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THE TWO VOICES OF FEDERAL LAW ON “ARBITRABILITY”: SUBSTANTIVE COMMON LAW, FEDERALISM, AND CHOICE OF LAW FOR INTERNATIONAL COMMERCIAL ARBITRATION AGREEMENTS

Tuo Huang



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SUBSTANTIVE COMMON LAW, FEDERALISM, AND CHOICE OF
LAW FOR INTERNATIONAL COMMERCIAL
ARBITRATION AGREEMENTS

*Tuo Huang**

ABSTRACT

The Supreme Court’s 2020 decision in GE Energy v. Outokumpu clarified that nonsignatories to an international commercial arbitration agreement might nevertheless have the right to enforce the agreement under doctrines such as equitable estoppel and that the New York Convention does not prohibit such enforcement. However, misunderstandings and confusions continued regarding the appropriate governing law for such questions of enforcement involving nonsignatories. Some recent appellate court jurisprudence and scholarship point to application of federal substantive law based on the long-standing proposition that federal law uniformly governs questions of “arbitrability.” While this proposition is technically correct, it does not support the application of federal substantive law to determine substantive contract law questions in enforcement of international commercial arbitration agreements. This Article sets out to clarify the misunderstandings surrounding the “federal substantive law of arbitrability” through a review of all Supreme Court decisions invoking the concept of “arbitrability.” I will show that the Court has spoken in two voices with respect to the concept of “arbitrability,” in that there are in fact two distinct usages—one “literal” and another “emblematic”—of the word “arbitrability” in the Court’s arbitration jurisprudence. In the first type of usage, the Court applied the concept of “arbitrability” in its traditional,

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literal sense—that is, whether certain types of questions can, as a matter of law, be resolved by arbitration. The Court promulgated substantive law on arbitrability by prescribing a set of “meta”-rules on substantive state laws without replacing the relevant state laws. Meanwhile, the Court also used the word “arbitrability” as an algebraic symbol to denote the larger question of “whether the claim should go to arbitration.” The second type of usage is “emblematic,” because, in these cases, the Court did not purport to decide the actual question of arbitrability but referenced “arbitrability” only as a shorthand representation of this question. Accordingly, the Court created no substantive law of arbitrability under this second usage but left such matters mainly to principles of state laws such as contract law. This Article thus demonstrates that it is state law, not federal law, that should be the source of substantive rules on contractual matters in enforcement of arbitration agreements, such as enforcement involving non-signatories by equitable estoppel, despite applicability of the Federal Arbitration Act. At the same time, the Article also lays out a compromise solution that both promotes uniformity in arbitration law and is consistent with the structure of federalism: having federal common law supply a simple and predictable set of choice-of-law rules ensures uniform interpretation and enforcement of arbitration agreements, validates parties’ intent, and discourages international forum shopping.

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I. INTRODUCTION

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention” or “Convention”)¹ is a central piece of international treaty in international commercial arbitration that all major economies have joined.² Under the Convention, contracting states are obliged to recognize and enforce arbitration agreements and arbitral awards that meet the Convention’s requirements.³ The United States implements the New York Convention under Chapter 2 of the Federal Arbitration Act (“FAA”).⁴

The Supreme Court’s 2020 decision in *GE Energy v. Outokumpu*⁵ addressed the application of the Convention and the FAA in cases involving enforcement of an arbitration agreement involving a “nonsignatory,” that is, a party who did not technically sign the arbitration agreement. Normally, a party’s obligation to resolve its disputes by arbitration depends on the existence of a valid arbitration agreement concerning those disputes.⁶ In practice, however, a nonsignatory who did not sign that agreement may seek to compel a party to the agreement (or a “signatory”) to arbitrate. Conversely, in some other cases, a signatory may seek to compel a nonsignatory to arbitrate under an arbitration agreement even though the latter did not technically sign the agreement. In other words, lack of a party’s signature to an arbitration agreement does not absolutely prevent an inference that the arbitration agreement is binding on that party.

U.S. courts have long been enforcing arbitration agreements both at the request of and against nonsignatories under various legal doctrines.⁷ One

¹ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997 [hereinafter *New York Convention*].

² For a list of contracting states, see *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”)*, U.N. COMM’N ON INT’L TRADE L., https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last visited Feb. 15, 2021).

³ *New York Convention*, *supra* note 1, art. II.

⁴ 9 U.S.C. § 201.

⁵ *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 140 S. Ct. 1637 (2020).

⁶ *E.g.*, *Jones v. Halliburton Co.*, 583 F.3d 228, 234 (5th Cir. 2009); *Jacobs v. U.S.A. Track & Field*, 374 F.3d 85, 88 (2d Cir. 2004); *InterGen N.V. v. Grina*, 344 F.3d 134, 142 (1st Cir. 2003).

⁷ I G. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* § 10.02[K] at 1589 (3d ed. 2020).

major doctrine allowing such enforcement, which the Court addressed in *GE Energy*, is equitable estoppel. Under this doctrine, a nonsignatory may compel a signatory to arbitrate if “[the] signatory to the written agreement [containing the arbitration clause] must rely on the terms of that agreement in asserting its claims against the nonsignatory.”⁸ In other cases, equitable estoppel allows a party to enforce an arbitration clause against a nonsignatory if the nonsignatory received a benefit under the agreement containing the arbitration clause.⁹

However, until recently, there had been a circuit split on whether such enforcement involving nonsignatories is permissible for international arbitration agreements falling under the New York Convention.¹⁰ Some circuit courts held that the Convention provides only for enforcement of written agreement actually signed by the parties (or exchanged in letters or telegrams) and forbids enforcement by or against nonsignatories, and some other circuit courts differed.¹¹ The Supreme Court’s *GE Energy* decision resolved the split and clarified that the Convention imposes only a “baseline” requirement on the contracting states without limiting applications of domestic law principles such as equitable estoppel.¹² As such, courts are now free to consider enforcement of international arbitration agreements involving nonsignatories, using domestic law principles such as equitable estoppel. This conclusion is consistent with the long-held consensus in the practice of international arbitration and with the other countries’ understanding in their application of the Convention.¹³

While the Court in *GE Energy* approved application of equitable estoppel in cases under the Convention, it did not discuss which body of domestic law courts should apply. Should courts decide questions of equitable estoppel (or other similar doctrines) based on federal common law under the FAA? If not, how should the court decide what law to apply? These

⁸ *GE Energy*, 140 S. Ct. at 1644.

⁹ *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993).

¹⁰ *Outokumpu Stainless USA, LLC v. Convertteam SAS (Outokumpu II)*, 902 F.3d 1316, 1327 (11th Cir. 2018), *reversed and remanded*, *GE Energy*, 140 S. Ct. 1637; *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 999–1001 (9th Cir. 2017) (discussing circuit split), *abrogated by GE Energy*, 140 S. Ct. 1637.

¹¹ *Yang*, 876 F.3d at 999–1001 (discussing circuit split).

¹² *GE Energy*, 140 S. Ct. at 1646.

¹³ BORN, *supra* note 7, § 10.02[K] at 1590, 1590 n.391.

questions will likely have long-term consequences for the implementation of the Convention.

In a recent post-*GE Energy* decision, *Setty v. Shrinivas Sugandhalaya LLP (Setty III)*,¹⁴ a divided panel of the Ninth Circuit Court of Appeals answered in the affirmative to the first question, holding that “federal substantive law” on arbitrability supplies the “ordinary contract and agency principles” in “determining the arbitrability of federal claims by or against nonsignatories to an arbitration agreement.”¹⁵ In the FAA context, the federal substantive law on arbitrability, sometimes also referred to as the “federal common law” on arbitrability,¹⁶ refers to the body of substantive federal law created under the FAA to decide whether to enforce an arbitration agreement to resolve a particular dispute.¹⁷ The *Setty III* majority maintains that federal substantive law, not state law, should supply the substantive rules of decision on questions of nonsignatory enforcement of arbitration agreements.¹⁸

This Article offers a discussion of why *Setty III* and certain pre-*GE Energy* cases are incorrect in holding that federal common law (or federal substantive law) applies to such questions. The central argument of cases like *Setty III* and scholarship supporting this view¹⁹ is that federal common law under the FAA governs the issue of “arbitrability” of the dispute,²⁰ and therefore is applicable to decide questions like whether a nonsignatory can compel another or be compelled to arbitrate.²¹

In response, I will demonstrate that this line of argument in lower courts and scholarship misreads the Supreme Court’s jurisprudence on arbitrability, based on a review of all of the Court’s decisions invoking the concept of

¹⁴ *Setty v. Shrinivas Sugandhalaya LLP (Setty III)*, 3 F.4th 1166 (9th Cir. 2021). The case was initially decided in *Setty v. Shrinivas Sugandhalaya LLP (Setty I)*, 771 F. App’x 456 (9th Cir. 2019), but the Supreme Court vacated *Setty I* after deciding *GE Energy v. Shrinivas Sugandhalaya LLP*, 141 S. Ct. 83 (2020). On remand, the Circuit Court issued but withdrew a decision in *Setty v. Shrinivas Sugandhalaya LLP (Setty II)*, 986 F.3d 1139 (9th Cir. 2021), *withdrawn on denial of reh’g en banc*, 998 F.3d 897 (9th Cir. 2021). Subsequently, the Circuit Court issued *Setty III* in replacement.

¹⁵ *Setty III*, 3 F.4th at 1168.

¹⁶ *Painwebber Inc. v. Elahi*, 87 F.3d 589, 593 (1st Cir. 1996); BORN, *supra* note 7, § 10.05[A] at 1610.

¹⁷ *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019).

¹⁸ *Setty III*, 3 F.4th at 1168.

¹⁹ Tamar Meshel, *Of International Commercial Arbitration, Non-signatories, and American Federalism: The Case for a Federal Equitable Estoppel Rule*, 56 STAN. J. INT’L L. 123 (2020).

²⁰ *Henry Schein*, 139 S. Ct. at 527.

²¹ *Setty III*, 3 F.4th at 1168.

“arbitrability.”²² Traditionally, “arbitrability” has a narrower meaning (as it still does outside the U.S. context) and refers to whether any particular type of disputes (such as “antitrust claims” or “patent claims”) per se can be resolved by arbitration—that is, the question of “objective arbitrability.”²³ However, courts in the United States have also taken “arbitrability” to mean “whether [the] arbitration agreement applies to the particular dispute.”²⁴ This is a broader question (hence a broader meaning for “arbitrability”) because it depends not only on whether the claims per se are arbitrable but also on other factors such as the scope and validity of the arbitration agreement.

This Article will show that these two different meanings correspond to two different usages of the concept of “arbitrability” in the Court’s arbitration jurisprudence. The first type is what I call the “literal” usage, in which cases the Court applied the concept of arbitrability with its literal meaning—whether the claims per se are amenable to arbitration. This is precisely the question of objective arbitrability. In these cases, the Court dealt with legal restraints on the types of disputes that can be subject to arbitration, thus furnishing substantive rules on arbitrability. These cases include, most importantly, the Court’s decisions invalidating anti-arbitration state laws that hold certain types of disputes non-arbitrable. In making these decisions, the Court has articulated a set of *meta*-rules to enforce the federal policy in favor of arbitration, as embodied by the FAA.

By contrast, with the second type of usage, the Court has used “arbitrability” in the broader sense to *denote* the ultimate question of whether the arbitration agreement can be enforced in the case, without *deciding* that question. I call this second type of usage the “emblematic” use of the term “arbitrability.” In these cases, the Court did not decide the (broad) arbitrability question per se but instead addressed peripheral questions such as “who should decide arbitrability.” In doing so, the Court furnished no substantive federal rule for this broader “arbitrability” question, and thus the use of the term in these cases was only “emblematic.” Instead, the Court held that the primary substantive questions on the enforceability of the arbitration agreement, including the traditional contract law principles of formation, validity, or estoppel, should be left to state law, consistent with the spirit of

²² *Infra* Part III.A.2.

²³ BORN, *supra* note 7, § 6.01 at 1028–29.

²⁴ *Henry Schein*, 139 S. Ct. at 527.

Erie and federalism.²⁵ Thus, even under the broad meaning of “arbitrability” available under U.S. federal law, the Court’s jurisprudence invoking this concept does not support extending federal substantive law to contract law questions such as estoppel.

These are the Court’s two voices in invoking the concept of “arbitrability”: the literal use of the concept dealt with issues of objective arbitrability, while the emblematic use referred to the broader arbitrability question but furnished no substantive rules on that version of arbitrability. The Court’s jurisprudence displays a pattern under which the federal law on arbitrability is to serve only as *meta*-rules checking on state laws may otherwise be hostile to or discriminatory against enforcement of arbitration agreements. It is therefore a mistake to seize upon the Court’s pronouncement of federal substantive law on arbitrability to open the door for federal courts to legislate substantive contract law for questions like estoppel.

Next, I will take on the cases and scholarship that continued to endorse the applicability of federal common law to substantive contract questions in certain matters based on federal question jurisdiction such as cases under the Convention.²⁶ I will show that such arguments either confuse the subject matter at stake or ignore the structure of the FAA and the scope of federal common law.

Finally, I will explain why having a body of substantive U.S. federal common law on contractual equitable estoppel, as *Setty III* and some commentators suggested, is bad judicial policy and encourages international forum-shopping.²⁷ Instead, a set of federal common law conflict (choice-of-law) rules will fully address the concerns for uniformity in advancing a federal policy based on an international treaty. I propose a simple two-part test that is both in line with the norm of international arbitration and sufficient to resolve the question of governing law in the vast majority of

²⁵ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state, whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.”).

²⁶ *Infra* Part III.B.

²⁷ *Infra* Part III.C.

circumstances.²⁸ Using federal common law as the vehicle for choice-of-law rules, rather than for substantive contract law rules of decision, places federal common law—a constitutionally tricky existence—in its proper place in the U.S. legal system’s enforcement of treaties like the Convention.

II. THE *GE ENERGY* DECISION AND ITS AFTERMATH

A. *The GE Energy Decision under the FAA*

The FAA contains two chapters. Chapter 1, the original FAA, requires courts to enforce and recognize “a contract evidencing a transaction involving commerce to settle by arbitration.”²⁹ However, it “does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise.”³⁰ For a party seeking to compel arbitration under Chapter 1, “there must be diversity of citizenship or some other independent basis for federal jurisdiction.”³¹ By contrast, Chapter 2 of the FAA, which implements the New York Convention,³² provides an independent basis of federal jurisdiction.³³ Commercial arbitration agreements that are not purely domestic, namely, international arbitration agreements, would fall under and be governed by Chapter 2 in addition to Chapter 1.³⁴ *GE Energy* is a case that arose under Chapter 2.³⁵ Many practitioners and commentators have already

²⁸ *Infra* Part IV.

²⁹ 9 U.S.C. § 2.

³⁰ *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 25 n.32 (1983); *Acosta v. Master Maint. & Constr., Inc.*, 452 F.3d 373, 377 n.7 (5th Cir. 2006) (“we note that the FAA contains no independent grant of federal jurisdiction, . . . the Convention Act does”); *accord* *Certain Underwriters at Lloyd’s London v. Argonaut Ins. Co.*, 500 F.3d 571, 581 n.9 (7th Cir. 2007).

³¹ *Moses*, 460 U.S. at 25 n.32.

³² 9 U.S.C. § 201.

³³ 9 U.S.C. §§ 203, 205; *Ministry of Def. & Support v. Cubic Def. Sys.*, 665 F.3d 1091, 1103 (9th Cir. 2011) (holding that “[a]ctions under the Convention . . . ‘arise under the laws and treaties of the United States’” under 9 U.S.C. § 203 and federal question cases); *Argonaut*, 500 F.3d at 581 n.9; *Acosta*, 452 F.3d at 377 n.7; *Beiser v. Weyler*, 284 F.3d 665, 670 (5th Cir. 2002) (“Section 205 confers a form of federal question jurisdiction: it permits the federal courts to decide cases that arise ‘under . . . Treaties made’ by the United States.”); *see also* *Vaden v. Discover Bank*, 556 U.S. 49, 59 n.9 (2009) (holding that “FAA § 205 goes further and overrides the well-pleaded complaint rule” usually applicable to federal question jurisdiction cases).

³⁴ 9 U.S.C. §§ 202, 208.

³⁵ *Outokumpu Stainless USA LLC v. Convertteam SAS (Outokumpu I)*, No. 16-00378, 2017 WL 401951 at *2–3 (S.D. Ala. Jan. 30, 2017) (analyzing under Chapter 2 of the F.A.A.).

thoroughly analyzed the *GE Energy* decision,³⁶ and I will include only a brief summary to the extent relevant.

In 2007, Thyssenkrupp Stainless USA, LLC (“TKS”), then a subsidiary of a German corporation Thyssenkrupp AG, entered into three contracts (collectively, “Contracts”) with F.L. Industries Inc. (“FLI”) for FLI to construct a stainless steel factory in Alabama.³⁷ Each of the Contracts contains an arbitration clause that reads: “[a]ll disputes arising between both parties in connection with or in the performances of the Contract . . . shall be submitted to arbitration for settlement.”³⁸ The Contracts further identify TKS as the “Buyer” and FLI as the “Seller” and provide that the Buyer and the Seller are collectively referred to as “Parties.”³⁹ The Contracts provide an agreed interpretation that “[w]hen Seller is mentioned it shall be understood as Sub-contractors included, except if expressly stated otherwise.”⁴⁰ In addition, the Contracts set out a list of “mandatory” vendors from which FLI could select as suppliers for the construction project.⁴¹ Accordingly, FLI entered into an agreement (“Subcontract”) with subcontractor Converteam for supply of electric motors for the factory.⁴² Converteam subsequently became GE Energy after acquisition by General Electric Company, and TKS became Outokumpu Stainless, USA LLC (“Outokumpu”) after a merger into Outokumpu Oyj, a Finnish company.⁴³ In other words, post-acquisition, the Contracts containing the arbitration clause were between Outokumpu and

³⁶ E.g., T. Meshel, *GE Energy v. Outokumpu: Non-signatories Can Now Enforce International Commercial Arbitration Agreements on Equitable Estoppel Grounds*, HARV. BUS. L. REV. ONLINE (2021), https://www.hblr.org/wp-content/uploads/sites/18/2021/01/HBLR_Meshel_GE_Energy_2.pdf; Alexander Bedrosyan, *U.S. Supreme Court Applies International Law Without Saying So: GE Energy v. Outokumpu Stainless*, KLUWER ARBITRATION BLOG (June 29, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/06/29/u-s-supreme-court-applies-international-law-without-saying-so-ge-energy-v-outokumpu-stainless/>.

³⁷ *Outokumpu I*, 2017 WL 401951 at *1.

³⁸ *Id.* at *2.

³⁹ *Id.* at *1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *GE Energy Completes \$3.2 Billion Deal to Acquire Converteam*, GENERAL ELECTRIC (Sept. 2, 2011), <https://www.ge.com/news/press-releases/ge-energy-completes-32-billion-deal-acquire-converteam> (last visited Mar. 2, 2021); *ThyssenKrupp Stainless USA changes name after Outokumpu merger*, FASTMARKETS MB (Jan. 7, 2013, 10:35 PM), <https://www.metalbulletin.com/Article/3137873/ThyssenKrupp-Stainless-USA-changes-name-after-Outokumpu-merger.html>.

FLI, and there was a Subcontract between FLI and GE Energy for the supply of motors.

