No.

IN THE

Supreme Court of the United States

KT CORPORATION, KTSAT CORPORATION,

Petitioners,

v.

ABS HOLDINGS, LTD., ABS GLOBAL, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PETITION FOR WRIT OF CERTIORARI

PAUL A. WERNER
PWERNER@SHEPPARDMULLIN.COM
Counsel of Record
IMAD S. MATINI
MATTHEW G. HALGREN
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
2099 Pennsylvania Avenue, Suite 100
Washington, DC 20006
202.747.1900
Counsel for Petitioners

QUESTION PRESENTED

If a foreign company absconded with a U.S. strategic satellite, in the face of orders of our government mandating its return, no court would recognize an arbitral award declaring that move "perfectly lawful" and U.S. actions to recover it "unauthorized" and "poor and unacceptable."

But our courts enforced just such an award when it was the Republic of Korea's national interests at stake. Korea declared the sale of a geostationary satellite by KT Corporation and KTSAT Corporation ("KTSAT") to ABS Holdings, Ltd., and ABS Global, Ltd. ("ABS"), null and void, unwound it, and imposed corrective actions. Despite these enforcement actions, however, ABS forcibly wrested control of the satellite, flew it to a different orbital location, and used it to attack Korea's national interests.

When the parties then arbitrated commercial disputes, the tribunal declared Korea's actions lacked "credibility," were "*ultra vires*," and violated U.S. due process standards. On those grounds, it awarded ABS title to the satellite and enjoined KTSAT from complying with Korea's enforcement actions. The District Court and Court of Appeals enforced the award. The question presented is thus:

Does the doctrine of international comity bar our courts from enforcing arbitration awards that are based on a tribunal's conclusion – in excess of its limited mandate to resolve contract issues – that a foreign government violated its own laws?

CORPORATE DISCLOSURE STATEMENT

Petitioners KT Corporation and KTSAT Corporation certify that KT Corporation, a publicly-traded company, is the parent corporation of KTSAT Corporation, its subsidiary.

PROCEEDINGS BELOW

U.S. District Court for the Southern District of New York, Case No. 1:17-cv-07859-LGS-DCF, *KT Corporation et al. v. ABS Holdings, Ltd. et al.*, Order Closing Case entered September 5, 2018.

U.S. Court of Appeals for the Second Circuit, Case No. 18-2300, *KT Corporation et al. v. ABS Holdings, Ltd. et al.*, Judgment entered September 12, 2019.

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KT Corporation and KTSAT Corporation ("KTSAT") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit, App. 1a, is unreported but is available at 2019 WL 4308992 and 2019 U.S. App. LEXIS 27707. The July 10, 2018 order, App. 27a, and July 12, 2018 order, App. 12a, of the District Court are also unreported but are available at 2018 WL 3364390 and 2018 U.S. Dist. LEXIS 115268, and at 2018 WL 3435405 and 2018 U.S. Dist. LEXIS 116386, respectively.

JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("FAA") of June 10, 1958 ("Convention"), as enforced under 9 U.S.C. § 201 *et seq*. The arbitration is between two foreign parties and falls under the Convention, which "arise[s] under the laws and treaties of the United States." *Id.* at §§ 202 & 203.

The Court of Appeals for the Second Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(1)(D). The Second Circuit issued its opinion on September 12, 2019.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This most improbable dispute centers on the wrongful seizure and misappropriation of a strategic satellite orbiting in outer space 36,000 kilometers above the Earth by a satellite venture based in the People's Republic of China ("PRC"), and the legitimate actions by Korea to recover it.

The Wall Street Journal aptly described this case as an "outer-space turf war," and where it has ended up – after years of arbitral proceedings and judicial review – is deeply troubling.[1] The Court should review it now to address issues of significant national and international importance. It provides an ideal vehicle for the Court to dispel longstanding confusion over the international comity doctrine that has bedeviled lower courts and to ensure uniformity and consistency in the doctrine's application in the context of judicial review of arbitral awards.

KTSAT manages Korea's satellite fleet. In 2010, it agreed to sell to ABS, a private-equity backed

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[1] Jeyup S. Kwaak, *South Korea Orders Telecommunications Operator to Buy Back Satellite*, WSJ (Jan. 3, 2014), https://www.wsj.com/amp/articles/south-korea-orders-telecommunications-operator-to-buy-back-satellite-1388749638.

Bermuda company headquartered in Hong Kong, a "retired" strategic geostationary satellite known as Koreasat-3, or KS-3. The parties agreed KTSAT would operate KS-3 for ABS under the Korean Administration and it would remain at the 116° East position assigned to Korea for its exclusive use by the International Telecommunications Union ("ITU") – an arm of the United Nations that oversees the global assignment and use of finite satellite orbital positions and related radiofrequencies. It was imperative for KS-3 to remain at 116° East to "protect" Korea's ITU priority rights at that location – which are subject to challenge if not consistently maintained – and for KTSAT to provide emergency communications services to the people of Korea.

Once the Korean government learned of the parties' transaction, however, it swiftly moved to protect its national strategic assets, broadcast resources, and orbital rights. Multiple branches of the Korean government undertook to investigate the legality of the transaction, declare it unlawful in violation of multiple mandatory laws, unwind it, impose corrective actions, and punish corporate decisionmakers involved.

