Beavers v. UHG LLC, 2020 WL 5982302, *3 (N.D. Ohio 2020).

[103] GE Energy Power Conversion France SAS, Corp.s, 140 S.Ct. at 1649 (concurring opinion).

[104] *Id*.

[105] Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 449 Fed. Appx. 704, 708 (10th Cir. 2011).

[106] *Id*. The Supreme Court in *Outokumpu* itself referred to one such common elements, namely that "equitable estoppel allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory." GE Energy Power Conversion France SAS, Corp., 140 S.Ct. at 1644.

tend to be similar to most state laws. As GE Energy noted in its Reply Brief, "there is no significant difference between federal and Alabama law concerning equitable estoppel."[107] Therefore, rather than subjecting parties to international commercial arbitration agreements to unpredictable state law formulations of the equitable estoppel doctrine, courts should seek guidance from basic and common federal law elements.

V. Conclusion

The Supreme Court's decision in *Outokumpu* resolved a long-standing circuit split concerning the availability, in principle, of equitable estoppel to non-signatories invoking international commercial arbitration agreements under the New York Convention. It confirms in the United States what has long been accepted in other jurisdictions and in international commercial arbitration practice: the ability to enforce a valid international arbitration agreement does *not* require a signature on the dotted line. Moreover, as noted by one commentator, "[t]he ruling in this case is expected to have significant impact on international arbitration . . . [since] [c]ompanies engaged in international commercial transactions often participate in transactions that involve performance by entities that are not actual signatories to the contract."[108] The Court, however, left unanswered both antecedent and subsequent questions surrounding its ruling. As a threshold question, does the New York Convention require parties' signatures to evidence a valid international arbitration agreement? And as a tail-end question, what law governs the application of equitable estoppel in cases involving non-signatories to international commercial arbitration agreements, and what is the precise formulation of the doctrine? The Court left these questions for another day.

[107] Reply Brief for Petitioner, GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S.Ct.1637 (2020) (No. 18-1048), 2019 WL 7209865, at *9.

[108] Lionel M. Schooler, *New York Convention Case Update*, ABA Disp. Resol. Mag., (Jan. 29, 2020), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2020/dr-magazine-criminal-justice-reform/new-york-convention-case-update/.