GE Energy's motors failed in 2014, and Outokumpu sued GE Energy in an Alabama state court in 2016.⁴⁴ GE Energy removed the case to the federal District Court of the Southern District of Alabama and moved to compel arbitration under the New York Convention based on the arbitration clause in the Contracts; Outokumpu opposed, pointing out that GE Energy did not sign the Contracts.⁴⁵

Article II of the New York Convention requires contracting states to “recognize an agreement in writing under which the parties undertake to submit to arbitration . . .” (Article II(1)),⁴⁶ and that courts of the contracting states should refer parties to arbitration upon a party's request where “the parties have made an agreement within the meaning of this article” (Article II(3)).⁴⁷ Article II(2) further provides that “the term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”⁴⁸

The District Court, citing federal precedents applying “generally accepted principles of contract law,” held that the Contracts' plain language did not exclude subcontractors from the meaning of “parties” in the arbitration agreement, and granted GE Energy's motion to compel arbitration after finding that there was an agreement in writing to arbitrate within the meaning of the Convention.⁴⁹

The Court of Appeals for the Eleventh Circuit reversed and held that the language of Article II of the Convention requires that the arbitration agreement must be *actually signed* by the parties seeking to enforce it.⁵⁰ According to the Court of Appeals, this also precluded GE Energy from enforcing the arbitration agreement under the state law doctrine of equitable estoppel.⁵¹ Equitable estoppel in this case, if applied, could prevent (or estop)

⁴⁴ *Outokumpu I*, 2017 WL 401951 at *2.

⁴⁵ *Id.* at *2, *4.

⁴⁶ *New York Convention*, *supra* note 1, art. II(1).

⁴⁷ *Id.* art. II(3).

⁴⁸ *Id.* art. II(2).

⁴⁹ *Outokumpu I*, 2017 WL 401951 at *4, *7.

⁵⁰ *Outokumpu Stainless USA, LLC v. Convertteam SAS (Outokumpu II)*, 902 F.3d 1316, 1326 (11th Cir. 2018).

⁵¹ *Id.* at 1326–27.

Outokumpu, who signed the Contracts and received benefits thereunder, from denying that GE Energy is a “party” under the Contracts who would have the right to compel arbitration based on contractual language.⁵²

The Court of Appeals framed equitable estoppel as a question under Chapter 1 of the FAA, which allows courts to enforce arbitration agreements based on domestic state law doctrines including estoppel.⁵³ The *GE Energy* case arose under the Convention and Chapter 2.⁵⁴ Because the Court of Appeals held that Article II of the Convention requires actual signatures of the parties seeking to enforce the arbitration agreement, state law equitable estoppel doctrines providing for enforcement in the absence of such signatures would contravene the Convention and would therefore inapplicable.⁵⁵

In a unanimous opinion, the Supreme Court reversed, holding that Article II of the Convention does not preclude application of equitable estoppel under domestic law.⁵⁶ The Court noted that the Convention’s only relevant provision on enforcement of arbitration agreements is Article II(3), which provides that a court “‘shall . . . refer the parties to arbitration’ when the parties to an action entered into a written agreement to arbitrate and one of the parties requests referral to arbitration” but “does not restrict contracting states from applying domestic law to refer parties to arbitration in other circumstances.”⁵⁷ The Court pointed out further that the drafters intended to impose only minimum “baseline” requirement and that the Convention “does not prevent the application of domestic laws that are more generous in enforcing arbitration agreements,” such as the state-law equitable estoppel doctrine here.⁵⁸ The Court then remanded the case to the Eleventh Circuit Court of Appeals.⁵⁹

Overall, the Court’s decision, in and of itself, is hardly anything remarkable. As the Court and the United States’s amicus brief have pointed

⁵² See *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, U.S. 9 F.3d 1060, 1064 (2d Cir. 1993).

⁵³ *Outokumpu II*, 902 F.3d at 1326–27.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *GE Energy Power Conversion Fr. SAS Corp. v. Outokumpu Stainless USA, LLC (GE Energy)*, 140 S. Ct. 1637, 1645 (2020).

⁵⁷ *Id.*

⁵⁸ *Id.* at 1645–46.

⁵⁹ *Id.* at 1648.

out, the Court's interpretation is consistent with the drafters' intent as well as the post-ratification understandings of other contracting states.⁶⁰ That interpretation is also consistent with the general understanding among international arbitration practitioners.⁶¹ Indeed, it would have been odd if a treaty aimed at "encourag[ing] the recognition and enforcement of commercial arbitration agreements in international contracts"⁶² ends up making such recognition and enforcement harder than they would have been under domestic law.

B. The Undecided Questions of the Choice of Substantive Law

While the *GE Energy* decision itself is unremarkable, what has not come up in the decision is much more intriguing. A seasoned international arbitration practitioner would have probably noticed, by this point, that the courts have been talking about a doctrine of equitable estoppel without specifying whose doctrine it is—that is, which jurisdiction's law on equitable estoppel the court should apply. The District Court avoided explicit discussions of equitable estoppel altogether and decided the case based on the contractual language.⁶³ The Court of Appeals held that applying equitable estoppel was in conflict with the Convention (which the Supreme Court reversed) and thus did not need to address the merits of the estoppel argument at all.⁶⁴ The Supreme Court, again, referred to "state law" equitable estoppel doctrine,⁶⁵ even though the Contracts implicated German law.⁶⁶

⁶⁰ *Id.* at 1646–47.

⁶¹ BORN, *supra* note 7, § 10.02[K] at 1590, 1590 n.391.

⁶² Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

⁶³ *Outokumpu Stainless USA, LLC v. Converteam SAS (Outokumpu I)*, No. 16-00378-KD-C, 2017 WL 401951, at *4 (S.D. Ala. Jan. 30, 2017).

⁶⁴ *Outokumpu Stainless USA, LLC v. Converteam SAS (Outokumpu II)*, 902 F.3d 1316, 1326–27 (11th Cir. 2018).

⁶⁵ *GE Energy*, 140 S. Ct. at 1643.

⁶⁶ Because the District Court explained only that the Supply Agreements further provide that arbitration shall take place in Dusseldorf, Germany, be "conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce" and that the "substantive law of Federal Republic of Germany shall apply," and the exhibits are under seal, *Outokumpu I*, 2017 WL 401951 at *2, it is unclear whether the choice-of-law provision applied to the whole Contract, or just the arbitration clause. Nevertheless, even if the provision applied to the whole Contract, the arbitration clause should be governed by German law. *Infra* note 316. To err on the side of caution, this Article proceeds with the understanding that the choice-of-law provision applies to the whole contract.

This leads to an important clarification before I proceed further. As is evident in *GE Energy*, in which case the governing law for the arbitration agreement (hence for the question of nonsignatory enforcement) should apparently be German law,⁶⁷ calling it “state law” is somewhat a misnomer in this context. “State law,” in this context, naturally includes the laws of foreign countries if they are applicable to the arbitration agreement to be enforced,⁶⁸ including questions like nonsignatory enforcement.⁶⁹ Unlike U.S. federal laws, which are limited and “interstitial” in nature,⁷⁰ state laws and foreign laws are both bodies of general substantive laws and are thus equivalent in the U.S. federal system as articulated in *Erie*.⁷¹ However, for simplicity’s sake, I will continue to use the term “state law” as a shorthand, with the understanding that it includes foreign law that supplies substantive rules of decisions in areas traditionally covered by state law, such as contract, torts, and so on.

On remand, the lower courts in *GE Energy* finally need to address whether the domestic equitable estoppel doctrine allows enforcement of an international arbitration agreement by a nonsignatory.⁷² Then the problem emerged: whose equitable estoppel should the court apply? While this looks like a choice-of-law question at first sight, the court does not actually have

⁶⁷ *Infra* note 316 and accompanying text.

⁶⁸ *E.g.*, *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53 (2d Cir. 2004) (applying Swiss law to arbitration agreement); *Clientron Corp. v. Devon IT, Inc.*, 35 F. Supp. 3d 665, 682 (E.D. Pa. 2014) (applying Taiwan law to arbitration agreement); *Lobatto v. Berney*, 98 Civ. 1984 (SWK), 1999 U.S. Dist. LEXIS 13224, at *19 (S.D.N.Y. Aug. 25, 1999) (applying English law to arbitration agreement).

⁶⁹ *Motorola*, 388 F.3d at 53 (“We therefore conclude that under Swiss law, which governs the agreements at issue, defendants, as nonsignatories, have no right to invoke those agreements.”); *Todd v. S.S. Mut. Underwriting Ass’n (Berm.) Ltd.*, 601 F.3d 329, 336 (5th Cir. 2010) (directing assessment of English law based on the holding that “state law” governs); Foreign law is similar to state law in the *Erie* sense, *supra* note 25: unlike state law, federal law, which is “interstitial in nature” for “limited objectives”; *Richards v. United States*, 369 U.S. 1, 7 (1962); *N.D. v. Merchs. Nat’l Bank & Tr. Co.*, 634 F.2d 368, 375 (8th Cir. 1980); *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 888 (3d Cir. 1975).

⁷⁰ *Richards v. United States*, 369 U.S. 1, 7 (1962); *Merchs. Nat’l Bank & Tr. Co.*, 634 F.2d at 375; *Three Rivers Motors*, 522 F.2d at 888.

⁷¹ *Cooper v. Tokyo Electric Power Co. Holdings*, 960 F.3d 549, 557 (9th Cir. 2020) (applying *Erie* and holding that “a federal district court sitting in diversity jurisdiction, 28 U.S.C. § 1332, applies substantive state or foreign law.”); *Martinez v. Bloomberg LP*, 740 F.3d 211, 221–22, 224 (2d Cir. 2014) (applying *Erie* and holding that there is “no authority for federal courts to generate general rules of contract interpretation where the contracting parties have expressly selected another body of law to govern their agreement and rely on this law in litigation” and applied English law).

⁷² *GE Energy Power Conversion Fr. SAS Corp. v. Outokumpu Stainless USA, LLC (GE Energy)*, 140 S. Ct. 1637, 1648 (2020).

to get into a choice-of-law analysis if federal common law governs. Only if it does not apply, the court would need to decide the second question of which jurisdiction's law applies following choice-of-law rules.

In cases involving domestic arbitration agreements under Chapter 1 of the FAA, the Supreme Court had previously held, on two separate occasions in *First Options of Chi., Inc. v. Kaplan*⁷³ of 1995 and *Arthur Andersen LLP v. Carlisle*,⁷⁴ that equitable estoppel allowing enforcement of arbitration agreements is a question for state law.⁷⁵ However, federal courts have been unsure about the applicability of these holdings in the various scenarios involving international arbitration agreements.

For example, in *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, a 2000 case, the Fourth Circuit Court of Appeals was faced with the same question of whether a nonsignatory can enforce an international arbitration agreement under the New York Convention based on equitable estoppel.⁷⁶ The court acknowledged that *First Options* required application of state law, but opined that “[b]ecause the determination of whether 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.”⁷⁷

On the other hand, in *Todd v. S.S. Mut. Underwriting Ass'n (Berm.) Ltd.*, another Convention case under Chapter 2, the Fifth Circuit Court of Appeals accepted *Arthur Andersen*'s conclusion that “traditional principles of state law” provides the theories of “assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.”⁷⁸ In particular, the court held that “[*Arthur Andersen*] and other cases discussing whether nonsignatories can be compelled to arbitrate under the FAA [Chapter 1] are relevant for this case governed by the New York Convention.”⁷⁹ The *Todd* court specifically acknowledged that *Arthur*

⁷³ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

⁷⁴ *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

⁷⁵ *Id.* at 630; *First Options*, 514 U.S. at 944.

⁷⁶ *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000).

⁷⁷ *Id.* at 417, 417 n.4 (internal quotation marks omitted).

⁷⁸ *Todd v. S.S. Mut. Underwriting Ass'n (Berm.) Ltd.*, 601 F.3d 329, 334 (5th Cir. 2010).

⁷⁹ *Id.* at 334–35.

Andersen “made clear that state law controls whether an arbitration clause can apply to nonsignatories.”⁸⁰

The Supreme Court’s 2020 decision in *GE Energy* did not seem to have settled the issue, even as the decision made it even clearer that Chapter 1 is applicable in Chapter 2 cases in the context of nonsignatory enforcement. Before the Eleventh Circuit Court of Appeals had an opportunity to decide this issue on remand, in another case that the Supreme Court remanded in light of its *GE Energy* decision, *Setty III*, the Ninth Circuit Court of Appeals similarly encountered a request to enforce an arbitration agreement by a nonsignatory.⁸¹ The arbitration clause there was in a partnership agreement involving Indian parties, and neither party was a signatory.⁸² The court decided, in a split decision, that federal substantive law applies, without much legal analysis, but relied⁸³ on a 1986 decision of the Circuit, *Letizia v. Prudential Bache Sec., Inc.*⁸⁴ and a 2016 decision of the Circuit, *Casa del Caffè Vergnano S.P.A. v. ItalFlavors, LLC.*⁸⁵ Notably, neither case provided much further analyses for the holding but instead relied on precedents that predate the *Arthur Andersen*.⁸⁶ While some courts and scholars attempt to distinguish *Arthur Andersen* on the basis that *Arthur Andersen* was a case under Chapter 1 of the FAA and not a case under the New York Convention or Chapter 2 of the FAA, such a view is mistaken, as detailed below.⁸⁷

Judge Bea filed a dissenting opinion in *Setty III*, arguing that state law, not federal common law, should have governed the question of estoppel.⁸⁸ Judge Bea observed that “the Supreme Court [in *Arthur Andersen*] has in effect abrogated *Letizia*’s broad holding by making clear that the FAA does not allow federal courts to apply federal common law to all questions in disputes involving arbitration” by “stat[ing] quite clearly that ‘state law . . . is applicable to determine which contracts are binding under § 2 and

⁸⁰ *Id.* at 336.

⁸¹ *Setty III*, 3 F.4th at 1167.

⁸² *Id.* at 1170 (Bea, J., dissenting).

⁸³ *Id.* at 1168.

⁸⁴ *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986).

⁸⁵ *Casa del Caffè Vergnano S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1208, 1211 (9th Cir. 2016).

⁸⁶ *Letizia*, 802 F.2d at 1187 (citing *Bayma v. Smith Barney, Harris Upham & Co.*, 784 F.2d 1023, 1025 (9th Cir. 1986)); *Casa del Caffè*, 816 F.3d at 1211 (citing *Certain Underwriters at Lloyd’s London v. Argonaut Ins. Co.*, 500 F.3d 571, 577–78 (7th Cir. 2007)).

⁸⁷ *Infra* Part III.B.2.

⁸⁸ *Setty III*, 3 F.4th at 1173 (Bea, J., dissenting).

enforceable under § 3 if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”⁸⁹

III. FEDERAL SUBSTANTIVE LAW UNDER THE FAA AND EQUITABLE ESTOPPEL

As noted above, *Setty III*'s majority provided little legal analysis for its conclusion that federal common law applies to equitable estoppel. Instead, it relied chiefly on *Letizia* and *Casa del Caffè*.⁹⁰ However, it is possible to discern, from these decisions and similar ones, as well as scholarship holding the same view,⁹¹ two distinct elements of the argument for applying federal common law. The first element begins with the proposition that, “[b]ecause the issue involves the arbitrability of a dispute, it is controlled by application of federal substantive law rather than state law.”⁹² The logic, therefore, is that because enforcement of arbitration agreement involving nonsignatories is a question about whether the dispute should be arbitrated and is thus a question of “arbitrability,” substantive federal common law should govern. A second element of the argument attempts to distinguish Supreme Court precedents requiring application of state law by arguing that cases governed by the Convention, or brought under federal question jurisdiction, are different and governed by federal substantive law.⁹³

These two parts of the argument represent two areas of widespread misconceptions in the U.S. arbitration law surrounding the FAA. To clarify these misconceptions, I shall begin with an analysis of the text and structure of the FAA, as well as the Court’s jurisprudence of arbitrability under the FAA.

⁸⁹ *Id.* at 1174 (Bea, J., dissenting).

⁹⁰ *Setty III*, 3 F.4th at 1168.

⁹¹ *E.g.*, *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411, 417 n.4 (4th Cir. 2000); *Shamsi v. Levin*, No. 17-80372-CIV, 2017 WL 7803807, at *4 (S.D. Fla. Oct. 27, 2017); *Meshel*, *supra* note 19; *BORN*, *supra* note 7, § 10.05[A] at 1610.

⁹² *Letizia*, 802 F.2d at 1187.

⁹³ *E.g.*, *Setty III*, 3 F.4th at 1168; *Letizia*, 802 F.2d at 1187 (citing *Bayma*); *Shamsi*, 2017 WL 7803807, at *4; *Meshel*, *supra* note 19; *BORN*, *supra* note 7, § 10.05[A] at 1610.

A. The “Arbitrability” Argument

1. The Myth of “Federal Substantive Law on Arbitrability”

In holding that federal substantive law applies to questions of equitable estoppel, one case that *Setty III* ultimately relied on was *Bayma*,⁹⁴ a 1986 decision from the same Circuit holding that “[the FAA] preempts state law on the issue of arbitrability in dealing with those contracts falling under the Act.”⁹⁵ *Bayma* cited two Supreme Court cases in support, *Moses H. Cone Memorial Hospital v. Mercury Construction Co.* from 1983⁹⁶ and *Southland Corp. v. Keating* from 1984.⁹⁷ Neither, however, supports the notion that federal substantive law should displace state law and apply to questions of equitable estoppel.

In *Moses*, the Court had to decide whether it was proper for the district court to stay the federal action compelling arbitration until resolution of related state court actions.⁹⁸ In holding that the district court’s stay of the federal action was an abuse of discretion, one of the reasons given by the Court was the presence of federal law questions:

The basic issue presented in Mercury’s federal suit was the arbitrability of the dispute between Mercury and the Hospital. Federal law in the terms of the Arbitration Act governs that issue in either state or federal court. Section 2 is the primary substantive provision of the Act . . . [and] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. *The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.*⁹⁹

This is nothing more than saying that a body of federal substantive law exists on the question of arbitrability, in the context of deciding whether questions of federal law are present so as to require a district court to decline to stay a

⁹⁴ *Bayma v. Smith Barney, Harris Upham & Co.*, 784 F.2d 1023, 1025 (9th Cir. 1986) (cited in *Letizia*, 802 F.2d at 1187 (cited in *Setty III*, 3 F.4th at 1168).

⁹⁵ *Bayma*, 784 F.2d at 1024.

⁹⁶ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1 (1983).

⁹⁷ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁹⁸ *Moses*, 460 U.S. at 8.

⁹⁹ *Id.* at 41 (emphasis added).

federal action. It says nothing about the scope or reach of that body of federal common law.

In the other case, *Southland*, the Court reviewed a decision of the California Supreme Court, in which the California court invalidated an arbitration agreement in a franchise agreement on the basis that § 31512 of the California Franchise Investment Law forbids the franchisor from requiring the franchisee to waive the right to litigate.¹⁰⁰ The Supreme Court reversed and held that the FAA preempts § 31512.¹⁰¹ The Court cited *Moses* as “read[ing] the underlying issue of arbitrability to be a question of substantive federal law,”¹⁰² and concluded that the FAA supplied “a substantive rule applicable in state as well as federal courts.”¹⁰³ Again, in stating that a body of federal substantive rules exist under the mandate of the FAA, the Court did not opine on the scope of that body of federal common law on arbitrability.