Korea's Legislative Branch held hearings to challenge the legality of the sale. Multiple Executive Branch agencies – the Ministry of Trade, Industry, and Energy ("MOTIE") and the Ministry of Science ICT and Future Planning ("MSIP") – investigated

the transaction too. MOTIE determined the sale violated Korea's export control law, the Foreign Trade Act ("FTA"), which protects the nation's peace and security, because the parties transferred a national strategic asset – a space launch and flight vehicle – without obtaining a required FTA permit. MOTIE referred the matter for criminal prosecution.

The MSIP issued an Order holding the sale null and void because it violated the FTA and other telecommunications laws. The MSIP imposed corrective actions and penalties, including ordering the parties to unwind the sale and ordering KTSAT to operate KS-3 as it had before the transaction. The Korean courts later convicted and imposed serious criminal sanctions on decisionmakers involved in the sale for failure to obtain an FTA permit.

While Korea acted against the sale, ABS executed on a carefully-calculated secret plan to seize control of and move KS-3 that it set in motion when the parties first entered the transaction. After MOTIE determined the sale violated the FTA, ABS forcibly seized operational control of KS-3 from KTSAT by deceiving KTSAT and a third party. The day of the Order, ABS then "brought into use" – *i.e.*, announced it was initiating service under – an ITU filing made years earlier by falsely stating KS-3 had always operated under Papua New Guinea's ("PNG's") Administration, not Korea's. This move threatened KTSAT's priority rights at 116° East because if it did not have a satellite there under continuous use, the

ITU could revoke its rights. ABS then physically flew KS-3 to PNG's newly-minted 116.1° East position – a position so close to where KS-3 was located ABS could not even operate the satellite there unless it deprived Korea of its rights to operate at 116° East. In other words, ABS weaponized KS-3 to secure orbital rights by suppressing Korea's priority rights.

The upshot of ABS's actions are undisputed. ABS took and moved KS-3 in the face of Korea's actions against the transaction. By wrongfully switching KS-3's flag from Korea to PNG and relocating it, ABS also prevented KTSAT from providing emergency services to Korea and caused it to lose valuable orbital rights *forever*.

After ABS moved KS-3, the parties commenced arbitration before a three-person tribunal to address commercial disputes arising from their voided transaction, which centered on issues of performance and damages. These proceedings resulted in a majority issuing a Partial Award and a Final Award.

Although multiple arms of the Korean government declared the sale illegal and void under mandatory laws, the majority in its Partial Award held the sale was "perfectly lawful," awarded ABS title to KS-3, required KTSAT to deliver equipment to fly the satellite to ABS, and enjoined KTSAT from "interfering" with KS-3's ongoing operations. The majority *sua sponte* ruled Korea's actions were "unauthorized" and even violated these foreign

parties' supposed American constitutional due process rights.

While it found Korea's actions were "unauthorized" and the sale was "perfectly lawful," the same majority nevertheless relied on those very actions in its Final Award to hold KTSAT breached obligations to obtain and maintain necessary Korean authorizations. The majority also held ABS did not have to pay KTSAT for KS-3, even though ABS enjoyed uninterrupted use of the satellite and was awarded title to it.

The third tribunal member – Gary Born, the world's foremost authority on international arbitration – was compelled by "conscience" to issue separate dissents from the awards because "nothing in the arbitral tribunal's mandate, U.S. laws or principles of procedural fairness justifies these extraordinary results."

KTSAT sought to vacate the awards, but the District Court found they had a "colorable justification" and the Second Circuit affirmed that judgment. In doing so, the Second Circuit blessed the tribunal's rejection of Korea's enforcement actions against the parties' transaction, as well as its decision to override those enforcement actions – a flagrant departure from its limited mandate.

This surprising outcome raises significant and important issues, and the Court should grant the petition to address them. Our Nation and this Court

have long recognized the international comity doctrine requiring recognition of foreign decrees. We respect valid foreign decrees in the interest of comity, because we have a fundamental national interest in foreign nations respecting our own government's actions. Despite the vital importance of this doctrine, however, its ill-defined and vague contours have spawned confusion among lower courts, leading them to adopt a diversity of understandings and applications.

Even still, the Second Circuit's opinion stands apart as an extreme outlier and out of step with this Court's precedent. That court permitted the tribunal to flout international comity and interfere with foreign relations by commanding KTSAT to violate Korean law under the guise of resolving simple contract disputes. And by enforcing the tribunal's diktat, that court forced KTSAT into the very impossible compliance dilemma the international comity doctrine guards against.

If our courts allow private arbitrators to countermand the enforcement actions of a friendly democratic nation intended to protect its peace and security – on the basis their judgments have some "colorable justification" – we have no real policy of recognizing foreign decrees and we can expect other nations to show our government's actions the same "comity." That is a dangerous precedent with far reaching and untoward consequences. If a Chinese company had absconded with a U.S. strategic

satellite, in the face of orders of our government mandating its return, no court would recognize an award declaring that move "perfectly lawful" and U.S. actions to recover the satellite "unauthorized" or "poor and unacceptable."

The comity doctrine is of course designed to avoid this kind of foreign relations fiasco, and this case represents a perfect opportunity for the Court to provide lower courts crucial guidance on how to assess and respect valid foreign decrees to protect our own national interests. The Court has not seriously treated the doctrine during the last quarter century despite the broad recognition it is critical for foreign relations and comity among nations. The time is ripe to do so to ensure courts understand how to apply the doctrine correctly.

While the Court has also been careful to hold arbitrators, who derive power solely from party consent, to their express mandates, it has never confronted how courts are to apply the international comity doctrine when called on to review and enforce awards that reject foreign governmental actions. The troubling result here illustrates why that guidance is necessary. Despite the core tenet that parties are entitled to arbitration according to the terms they contractually agree upon, the Second Circuit enforced awards resting on the tribunal's resolution of issues far outside its mandate – and competence. The tribunal was not asked, and was not empowered, to review or pass on the legality or

wisdom of Korea's enforcement actions against the transaction. As this Court has warned against, the tribunal assumed the role of a roving "good governance" committee to dispense its own unauthorized and idiosyncratic brand of "industrial justice." In approving that approach, the Second Circuit has created uncertainty and confusion about how courts are to review awards that reject foreign decrees and mandate violations of foreign law.

STATEMENT OF THE CASE

KTSAT entered a novel transaction with ABS for the sale and operation of KS-3, which had outlived its planned life expectancy. Joint Appendix ("JA") 110–11.[2] The parties entered a Purchase Agreement for ABS to buy KS-3 and "baseband equipment"[3] as well as an Operations Agreement for KTSAT to operate KS-3 on ABS's behalf. JA247 & 277.

These agreements are complicated instruments and reflected a number of critical provisions to ensure KTSAT and Korea maintained their rights to use the orbital location where KS-3 was located for a future planned satellite and to use KS-3 to provide

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[2] "JA" refers to the Joint Appendix filed in KTSAT's appeal to the Second Circuit, which is located at Dkt. Nos. 45–47 & 52.

[3] Baseband equipment is the part of a satellite "ground station" between the radio frequency terminal and the terrestrial interface used to assemble and disassemble user information for the satellite uplink and downlink.

critical back up communications services to Korea's residents. The parties agreed KTSAT would fly KS-3 under the Korean flag and it would remain at Korea's assigned 116º East orbital position. The ITU had assigned Korea the highest priority globally to exploit certain frequencies at that position.[4] Confidential Joint Appendix ("CA") 40.[5] KS-3's location and continued use was essential to "protect" Korea's priority rights, which could be threatened or lost if KTSAT failed consistently to maintain them, and for KTSAT to provide emergency communications services.

Purchase Agreement

The parties entered a Purchase Agreement for the sale of KS-3. Because the satellite communications sector is highly regulated, the agreement addressed regulatory approvals required for KS-3's sale and operation. Obtaining governmental approvals is critical and benefits both

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[4] The ITU coordinates telecommunications operations around the world, and it manages global assignments of finite orbital positions and coordinates frequency uses. In doing so, the ITU can revoke orbital assignments that are not used for three years – which is a brief window given the time it takes to plan, order, construct, launch, and position a satellite. *See* ITU Radio Regulations Ch. III, § 11.49 (2016).

[5] "CA" refers to the Confidential Joint Appendix filed in KTSAT's appeal to the Second Circuit, which is located at Dkt. No. 53.

parties given their transaction could not lawfully proceed unless they obtained all necessary approvals. The parties also faced governmental sanctions and penalties if they failed to obtain any required approvals. KTSAT was thus required to "obtain all necessary licenses, consents and approvals for the sale of the Satellite and the Baseband Equipment." JA254 & 261.

Transfer of title to KS-3 and the baseband equipment was expressly conditioned upon the parties obtaining all necessary governmental approvals. Title passed to ABS if – and only if – it paid the purchase price *and* the parties obtained "any necessary approvals and licenses, including the U.S. State Department approval [i.e., International Traffic in Arms Regulations ("ITAR") approval] and the approvals and consents required for and during the Orbital Slot Use Period." JA260; JA171.[6]

The agreement required KS-3 to remain at 116° East and precluded ABS from moving it. Neither ABS nor any third party could unilaterally relocate KS-3 to another orbital position. Only KTSAT could relocate KS-3 to an "orbital slot(s) other than the Designated Orbital Position," and it could only do so under specific and limited circumstances. JA259.

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[6] Title to KS-3 and the baseband equipment would return to KTSAT if "ABS defaults in its obligations to pay." JA261.

In recognition of KTSAT's obligations to provide emergency services, KTSAT could preempt ABS's use of twelve of KS-3's transponders to provide such services. JA255 & 257. The right to preempt service was of critical importance for KTSAT to provide emergency services to over four million Koreans.

Operations Agreement

The Purchase Agreement required the simultaneous execution of an Operations Agreement governing KTSAT's operation of and engineering support for KS-3. JA260.

KTSAT agreed to provide telemetry, tracking, and control – "TT&C" – and other services to "fly" or "operate" the satellite from an earth station on ABS's behalf in exchange for service fees. JA284. The parties also agreed ABS would pay KTSAT "Technical Engineering Service Fees" ("TE fees") totaling "at least" $11.2 million. JA285 & 301–04. The TE fees were part of KS-3's purchase price. JA284–85, 301–04, 850–51, 855–57 & 878.

The agreements also contained carefully negotiated and expressly limited dispute resolution provisions. Any dispute "aris[ing] under" the Purchase Agreement, JA268, or "arising out of" the Operations Agreement, JA294, was subject to arbitration under the auspices of the International Chamber of Commerce ("ICC") Court of Arbitration. Both agreements are "governed by and construed in

accordance with the federal and state laws" of New York. JA270 & 293.