Perhaps what came closest to endorsing federal replacement of state law is the following observation of the *Southland* Court, which is quoted by the Ninth Circuit court in *Bayma*:¹⁰⁴ “In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”¹⁰⁵ This statement still is not saying that federal law must supply substantive rules of decisions of contract law; instead, it merely says that, under the FAA, state law cannot deprive parties of the right to arbitrate when they have agreed to do so.

Of course, this begs the question of which law applies to decide whether parties “have agreed” to arbitrate, that is, whether there is a valid arbitration agreement. It would be circular to argue that state law provides the basis to decide whether state law has deprived parties of the right to arbitrate, before establishing in the first place that state law, not federal law, supplies the substantive rules of decision. In other words, if arbitrability is purely a matter of state law, then state law can frustrate the objectives of the FAA simply by

¹⁰⁰ *Southland*, 465 U.S. at 10.

¹⁰¹ *Id.* at 8.

¹⁰² *Id.* at 12.

¹⁰³ *Id.* at 16.

¹⁰⁴ *Bayma v. Smith Barney, Harris Upham & Co.*, 784 F.2d 1023, 1025 (9th Cir. 1986).

¹⁰⁵ *Southland*, 465 U.S. at 10.

declaring that there is no agreement to arbitrate in any given case—indeed, this is precisely the reason that some have advocated for federalization of substantive contract law in international arbitration agreements.¹⁰⁶ However, the Court has repeatedly held that state law continues to apply to substantive contract law questions such as the scope, validity, or interpretation of the arbitration agreement.¹⁰⁷ To resolve this seemingly intractable contradiction, it is necessary to take a closer look at what the Court really means when it talks about “arbitrability.” As the next part will show, while a mix-up in terminology is to blame for the confusion in the lower courts, the Court’s jurisprudence is clear: state laws provide substantive rules of decision, but they are subject to federal law—specifically FAA—scrutiny to ensure that they cannot be hostile or discriminatory toward arbitration.

2. *The Supreme Court’s “Arbitrability” Jurisprudence*

In international arbitration practice, “arbitrability” or “non-arbitrability” usually refers to the question of whether “particular categories of disputes are not capable of settlement by arbitration.”¹⁰⁸ For example, whether antitrust claims—which are public statutory claims—can be arbitrated or must be resolved by courts is a question of arbitrability in its usual meaning.¹⁰⁹ By contrast, in the U.S. context, “arbitrability” can mean, much more broadly, the question of “whether [the] arbitration agreement applies to the particular dispute.”¹¹⁰ This meaning is so broad that it essentially engulfs the whole substantive question of whether the court should compel arbitration in a given matter.¹¹¹ While Professor Gary Born’s treatise has criticized the U.S. courts’

¹⁰⁶ Meshel, *supra* note 19, at 140.

¹⁰⁷ GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC, 140 S. Ct. 1637, 1643 (2020); Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 (2009); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

¹⁰⁸ BORN, *supra* note 7, § 6.01 at 1028–29.

¹⁰⁹ *Id.* § 6.04[A].

¹¹⁰ Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 527 (2019).

¹¹¹ This is the same regardless of whether the motion is brought under Chapter 1 (9 U.S.C. § 4) or Chapter 2 (9 U.S.C. § 206) of the FAA. Bacon v. Avis Budget Grp., Inc., 959 F.3d 590, 599 (3d Cir. 2020) (“The FAA requires courts to stay litigation and compel arbitration of claims covered by a written, enforceable arbitration agreement. 9 U.S.C. §§ 3, 4; *see also* § 206.”); *see also* Aggarao v. MOL Ship Mgmt. Co., Ltd., 675 F.3d 355, 375 (4th Cir. 2012) (citing Hooters of Am. Inc. v. Phillips, F.3d 933, 937 (4th Cir. 1999) (“When a valid agreement to arbitrate exists between the parties and covers the matter in dispute, the FAA commands the federal courts to stay any ongoing judicial proceedings and to compel

broad usage of the word as an “imprecise terminology” that should be avoided,¹¹² for consistency, I will, in discussing *U.S.* case law, continue to use the term “arbitrability” as U.S. courts have used them and will refer to the usual, narrower meaning of arbitrability as “objective arbitrability.”¹¹³

Using the term “arbitrability” broadly does not mean that the Court intends that federal law governs all questions relevant to determining the question of arbitrability. In particular, as discussed below, the Court’s “federal substantive law on arbitrability” does not include rules of substantive laws that are traditionally areas for state law, such as contract laws. The author’s research identified twenty-four decisions in which the Court invoked the concept of “arbitrability” and rendered a decision touching upon questions of arbitrability under the FAA.¹¹⁴

arbitration.”); *McAllister Bros. v. A & S Transp. Co.*, 621 F.2d 519, 522 (2d Cir. 1980) (“If the arbitration clause is broad and arguably covers disputes concerning contract termination, arbitration should be compelled and the arbitrator should decide any claim that the arbitration agreement”); *A.D. v. Credit One Bank, N.A.*, 885 F.3d 1054, 1060 (7th Cir. 2018) (“We will compel arbitration under the Federal Arbitration Act ‘if three elements are present: (1) an enforceable written agreement to arbitrate, (2) a dispute within the scope of the arbitration agreement, and (3) a refusal to arbitrate.’”).

¹¹² BORN, *supra* note 7, § 6.01 at 1028 n.3.

¹¹³ *Id.* § 6.01 at 1028–29.

¹¹⁴ A precise-term search is performed with Westlaw on April 18, 2022 among all Supreme Court decisions using the keyword (“*arbitrable*” or “*arbitrability*” or “*nonarbitrable*” or “*nonarbitrability*” or “*non-arbitrable*” or “*non-arbitrability*”) and “*arbitration act*” and returned forty-seven results in total containing these exact words. Of these forty-seven decisions, the following fourteen decisions contain no discussions on the arbitrability under the FAA. *Badgerow v. Walters*, 142 S. Ct. 1310 (2022) (concerning whether the “look through” approach for subject matter jurisdiction determination is applicable to Sections 9 and 10 of Chapter 1 of the FAA); *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008) (concerning judicial review for vacating, or for modifying or correcting, arbitration award); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002) (concerning whether an arbitration agreement barred EEOC from pursuing victim-specific judicial relief on behalf of employee); *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) (concerning appealability of district order enforceability of arbitration agreement that does not mention arbitration costs and fees); *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995) (concerning the reach of Congress’s power under the Commerce Clause in enacting the FAA); *Livadas v. Bradshaw*, 512 U.S. 107 (1994) (no reference to the FAA); *Stewart Organization v. Ricoh Corp.*, 487 U.S. 22 (1988) (same); *United Paperworkers Int’l. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987) (concerning judicial review of awards; only reference to arbitrability says “when the subject matter of a dispute is arbitrable, ‘procedural’ questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 469 U.S. 1127 (1985) (denying certiorari; no opinion of Court); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) (only reference to the F.A.A., 9 U.S.C. §§ 1–14, speaks of “narrow grounds for vacating an award”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973) (no substantive discussion of the FAA; one reference to the FAA discussing holding of another case); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971) (same); *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167, 171 (1963) (explicitly not reaching question of arbitrability); *Shanferoke*

Among these twenty-four cases, eleven are cases related to “objective arbitrability” in the sense that they deal with whether arbitration is or should

Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449 (1935) (references to the F.A.A. discussing only the court’s power to grant a stay).

Another three decisions concerned union collective bargaining agreements, and each turned on specific factual scenarios presented by those agreements. Granite Rock Co. v. International Broth. of Teamsters, 561 U.S. 287 (2010) (concerning dispute over ratification date of a collective bargaining agreement); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009) (obligation to arbitrate Age Discrimination in Employment Act (ADEA) claims pursuant to a collective bargaining agreement); Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998) (no obligation to arbitrate ADA claims pursuant to a collective bargaining agreement). In addition, collective bargaining agreements are no ordinary contracts and “not in any real sense the simple product of a consensual relationship”; therefore, “principles of law governing ordinary contracts” would not apply. See *infra* note 247 and accompanying text; see also Thompson v. Bhd. of Sleeping Car Porters, 367 F.2d 489, 493 (4th Cir. 1966) (“[Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957)] mandates the federal courts to fashion effective remedies for the impairment of federally created rights in the field of labor relations.”). They are therefore not strictly FAA arbitration cases, which are a “matter of contract” and in which courts must “enforce arbitration contracts according to their terms.” *Henry Schein*, 139 S. Ct. at 529 (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)).

Finally, six decisions concerned the availability of class arbitration. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (class arbitration not permitted when an agreement is not silent, but rather ambiguous about the availability of such arbitration); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015) (concerning enforceability of a class-arbitration waiver); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013) (arbitrator did not exceed his powers in authorizing class arbitration); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (FAA preemption of California law holding class arbitration waivers in consumer contracts unconscionable); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010) (no class arbitration when lacking a contractual basis); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (holding that arbitration clause in question did not clearly preclude class arbitration and issue was one of state-law contract interpretation). The Court, in its own words, “has not decided whether the availability of class arbitration is a so-called ‘question of arbitrability.’” *Lamps Plus*, 139 S. Ct. at 1417 n.4; accord *Oxford Health Plans LLC*, 569 U.S. at 568 n.1. Research of subsequent decisions of cases also did not identify any cases deciding this question. Nevertheless, in a sense, these “class arbitration” cases can arguably be classified into the “objective arbitrability” category because they also concern whether a “type” of dispute can go to an arbitrator, even though such “type” is defined procedurally. This does not change the conclusion of this Article, which is that the Court’s use of the concept “arbitrability” is either literal (referring to the concept of “objective arbitrability”) or emblematic (referring to the broader arbitrability question but using the concept only as a symbol).

The remaining twenty four decisions touch upon the question on questions of arbitrability under the FAA, as analyzed *infra*. Of course, the author does not purport that these constitute the entirety of the Court’s jurisprudence touching upon questions of arbitrability. For example, *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421 (2017) may arguably be deemed an objective arbitrability case had it mentioned “arbitrability” or the federal substantive law thereon. In *Kindred*, the Court overruled Kentucky Supreme Court’s decision forbidding arbitration in the type of cases in which an agent bound her principal to an arbitration agreement without such authority being expressly provided in the power of attorney. *Id.* at 1424–25. However, this is immaterial because the purpose here is to ascertain what the Court really meant when it invoked the concept of “arbitrability” and the federal substantive law thereon.

be available for certain *types* of disputes or cases.¹¹⁵ The Court’s invocation of the concept of “arbitrability” was therefore “literal” in these cases, consistent with the term’s traditional, literal meaning, that is, the “types of claims” that should be nonarbitrable.¹¹⁶ In one additional case, which happens to be *GE Energy*, the Court did not opine on the question of arbitrability, but invoked the concept of arbitrability in its literal sense to explain the limited scope of the New York Convention.¹¹⁷ The other twelve cases used the term “arbitrability” broadly but focused on peripheral matters surrounding the questions of arbitrability, such as *who* should decide the question of arbitrability—the court or the arbitrator—instead of furnishing substantive rules for arbitrability.¹¹⁸

¹¹⁵ *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012) (claims of violations of the Credit Repair Organizations Act arbitrable); *Preston v. Ferrer*, 552 U.S. 346 (2008) (FAA overriding California law preventing arbitration from having primary jurisdiction over disputes under California’s Talent Agencies Act); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (punitive damages claim available for arbitration despite choice of New York law, which allowed only courts not arbitrators to award punitive damages); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (held enforceable an agreement to arbitrate Age Discrimination in Employment Act (ADEA) claims); *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477 (1989) (held enforceable an agreement to arbitrate Securities Act claim); *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987) (certain Securities Exchange Act claims and RICO claims arbitrable); *Perry v. Thomas*, 482 U.S. 483 (1987) (FAA preempting California Labor Code provision that provided for disregard of arbitration agreements in wage collection claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act antitrust claims arbitrable); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (FAA preempting California Franchise Investment Law that renders claims thereunder non-arbitrable); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (certain Securities Exchange Act claims arbitrable).

¹¹⁶ BORN, *supra* note 7, § 6.01 at 1028–29.

¹¹⁷ The only reference to arbitrability reads: “Article II(1) [of the New York Convention] refers to disputes ‘capable of settlement by arbitration,’ but it does not identify what disputes are arbitrable, leaving that matter to domestic law.” *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 140 S. Ct. 1637, 1645 (2020) (citing *Mitsubishi Motors*, 473 U.S. at 639 n.21). The invocation of the arbitrability concept here was a “literal” use because it was referring to the question regarding the types of legal disputes that can be arbitrated, that is, the question of objective arbitrability. This proposition also cites as an example *Mitsubishi Motors*, 473 U.S. at 639 n.21, which was a case on whether antitrust claims are arbitrable and was a classic “objective arbitrability” case.

¹¹⁸ *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019) (whether an arbitration agreement falls under an exception under § 1 of the FAA is a matter for the court, including an agreement to delegate arbitrability question to arbitrator); *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019) (no “wholly groundless” exception to allow courts to override agreement to let arbitrator decide arbitrability); *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25 (2014) (in the absence of contractual stipulation, courts presume that the parties intended courts to decide disputes about “arbitrability” and arbitrators to decide disputes about “meaning and application of procedural preconditions for the use of arbitration”); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011) (when complaint contains both arbitrable and nonarbitrable claims, FAA requires courts to compel arbitration of pendent arbitrable claims); *Rent-A-Center, West*,

For example, the Court's landmark decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* is a classic case of objective arbitrability in which the Court used the concept of "arbitrability" literally.¹¹⁹ In that case, "[t]he principal question presented . . . is the *arbitrability* . . . of claims arising under the Sherman Act."¹²⁰ The Court acknowledged the concerns over letting private arbitrators decide such claims given "the pervasive public interest in enforcement of the antitrust laws" and "the nature of the claims,"¹²¹ and in particular antitrust laws' "fundamental importance to American democratic capitalism."¹²² However, the Court rejected these concerns,¹²³ holding that "[t]he importance of the private damages remedy . . . does not compel the conclusion that it may not be sought outside an American court" and that "[t]here is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism."¹²⁴ Cases in this category, therefore, dealt with questions of whether a certain legal type of disputes are per se amenable to arbitration, which is within the sphere of objective arbitrability.¹²⁵

Inc. v. Jackson, 561 U.S. 63 (2010) (upholding provision of employment agreement which delegated to an arbitrator exclusive authority to resolve any dispute relating to the agreement's enforceability, which is a threshold question of arbitrability); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (nonsignatory can invoke arbitration if allowed by relevant state contract law to enforce agreement); *Vaden v. Discover Bank*, 556 U.S. 49 (2009) (holding that federal court should "looking through" a petition to the parties' underlying substantive controversy in jurisdictional inquiry under FAA § 4, but denying jurisdiction in the case); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (interpretation of National Association of Securities Dealers rule imposing six-year time limit for arbitration was not question of arbitrability and is thus for arbitrator); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ("clear and unmistakable" evidence required to find that parties agreed to arbitrate arbitrability); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989) (FAA did not preempt state rule allowing stay of arbitration "pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it"); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) (requiring district court to compel arbitration on arbitrable pendent state claims); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1 (1983) (holding that district court abused discretion in granting a stay pending state litigation even though a federal question of arbitrability is present); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (fraud in the inducement of a contract rather than of the arbitration clause a question for arbitrator).

¹¹⁹ BORN, *supra* note 7, § 6.04[A][1].

¹²⁰ *Mitsubishi*, 473 U.S. at 616 (emphasis added).

¹²¹ *Id.* at 629 (quoting court below).

¹²² *Id.* at 634.

¹²³ *Id.* at 632–34.

¹²⁴ *Id.* at 635, 636.

¹²⁵ BORN, *supra* note 7, § 6.01 at 1028–29.

Importantly, many of these objective arbitrability cases involved upholding the (objective) arbitrability in certain types of disputes by striking down state laws preventing arbitration of these disputes.¹²⁶ These represent the Court's efforts to enforce "a liberal federal policy favoring arbitration agreements" as Congress declared through the FAA, in particular § 2,¹²⁷ which requires courts to recognize and enforce arbitration agreements.¹²⁸ Congress enacted the FAA as "a response to hostility of American courts to the enforcement of arbitration agreements," and, "[t]o give effect to this purpose, the FAA compels judicial enforcement of a wide range of written arbitration agreements."¹²⁹ To that end, "the Act was applicable in state courts and pre-emptive of state laws hostile to arbitration,"¹³⁰ and requires courts to "place arbitration agreements upon the same footing as other contracts."¹³¹

The Court's objective arbitrability cases do precisely that by striking down state laws that make certain types of claims non-arbitrable, thereby restoring the objective arbitrability of those claims. *Southland*, a case that *Setty III* ultimately relies on for applying federal substantive law of arbitrability,¹³² was one of them. In *Southland*, as analyzed above, the Court restored arbitrability in a category of franchisor-franchisee disputes.¹³³ Similarly, *Perry v. Thomas* (1987) involved § 229 of the California Labor Code providing that a plaintiff can litigate collection of wages in court "without regard to the existence of any private agreement to arbitrate."¹³⁴ The Court held that the FAA preempts § 229 and restored the arbitrability of wage collection claims.¹³⁵ Then, in *Preston v. Ferrer* (2008), the Court struck down another California law requiring administrative resolution of disputes under the California Talent Agencies Act (which made such claims non-arbitrable in the first instance).¹³⁶ Thus, in these cases, where the Court did

¹²⁶ See *infra* notes 136–39 and accompanying text.

¹²⁷ *Perry v. Thomas*, 482 U.S. 483, 489 (1987).

¹²⁸ 9 U.S.C. § 2.

¹²⁹ *Circuit City Stores v. Adams*, 532 U.S. 105, 111 (2001).

¹³⁰ *Id.* at 112.

¹³¹ *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 225–26.

¹³² See *supra* notes 97 and 100, and accompanying text.

¹³³ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

¹³⁴ *Perry v. Thomas*, 482 U.S. 483, 484 (1987) (citing Cal. Lab. Code Ann. § 229 (West 1971)).

¹³⁵ *Id.* at 489, 491.

¹³⁶ *Preston v. Ferrer*, 552 U.S. 346, 349–50 (2008).

furnish substantive contents to the federal law on arbitrability, it did so by creating *meta*-rules prohibiting state laws from being hostile toward or discriminating against arbitration.

By contrast, in the other cases, the Court used the word “arbitrability” in its broad sense to denote the question of “whether the arbitral agreement applies to the dispute,” without furnishing substantive federal legal rules for deciding that question. Instead, these cases dealt with the peripheral questions that courts encounter before even reaching that (broad) question of arbitrability. These cases often concerned the question of who—the court or the arbitrator—gets to decide the question of arbitrability in a given scenario,¹³⁷ or whether a disputed issue is a question of arbitrability at all.¹³⁸ These cases also dealt with procedural or jurisdictional matters. For example, *Vaden*¹³⁹ addressed the federal courts’ subject matter jurisdiction under § 4 of the FAA. Section 4 provides for jurisdiction for a federal district court to entertain a petition to compel arbitration if the court would otherwise have jurisdiction over “a suit arising out of the controversy between the parties,” “save for [the] agreement [to arbitrate].”¹⁴⁰ In *Vaden*, however, there was a dispute over whether the “controversy” in § 4 refers to only the threshold dispute over the “arbitrability” of the parties’ claims, or whether such “controversy” can include the underlying substantive claims on the merits.¹⁴¹ The Court adopted the latter interpretation, holding that the district court may “look through” the § 4 petition and examine the underlying disputes to determine jurisdiction.¹⁴² This case, like one on “who should decide the question of arbitrability,” did not purport to answer the arbitrability question itself. Instead, the decision used “arbitrability” as a symbol in a discussion of whether the federal court even gets to decide that question of arbitrability.

¹³⁷ See *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 536; *Henry Schein Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019); *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25 (2014); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). See also *supra* note 118.

¹³⁸ See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (interpretation of National Association of Securities Dealers rule imposing six-year time limit for arbitration was not question of arbitrability and is thus for arbitrator); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (fraud in the inducement of a contract rather than of the arbitration clause a question for arbitrator).

¹³⁹ *Vaden v. Discover Bank*, 556 U.S. 49 (2009).

¹⁴⁰ 9 U.S.C. § 4.

¹⁴¹ *Vaden*, 556 U.S. at 63.

¹⁴² *Id.* at 65.

A further example is the *Volt* case, which dealt with a state law providing for stay of arbitration pending related litigation by third parties.¹⁴³ In that case, state law governing the parties' contract contains a rule providing for stay of arbitration pending resolution of related litigation, and the Court held that this does not violate the "settled federal rule that questions of arbitrability in contracts subject to the FAA must be resolved with a healthy regard for the federal policy favoring arbitration."¹⁴⁴ The Court invoked the concept of "arbitrability" to illustrate the federal policy in favor of arbitration, without purporting to decide the arbitrability. Similarly, in yet another case, *Vaden*, the Court held that the district court should compel arbitration of pendent arbitrable claims when a case has such arbitrable claims in addition to other non-arbitrable claims—again, the question of arbitrability itself was not the issue.¹⁴⁵

Because these cases discussed peripheral questions concerning arbitrability but did not get under the hood to decide the very question of arbitrability itself, the concept of arbitrability in these cases remained a symbol only. This is akin to assigning an algebraic symbol " x " (let x = arbitrability of the matter, that is, whether the arbitration agreement applies here), without solving for the value of x . Instead, the Court uses that symbol for other analyses, such as "who should decide x " or "whether the court has jurisdiction to decide x ," much like how one may discuss "the property of $f(x)=x^2$ " or "the range of x if $x=\sin(t)$ and $0.5\pi \leq t \leq 0.7\pi$ " without knowing the actual value of x . This type of use, therefore, is purely "emblematic." It is not illogical for the emblematic use to command a broader meaning of the word "arbitrability" because in these cases the Court was deciding the procedural or jurisdictional treatment of a decisional scheme generally. The decision there is whether the arbitration agreement applies to a dispute, that is, the "broad" arbitrability question. This necessarily includes deciding smaller questions including whether the nature of the dispute (such as "antitrust claim" or "patent claim") renders the dispute legally non-arbitrable in the narrower, "objective arbitrability" sense.

¹⁴³ *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 475–76 (1989).

¹⁴⁴ *Id.* at 476.

¹⁴⁵ *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223–24 (1985) (requiring district court to compel arbitration on arbitrable pendent state claims).

The evolution of the “federal substantive law on arbitrability” under *Moses* illustrates this relationship between the literal and emblematic uses of the term. Recall that *Moses* is the case that first explicitly recognized the existence of “a body of federal substantive law of arbitrability” under the FAA.¹⁴⁶ The use of “arbitrability” in *Moses* was, however, emblematic, because *Moses* dealt with a procedural issue of whether a stay of a federal case pending state court litigation is proper when the state litigation involves an identical question of arbitrability governed by federal law.¹⁴⁷ On the other hand, the fact that *Moses* used the concept emblematically did not prevent the subsequent objective arbitrability cases from relying on *Moses*’ recognition of the federal substantive law of arbitrability. For example, the *Perry* case discussed above relied on *Moses* for the existence of federal substantive law of arbitrability.¹⁴⁸ The case then went on to hold that the FAA preempts a state law prohibiting arbitration of certain wage collection claims, thereby restoring the objective arbitrability of such claims.¹⁴⁹ The reliance on *Moses*, which is a case invoking the broad version of arbitrability emblematically, is not inconsistent with the fact that *Perry* dealt with the narrower, objective arbitrability question, because the broad meaning of “arbitrability” invoked in the emblematic use of the concept in *Moses* necessarily encompasses the narrower question of objective arbitrability addressed in *Perry*.

The Court’s FAA jurisprudence thus presents a clear pattern with its two voices—emblematic and literal—on the concept of “arbitrability,” corresponding to the broad and narrow meanings of the concept, respectively. Even though the two are sometimes connected, they can and should be distinguishable from each other. Most importantly, analyzing the Court’s jurisdiction through the lens of these two different usages reveals that the Court has never recognized the existence of federal common law on substantive law principles traditionally supplied by state law, such as estoppel. The literal use of the concept supplies substantive federal law principles (such as “antitrust claims are arbitrable”) addressing the question of arbitrability itself but deals with arbitrability in its narrow sense, that is, objective arbitrability. The emblematic use of the concept refers to

¹⁴⁶ *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 24 (1983).

¹⁴⁷ *Id.* at 7, 19, 24.

¹⁴⁸ *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

¹⁴⁹ *Id.* at 484.

arbitrability in the broad sense, but only does so in the abstract without addressing the arbitrability question itself, supplying no substantive rules on arbitrability. Thus, neither usage has furnished substantive rules of contract law or suggested replacement of state contract law with federal common law. Instead, as discussed next, the Court chose state law as the source of substantive rules of decision because arbitration, in the end, is “a matter of contract,”¹⁵⁰ even though such state law is subject to the federal meta-rules’ scrutiny under the federal law on arbitrability.

3. State Law as Substantive Rules of Decision for Arbitrability

While application of state law and the uniform pro-arbitration federal purpose seem antithetical, they are not. The Court’s 1987 decision in *Perry* sums up the relationship between federal law under the FAA and state law. Reaffirming that FAA “create[s] a body of federal substantive law of arbitrability,” the Court noted at the same time that

the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, *see* [*Moses*, 460 U.S. at 24 (recognizing existence of federal substantive law on arbitrability)], “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (emphasis added). Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. . . . A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.¹⁵¹

The Court thus has never intended for the FAA to govern *all* questions relevant to arbitrability or to supply the underlying substantive contract law principles; instead, such federal substantive law is supposed to encourage courts to resolve ambiguities (which often arise when applying substantive state contract law) in favor of arbitration and to act as a check on state laws

¹⁵⁰ *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

¹⁵¹ *Perry*, 482 U.S. at 492 n.9.

that are otherwise hostile or unfavorably discriminatory toward arbitration.¹⁵² As the Court has explained on other occasions, while the FAA requires that state law “place[] arbitration agreements on equal footing with all other contracts,”¹⁵³ the Court does not “suggest that a state court is precluded from announcing a new, generally applicable rule of law in an arbitration case” so long as “the rule must in fact apply generally, rather than single out arbitration.”¹⁵⁴ A state law (such as the California court’s decision based on the state’s Franchise Investment Law, which was overturned in *Southland*) singling out arbitration would be an instance where the state hinders arbitration by “requir[ing] a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”¹⁵⁵ The Court will restore arbitrability by holding such a law invalid under the FAA as it did in the objective arbitrability cases, even though state contract law generally applicable to interpret and enforce contracts continues to apply.¹⁵⁶ In other words, instead of displacing state contract law with federal common law, what the Court did in these cases is to articulate a set of *meta*-rules to enforce the federal policy in favor of arbitration.

It is under this background that the Court finally made this point explicit in the context of equitable estoppel. In *Arthur Andersen*, a 2009 decision, the Court specifically re-affirmed that enforcement of arbitration agreements based on equitable estoppel is a question under the relevant state law.¹⁵⁷ In *Arthur Andersen*, the petitioner, who was not a party to the agreement between the respondent and its clients, sought a motion under § 3 of the FAA (Chapter 1) to stay court litigation and to compel the respondent to arbitrate, based on the theory of equitable estoppel.¹⁵⁸ The District Court denied the motion and the Court of Appeals for the Sixth Circuit denied interlocutory

¹⁵² *Id.* See also *City Stores v. Adams*, 532 U.S. 105, 112 (2001) (“the [FAA] was applicable in state courts and pre-emptive of state laws hostile to arbitration”); *Shearson/American Express v. McMahon*, 482 U.S. 220, 225–26 (“[The Federal Arbitration Act] was intended to reverse centuries of judicial hostility to arbitration agreements by ‘placing arbitration agreements ‘upon the same footing’ as other contracts.”) (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess., 1, 2 (1924)).

¹⁵³ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

¹⁵⁴ *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1428 n.2 (2017).

¹⁵⁵ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

¹⁵⁶ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

¹⁵⁷ *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

¹⁵⁸ *Id.* at 627.

review.¹⁵⁹ The Supreme Court reversed, holding that “a litigant who was not a party to the relevant arbitration agreement may invoke § 3 [of the FAA] if the relevant state contract law allows him to enforce the agreement.”¹⁶⁰ In reaching this conclusion, the Court first held that the FAA does not alter “background principles of state contract law on the scope of agreements (*including the question of who is bound by them*).”¹⁶¹ The Court further noted that “[i]ndeed[,] § 2 [of the FAA requiring courts to enforce arbitration agreements] explicitly retains an external body of law governing revocation (such grounds ‘as exist at law or in equity’)” and that “[s]tate law, therefore, is applicable to determine which contracts are binding under § 2 and enforceable under § 3 if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”¹⁶² Accordingly, the Court held that, “[b]ecause ‘traditional principles’ of state law allow a contract to be enforced by or against nonparties to the contract through ‘assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,’” it was error for the court below to hold that non-parties to a contract are categorically barred from relief under § 3 of the FAA.¹⁶³

One may be tempted to argue, as Professor Gary Born pointed out in the latest version of his famous treatise, *International Commercial Arbitration*, that the *Arthur Andersen* Court referred only to “background principles of state contract law” and “traditional principles” of state contract law, instead of “rules of state law,” and thus the Court “arguably contemplate[d] federal common law rules based in traditional state contract law.”¹⁶⁴ This argument would essentially require federal courts to create a body of federal common law by adopting principles of state law. Unfortunately, this reading is probably incorrect in light of the decision itself and relevant case law.

First, as quoted above, the Court did not speak *only* of “background” or “traditional” principles—the Court did say “[s]tate law” applies to “issues concerning the validity, revocability, and enforceability of contracts

¹⁵⁹ *Id.* at 627–28.

¹⁶⁰ *Id.* at 632.

¹⁶¹ *Id.* at 630 (emphasis added).

¹⁶² *Id.* at 630–31.

¹⁶³ *Id.* at 631.

¹⁶⁴ BORN, *supra* note 7, § 10.05[A] at 1610.

generally” without any qualifiers Professor Born referred to.¹⁶⁵ And the Court said so quoting *Perry*, a 1987 case, which means that it is not the first time the Court was taking such a stance.¹⁶⁶ Further, even though *Arthur Andersen* also recognized the body of federal law on arbitrability,¹⁶⁷ as analyzed above in Part III.A.2 and this Part, in the only cases in which the Court addressed arbitrability in any substantive manner (that is, the objective arbitrability cases), the Court articulated only a set of *meta*-rules and did not suggest using federal common law to displace state contract law. Finally, the suggestion that the *Arthur Andersen* Court contemplated such a displacement is also inconsistent with the Circuit Courts’ case law after *Arthur Andersen*. The Courts of Appeals around the country have overwhelmingly understood the *Arthur Andersen* decision as holding that *state law* applies to questions of nonsignatory enforcement, not that courts should adopt federal common law incorporating state law principles.¹⁶⁸

Arthur Andersen is also significant in clarifying that enforcement of arbitration agreements by or against nonsignatories is a question governed by state law because it is about “the scope of agreements (including the question

¹⁶⁵ *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 630 n.5.

¹⁶⁸ See *GGNSC Louisville Hillcreek v. Estate of Bramer*, 932 F.3d 480, 485 (6th Cir. 2019) (citing *Arthur Andersen* to hold that “[w]e use state law to assess the existence of an agreement”); *GGNSC Admin. Servs., LLC v. Schrader*, 917 F.3d 20, 23 (1st Cir. 2019) (citing *Arthur Andersen* to hold that “[s]tate contract law controls ‘who is bound by [arbitration agreements]’”); *Scheurer v. Fromm Family Foods LLC*, 863 F.3d 748, 752 (7th Cir. 2017) (citing *Arthur Andersen* as holding that “state law governs whether a contract with an arbitration agreement is enforce-able”); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1293 (10th Cir. 2017) (citing *Arthur Andersen* as “holding that the issue of whether a nonsignatory can be bound by or compel arbitration under an arbitration agreement is governed by state law”); *Dylag v. W. Las Vegas Surgery Ctr., LLC*, 719 F. App’x 568, 570 (9th Cir. 2017) (“Following the U.S. Supreme Court’s decision in *Arthur Andersen* . . . , courts must apply state law in determining the applicability of these principles.”); *Physician Consortium Servs., LLC v. Molina Healthcare, Inc.*, 414 F. App’x 240, 242 (11th Cir. 2011) (citing *Arthur Andersen* as holding that “[t]he scope, validity, and enforceability of arbitration agreements, including the right of non-signatories to compel arbitration, is governed by state contract law.”); *Donaldson Co. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 732 (8th Cir. 2009) (citing *Arthur Andersen* to hold that “[t]he Supreme Court has ruled that state contract law governs the ability of nonsignatories to enforce arbitration provisions.”). *But see* *Griswold v. Coventry First*, 762 F.3d 264, 272 n.6 (3d Cir. 2014) (“Because we are satisfied that the Supreme Court’s decision in *Arthur Andersen* did not overrule Third Circuit decisions consistent with relevant state law contract principles, we may rely on our prior decisions so long as they do not conflict with these Georgia and Pennsylvania state law principles.”).

of who is bound by them).”¹⁶⁹ In light of this conclusion, decisions like *Int’l Paper Co.* (discussed above) are also mistaken in holding that “[b]ecause the determination of whether . . . 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.”¹⁷⁰ In other words, while the Fourth Circuit Court of Appeals took a less extreme view than *Lezitia* and *Setty III* and did not purport that *all* questions of arbitrability are governed by federal common law, it is nevertheless mistaken in limiting the applicability of state law to questions strictly about contract formation or validity.

First Options of Chicago and *Arthur Andersen* thus show that enforcement of arbitration agreements under equitable estoppel is: (a) a question about formation of contracts because it is about which parties should be involved; (b) a question about the scope of arbitration agreements because it is about “who is bound by them”; and thus (c) a question properly within the scope of state law.

Some courts and scholarship questioned whether these holdings apply in a case brought under federal question jurisdiction or under Chapter 2 of the FAA,¹⁷¹ and I will address this question in the next part. For now, it suffices to note the conclusion that making a distinction based on jurisdictional basis both ignores the text and structure of the FAA (in particular, § 208 providing explicitly for applicability of Chapter 1)¹⁷² and

¹⁶⁹ *Arthur Andersen*, 556 U.S. at 630.

¹⁷⁰ *Int’l Paper Co. v. Schwabedissen Maschinen*, 206 F.3d 411, 417 n.4 (4th Cir. 2000) (Strictly speaking, the *Int’l Paper Co.* court’s mistake is two-fold. Not only has it taken an overbroad view of arbitrability questions for federal law, but it has also misread the Supreme Court’s *First Options* decision. Citing *First Options*, the Fourth Circuit held that “[t]he Supreme Court has directed that we ‘apply ordinary state law principles that govern the formation of contracts,’ [but] the determination of whether . . . a nonsignatory, is bound by the . . . contract presents no state law question of contract formation or validity” *Id.* (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). The *First Options* Court did not hold that *only* questions of contract formation or validity are governed by state law. 514 U.S. at 944. To the contrary, when holding that “courts generally . . . should apply ordinary state-law principles that govern the formation of contracts,” *First Options* Court was faced with a question of “whether the parties agreed to arbitrate a certain matter” (in that case it was arbitrability), *id.*, which is about the “scope” the contract, *id.* at 945. Therefore, the Fourth Circuit jumped to its conclusion too quickly without examining whether the contract’s effect on nonsignatories—that is, *who* are bound by the contract—is also a question about the scope of the contract. The Supreme Court eventually answered yes to that question and held that state law applies. *See supra* note 107 and accompanying text.

¹⁷¹ *See infra* note 179 and accompanying text.

¹⁷² *See infra* Part III.B.2.

finds no support in the *First Options of Chicago* and *Arthur Andersen* decisions. In neither case did the holdings depend on the federal subject matter jurisdiction (that is, how the case got before the federal court) or whether the contract involved a foreign party (that is, whether the case is a Chapter 2 case).¹⁷³ All of these holdings are about the contracts themselves and who are bound by them. Moreover, such a question is now moot in any event, because *GE Energy* was a Chapter 2 case and applied *Arthur Andersen*'s holding.¹⁷⁴

Fundamentally, in practice, it is simply impossible for federal common law to supply the substantive rules of decision in a principled fashion unless it federalizes contract law entirely for arbitration agreements, which is both difficult and constitutionally questionable.¹⁷⁵ Because “[t]he FAA reflects the fundamental principle that arbitration is a matter of contract,”¹⁷⁶ before reaching that overarching question of arbitrability, the court first needs to answer the “sub”-questions of substantive contract law such as the validity, scope, and interpretation of contracts, including related quasi-contractual doctrines such as estoppel. This is perhaps why the Supreme Court repeatedly upheld the applicability of state law as substantive rules of decision while continuing to endorse that a body of substantive federal common law under the FAA governs arbitrability.¹⁷⁷ These two propositions are not contradictory to each other—to the contrary, as demonstrated above, they are supposed to co-exist, with the federal common law on arbitrability being applied in the background to encourage arbitration and to inhibit state laws hostile to arbitration. Accordingly, courts like *Setty III* are mistaken in applying federal common law to substantive contract questions on the basis that federal substantive law governs arbitrability.

¹⁷³ *Arthur Andersen*, 556 U.S. 62; *First Options*, 514 U.S. at 944.

¹⁷⁴ *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA*, 140 S. Ct. 1637, 1644–45 (2020).

¹⁷⁵ *See infra* Part III.C.1.

¹⁷⁶ *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

¹⁷⁷ *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

B. Attempts to Distinguish Arthur Andersen and GE Energy

1. Federal Subject Matter over Underlying Disputes

Nevertheless, courts like *Setty III* and some scholarship have continued to advocate for federal substantive law on equitable estoppel at least in cases having underlying disputes involving questions of federal claim¹⁷⁸ or involving international arbitration under Chapter 2 of the FAA.¹⁷⁹ *Setty III* itself can be read in both of these ways. Its entire legal analysis on the issue of governing law for equitable estoppel reads:

The New York Convention and its implementing legislation emphasize the need for uniformity in the application of international arbitration agreements. See *Certain Underwriters at Lloyd's v. Argonaut Ins. Co.*, 500 F.3d 571, 580–81 (7th Cir. 2007) (“The Supreme Court has recognized that in the context of the *New York Convention*, uniformity of the law is of *paramount* importance” and concluding application of state-specific law would undermine this purpose). In cases involving the New York Convention, in determining the arbitrability of federal claims by or against non-signatories to an arbitration agreement, we apply “federal substantive law,” for which we look to “ordinary contract and agency principles.” *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986); *Casa del Caffè*, 816 F.3d at 1211 (concluding that “[b]ecause this case arises under Chapter 2 of the Federal Arbitration Act, the issue of whether the Commercial Contract constituted a binding agreement is governed by federal common law”) (citing *Argonaut Ins. Co.*, 500 F.3d at 577–78).¹⁸⁰

I shall address the broader policy question about uniformity in a later part of this Article.¹⁸¹ In this passage quoted above, the *Setty III* court first emphasized that the case was about “federal claims.” It is true that both *Setty III* and *Letizia* started out as federal court actions in which a plaintiff brought federal statutory claims: in *Setty III*, it was federal trademark (Lanham Act)

¹⁷⁸ *Setty v. Shrinivas Sugandhalaya LLP (Setty III)*, 3 F.4th 1166 (9th Cir. 2021).