Korea Determines KS-3's Sale Violated Korean Law And Imposes Corrective Actions

When Korea learned of the KS-3 sale, multiple branches of government began to investigate and take actions to unwind it to protect Korea's national strategic assets, broadcast resources, and orbital rights. Korea's Legislative Branch – the National Assembly – held multiple hearings questioning the legality of the sale. JA113–15.

Multiple Executive Branch agencies also investigated and took actions against the sale. MOTIE requested the Korean Prosecutor's office to investigate the KS-3 transaction based on its determination the parties' transaction violated the FTA. JA465. It held the parties "failed to obtain the necessary export permissions required for the sale of KS-3," which involved the "export" of a "strategic good" under the FTA. *Id.*

The MSIP, which, like our Federal Communications Commission, is the Korean Executive Branch agency responsible for regulating the communications industry and licenses KTSAT, also initiated an enforcement proceeding to address the transaction. JA114. KTSAT and ABS had notice of the MSIP proceedings and a full and fair opportunity to persuade the agency. JA864–67. ABS retained Korean counsel to "explain[ ] and

emphasize[ ] to the MSIP" the potential impact of the agency's actions on its services. JA865.

The MSIP ultimately issued an Order declaring the sale of KS-3 void *ab initio*, unwinding it, and imposing corrective actions. JA306–07 & 562. The MSIP concluded the sale violated multiple laws, including the FTA, Telecommunications Business Act, and Radio Waves Act. JA306–07 & 562. Accordingly, the Order held the transaction KTSAT "entered into with ABS, an overseas satellite business operator, is null and void, since it is in violation of the mandatory law [FTA]." JA306.

The MSIP Order also required KTSAT to take corrective measures necessary to "protect the satellite orbit and the spectrum, both of which are national resources." JA306. The MSIP ordered KTSAT to hold title to and operate KS-3 as it had before the transaction. JA562.

Korea's actions unwinding the transaction involved enforcement of its mandatory laws, including its national export control law. The operative version of the FTA was enacted, and the Enforcement Decree implementing it was promulgated, long before the parties contemplated any satellite sale.[7] The FTA governs the export of

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[7] Korea enacted the operative version of the FTA, which makes it mandatory to obtain export approvals for transfers of strategic goods like satellites, in 2007. JA555–56. In 2008 and

strategic goods – such as satellites – and protects Korea's national security interests and international peace. JA324. Actions in violation of the FTA are void *ab initio*. JA306–07 & 328.

The FTA is akin to the United States' ITAR export controls in purpose and effect. The FTA satisfies Korea's obligations as a signatory to the Wassenaar Arrangement, which "promot[es] transparency" and regulation of the transfers of "conventional arms and dual-use goods and technologies." The Wassenaar Arrangement, https://www.wassenaar.org. The U.S. is also a signatory to the Wassenaar Arrangement, and it carries out its obligations through the ITAR and its Export Administration Regulations.

In addition to the actions of the MSIP against the transaction, Korean law enforcement officials commenced criminal prosecutions of key executives involved in the sale. JA332–43. In January 2016, KTSAT executives, one of whom acted as an agent for ABS, were convicted in Korean judicial proceedings of criminal violations of Korean law for assisting in the unlawful export of a strategic asset. *Id.* The court held the sale of KS-3 required an FTA permit, that no permit had been obtained, and

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2009, MOTIE promulgated an Enforcement Decree reinforcing that the FTA's export permit provisions are "mandatory provisions." JA560.

consummating the transaction without a permit violated mandatory Korean law. *Id.*

The court explained the executives "sold a strategic item to a foreign corporation without the necessary approval or permit, which is the satellite operating in one of the limited number of orbit slots with high-performance transponders on it." JA342. It therefore concluded "[t]his is not a minor crime" and imposed serious criminal penalties. *Id.*

Even before the MSIP issued its Order, ABS purported to terminate the Purchase Agreement because KTSAT allegedly failed to obtain all "necessary approvals and licenses," a condition precedent to passage of title to KS-3. JA260 & 345–47. ABS also stopped paying KTSAT the TE fees it owed towards the purchase price. CA72.

ABS Skyjacks KS-3 In Defiance Of Korea's Enforcement Actions Against The Transaction

Unbeknownst to KTSAT, long before any disputes arose, ABS had coordinated with the PNG Administration to make a filing at the ITU to operate KS-3 from 116.1° East, which is immediately adjacent to Korea's 116° East location (where KS-3 was supposed to remain). JA349. Given the close proximity of these locations, satellites could not be operated from both locations without impairing Korea's existing ITU rights.

After ABS learned the MSIP would take action against the transaction, it triggered its 116.1° East filing. ABS seized operational control of KS-3 from KTSAT by overpowering the signal KTSAT used to operate it. CA2–8 & 26–31; JA587–88. Promptly after the MSIP issued its Order, ABS flew KS-3 away from Korea's 116º East to PNG's 116.1º East position. To make these moves, ABS switched KS-3's "flag" from the Korean Administration to the PNG Administration and represented to the ITU that it had operated the satellite under the PNG flag all along. This misrepresentation allowed ABS to secure orbital rights it could never have obtained otherwise. It also allowed the PRC Administration, which held the second-highest priority at 116° East behind Korea, to suppress Korea's existing orbital rights. JA37–38 & 366–69; CA16–24.