¹⁷⁹ *Shamsi v. Levin*, No. 17-80372-CIV, 2017 WL 7803807, at *4 (S.D. Fla. Oct. 27, 2017) (quoting and citing *Escobal v. Celebration Cruise Operator, Inc.*, 482 F. App'x 475, 476 n.3 (11th Cir. 2012) and going on to apply federal substantive law); see also *Herrera Gollo v. Seaborne Puerto Rico, LLC*, Civ. No. 15-1771 (JAG), 2017 WL 657430, at *6 (D.P.R. 2017) (“There is conflicting precedent as to which jurisdiction’s law controls questions of whether a nonsignatory to an arbitration agreement can sue to enforce it under the FAA.”); Meshel, *supra* note 19, at 146–47; BORN, *supra* note 7, § 10.05[A] at 1610.

¹⁸⁰ *Setty III*, 3 F.4th at 1168.

¹⁸¹ *Infra* Part III.C.2.

claims,¹⁸² while in *Letizia*, it was Securities Act and Securities Exchange Act claims.¹⁸³ Then, during the course of litigation, one party moved to compel arbitration.¹⁸⁴

The majority's reasoning, however, is based on a mistaken view in a motion to compel arbitration: this view confused the underlying disputes (whether it is the federal trademark or securities claims or the "state-law tort and warranty claims") with the dispute of whether a party is obliged to arbitrate those disputes. It is the latter, not the former, that the federal court is deciding when ruling on a motion to compel arbitration under the FAA: "[i]n addressing a motion to compel arbitration, a court may *not* resolve the merits of the underlying dispute," and the district court need only "engage in a limited review to ensure that the dispute is arbitrable."¹⁸⁵ The underlying disputes may be based on any cause of action—be it torts, contract, or patent infringement, and may be brought under any law—state, federal, foreign, or, maybe one day, galactic. But that is irrelevant to the court's task under the FAA, which is only to "enforce arbitration contracts according to their terms," because "[u]nder the [FAA], arbitration is a matter of *contract*."¹⁸⁶

¹⁸² Compl. at 1, *Setty v. Shrinivas Sugandhalaya LLP*, (N.D. Ala. 2016) (No. 2:17-cv-01146-RAJ).

¹⁸³ *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1186 (9th Cir. 1986).

¹⁸⁴ *Id.* at 1185; *Setty v. Shrinivas Sugandhalaya LLP (Setty I)*, 771 F. App'x 456 (9th Cir. 2019).

¹⁸⁵ *Townsend v. Pinnacle Ent., Inc.*, 457 F. App'x 205, 207–08 (3d Cir. 2012) (citing *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 178–78 (3d Cir. 1999) and *Gay v. CreditInform*, 511 F.3d 369, 386–87 (3d Cir. 2007)) (emphasis added); *accord Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs.*, 623 F.3d 476, 480 (7th Cir. 2010) ("In ruling on a motion to compel arbitration, we determine whether the parties' grievance belongs in arbitration, not rule on the potential merits of the underlying dispute between the parties." (quoting and citing *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 466 F.3d 577, 581 (7th Cir. 2006) (internal quotation marks omitted)); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) holding that the FAA requires courts to "direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed" and "limits court involvement to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." (quoting and citing *Chiron Corp v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000); *Vera v. Saks & Co.*, 335 F.3d 109, 117 (2d Cir. 2003) ("In deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." (quoting and citing *Transit Max Concrete Corp. v. Local Union No. 282*, 809 F.2d 963, 967–68 (2d Cir. 1987)); *Transp. Workers Union, Local 252 v. Veolia Transp. Servs.*, 24 F. Supp. 3d 223, 229 (E.D.N.Y. 2014) ("[I]t is *settled law* that the Court may not consider arguments pertaining to the potential merits of the underlying dispute when resolving a motion to compel arbitration." (citing *Vera*, 335 F.3d at 117) (emphasis added)).

¹⁸⁶ *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (emphasis added); *see also Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019) (Thomas, J., concurring) ("As our precedents make clear and the Court acknowledges, the Federal Arbitration Act (FAA) requires federal courts to enforce arbitration agreements "just as they would ordinary contracts: in accordance with their

As Judge Bea’s dissent also pointed out, “neither the Supreme Court nor the Ninth Circuit has ever relied on the subject matter jurisdiction *or the nature of the claims* in holding that state law governs equitable estoppel under the FAA.”¹⁸⁷ That is the same for *GE Energy*: the subject matter dispute in *GE Energy* was over an international arbitration agreement falling under Chapter 2, but *GE Energy* was properly a case under federal question jurisdiction.¹⁸⁸ The original underlying disputes over state law claims are therefore irrelevant.

Accordingly, in holding that federal substantive law applies to the question of equitable estoppel, *Setty III*’s majority mixed up the underlying dispute with the motion to compel, and the reliance on the federal nature of the underlying claims was improper.

2. Federal Substantive Law in Chapter 2 (Convention) Cases

Setty III and the cases on which it relied also showed a second theme in the argument in favor of applying federal substantive law to questions of equitable estoppel in enforcement of arbitration agreements, by emphasizing that the Convention and Chapter 2 of the FAA (not Chapter 1) governed the motion to compel arbitration.¹⁸⁹ The underlying assumption here appears to be that federal law should apply to Convention and Chapter 2 cases because such cases are “federal” in their nature.¹⁹⁰ *Setty III* is not alone in resisting

terms.”) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 87). While it is correct that, for a petition to compel arbitration under Chapter 1, 9 U.S.C. § 4, “[a] federal court may ‘look through’ a § 4 petition and order arbitration if, ‘save for [the arbitration] agreement,’ the court would have jurisdiction over ‘the [substantive] controversy between the parties.’” *Vaden v. Discover Bank*, 556 U.S. 49, 53 (2009) (which may have been what led the *Setty II* court to focus, erroneously, on the underlying dispute), that does not change the fact that ruling on a motion to compel arbitration is a discrete and separate task from deciding the underlying disputes, *Townsend*, 457 F. App’x at 207–08 (3d Cir. 2012), and is irrelevant here in any event because *GE Energy* did not have to rely on diversity jurisdiction and was based on federal subject matter jurisdiction. *Outokumpu Stainless USA, LLC v. Convertteam SAS (Outokumpu II)*, 902 F.3d 1316, 1322–25 (11th Cir. 2018).

¹⁸⁷ *Setty v. Shrinivas Sugandhalaya LLP (Setty III)*, 3 F.4th 1166, 1174–75 (9th Cir. 2021) (Bea, J., dissenting) (emphasis added).

¹⁸⁸ *Outokumpu II*, 902 F.3d at 1324–25.

¹⁸⁹ *Setty III*, 3 F.4th at 1168; *see also* *Certain Underwriters at Lloyd’s London v. Argonaut Ins. Co.*, 500 F.3d 571, 578 (7th Cir. 2007) (collecting cases) (cited in *Casa del Caffè*, 816 F.3d at 1211, on which *Setty III*, 3 F.4th at 1168, relied).

¹⁹⁰ *See supra* notes 29–34 and accompanying text; *see also* *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 92 (2d Cir. 1999) (“When we exercise jurisdiction under

the application of *Arthur Andersen's* holding in Chapter 2 (Convention) cases. Courts and scholarship had continued to endorse the applicability of federal substantive law in Chapter 2 cases on the basis that *First Options of Chicago* or *Arthur Andersen* “involved the FAA [Chapter 1] rather than the Convention,”¹⁹¹ a view also supported by Professor Born’s treatise: “[The *Arthur Andersen*] decision did not address the application of the New York Convention or Chapter 2 of the FAA, where the better view, generally adopted by U.S. lower courts, remains that federal common law should govern issues of alter ego, agency, estoppel and the like.”¹⁹²

I should note upfront that this statement (namely, the proposition that *Arthur Andersen* does not apply in Chapter 2 cases) no longer holds after *GE Energy*, which was a Chapter 2 case and applied *Arthur Andersen*.¹⁹³ But before I analyze *GE Energy*, I will demonstrate why this proposition should have been untenable even in the absence of *GE Energy*.

The statutory basis here, the FAA, offers critical clues. FAA (now Chapter 1 of the FAA, 9 U.S.C. §§ 1–16) was initially enacted in 1925,¹⁹⁴ long before the New York Convention, which was adopted in 1958,¹⁹⁵ and Chapter 2 of the FAA, 9 U.S.C. §§ 201–208, implementing the Convention, enacted in 1970.¹⁹⁶ The “primary substantive provision of the Act,”¹⁹⁷ § 2 of Chapter 1, 9 U.S.C. § 2, requires courts to enforce and recognize “a contract evidencing a transaction involving *commerce* to settle by arbitration . . . ,”¹⁹⁸ where “commerce” is defined under § 1 to include “commerce among the

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. . . . [P]roceeding otherwise would introduce a degree of parochialism and uncertainty into international arbitration that would subvert the goal of simplifying and unifying international arbitration law.”)

¹⁹¹ *Shamsi v. Levin*, No. 17-80372-CIV, 2017 WL 7803807, at *9–10 (S.D. Fla. Oct. 27, 2017).

¹⁹² BORN, *supra* note 7, § 10.05[A] at 1610, 1610 n.493. The only post-*Arthur Andersen* example that Born cites from an appellate court in support of this proposition, *Todd*, 601 F.3d at 334, does not exactly support his proposition. As analyzed above, the *Todd* court actually accepted *Arthur Andersen's* applicability in Chapter 2 cases. *Supra* notes 78–80 and accompanying text.

¹⁹³ *GE Energy Power Conversion Fr. SAS v. Outokumpu Stainless USA LLC*, 140 S. Ct. 1637, 1643–45 (2020).

¹⁹⁴ Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925).

¹⁹⁵ *See* 9 U.S.C. § 201.

¹⁹⁶ Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 692.

¹⁹⁷ *Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983).

¹⁹⁸ 9 U.S.C. § 2 (emphasis added).

several States or *with foreign nations*.”¹⁹⁹ No such provision exists under Chapter 2 of the FAA.²⁰⁰ Instead, § 208 under Chapter 2 provides that “Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention”²⁰¹

Two conclusions immediately follow. First, Chapter 1 is applicable to *all* arbitration agreements by default, including international agreements. In fact, a common but misleading conception, even among those well versed in arbitration law, is that Chapter 1 of the FAA is for domestic arbitration while Chapter 2 is for international arbitration agreements.²⁰² While this reflects the practical reality that domestic arbitration agreements can invoke only Chapter 1 while international arbitration agreements implicate Chapter 2,²⁰³ such a division is inaccurate. Chapter 1 of the FAA requires courts to enforce arbitration agreements involving “commerce,”²⁰⁴ which includes commerce “with foreign countries.”²⁰⁵ Thus, Congress apparently intended to apply Chapter 1 of the FAA to both domestic and international arbitration agreements from the very beginning when enacting the FAA, decades before the Convention was even drafted. Moreover, § 208 under Chapter 2, 9 U.S.C. § 208, explicitly incorporates Chapter 1 “to the extent that chapter is not in conflict with [Chapter 2] or the Convention as ratified by the United States.”²⁰⁶

¹⁹⁹ 9 U.S.C. § 1 (emphasis added).

²⁰⁰ 9 U.S.C. §§ 201–208 (1970).

²⁰¹ 9 U.S.C. § 208.

²⁰² *E.g.*, *Commissions Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 328 (D.C. Cir. 2014) (“Chapter 1 concerns domestic arbitration while Chapter 2 concerns international arbitration”); *China Nat. Metal Prod. Imp./Exp. Co. v. Apex Digital, Inc.*, 155 F. Supp. 2d 1174, 1178 (C.D. Cal. 2001) (“Chapter 1 of the FAA applies to domestic arbitration agreements while Chapter 2 of the FAA applies to international arbitration agreements. . . .”); Rebecca Lunceford Kolb, *The New York Convention or the FAA: Circuit Split Still Stands*, ABA PRACTICE POINTS (Oct. 2, 2019), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2019/the-new-york-convention-or-the-faa-circuit-split-still-stands/> (“The United States has adopted the New York Convention and incorporated it into Chapter 2 of the FAA while Chapter 1 of the FAA addresses *domestic* arbitration law. *See* 9 U.S.C. §§ 201–208 and 9 U.S.C. §§ 1–16.”).

²⁰³ *See* 9 U.S.C. § 202 (holding Chapter 2 inapplicable to domestic arbitration agreements).

²⁰⁴ 9 U.S.C. § 2.

²⁰⁵ 9 U.S.C. § 1.

²⁰⁶ 9 U.S.C. § 208; *see also* *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1155 (9th Cir. 2008) (noting that § 208 “incorporates the provisions of the FAA unless they are ‘in conflict with’ either the Convention Act or the Convention”).

The law is therefore clear that Chapter 1 applies to all (including international) arbitration agreements except where such application conflicts with Chapter 2 and the Convention. While *GE Energy* further clarified that there are no such conflicts,²⁰⁷ even in the absence of such clarification, *First Options of Chicago* and *Arthur Andersen* should have been applicable in Chapter 2 cases, unless they explicitly identify a conflict between Chapter 1 and the Convention as the Ninth and Eleventh Circuits' Courts of Appeals did (which were overruled by *GE Energy*).²⁰⁸

Second, the structure of the FAA provides an even more powerful reason why case law under Chapter 1 like *First Options of Chicago* and *Arthur Andersen* requiring application of state law are also controlling in Chapter 2 cases, for reasons explained below. As discussed in Part III.A.1, courts that defied these decisions and applied federal substantive law to equitable estoppel in Chapter 2 cases did so because they believed that there is a “body of federal substantive law of arbitrability” as stated in *Moses* and *Southland*.²⁰⁹ However, that body of federal law is the creation of *Chapter 1*, 9 U.S.C. § 2, not of Chapter 2. The Court in *Moses* characterized this as the “primary substantive provision of the Act” that authorizes federal courts to create the body of federal substantive law to guide their decisions on arbitrability.²¹⁰

Chapter 2 does not have a comparable statute. It contains eight provisions. Section 201 declares that Chapter 2 implements the Convention.²¹¹ Section 202 defines what an “[a]greement or award falling under the Convention” is.²¹² Section 203 confers federal question jurisdiction in Chapter 2 (Convention) cases.²¹³ Section 204 deals with venue²¹⁴ and § 205 deals with removal.²¹⁵ Section 206 authorizes courts to compel

²⁰⁷ *GE Energy Power Conversion Fr. SAS v. Outokumpu Stainless USA LLC*, 140 S. Ct. 1637, 1644–45 (2020).

²⁰⁸ *Outokumpu Stainless USA, LLC v. Converteam SAS (Outokumpu II)*, 902 F.3d 1316, 1326–27 (11th Cir. 2018); *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 999–1001 (9th Cir. 2017).

²⁰⁹ See *supra* notes 95–106 and accompanying text.

²¹⁰ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983).

²¹¹ 9 U.S.C. § 201 (“The Convention . . . shall be enforced in United States courts in accordance with this chapter.”).

²¹² 9 U.S.C. § 202.

²¹³ 9 U.S.C. § 203.

²¹⁴ 9 U.S.C. § 204.

²¹⁵ 9 U.S.C. § 205.

arbitration and appoint arbitrators.²¹⁶ Section 207 gives parties to arbitration the right to seek confirmation of award in court “within three years” after the award is rendered.²¹⁷ Finally, § 208 incorporates Chapter 1 into Chapter 2 save for any inconsistencies with Chapter 2 or the Convention.²¹⁸ None of these provisions concern the substantive rules for enforcing an arbitration agreement.

Therefore, the body of federal law concerning arbitration agreements exists under and by virtue of only Chapter 1. It would have been illogical to apply this body of federal substantive law to Chapter 2 cases, while simultaneously suggesting that Chapter 1 case law (including *Arthur Andersen*) does not apply to Chapter 2.

Finally, *GE Energy* should have ended this discussion once and for all. *GE Energy* was a Chapter 2 case,²¹⁹ and it applied *Arthur Andersen* and directed application of state law.²²⁰ In particular, even though *GE Energy* was a Chapter 2 case, the Court began its analysis from Chapter 1, reaffirming that § 2 of Chapter 1 requires federal courts to “place arbitration agreements upon the same footing as other contracts” and “does not alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).”²²¹ The Court then reiterated its holding in *Arthur Andersen* that “Chapter 1 of the FAA permits a nonsignatory to rely on state-law equitable estoppel doctrines to enforce an arbitration agreement.”²²² The Court concluded that “nothing in the text of the Convention ‘conflict[s] with’ the application of domestic equitable estoppel doctrines permitted under Chapter 1 of the FAA,”²²³ citing 9 U.S.C. § 208, which, as explained above, incorporates Chapter 1 explicitly into Chapter 2.

²¹⁶ 9 U.S.C. § 206.

²¹⁷ 9 U.S.C. § 207.

²¹⁸ 9 U.S.C. § 208.

²¹⁹ The Eleventh Circuit Court of Appeals also made this more explicit by examining the jurisdiction question specifically. The court held that “this lawsuit sufficiently ‘relates to’ the arbitration agreement in the . . . Contracts” between Outokumpu and FLI, it falls under the New York Convention, and thus jurisdiction and removal were proper under 9 U.S.C. §§ 203 and 205, both of which are federal question jurisdiction statutes under Chapter 2. *Outokumpu Stainless USA, LLC v. Converteam SAS (Outokumpu II)*, 902 F.3d 1316, 1322–25 (11th Cir. 2018).

²²⁰ *GE Energy Power Conversion Fr. SAS Corp. v. Outokumpu Stainless USA LLC*, 140 S. Ct. 1637, 1643–45 (2020).

²²¹ *Id.* at 1643.

²²² *Id.* at 1644.

²²³ *Id.* at 1645.

Therefore, if it is not already clear under *First Options of Chicago* and *Arthur Andersen*, it should be clear under *GE Energy* that substantive contract law questions such as equitable estoppel in Chapter 2 cases should be governed by state law, not federal common law. Regardless of how one interprets *Setty III*'s attempt to distinguish *Arthur Andersen* and *GE Energy*, *Setty III* is wrongly decided.

C. Legal and Policy Considerations of Federal Substantive Law of Estoppel for Nonsignatory Enforcement

Despite the clear results under *Arthur Andersen* and *GE Energy*, subsistence of federal common law is likely to continue in light of the courts' inertia as is evident in *Setty III*. Resistance to application of state law is not without supporters from a theoretical or policy perspective, but such arguments often misconstrue the nature of federal common law and fail to appreciate the unintended policy consequences, such as encouraging international forum shopping in disregard of parties' contractual intent. For example, a recent scholarly article by Professor Tamar Meshel argued that the question of estoppel should be governed by federal, not state, law.²²⁴ I examine such arguments from both legal and policy perspectives.

1. The Nature of Federal Courts' Law-Making Power

There are two basic ways by which federal courts can furnish a *federal* rule of estoppel: by statutory interpretation, or by development of federal common law.²²⁵ Conceptually, there is a nuanced difference between the two, in the sense that a federal rule resulting from statutory interpretation "is not federal common law in the strictest sense, i.e., a rule of decision that amounts . . . to the judicial *creation* of a special federal rule of decision."²²⁶ In other words, because "post-*Erie* federal common law is made, not

²²⁴ Meshel, *supra* note 19, at 127, 146–47.

²²⁵ *Ellis v. Liberty Life Assurance Co. of Bos.*, 958 F.3d 1271, 1280 (10th Cir. 2020) ("In resolving a federal claim, questions may arise that cannot be answered by statutory interpretation. The court then must either adopt a federal common-law rule of decision or incorporate state law."); Meshel, *supra* note 19, at 144–45.

²²⁶ *Burlington Indus. v. Ellerth*, 524 U.S. 742, 755 (quoting and citing *Atherton v. FDIC*, 519 U.S. 213, 218 (1997)) (internal quotation marks and omission marks omitted) (emphasis added).

discovered,” unlike statutory interpretation, “federal courts must possess some federal-common-law-making authority before undertaking to craft it.”²²⁷

The argument for a federal rule of estoppel based on statutory interpretation goes as follows. It is well established that invocation of Article II of the Convention requires a “written agreement” to arbitrate.²²⁸ From there comes naturally the suggestion that federal courts are authorized to create a federal rule of equitable estoppel based on the statutory interpretation of the “in writing” requirement under the Convention, as adopted in Chapter 2 of the FAA.²²⁹

However, *GE Energy* held that the Convention provides no such *affirmative* content. As the Court explained, Article II of the Convention, which is the “[o]nly . . . article of the Convention [that] addresses arbitration agreements,” imposes only “*baseline* requirements on contracting states.”²³⁰ The Court then held that the “Convention *does not conflict* with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines.”²³¹ The observation that the Convention embodies only “baseline” requirement is significant: while the Convention does not prevent (“does not conflict with”) the application of equitable estoppel under domestic law (which the Court has recognized to be state law²³²), the Convention imposes no *affirmative* requirement that contracting states must recognize equitable estoppel. Accordingly, there is no textual or legal basis to extract an affirmative equitable estoppel rule from the Convention through statutory interpretation.

If the Convention provides no basis for a rule of equitable estoppel through statutory interpretation, would courts nevertheless have the authority

²²⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (2004) (Scalia, J., concurring).

²²⁸ *GE Energy Power Conversion Fr. SAS Corp. v. Outokumpu Stainless USA LLC*, 140 S. Ct. 1637, 1645 (2020); *accord* *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 n.7 (11th Cir. 2005); *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 92 (2d Cir. 1999); Curiously, the *GE Energy* Court did not actually opine on the meaning of “agreement in writing” under Article II(2), 140 S. Ct. at 1648 n.3, even though Article II(3) speaks only of “an action in a matter in respect of which the parties have made an agreement within the meaning of this article.” *New York Convention*, *supra* note 1, art. II(3).

²²⁹ Meshel, *supra* note 19, at 144–45.

²³⁰ *GE Energy*, 140 S. Ct. at 1645, 1646 (emphasis added).

²³¹ *Id.* at 1648.

²³² See cases cited *supra* note 107.

to create such a rule as a matter of federal common law—after all, the body of federal substantive law on arbitrability is also federal common law?²³³ The answer is still likely negative. While *Erie* made clear that there is no general federal common law,²³⁴ in some “few and restricted” circumstances, federal courts have the authority to furnish substantive rules of decisions that constitute a body of federal common law as we know it today.²³⁵ These circumstances “fall into essentially two categories: those in which a federal rule of decision is necessary to protect ‘uniquely federal interests,’ and those in which Congress has given the courts the power to develop substantive law.”²³⁶

Chapter 2 of the FAA contains no Congressional grant of power to develop substantive contract laws.²³⁷ However, it no doubt embodies a federal interest in promoting arbitration: the Court has repeatedly emphasized that the FAA reflects a “federal policy in favor of arbitral dispute resolution.”²³⁸ Another arguably “federal” interest lies in the fact that enforcement of international arbitration agreements under Chapter 2 of the FAA concerns an international treaty, the New York Convention, and thus the foreign relations of the United States.²³⁹ But neither is sufficient here to support creation of federal common law. In order to establish “federal interest sufficient to bring forth the application of federal common law, . . . the guiding principle is that a *significant conflict* between some federal policy or interest and the use of state law in the premises must first be specifically shown.”²⁴⁰ There has been no such showing in *Setty III* or the cases it relied on, or in the similar cases from other Circuits.²⁴¹ Indeed, the Court’s FAA jurisprudence makes it impossible for state law to have a “significant

²³³ See sources cited *supra* note 16.

²³⁴ See discussion of source *supra* note 25.

²³⁵ *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 640–41 (1981) (citing *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).

²³⁶ *Id.* (citations omitted).

²³⁷ *Supra* notes 216–23 and accompanying text.

²³⁸ *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011); *accord Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

²³⁹ *Meshel*, *supra* note 19, at 144.

²⁴⁰ *Miree v. De Kalb Cty.*, 433 U.S. 25, 31–32 (1977) (quoting and citing *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)) (emphasis added) (internal quotation marks omitted).

²⁴¹ *Int’l Paper Co. v. Schwabedissen Maschinen*, 206 F.3d 411, 417 n.4 (4th Cir. 2000); *Bayma v. Smith Barney, Harris Upham and Co.*, 784 F.2d 1023, 1024 (9th Cir. 1986).

conflict” with the FAA: any state law that is hostile, discriminatory, or otherwise unfavorable to arbitration or conflicts with the FAA or the Convention is preempted and invalid—that is precisely what many of the Court’s FAA cases are about.²⁴² Further, given that the Court has repeatedly recognized the applicability of state law in enforcing arbitration agreements,²⁴³ it is difficult to see how the use of state law in general has a “significant conflict” with the FAA and requires wholesale replacement by federal common law.

Nor is the grant of federal jurisdiction under Chapter 2 of the FAA sufficient to create a “uniquely federal interest” to justify development of federal common law.²⁴⁴ Indeed, the Court has only taken a grant of jurisdiction as a mandate to furnish federal common law in very rare instances, such as the unquestionably “federal” areas of laws such as admiralty or disputes between states,²⁴⁵ or the enforcement of collective bargaining agreements under § 301 of the Taft-Hartley Act in *Textile Workers v. Lincoln Mills*.²⁴⁶

One may be tempted to compare arbitration agreements to collective bargaining agreements and argue that a grant of federal jurisdiction in both cases justified creation of federal common law. However, the Court explained in a subsequent case, *John Wiley*, collective bargaining agreements are “not in any real sense the simple product of a consensual relationship” and “principles of law governing ordinary contracts” would not apply.²⁴⁷ By contrast, arbitration agreements are ordinary contracts and matter of

²⁴² *Supra* notes 118, 123–28 and accompanying text.

²⁴³ See cases cited *supra* note 107.

²⁴⁴ Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1432–33 (2017) (“[A] grant of jurisdiction is insufficient to create an area of uniquely federal interests. . . . [T]he mere fact of a jurisdictional grant shouldn’t count for much.”).

²⁴⁵ RICHARD H. FALLON JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 653, 654, 660, 663 (6th ed. 2009).

²⁴⁶ *Id.* at 663; *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); see also Volokh, *supra* note 244, at 1432.

²⁴⁷ *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964) (internal quotation marks and citations omitted).

consent,²⁴⁸ and courts must “enforce arbitration contracts according to their terms.”²⁴⁹ There is therefore no similarity between the two.

Still, Professor Meshel argued that, because Chapter 2 of the FAA grants federal question jurisdiction in cases enforcing international commercial arbitration agreements, such agreements “are governed exclusively by the Convention and the FAA” and thus are “dominated by the sweep of federal statutes and doctrines . . . that the legal relations they affect must be deemed governed by federal law.”²⁵⁰ Putting aside whether the jurisdictional grant is indicative of the nature of legal relations, this argument is incorrect on its face: as explained in Part III.B.2, *supra*, international commercial arbitration agreements are not governed exclusively by the Convention or the FAA—these agreements are concurrently governed by state law pursuant to Chapter 1 of the FAA.

Further, it appears that only two court decisions have stated, as a general proposition, that arbitration is “so dominated by the sweep of federal statutes and doctrines” that the “legal relations” are a matter of federal law, without saying anything about the law governing arbitration *agreements*.²⁵¹ Neither case was brought under the Convention or Chapter 2²⁵² and thus neither would support Meshel’s argument that Chapter 2’s jurisdictional grant is indicative of the federal nature of the legal relations. Both cases also predate *Arthur Andersen*, meaning that they are of questionable validity to the extent they suggest that federal law dominate substantive contract law questions.

To look at the question from another angle, if the “legal relations” of arbitration agreements are “so dominated” by federal law, then federal law must apply to not only equitable estoppel but substantive contract issues such

²⁴⁸ GE Energy Power Conversion Fr. SAS Corp. v. Outokumpu Stainless USA LLC, 140 S. Ct. 1637, 1648 (2020) (Sotomayor, J., concurring).

²⁴⁹ Henry Schein, Inc. v. Archer and White Sales, 139 S. Ct. 524, 529 (2019).

²⁵⁰ Meshel, *supra* note 19, at 146.

²⁵¹ While Meshel cites 19 FED. PRAC. & PROC. JURIS. § 4514 (3d ed. 2019) for this general proposition, additional research identified only two federal cases addressing this in the arbitration context, *Grand Bahamas Petroleum Company, Ltd. v. Asiatic Petroleum Corp.*, 550 F.2d 1320, 1324 (2d Cir. 1977) and *China Grove Cotton Mills Co. v. Industrion, Inc.*, No. 89 Civ. 7179 (CSH), 1990 U.S. Dist. LEXIS 3702, at *11 (S.D.N.Y. Apr. 3, 1990).

²⁵² *Grand Bahamas Petroleum Company, Ltd. v. Asiatic Petroleum Corp.*, 550 F.2d 1320, 1321 (2d Cir. 1977) (noting that the petition was brought under diversity jurisdiction); *China Grove Cotton Mills Co. v. Industrion, Inc.*, No. 89 Civ. 7179 (CSH), 1990 U.S. Dist. LEXIS 3702, at *1 (S.D.N.Y. Apr. 3, 1990) (describing domestic parties and domestic arbitration provision); *China Grove*, 990 U.S. Dist. LEXIS 3702, at *1.

as formation, validity, revocability, and enforceability as well, because the term “legal relations” can implicate anything in a contract given that contract itself is all about legal relations.²⁵³ Courts, including those applying federal common law to equitable estoppel like *Int’l Paper Co.*, have not endorsed the sweeping proposition that legal relations in international arbitration agreements are so dominated by federal issues that their “legal relations” are a matter of federal law.²⁵⁴

Hence, there is no basis to suppose that the FAA authorizes creation of a federal rule of estoppel. Such an affirmative rule cannot be derived from a treaty that imposes only a baseline requirement, and the FAA does not authorize creation of any substantive federal common law on the arbitration agreements beyond the body of substantive law on arbitrability under Chapter 1 that acts as meta-rules imposing restraints on the state law.

2. Uniformity or Disparity?

Proponents of federal common law often invoke some version of argument for national uniformity,²⁵⁵ and it is no exception when it comes to arbitration law.²⁵⁶ Here, Professor Meshel, like *GE Energy* on remand,²⁵⁷ argued that a federal rule of estoppel is appropriate because the FAA “demands national uniformity” to which state law might not be “sufficiently sensitive.”²⁵⁸ However, “generalized pleas for uniformity” is never a

²⁵³ 8 CORBIN ON CONTRACTS § 30.3 (2020) (“By the process of contracting, parties create legal relations. . . . The truth is that legal relations are nothing other than groups of facts that enable us to predict with some degree of accuracy the future action of the judicial and administrative officials of an organized society.”); 2 CORBIN ON CONTRACTS § 7.12 (2020) (“The term ‘duty’ describes one of the primary legal relations, existing from the moment a contract is made.”).

²⁵⁴ *Int’l Paper Co. v. Schwabedissen Maschinen*, 206 F.3d 411, 417 n.4 (4th Cir. 2000).

²⁵⁵ *E.g.*, *Atherton v. FDIC*, 519 U.S. 213, 219 (1997) (“FDIC invokes the need for ‘uniformity.’ Federal common law, it says, will provide uniformity”); *United States v. Kimbell Foods*, 440 U.S. 715, 730 (1979) (rejecting argument for federal common law based on uniformity).

²⁵⁶ *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004) (rejecting argument for uniformity).

²⁵⁷ Supplemental Response Brief for Defendant-Appellee at 10-13, *Outokumpu Stainless USA, LLC v. Converteam SAS*, No. 17-10944 (11th Cir. Aug. 28, 2020).

²⁵⁸ Meshel, *supra* note 19, at 146–47. In particular, she argued that estoppel questions involving nonsignatories “presents ‘no state law question of contract formation or validity’ but goes either to the arbitrability of the parties’ claims or the scope of the arbitration agreement,” and thus a federal rule is appropriate. *Id.* This latter proposition was quoted directly from the Fourth Circuit’s decision in *Int’l Paper Co.*, 206 F.3d at 417 n.4, which, as I have analyzed above, is incorrect: *Arthur Andersen* has made

sufficient basis for furnishing federal common law.²⁵⁹ Besides, there is a bigger question of whether the particular kind of uniformity is actually desirable here.

Atherton v. FDIC, decided in 1997, is illustrative, and presents an almost perfect parallel to the situation here. In that case, the receiver of a bank sued the bank's officers and directors for making bad loans.²⁶⁰ The receiver (subsequently replaced by the FDIC) alleged gross negligence, simple negligence, and breaches of fiduciary duty.²⁶¹ The defendants moved to dismiss based on a federal banking statute, 12 U.S.C. § 1821(k), providing that a director or officer of a federally insured bank may be sued for gross negligence or "similar conduct . . . that demonstrates a greater disregard of a duty of care."²⁶² The defendants argued that this federal statute bars claims based upon "less seriously culpable conduct" under state law, such as simple negligence, which the district court agreed.²⁶³ The Third Circuit Court of Appeals reversed but held that, because the bank was a federally chartered savings institution, the plaintiff may "pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law."²⁶⁴

The Supreme Court reversed, holding that "state law, not federal common law, provides the applicable rules for decision."²⁶⁵ The Court noted that 12 U.S.C. § 1821(k)'s "gross negligence" standard "provides only a floor—a guarantee that officers and directors must meet at least a gross negligence standard" and "does not stand in the way of a stricter standard that the laws of some States provide."²⁶⁶ The Court also observed that the statute "preserves the applicability of stricter state standards" by providing

that questions about the "scope" of the agreement (including enforcement involving nonsignatories) are in fact governed by state law, 556 U.S. at 630, and federal law on "arbitrability" is not meant to replace state law. *See supra* note 173 and accompanying text.

²⁵⁹ *Kimbell Foods*, 440 U.S. at 730; *see also Atherton*, 519 U.S. at 219–20 (quoting and citing *Kimbell Foods*).

²⁶⁰ *Atherton*, 519 U.S. at 216.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 217.

²⁶⁵ *Id.* at 218.

²⁶⁶ *Id.* at 227.

that “nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.”²⁶⁷

The same observation applies in the FAA context: the *GE Energy* Court held that the Convention, as implemented by the FAA, provides only a “baseline” standard and does not conflict with state law that otherwise provides for enforcement of arbitration agreement, such as the law of equitable estoppel.²⁶⁸ In addition, like the proviso in § 1821(k), § 2 of the FAA provides that arbitration agreements shall be “enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁶⁹ The Supreme Court has interpreted this to mean that “state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”²⁷⁰ Thus, both *Atherton* and the question here involve federal law providing for some minimum, baseline protection, and the Court decided, in both scenarios, that state laws continue to apply so long as they do not fall below that baseline.

Two of FDIC’s arguments and the Court’s responses highlight the parallel here. FDIC first argued that federal common law should be applied to provide “uniformity,” and that “superimposing state standards of fiduciary responsibility over standards developed by a federal chartering authority would upset the balance that the federal chartering authority may strike.”²⁷¹ In response, the Court observed that “a federal standard that increases uniformity among the [federally chartered banks] would increase disparity with the [state chartered banks]” and that the “Nation’s banking system has thrived despite disparities in matters of corporate governance[,] . . . for example, the divergent state-law governance standards applicable to banks chartered in different States.”²⁷²

This is similar to the situation under the FAA: despite diverging state substantive contract laws, courts have persistently upheld and enforced

²⁶⁷ *Id.*

²⁶⁸ *GE Energy Power Conversion Fr. SAS Corp. v. Outokumpu Stainless USA LLC*, 140 S. Ct. 1637, 1646 (2020).

²⁶⁹ 9 U.S.C. § 2.

²⁷⁰ *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

²⁷¹ *Atherton*, 519 U.S. at 219–20 (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 103 (1991)).

²⁷² *Id.* at 220.

arbitration agreements, and to the extent that state laws are hostile to or discriminate against arbitration agreements, they are invalidated.²⁷³ Further, applying federal substantive contract law to international arbitration agreements only, as Professor Born observed or as Professor Meshel proposed,²⁷⁴ creates a disparity with domestic arbitration agreements that has no basis in either the Convention or the FAA: again, arbitration is a matter of contract, and no language under Article II of the Convention, which imposes only a “baseline” requirement, or Chapter 2 of the FAA requires treating international agreements *more* favorably as a matter of contract law.²⁷⁵ This disparity is particularly unjustifiable in the contemporary world in which the distinction between “domestic” and “international” is increasingly blurry because the national identities of companies are often complicated and constantly changing through international investment, merger, and acquisition activities.

Next, in *Atherton*, the respondent also argued that “courts must apply a federal common-law standard of care simply because the banks in question are federally chartered.”²⁷⁶ The Court responded that, while such an argument would have made sense “during most of the first century of our Nation’s history” when federal banks were few in number and “often encountered hostility and deleterious state laws,”²⁷⁷ that argument no longer applies after the Civil War—in particular, from 1870, “this Court held that federally chartered banks are subject to state law.”²⁷⁸ Thus, “[t]o point to a federal charter by itself shows no conflict, threat, or need for ‘federal common law.’”²⁷⁹

This is again the same as the situation here: Congress enacted the FAA to reverse “centuries of judicial hostility to arbitration agreements” in the

²⁷³ See, e.g., 9 U.S.C.A. § 2 (1947); *Preston v. Ferrer*, 552 U.S. 346, 349–50; *Circuit City Stores v. Adams*, 532 U.S. 105, 111–12; *Perry*, 482 U.S. at 484, 489, 491; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225–26 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986); *Bayma v. Smith Barney, Harris Upham & Co.*, 784 F.2d 1023, 1024 (9th Cir. 1986); see *supra* notes 130–39 and accompanying text.

²⁷⁴ BORN, *supra* note 7, § 10.05[A] at 1610, 1610 n.493; Meshel, *supra* note 19, at 127, 146–47.