By skyjacking KS-3, ABS escalated the parties' contractual dispute to an international conflict that resulted in ABS and China obtaining orbital rights at KTSAT's and Korea's expense. ABS secured orbital rights it could never have obtained if it had not seized and moved KS-3. Korea and KTSAT, as the operator of Korea's satellite fleet, lost *forever* the ability globally to exploit certain radiofrequencies from the 116° East orbital position and provide emergency services in Korea and other communications services in other important regions outside Korea. CA40 & 94.

There was no need for ABS to take these actions and inflict these harms, which it expressly recognized would be "catastroph[ic]" for Korea. JA319. ABS has always enjoyed uninterrupted use of KS-3. And when the transaction was challenged, KTSAT offered to preserve the status quo and avoid any service issues by transitioning the arrangement to a lease authorized by the Korean government. KTSAT even offered to buy back KS-3 and guarantee services to ABS. CA55–56.

The Tribunal Exceeds Its Mandate And Rejects Korea's Enforcement Actions

The parties ultimately commenced arbitral proceedings to resolve commercial disputes arising under their agreements. ABS brought claims against KTSAT, and KTSAT brought counterclaims against ABS, all of which focused on issues of contractual performance, breach, and damages.

A year after the arbitration commenced, the tribunal issued Terms of Reference setting forth the parties' positions, requested relief, and issues for resolution. JA392–415. The Terms of Reference limited "the issues to be determined in this arbitration" to those "resulting from the Parties' submissions during the arbitration." JA406.

The parties submitted extensive briefing, authorities, and evidence in support of their respective positions. Neither party presented for decision the issue whether the MSIP Order, or any

other actions taken by Korea, was authorized, valid, or binding. Neither party argued the Order was unauthorized, *ultra vires*, or violated American constitutional due process.

To the contrary, the validity and binding nature of the Korean government's actions were common ground in the arbitration. Both parties assumed and relied on Korea's actions to support their respective positions, and the record evidence demonstrated the legitimacy and validity of those actions. JA313–17, 322, 325, 330, 526–34, 538 & 541.

Partial Award. On July 18, 2017, a two-member majority of the tribunal issued a Partial Award granting ABS title to KS-3, despite Korea's actions to nullify the sale and order KTSAT to operate it. JA96. While title was a hotly contested issue under the parties' purchase agreement, the majority resolved it by addressing matters that neither party raised, briefed, or presented evidence on, were nowhere found in the Terms of Reference, and did not even arise out of the parties' agreements.

The majority's determination hinged on its *sua sponte* conclusion that Korean law did not bar the sale and Korea's actions holding it null, void, and criminal were, in the majority's subjective opinion, "poor," "unacceptable," without "credibility," and "unauthorized." In the face of Korea's enforcement actions, the majority declared that "the transfer of the Satellite was perfectly lawful." JA204.

The majority announced the MSIP Order was "unauthorized" and "Korean law did not require an FTA export permit." JA178–79; JA173–74, 180 & 186–87. Because Korean export approval was unnecessary in its view, the majority found ABS satisfied all conditions precedent to transfer of title to KS-3. JA195. The majority concluded "[n]o existing Korean mandatory law, regulation, rule, or practice was violated when title passed" to ABS. JA187. The majority disregarded Korea's actions to unwind the sale and criminally punish the decisionmakers involved because the government's actions were supposedly (and somehow inappropriately) influenced by politics. JA185–186, 188–89, 192–94 & 198–99. The majority even declared the Order was "unauthorized" and of "no effect" based on its view the MSIP exceeded its jurisdiction. JA194.

Even though the issue was not presented to the tribunal or argued by either party, the majority further determined the MSIP's Order violated American constitutional due process "rights" of these entirely foreign parties because it was a "very poor and unacceptable precedent." JA206. In doing so, the majority relied on a U.S. Court of Appeals for the District of Columbia Circuit decision – *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) – that it came across entirely on its own and was decided *after* the proceedings closed. *Id.* But the D.C. Circuit *vacated PHH Corp. before* the majority issued its award, so the one "relevant" case on which the majority based

its bizarre due process holding was not good law when the majority relied on it. *See* Order Granting Petition for Rehearing En Banc, *PHH Corp. v. CFPB*, No. 15-1177 (Feb. 16, 2017).[8]

Without reference to any authorities or submissions from the parties – and in the face of orders and rulings from Korean executive agencies and courts – the majority declared the MSIP Order "was not law and was not accepted public policy," "there is no mandatory law in this case governing the regulations of satellite sales," and "there was no such Korean law to violate at the relevant times, or at any time." JA208–09. The majority therefore awarded ABS title to KS-3, ordered KTSAT to deliver baseband equipment to ABS, and enjoined KTSAT from "interfering" with the satellite's ongoing operations. JA210–11.

The third member of the tribunal, Gary Born, dissented.[9] JA214. Born did so "exceptionally"

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[8] In *PHH Corp.*, the D.C. Circuit considered whether the U.S. Consumer Financial Protection Bureau's ("CFPB's") single-director structure violated Article II of our Constitution. 839 F.3d at 7. When the D.C. Circuit reheard the case *en banc*, it held the CFPB's structure *is* constitutional. *See PHH Corp. v. CFPB*, 881 F.3d 75, 84 (D.C. Cir. 2018).