²⁷⁵ See, e.g., 9 U.S.C.A. §§ 201–208 (1970); *GE Energy*, 140 S. Ct. at 1643; *Arthur Andersen*, 556 U.S. at 630.

²⁷⁶ *Atherton*, 519 U.S. at 221.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 222.

²⁷⁹ *Id.* at 223.

English and American common law courts that viewed arbitration agreements as attempts to divest courts of their jurisdiction.²⁸⁰ Almost one hundred years have passed since the enactment of the FAA in 1925, and that hostility is essentially gone: now federal and state courts alike routinely enforce agreements to arbitrate, even in contexts outside traditional contract disputes or involving nonsignatories to arbitration agreements.²⁸¹ The Court apparently has no problem that state laws, which by definition vary from state to state, be applied so long as they treat arbitration agreements as equally as any other agreement.²⁸² The Court has also explicitly endorsed *Arthur Andersen's* adherence to state law in *GE Energy*, which is a Convention case.²⁸³ Therefore, to point simply to the federal nature of the Convention cases, in itself, establishes no “conflict, threat, or need” for a federal common law rule to displace state law on equitable estoppel.

Ultimately, the argument for uniformity fails because it ignores the most important stakeholders—the parties—and their intent, which is not uniform to begin with and varies from agreement to agreement. In particular, as the Second Circuit Court of Appeals observed in *Motorola Credit Corp. v. Uzan*, to the extent that the parties have chosen governing law for the agreement (which is common in international transactions), honoring their choice of law “is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping,” and “[t]his is especially true of contracts between transnational parties, where applying the parties’ choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have signed the New York Convention.”²⁸⁴

²⁸⁰ *Scherk*, 417 U.S. at 510, 510 n.4.

²⁸¹ Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 93 (2012); see also *GE Energy*, 140 S. Ct. at 1646 (upholding possibility of nonsignatory enforcement); *ConocoPhillips Co. v. Graham*, No. 01-11-00503-CV, 2012 Tex. App. LEXIS 2461, at *25 (Tex. App. Mar. 29, 2012) (“Texas courts routinely enforce employee-employer arbitration agreements under the FAA.”); *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142, 149 (Tenn. Ct. App. 2001) (“Today Tennessee’s courts construe arbitration agreements broadly in favor of arbitration and routinely uphold and enforce arbitration agreements.”).

²⁸² *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. at 1428 n.2 (2017); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. at 443 (2006); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

²⁸³ *GE Energy Power Conversion Fr. SAS Corp. v. Outokumpu Stainless USA LLC*, 140 S. Ct. 1637, 1643–44 (2020).

²⁸⁴ *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004).

A federal substantive rule of equitable estoppel thus has two fatal problems. First, it threatens predictability in international commercial transactions by frustrating parties' reasonable expectations. Take *GE Energy* as an example. Outokumpu's predecessor, TKS, a U.S. subsidiary of a German company, signed a contract governed by German law and providing for German arbitration.²⁸⁵ Under prevailing international arbitration practice, the arbitration agreement would also be governed by German law regardless of whether one takes the governing law of the overall contract or the law of the seat of arbitration.²⁸⁶ Therefore, it would not be a surprise to TKS and Outokumpu—hence within a reasonable expectation of these parties—if any disputes arising out of or relating to that agreement are to be governed by German law. If German law indeed allows a third party to enforce the arbitration agreement against TKS or Outokumpu based on estoppel, then TKS or Outokumpu is deemed to have accepted that when they accepted the benefits under the Contracts and cannot complain—which is precisely what estoppel means.²⁸⁷ On the other hand, if German law does not allow such enforcement, TKS or Outokumpu also had a reasonable expectation that a third party cannot compel arbitration against it, no matter whether a German court or a German arbitrator decides the issue—indeed, TKS totally could have chosen German law for that reason when it negotiated that contract.

To invent a U.S. federal rule on equitable estoppel thus frustrates that expectation. Worse yet, if each country then acts as the United States does and, instead of applying German law through choice-of-law rules, furnishes their own rule or decision on this issue, there will be little predictability in the outcome when parties signed the Contracts, because TKS cannot fully anticipate in advance in which country it or its successor will face a petition or motion to compel arbitration.²⁸⁸ As the Court has observed, enforcing

²⁸⁵ *Outokumpu Stainless USA LLC v. Convertteam SAS (Outokumpu I)*, No. 16-00378-KD-C, 2017 U.S. Dist. LEXIS 11995, at *4–5 (S.D. Ala. Jan. 30, 2017).

²⁸⁶ See *infra* note 316.

²⁸⁷ *GE Energy*, 140 S.Ct. at 1643–44.

²⁸⁸ While this is less of a practical problem in the *GE Energy* matter because Outokumpu filed the lawsuit first in Alabama state court, *Outokumpu I*, 2017 WL 401951 at *4–5, and would thus know which law such an action may implicate, this fact is irrelevant because the primary concern here is about parties' reasonable expectation when entering into contracts. Further, there is no guarantee that Outokumpu would be the one filing the lawsuit. A subcontractor may have a claim against Outokumpu and petitioned for arbitration. Or, a subcontractor sensing an impending claim from Outokumpu may have preemptively initiated an arbitration and asked for declaratory relief.

international arbitration agreements serves the “predictability” interest of international commerce:

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, *an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction*. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.²⁸⁹

This leads into the second fatal problem posed by a federal rule of equitable estoppel: it encourages international forum shopping. In the example above, if German law does not recognize equitable estoppel and the proposed U.S. federal rule does in this case, a nonsignatory petitioner could tactically choose to petition in the U.S. forum so long as it can get jurisdiction there. By contrast, if U.S. federal courts apply German law pursuant to a predetermined set of choice-of-law rules consistent with international arbitration practices, the result would theoretically be the same regardless of whether the motion to compel is litigated in Germany or the United States.²⁹⁰

In some cases, the unevenness can lead to rather problematic results and cause delays and excessive expenses to the parties. Suppose a U.S. court orders GE Energy and Outokumpu to go to arbitration in Germany based on a U.S. federal estoppel rule, even though (supposing again) German law does not allow GE Energy to enforce the arbitration agreement. The parties go to arbitration. Suppose again that German law does not recognize equitable estoppel; the German arbitrator would make an independent decision under the Competence-Competence doctrine²⁹¹ and find that she does not have jurisdiction because German law does not allow GE Energy to compel

²⁸⁹ Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–17 (1974) (emphasis added).

²⁹⁰ This, of course, assumes that U.S. courts faithfully apply German law, of which they are presumed to be capable. DiFederico v. Marriott Int'l, Inc., 714 F.3d 796, 807–08 (4th Cir. 2013) (“[F]ederal courts are quite capable of applying foreign law when required to do so.”); accord Applied Med. Distribution Corp. v. Surgical Co. BV, 587 F.3d 909, 920 (9th Cir. 2009); Lehman v. Humphrey Cayman, Ltd., 713 F.2d 339, 345 (8th Cir. 1983).

²⁹¹ BORN, *supra* note 7, § 7.01 at 1141 (“The competence-competence doctrine provides, in general terms, that international arbitral tribunals have the power to consider and decide disputes concerning their own jurisdiction.”).

arbitration. Then parties would not only have wasted time before the German arbitrator, but also be stuck in a limbo: they cannot resolve their dispute in a U.S. court because the U.S. is bound by the federal common law rule and would refuse arbitration, but they cannot arbitrate in Germany, either, because the German arbitrator has refused to entertain the request for arbitration under German law. This problem is much less likely to occur if the U.S. court had chosen and applied German law in the first place, consistent with the Contracts.

IV. A FEDERAL CHOICE-OF-LAW RULE FOR INTERNATIONAL ARBITRATION AGREEMENTS

If federal substantive law should not furnish the rules of decision for contractual or quasi-contractual questions like equitable estoppel or third-party beneficiary in the context of nonsignatory enforcement, the next question is naturally what law does govern. Here, it is not only within the federal courts' power, but is also desirable, to have federalized choice-of-law rules to ensure uniform enforcement of arbitration agreements.

The FAA and the Convention no doubt have an interest in uniformity, even though such an interest is insufficient to support federalizing substantive contract law, as analyzed above. The Second Circuit Court of Appeals's observation in *Motorola* is illustrative because it expounds the right kind of "uniformity" courts should pursue: they should uniformly interpret the agreement and discourage forum shopping.²⁹² There is no point pursuing uniformity over the particular substantive rules for which parties have reasonably relied on the contracts, because agreements between different parties are necessarily not uniform to begin with.

Federal choice-of-law rules will achieve the right kind of uniformity. While federal courts must apply the forum state's choice-of-law rules in Chapter 1 cases based on diversity jurisdiction (which is often the case) under the Supreme Court's decision in *Klaxon*,²⁹³ the courts can at least formulate and apply federal choice of law rules in Chapter 2 cases, in which there is an

²⁹² *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004).

²⁹³ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that federal courts sitting in diversity jurisdiction must apply the choice-of-law rules of the forum state).

independent federal question jurisdiction.²⁹⁴ But that alone does not explain why federal courts *should* formulate federal choice-of-law rules. To understand that, one needs to examine the role and function of such rules, in particular, under the Court’s line of decisions in *Erie* and *Klaxon* discussing the proposed uniform federal common law.

The seminal *Erie* decision rejected a uniform general federal common law in areas of substantive law such as contracts or torts to discourage “forum-shopping” and avoid “inequitable administration of the laws.”²⁹⁵ Three years after *Erie*, the Court decided *Klaxon*, which held that a federal court sitting in diversity jurisdiction must also apply the forum state’s choice-of-law rules.²⁹⁶ *Klaxon* framed itself as a simple extension of *Erie* and stated that allowing federal choice-of-law rules in diversity cases “would do violence to the principle of uniformity within a state upon which the [*Erie*] decision is based.”²⁹⁷ Further, any horizontal lack of uniformity “between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.”²⁹⁸

But *Klaxon* is not without its critics. The main criticism is that it undermines the federal courts’ role as a disinterested forum in cases in which multiple states’ laws could potentially be applicable and there are doubts as

²⁹⁴ 9 U.S.C.A. §§ 203, 205 (West 1957); *Vaden v. Discover Bank*, 556 U.S. 49, 59 n.9 (2009) (holding that “FAA § 205 goes further and overrides the well-pleaded complaint rule” usually applicable to federal question jurisdiction cases); *see also Jimenez v. Sun Life Assurance Co.*, No. 11-30872, 2012 U.S. App. LEXIS 17108, at *19–20 (5th Cir. 2012) (“[W]e should apply federal common law choice of law principles when we exercise federal question jurisdiction over a case.”); *Ministry of Def. & Support v. Cubic Def. Sys.*, 665 F.3d 1091, 1103 (9th Cir. 2011) (holding that “[a]ctions under the Convention . . . ‘arise under the laws and treaties of the United States’” under 9 U.S.C. § 203 and federal question cases); *Certain Underwriters at Lloyd’s London v. Argonaut Ins. Co.*, 500 F.3d 571, 581 n.9 (7th Cir. 2007); *Acosta v. Master Maint. & Constr., Inc.*, 452 F.3d 373, 377 n.7 (5th Cir. 2006); *InterGen N.V. v. Grina*, 344 F.3d 134, 143 (1st Cir. 2003); *Beiser v. Weyler*, 284 F.3d 665, 670 (5th Cir. 2002) (“Section 205 confers a form of federal question jurisdiction: it permits the federal courts to decide cases that arise ‘under . . . Treaties made’ by the United States.”); *Enter. Grp. Planning, Inc. v. Falba*, 73 F.3d 361 (6th Cir. 1995); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980).

²⁹⁵ *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

²⁹⁶ *Klaxon*, 313 U.S. at 496.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

to which state's substantive law should apply.²⁹⁹ In these cases, federal courts can and should sort out a solution that will properly balance the different states' policy interests under the federalist system.³⁰⁰ Further, as Justice Harlan pointed out, *Erie* was "more than . . . about 'forum-shopping and avoidance of inequitable administration of the laws.'"³⁰¹ Instead, as a "modern cornerstone[] of our federalism," "*Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs."³⁰² Thus, *Klaxon's* simplistic extension of *Erie* leaves too many questions unanswered—in particular, whether choice-of-law rules are indeed the same as the substantive laws of the states, and whether federal courts have a proper role in formulating those rules to safeguard the federal system.

It is not the objective of this Article to argue with *Klaxon*, which, in any event, is settled law. The point, however, is that choice-of-law rules are different from the substantive rules that "control[] the primary activity of citizens," around which people plan their everyday affairs. This is particularly important in the context of arbitration, which is based on consent.³⁰³ If parties granted their consent in the agreement and intended for the laws of jurisdiction X to govern, then a court that takes the liberty to legislate substantive rules to replace the laws of X will be frustrating that expectation. By contrast, a court can uphold that expectation if it can apply the appropriate choice of law rules to apply the substantive law of jurisdiction X.

Thus, at least in cases under Chapter 2 of the FAA, it is proper and within the federal courts' power for them to formulate uniform choice-of-law rules. Enforcement of international arbitration agreements under federal question jurisdiction poses no problem of vertical forum shopping (i.e. tactical "choice of federal versus state courts to gain a strategic advantage")

²⁹⁹ FALLON ET AL., *supra* note 245, at 566–67 (citing Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513–15 (1954); Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 23 (1963)).

³⁰⁰ *Id.*

³⁰¹ *Hanna v. Plumer*, 380 U.S. 460 at 474 (1965) (Harlan, J., concurring).

³⁰² *Id.*

³⁰³ *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA L.L.C.*, 140 S. Ct. 1637, 1646 (2020) (Sotomayor, J., concurring).

that *Erie* addressed.³⁰⁴ This is because Chapter 2 of the FAA provides independent federal question jurisdiction,³⁰⁵ and such cases will almost certainly end up in federal courts in any event, either in the first instance or by removal.³⁰⁶ On the other hand, applying uniform federal choice-of-law rules discourages horizontal forum shopping both domestically and internationally because uniform choice-of-law rules should lead to application of the same jurisdiction's substantive law, thereby eliminating the opportunity to "take[] advantage of courts' tendencies" that vary across the different geographical forums.³⁰⁷ Domestically, if federal courts apply a common, uniform set of federal choice-of-law rules, no matter in which state's federal courts parties litigate, the outcome would theoretically be the same. Internationally, while such U.S. federal choice-of-law rules would not be able to prevent litigants from tactically choosing other countries' courts, such rules can at least discourage litigants from choosing U.S. courts solely because of a perceived advantage under U.S. substantive law.

For enforcement based on contractual or quasi-contractual theories such as equitable estoppel or third-party beneficiary, the federal choice-of-law rule therefore must satisfy two requirements simultaneously. First, it must consist of simple bright-line rules, in order to achieve "orderliness and predictability essential to . . . international business transaction."³⁰⁸ A multi-factor standard requiring the court to weigh the factors in each case on an ad hoc basis thus will not do.³⁰⁹ Second, it must be in line with well-established international

³⁰⁴ William H.J. Hubbard, *An Empirical Study of the Effect of Shady Grove v. Allstate on Forum Shopping in the New York Courts*, 10 J.L. ECON. & POL'Y 151, 151–52 (2013).

³⁰⁵ See 9 U.S.C.A. §§ 203, 205 (West 1947); see also *Vaden v. Discover Bank*, 556 U.S. 49, 59 n.9 (2009) (holding that "FAA § 205 goes further and overrides the well-pleaded complaint rule" usually applicable to federal question jurisdiction cases); *Ministry of Def. & Support v. Cubic Def. Sys.*, 665 F.3d 1091, 1103 (9th Cir. 2011) (holding that "[a]ctions under the Convention . . . 'arise under the laws and treaties of the United States'" under 9 U.S.C. § 203 and federal question cases); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 581 n.9 (7th Cir. 2007); *Acosta v. Master Maint. & Constr., Inc.*, 452 F.3d 373, 377 n.7 (5th Cir. 2006); *Beiser v. Weyler*, 284 F.3d 665, 670 (5th Cir. 2002) ("Section 205 confers a form of federal question jurisdiction: it permits the federal courts to decide cases that arise 'under . . . Treaties made' by the United States.").

³⁰⁶ This is because when federal question jurisdiction exists, the party wanting to be in federal court will be able to either file in federal court, 28 U.S.C. § 1331, or remove to federal court, 28 U.S.C. § 1441(a).

³⁰⁷ Hubbard, *supra* note 304, at 151–52.

³⁰⁸ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

³⁰⁹ I emphasize the "ad hoc" nature here because it is plausible that an appellate court (such as the Court of Appeals or the Supreme Court) conducts a multi-factor balancing test and promulgate a bright-

arbitration practices. This second criterion serves two purposes: first, it ensures that the U.S. federal rule is not too far away from reasonable expectations of parties in international commerce who draft the arbitration agreements; second, it ensures that the U.S. rule maximally discourages international forum shopping by not offering a unique advantage compared with other countries' practices.

The resulting rule is therefore a simple, two-part test applicable in most circumstances. The key is to determine the governing law of the arbitration agreement, which should govern questions of estoppel when a party invokes that arbitration agreement to assert the estoppel.³¹⁰

line rule for a broad category of cases based on its balancing of the interest, as the U.K. Supreme Court did in *Enka Insaat Ve Sanayi A.S. v OOO Ins. Co. Chubb*, [2020] UKSC 38, [2020] WLR(D) 256 (Eng.), *infra* notes 334–43, and lower courts apply that rule uniformly. This arrangement would not suffer from the same lack of predictability as the one requiring courts to conduct the balancing of interest in each case (on an ad hoc basis).

³¹⁰ The weight of the authority, in particular after *Arthur Andersen*, is that the governing law of the contract should apply to the question of equitable estoppel or nonsignatory enforcement. *E.g.*, *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004); *Sisca v. Hal Mar., Ltd.*, No. 20-cv-22911-BLOOM/Louis, 2020 U.S. Dist. LEXIS 209722, at *12–14 (S.D. Fla. Nov. 9, 2020); *Andreoli v. Comcast Cable Commc'ns. Mgmt., LLC*, No. 3:19-cv-00954 (JAM), 2020 U.S. Dist. LEXIS 44965, at *10 (D. Conn. Mar. 16, 2020); *Judge v. UniGroup, Inc.*, No. 8:17-cv-201-T-23CPT, 2018 U.S. Dist. LEXIS 138722, at *2–4 (M.D. Fla. Aug. 16, 2018); *Haasbroek v. Princess Cruise Lines, Ltd.*, 286 F. Supp. 3d 1352, 1361–62 (S.D. Fla. 2017); *In re Auto. Parts Antitrust Litig.*, No. 12-md-02311, 2017 U.S. Dist. LEXIS 233243, at *8–9 (E.D. Mich. Sept. 12, 2017); *Wexler v. Solemates Marine, Ltd.*, No. 16-CV-62704, 2017 U.S. Dist. LEXIS 36376, at *4–5 (S.D. Fla. Mar. 14, 2017); *Wiles v. Palm Springs Grill, LLC*, No. 15-CV-81597-KAM, 2016 U.S. Dist. LEXIS 106297, at *9 (S.D. Fla. Aug. 10, 2016); *In re Liberty Refund Anticipation Loan Litig.*, MDL No. 2334, 2014 U.S. Dist. LEXIS 100458, at *12 (N.D. Ill. July 23, 2014); *Laumann v. NHL*, 989 F. Supp. 2d 329, 339 n.47 (S.D.N.Y. 2013); *Robinson v. John M. O'Quinn & Assocs.*, 2012 U.S. Dist. LEXIS 96247, at *12–13 (S.D.N.Y. July 10, 2012); *Rose v. SMS.AC, Inc.*, No. 10CV2163 DMS (MDD), 2011 U.S. Dist. LEXIS 97243, at *5 (S.D. Cal. Aug. 30, 2011); *Sigma Coatings USA B.V. v. Sigmakalon B.V.*, No. 06-2850, 2006 U.S. Dist. LEXIS 62101, at *11–12 (E.D. La. Aug. 31, 2006); *cf. Todd v. S.S. Mut. Underwriting Ass'n, Ltd.*, 601 F.3d 329, 336 (5th Cir. 2010) (directing consideration on whether English law should govern the question of estoppel). In addition, cases on promissory estoppel, another quasi-contractual doctrine to which equitable estoppel is similar and related, see 4 WILLISTON ON CONTRACTS §§ 8:3, 8:4 (2020) (discussing how promissory estoppel evolved from equitable estoppel, which is asserted as a defense, into an affirmative cause of action based on the presence of a promise); 3 CORBIN ON CONTRACTS § 8.12 (2020), also support application of the governing law of the contract to questions of estoppel. In those cases, courts have mostly applied the governing law of the contract based on which such promissory estoppel is claimed, in particular if the assertion of estoppel involves or relies on the terms of the contract. *E.g.*, *EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc.*, Nos. 19-5836/5838, 2020 U.S. App. LEXIS 12158, at *399, 810 F. App'x 389, 399 (6th Cir. Apr. 15, 2020); *N.H. Speedway v. Motor Racing Network*, No. 2012-0215, 2013 N.H. LEXIS 153, at *9 (Sept. 25, 2013); *First Marblehead Corp. v. House*, 473 F.3d 1, 8–9 (1st Cir. 2006); *Polydyne, Inc. v. Kirk*, Nos. 99-4085/99-4153, 2000 U.S. App. LEXIS 33892, at *6–7

First, the court should look at whether parties have explicitly chosen the governing law for the arbitration agreement, which often appears as an arbitration clause in a larger contract.³¹¹ Under the separability doctrine, the arbitration agreement is presumed to be separate from the underlying contract and thus may be governed by a different law than the underlying contract.³¹² Therefore, if the arbitration agreement is viewed as a separate mini-contract in itself, honoring the parties' explicit choice-of-law is in line with traditional choice-of-law practices for standalone contracts.³¹³

Second, if parties have not explicitly chosen the governing law for the arbitration agreement (in other words, the arbitration clause contains no choice-of-law language), the court must infer the choice-of-law for the arbitration agreement. A wide variety of approaches exist to determine the governing law of the arbitration agreement, including application of the law of the forum (*lex fori*), the governing law of the underlying contract (*lex contractus*), the law of the arbitral seat (*lex arbitri*), or some kind of ad hoc multi-factor tests such as the law of the jurisdiction with the most significant contact.³¹⁴ I have explained that an ad hoc multi-factor test is not desirable here because it is uncertain and unpredictable. It is also unjust to apply *lex fori*, because parties cannot anticipate, at the time of contract, where they will be enforcing the arbitration agreement. Thus, the only sensible choices are *lex contractus* and *lex arbitri*, which also happen to be two choices to which courts across common law jurisdictions congregate.³¹⁵ In cases like *GE*

(6th Cir. Dec. 19, 2000); *but see* Bull Int'l, Inc. v. MTD Consumer Grp., Inc., No. 15-2438, 2016 U.S. App. LEXIS 11871, at 100 n.13 (3d Cir. June 29, 2016) 654 F. App'x 80, 100 n.13 (3d Cir. 2016) (the party's promissory estoppel claim "do[es] not involve questions or matters under the Agreements and therefore are not subject to the Ohio choice of law clause in the Agreements").

³¹¹ Indeed, some arbitration institutions' model arbitration clause contains such a provision. For example, the model clause of the Hong Kong International Arbitration Centre ("HKIAC") provides, among other things, "The law of this arbitration clause shall be . . . (Hong Kong law)." *Model Clauses*, H.K. INT'L ARB. CTR., <https://www.hkiac.org/arbitration/model-clauses#Arbitration%20under%20the%20HKIAC%20Administered%20Rules> (last visited Feb. 24, 2021).

³¹² BORN, *supra* note 7, § 4.02 at 510–11.

³¹³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. L. INST. 1988) (upholding parties' explicit choice of law).

³¹⁴ BORN, *supra* note 7, § 4.02[B] at 522. While there are other more "esoteric" methodologies for choice of law such as the location of residence of arbitrator, *id.*, it is unnecessary to discuss them here since the goal is to arrive at a simple, predictable rule.

³¹⁵ For U.S. cases applying *lex contractus*, see *Motorola*, 388 F.3d at 53 (2d Cir. 2004) (applying Swiss law to arbitration agreement); *Clientron Corp. v. Devon IT, Inc.*, 35 F. Supp. 3d 665, 682 (E.D. Pa. 2014) (applying Taiwan law to arbitration agreement); *Lobatto v. Berney*, 98 Civ. 1984 (SWK), 1999

Energy, applying either one would arrive at the conclusion that German law should govern the arbitration agreement, hence the question of estoppel.³¹⁶

However, things would be more complicated if the underlying contract's governing law is not the law of the jurisdiction of the seat of arbitration. The U.S. courts are divided on this issue, with some courts favoring *lex contractus* and some others favoring *lex arbitri*.³¹⁷ There are also views among various commentaries that federal common law supplies the substantive rules and is *the* governing law of arbitration agreements³¹⁸ (a view that, as explained above, is incorrect under *Arthur Andersen*).

The courts in the U.K. and Singapore, two major hubs of international arbitration in the common law world, have been debating around these two positions for years. A decision from the English Court of Appeal in 2007, *C v. D*, dealt with a contract governed by New York law but providing for arbitration in England.³¹⁹ The court held that, in the absence of an express choice of law for the arbitration clause, "the law of the seat of arbitration," rather than "the law of the underlying contract," is "more likely" to be "the law with which that [arbitration] agreement has its closest and most real connection . . .,"³²⁰ and thus English law, rather than New York law, governed the arbitration agreement.³²¹ However, in another decision in 2012 known as the "*Sulamérica*" case, the Court of Appeal held that "it is probably fair to start from the assumption that, in the absence of any indication to the

U.S. Dist. LEXIS 13224, at *19 (S.D.N.Y. Aug. 25, 1999) (applying English law to arbitration agreement); *see supra* note 68 and accompanying text; for cases from other jurisdictions, *see infra* notes 321–39 and accompanying text.

³¹⁶ As noted *supra* note 66, it is unclear from the District Court's opinion whether the choice of German law applied to the arbitration clause or the underlying Contracts. If it applied to the arbitration clause only, then there is no need to enter this second step. If it applied to the underlying Contracts, applying either *lex contractus* or *lex arbitri* would result in application of German law. *See* *Outokumpu Stainless USA LLC v. Convertteam SAS (Outokumpu I)*, No. 16-00378-KD-C, 2017 U.S. Dist. LEXIS 11995, at *4–5 (S.D. Ala. Jan. 30, 2017).

³¹⁷ BORN, *supra* note 7, § 4.04[A] at 585–86.

³¹⁸ *E.g.*, Peter Ashford, *The Law of the Arbitration Agreement: The English Courts Decide?*, 24 AM. REV. INT'L ARB. 469, 483–84 (2013) ("The scope of the FAA is such that it appears, of itself, to constitute the law governing the arbitration agreement."); *see also* Peter Tzeng, *Favoring Validity: The Hidden Choice of Law Rule for Arbitration Agreements*, 27 AM. REV. INT'L ARB. 327, 338 n.69 (2016) (suggesting that U.S. courts apply either federal substantive law or "international principles of contract law" (which would become federal common law if adopted by federal courts)).

³¹⁹ *C v. D* [2007] EWCA (Civ.) 1282, [¶ 3], [2008] 1 All ER (Comm.) 1001 (Eng.).

³²⁰ *Id.* ¶ 22.

³²¹ *Id.* ¶ 29.

contrary, the parties intended the whole of their relationship to be governed by the same system of law.”³²² The court explained that, in the absence of an express choice, “the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate.”³²³ Nevertheless, for that particular case, the court declined to find that the parties’ express choice of Brazilian law to govern the underlying contract implied the same governing law for the arbitration agreement, because “there is at least a serious risk that a choice of Brazilian law would significantly undermine that agreement.”³²⁴

The High Court of Singapore was faced with a similar question in *FirstLink*, a 2014 decision.³²⁵ It rejected the *Sulamérica* approach and decided to follow *C v. D* instead, holding that the law of the seat, not the governing law of the underlying contract, should be presumed to be the governing law of the arbitration agreement.³²⁶ However, that did not last long. In 2016, in *BCY v. BCZ*, the High Court took a different approach and held that the governing law clause of the underlying contract would be a “strong indicator” of the law that parties intended to govern the arbitration agreement, and “[t]he choice of a seat different from the law of the governing contract would not in itself be sufficient to displace that starting point.”³²⁷ Then, in a 2019 decision, *BNA v. BNB*, the Singapore Court of Appeal confirmed the approach in *BCY*, holding that the implied choice of law for the arbitration agreement should presumptively be the governing law of the underlying contract.³²⁸ The *Sulamérica* approach thus seems to have become the settled position in Singapore for now.

Another major hub of international arbitration, Hong Kong, took the same approach in a 2011 decision, *Klößner*, and preferred application of the governing law of the underlying contract.³²⁹ The case dealt with a contract

³²² *Sulamérica Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.* [2012] EWCA (Civ) 638, [¶ 11], [2013] 1 WLR 102 (Eng.).

³²³ *Id.*

³²⁴ *Id.* ¶ 31.

³²⁵ *FirstLink Invs. Corp. Ltd. v. GT Payment Pte. Ltd., and others*, [2014] SGHCR 12 (Sing.).

³²⁶ *Id.* ¶¶ 13–16.

³²⁷ *BCY v. BCZ*, [2016] SGHC 249 (Sing.).

³²⁸ *BNA v. BNB*, [2019] SGCA (Civ.) 84, ¶¶ 62–63 (Sing.).

³²⁹ *Klößner Pentaplast GmbH & Co. KG v. Advance Tech. (H.K.) Co.*, [2011] 4 H.K.L.R.D. 262, ¶¶ 5, 24, 32 (H.K.) (favoring application of the law of the underlying contract to the arbitration agreement)

governed by German law but providing for arbitration in China.³³⁰ The court rejected the argument that the law of the seat should be presumed to govern and held that the court should first “see if there is any agreement, express or implied, by the parties as to both the proper law of contract, or the *lex arbitri*.”³³¹ Further, “to determine governing law it is not permissible to look at the arbitration agreement in isolation, but that regard should be had to the surrounding circumstances including the law governing the substantive contract.”³³² The court eventually held that German law apply to the arbitration agreement, based on the broad governing law clause of the underlying contract.³³³

Finally, in the 2020 decision in *Enka*,³³⁴ the U.K. Supreme Court held that, in the absence of an explicit choice of governing law for the arbitration agreement, “a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.”³³⁵ Further, “[t]he choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.”³³⁶ On the other hand, if there is no choice of law for the underlying contract, “the arbitration agreement is governed by the law with which it is most closely connected,” and “[w]here the parties have chosen a seat of arbitration, this will generally be the law of the seat.”³³⁷ In a nutshell, in the absence of explicit choice of law for the arbitration agreement, the governing law of the underlying contract is presumed to govern the arbitration clause.

over the law of the seat of arbitration), *leave to appeal refused*, HCMP 1836/2011 ¶¶ 7, 8 (Oct. 19, 2011) (agreeing with the approach).

³³⁰ *Klöckner*, [2011] 4 H.K.L.R.D. 262 at ¶ 5.

³³¹ *Id.* ¶ 26.

³³² *Id.* ¶ 27.

³³³ *Id.* ¶¶ 29–32.

³³⁴ *Enka Insaat Ve Sanayi A.S. v. OOO Ins. Co. Chubb*, [2020] UKSC 38, [2020] WLR(D) 256 (Eng.).

³³⁵ *Id.* at ¶ 170(iv).

³³⁶ *Id.* at ¶ 170(v).

³³⁷ *Id.* at ¶ 170(viii). One would of course ask, what if the parties have not chosen a governing law or a seat of arbitration? By extension of *Enka*'s logic, which looks at the law with which the arbitration agreement is most closely connected, the court is of course free to look into traditional choice-of-law analysis of “most significant contact” or “closest connection.” However, while not impossible, this is rare in practice because parties who are sophisticated enough to put in a commercial arbitration clause are unlikely to both omit a governing law clause and fail to choose an arbitral institution.

It therefore appears that the three most important non-U.S. arbitration hubs in the common law world, England, Hong Kong, and Singapore have all taken the approach that favors application of the law governing the underlying contract over the law of the arbitral seat as the governing law of the arbitration agreement absent explicit provisions. Further, the reasoning behind this approach, as elaborated in *Enka*, appears persuasive. In explaining its preference for prioritizing the application of the governing law of the underlying contract, the *Enka* court began with the assumption that, “unless there is good reason to conclude otherwise, all the terms of a contract are governed by the same law applies to an arbitration clause, as it does to any other clause of a contract.”³³⁸ While the court acknowledged that the arbitration clause is separable and can be governed by a different law,³³⁹ the court nevertheless emphasized that applying the governing law of the contract serves important policy considerations, such as providing certainty, consistency, and coherence while avoiding complexities and artificiality in understanding the contract.³⁴⁰ In particular, the court noted that separability “is a legal doctrine and one which is likely to be much better known to arbitration lawyers than to commercial parties,” for whom “a contract is a contract; not a contract with an ancillary or collateral or interior arbitration agreement.”³⁴¹ Thus, the commercial parties “would therefore reasonably expect a choice of law to apply to the whole of that contract.”³⁴² The choice of an arbitral seat, which adopts the “curial law” (law governing arbitration process) of the seat, is not sufficient to override that because the “curial law which applies to the arbitration process is conceptually distinct from the law which governs the validity and scope of the arbitration agreement.”³⁴³

This is consistent with the realities in international commerce. Because “[t]he idea behind international arbitration is to provide a neutral *forum* rather than litigate in either party’s home court,”³⁴⁴ the choice of a particular jurisdiction as the seat of the arbitration reflects merely parties’ choice of a

³³⁸ *Id.* at ¶ 40.

³³⁹ *Id.* at ¶¶ 41–42.

³⁴⁰ *Id.* at ¶ 53.

³⁴¹ *Id.* at ¶ 53(iv).

³⁴² *Id.*

³⁴³ *Id.* at ¶ 69.

³⁴⁴ *OJSC Ukrafta v. Carpatsky Petroleum Corp.*, 957 F.3d 487, 502 (5th Cir. 2020) (emphasis added).

forum they can trust to administer the laws they have chosen. In the absence of additional evidence, this choice of forum does not indicate that parties intend to override their choice of substantive law, as *Enka* reckoned.³⁴⁵

Nevertheless, the contrary approach (favoring the law of the seat as the governing law of the arbitral clause) is also not without its merits. The most important justification lies in Article V(1)(a) of the New York Convention, which provides that a contracting state's courts may refuse to enforce an arbitral award made pursuant to an arbitration agreement if, among other things, the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, *under the law of the country where the award was made.*"³⁴⁶ Problems may arise if the contract's governing law deems the arbitration agreement valid (or allows enforcement by or against nonsignatory through estoppel) while the law of the seat is different. If so, parties may end up with an award they cannot enforce after being compelled to arbitrate. Indeed, that is a major concern expressed by the *FirstLink* court in rejecting the *Sulamérica* approach.³⁴⁷

It is not the goal of this Article to resolve the decade-long debate in the international arbitration world: it suffices to point out that either a rule similar to *Enka* (favoring law of the contract), or a contrary rule favoring application of the law of the seat,³⁴⁸ will be acceptable so long as the U.S. federal appellate courts settle with one of them. As explained above, both of these positions have good justifications, and each has been, or had once been, adopted in the common law world. The point here is to *have a rule* rather than having courts to engage in ad hoc weighing of factors.³⁴⁹ Regardless of which specific position it adopts, such a federal rule would both "ensure uniform interpretation and enforcement of [parties'] agreement" and reduce international forum shopping in implementing the New York Convention:³⁵⁰

³⁴⁵ *Enka Insaat Ve Sanayi A.S. v. OOO Ins. Co. Chubb* [2020] UKSC 38, ¶ 53(iv), [2020] WLR(D) 256 (Eng.).

³⁴⁶ *New York Convention*, *supra* note 1, art. V(1)(a).

³⁴⁷ *FirstLink Invs. Corp. v. GT Payment Pte. Ltd.*, [2014] SGHCR 12, [¶ 14] (Sing.).

³⁴⁸ Of course, a U.S. federal appellate court is free to conduct its own analysis and conclude that the law of the seat should be presumed to govern the validity and scope of the arbitration agreement. That would not be wrong per se given the difficulty of U.K. and Singaporean courts in deciding between the two, as discussed *supra*. Further, a party (even if it is a nonsignatory) invoking the arbitration agreement cannot claim that application of the law of the seat is a complete surprise. The point, rather, is that it is more important to settle on a rule beforehand.

³⁴⁹ *See* discussion *supra* note 309.

³⁵⁰ *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004).

a party who signed up for, or seeks to invoke, an arbitration agreement governed by, say, German law cannot seek to avoid application of German law by going to a U.S. court. The rule also preserves federalism because it does not purport to federalize substantive contract law in arbitration agreements.

V. CONCLUSIONS

For too long, courts and commentators have taken it for granted that federal law applies to decide questions of arbitrability without asking questions about the precise scope of that body of federal law on arbitrability. Because “arbitrability” is sometimes used in the U.S. context to encompass essentially the whole inquiry of whether an arbitration agreement applies to a given dispute, applying federal substantive law to questions of nonsignatory enforcement effectively federalizes the relevant contract law. This may have started out as an innocent mistake of mix-up in the terminology, but the consequence of this line of thinking is to disregard parties’ contractual intent and the federal system that the FAA did not set out to eliminate. This line of thinking should have stopped after *Arthur Andersen* and more so after *GE Energy*, but the erroneous decision of the Ninth Circuit Court of Appeals in *Setty III* casts doubts on whether the issue can be settled any time soon.

This Article’s review of Supreme Court decisions invoking the concept of arbitrability reveals that the Court’s jurisprudence does not support an expansive view of the federal law on arbitrability. Even though the Court has used “arbitrability” with its broad meanings, the Court did so emblematically, to address threshold or peripheral issues such as whether the court or the arbitrator should address a given question related to arbitrability. When the Court used the word literally with substantive meaning, the Court invariably did so to address whether a category of cases can be arbitrated (or, whether prohibition of arbitration thereof violates the FAA). Thus, the only substantive federal arbitrability law that the Court has authorized regarding the arbitration agreement itself consists of meta-rules ensuring that state laws do not improperly frustrate or discriminate against agreements to arbitrate.

In the context of nonsignatory enforcement, a federal substantive rule on equitable estoppel is both inconsistent with the Court’s arbitrability jurisprudence and an unconstitutional displacement of state law. Instead, a federal choice-of-law rule in line with international practices will better

achieve the uniformity objective in enforcement of the FAA and international treaty, while preserving the federal system.