[9] Born literally wrote the book – indeed *many* books, articles, seminars, and lectures – on international arbitration. *See, e.g.*, Gary B. Born, *International Arbitration: Law & Practice* (1st ed. 2016); Gary B. Born, *International Arbitration: Cases & Materials* (2d. ed. 2015); Gary B. Born, *International*

because the majority's "decision is so far removed from the parties' agreement and the results mandated by applicable law that conscience compel[led]" him to record his dissent. *Id.* He explained "the majority's decision disregards the parties' submissions in these proceedings, the unequivocal language of the parties' contractual agreements, the terms of directly-relevant Korean regulatory and judicial rulings and the content of applicable New York law." *Id.* As a consequence, "the majority purports to sanction the unlawful misappropriation of a strategic asset of a sovereign foreign state, ignoring the laws of that state and the express conclusions and directions of both that state's courts and governmental authorities, thereby causing the state, and [KTSAT], grave and potentially permanent injury." *Id.*

Born explained the majority's refusal to recognize Korea's actions to unwind the sale was procedurally and substantively improper. JA224–25. He pointed out the "majority's conclusions are . . . impossible to reconcile with the specific and unequivocal holdings of Korean regulatory and judicial bodies" finding the sale null and void and imposing corrective actions and criminal sanctions on the parties. JA215. The majority could not merely brush aside Korea's

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Commercial Arbitration (2d. ed. 2014); Gary B. Born, *International Civil Litigation in United States Courts* (5th ed. 2011).

actions as influenced by politics because "it is not the proper role of this Tribunal to speculate about the domestic political motivations for the MSIP's Order or to criticize the governance or regulatory policy of foreign states." JA225. "The Tribunal's only mandate is to apply the law, not to make subjective judgments about domestic Korean . . . political affairs or to offer its views about good governance or regulatory practice." *Id.*

Born further explained the majority's conclusions that the Order was "unauthorized" and "*ultra vires*" were "extraordinary" and "indefensible, both procedurally and substantively." JA225–26 & 228. Not only were those conclusions "outside the arbitral tribunal's mandate and wholly mistaken," but the Order was entitled to a "weighty presumption of validity" and the majority reached its opposite conclusion "without any party to this arbitration having made such an assertion, or providing expert or other evidence to support it, or having been afforded an opportunity to address the issue." JA228.

Born further explained "[t]he majority cites no authority for the extraordinary proposition that either Korean or U.S. law would allow private parties to, by contract, exempt themselves from export controls aimed at protecting national security." *Id.* Even applying New York law, Born concluded "the consequences of the illegality of the Purchase Contract under Korean law are to

invalidate the contract" because "New York law would not give effect to the terms of the Purchase Contract which were in violation of Korean mandatory law and which had given rise to criminal liability under Korean law." *Id.*

Final Award. The same majority later issued a Final Award addressing the commercial disputes the parties actually submitted for arbitration. JA733. Despite holding the MSIP Order was invalid in the Partial Award, in the Final Award the majority expressly relied on that Order to hold KTSAT breached the agreements by failing to obtain and maintain all necessary governmental approvals. *Id.* It further concluded ABS did not need to pay KTSAT for the satellite the majority had earlier awarded ABS title to because the MSIP Order "nullified the sale." JA748. Born again dissented because the Final Award "disregard[ed], and sanction[ed] the violation of, mandatory Korean law and judicial orders," and "was wrong and exceed[ed] the Tribunal's authority." JA797.

Proceedings Below

KTSAT petitioned the District Court to vacate the Partial Award. JA13. ABS cross-petitioned to confirm it. JA602.

While the parties' petitions remained pending, the majority issued its Final Award. ABS petitioned to confirm the Final Award, JA728, and KTSAT petitioned to vacate it, JA843.

The District Court confirmed the Awards. App. 12a–45a. The Court of Appeals affirmed. App. 1a–11a.

REASONS FOR GRANTING THE PETITION

The Court should step into this outer-space turf war to settle issues of significant national and international importance. The tribunal issued awards, which the lower courts in turn blessed, that are based on the express rejection of legitimate governmental enforcement actions by Korea to recover a strategic asset and protect its national orbital and broadcast rights. The parties did not ask the tribunal to make any such ruling, and it clearly lacked any authority (or competence) to do so.

While our Nation and this Court have long recognized the international comity doctrine – which mandates judicial recognition of foreign decrees – its vague contours have been a perennial source of confusion among lower courts that has resulted in a diversity of understandings, applications, and outcomes. Yet, among these diverse approaches the Second Circuit's opinion stands as an outlier that forces KTSAT into the very kind of impossible compliance dilemma the policy guards against.

As such, this case provides an excellent opportunity for the Court to supply much needed guidance to lower courts on how to assess, and the proper recognition to give, foreign decrees. Despite the broad recognition the doctrine is critical for

foreign relations and comity among nations, and the existing confusion over its scope and application, the Court has not seriously treated the doctrine during the last quarter century. As the world shrinks and foreign relations become more fraught, it is ever more imperative our courts understand how to apply the doctrine correctly.

With the rise of the role of arbitrations in our legal system, this Court has also been careful to hold arbitrators, who derive power only from party consent, to their express mandates. But the Court has never addressed how courts are to apply the international comity doctrine when called on to review and enforce awards that purport to override foreign governmental actions. This troubling case illustrates the need for and importance of guidance on that issue.

I. The Second Circuit's Rejection Of The Korean Government's Enforcement Of Its Own Laws Injects Dangerous Instability Into The International Comity Doctrine That Undermines Its Core Policy.

Our Nation has a firm and sound policy, which has been observed by this Court and others for well over a century, to recognize valid foreign decrees. Without hesitation, this Court has invoked comity to give force to a wide array of actions by foreign sovereigns without regard for the circumstances and reasons behind them – even when those actions were taken by revolting government officials in the midst

of civil wars and coups. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302–03 (1918); *Underhill v. Hernandez*, 168 U.S. 250, 254 (1897).

The reason, as this Court has explained time and again, is because "courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory." *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309–10 (1918); *see Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *Sung Hwan Co. v. Rite Aid Corp.*, 850 N.E.2d 600, 603 (N.Y. 2006). Accordingly, "the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Ricaud*, 246 U.S. at 309–10. Sound policy imperatives inform this rigid approach.

The doctrine of international comity is rooted in the doctrine of comity among nations – that is, the "recognition which one nation allows within its territory to the *legislative*, *executive*, *or judicial acts* of another nation." *Hilton*, 159 U.S. at 164 (emphasis added). The doctrine thus applies as "the comity of the nation, and not merely the comity of the courts." *Anderson v. N.V. Transandine Handelmaatschappij*, 27 N.Y.S.2d 547, 552 (1941), *aff'd*, 289 N.Y. 9 (1942) (citing *Hilton*, 159 U.S. at 163; *Bank of Augusta v. Earle*, 38 U.S. 519, 589 (1839)). Under the doctrine, then, "[w]hatever laws are carried into execution, within the limits of any government, are considered as having the same effect everywhere." *Societe Nationale Industrielle*

Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 543–44 n.27 (1987) (quoting *Emory v. Grenough*, 3 U.S. 369, 370 (1797)).

The doctrine promotes our vital national interests. International comity fundamentally depends on reciprocity: the failure to accord deference to foreign rulings "invites similar disrespect for our judicial proceedings." *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001). In light of this fundamental purpose, the policy of recognizing foreign decrees is not one of convenience or discretion – it is mandatory. *See Underhill*, 168 U.S. at 252.

Despite the necessity of international comity, and our Nation's and this Court's recognition of it, it is plagued by significant misunderstanding. Indeed, "[f]or a principle that plays such a central role in U.S. foreign relations law, international comity is surrounded by a surprising amount of confusion," and "courts and commentators repeatedly confess that they do not really understand what international comity means." William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2072–2073 (2015); *see also JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) (International comity "has never been well-defined."); *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir. 1994) (International comity is an "elusive doctrine."); *Turner Entm't Co. v. Degeto Film GmbH*,

25 F.3d 1512, 1518 (11th Cir. 1994) (International comity is "a rather vague concept."). This confusion has long presented "something of an embarrassment for U.S. foreign relations law." Dodge, *International Comity in American Law*, *supra,* at 2076.

This confusion is manifest in the Second Circuit's ruling. As a friendly democratic foreign sovereign, Korean rulings and judgments are consistently recognized by our courts because the Korean legal system provides substantive and procedural protections similar to our own. *See Daewoo Motor Am., Inc. v. General Motors Corp.*, 459 F.3d 1249, 1259 (11th Cir. 2006); *LG Display Co. v. Obayashi Seikou Co.*, 919 F. Supp. 2d 17, 29–32 (D.D.C. 2013). And, here, the parties presented neither argument nor evidence that Korea's actions against their transaction were fraudulent or otherwise undeserving of comity. They are not, and the parties fully accepted them as valid. JA314–17, 322, 325, 330, 524–34, 538 & 541. Nevertheless, the tribunal rested its awards on its determinations that Korea's actions were "unauthorized," they violated due process, and the sale of KS-3 was "perfectly lawful." JA176, 178–79, 204–09 & 225.

The Second Circuit approved this move, essentially holding a foreign government is only entitled to comity upon a determination after the fact (by commercial arbitrators and our courts) that it has correctly applied its own law. According to that court, the MSIP Order could be disregarded because the MSIP might have misconstrued Korean

law and agency actions may not even be entitled to comity anyway. App. 11a.[10]

But our policy of recognizing foreign decrees – rooted in international comity – is not limited to judicial orders. It necessarily applies to *all* "legislative, executive, or judicial acts of another nation." *Hilton*, 159 U.S. at 164. The reason it is not so limited is obvious from its purpose and highlighted by the very dilemma created by the awards. The Second Circuit's ruling puts KTSAT to a dire Hobson's Choice: It must choose to violate either the majority's edicts or mandatory Korean law. The MSIP Order held KS-3's sale null and void and ordered KTSAT to operate the satellite and re-point it "away from the Middle East." JA87–90 & 756. Yet, the majority approved the sale, awarded title to ABS, ordered KTSAT to deliver equipment to fly the satellite to ABS, and enjoined KTSAT from *complying with Korean law and enforcement actions* because, it said, doing so would interfere with the satellite's operations.

The policy of comity exists to protect parties like KTSAT from having to face such an impossible compliance dilemma. Although an apparent comity issue might be avoided "where a person subject to regulation by two states can comply with the laws of

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[10] The District Court similarly had concluded that Korea's actions did not need to be recognized because the Order was "an administrative and not a judicial order." App. 42a.

both," *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993), "a state may not require a person . . . to do an act in another state that is prohibited by the law of that state," Restatement (Third) of Foreign Relations Law § 441 (1987).

The Second Circuit's extreme and blithe rejection of international comity puts it at the far edge of the spectrum of how lower courts and this Court have applied the international comity doctrine. Even other courts that have eschewed broad interpretations of the comity doctrine acknowledge they may not second guess final decrees of foreign governments like Korea's here. *See, e.g., Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 392–394 (3d Cir. 2006) (noting court was "skeptical of [the Eleventh Circuit's] broad application of the international comity doctrine," but holding it would "not review acts of foreign governments and [would] defer to proceedings taking place in foreign countries"); *see also Mujica v. AirScan Inc.*, 771 F.3d 580, 602 (9th Cir. 2014) (declining "rigid" requirements for international comity assessment); *cf. Michigan Cmty. Servs., Inc. v. N.L.R.B.*, 309 F.3d 348, 357 (6th Cir. 2002) (holding comity applied to agency actions). And this Court has been emphatic in the doctrine's application in circumstances involving far more dubious government actions. Among diverse approaches to international comity among the lower courts, the Second Circuit's troubling decision here, where Korea took clear, express, and valid actions against the parties'

transaction, thus stands apart from how other courts, including this one, have applied the doctrine and is deeply inconsistent with the fundamental policy animating it.

This outlier case thus presents an ideal vehicle for this Court to bring needed clarity and uniformity to the application of the international comity doctrine. If the policy of recognizing foreign decrees does not apply here, where a private arbitration tribunal purports to override the actions of a friendly democratic nation (with due process standards akin our own) intended to protect its national interests in peace and security and requires a party to violate that nation's mandatory export control laws, it is hard to imagine a circumstance where and when it would apply. Failing to apply the policy here sets a dangerous precedent with far reaching and untoward consequences at home and abroad. If it were a U.S strategic satellite that a foreign entity had absconded with in the face of orders of our government mandating its return, we would not tolerate any court confirming an award that declared such a move "perfectly lawful" and U.S. actions to recover the asset "unauthorized" and "poor and unacceptable." But we cannot expect our democratic allies (such as, for example, Korea) to recognize our government's orders if our courts refuse to show theirs any respect.

"Although comity" has thus far "elude[d] a precise definition, its importance in our globalized economy

cannot be overstated." *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 360 (8th Cir. 2007). It has been more than a quarter century since this Court last seriously engaged with international comity. *Hartford Fire Ins. Co.*, 509 U.S. at 794–799; *see also Mujica*, 771 F.3d at 599 ("The Supreme Court's most recent discussion of international comity was in *Hartford Fire*."). The time to clarify this critical rule and promote consistency and uniformity in its application is now, and this case presents the right opportunity for the Court to do so. This Court should grant the petition to dispel confusion on the application of the international comity doctrine, which is of critical importance to our Nation's place in the international legal system.

II. The Second Circuit Set A Dangerous Precedent By Allowing An Arbitral Body To Exceed Its Mandate To Override A Foreign Nation's Law Enforcement.

The Second Circuit's approval of the awards further injects uncertainty and confusion into the proper scope of judicial review of arbitrators' adherence to their mandates. As this Court has made clear, the fundamental legitimacy of arbitrations and awards – and why courts second guess them only in limited circumstances – is because they are creatures of contractual agreement. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Arbitrators have "authority to

resolve disputes *only* because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648–649 (1986) (emphasis added).

Because arbitrators' power is based on consent, rather than coercion, "courts and arbitrators must give effect to the contractual rights and expectations of the parties," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010), who "have a right to arbitration according to the terms for which [they] contracted," *Western Employers Ins. v. Jeffries & Co.*, 958 F.2d 258, 261 (9th Cir. 1992). Arbitrators must therefore decide issues the parties actually agree to submit to arbitration, and refrain from dispensing free-wheeling justice on their own terms. *See Stolt-Nielsen*, 559 U.S. at 671; *Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc.*, 607 F.2d 649, 650 (5th Cir. 1979).

In other words, an arbitrator cannot act as a "private attorney general or investigating magistrate" to address matters outside his or her "original mandate." Born, *International Commercial Arbitration*, *supra*, § 13.04 at 1998. Instead, an arbitrator must "apply the applicable law, including . . . provisions of mandatory law" and cannot rest an award on "a legal theory not advanced by the parties." *Id.* These basic rules enforce the consent-based legitimacy of arbitrations and advance

fundamental interests in fairness and parties' "right to an opportunity to be heard." *Id.* § 25.04 at 3250.

In recent years, and with the rise of the role arbitrations play on our legal system, this Court has expressed concern with awards that result from disregard of contractual limitations on the scope of arbitration and violations of these rules, and this Court has issued guidance to lower courts scrupulously to enforce arbitration mandates. *See Stolt-Nielsen S.A.*, 559 U.S. at 682–87. The Second Circuit's ruling is out of step with this Court's rulings and threatens to undermine consent-based checks on an arbitrator's authority recognized by this Court. *See Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (Arbitration is "a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."). That unwarranted departure is especially worrisome given the tribunal here exceeded its limited mandate to reject lawful governmental enforcement actions owed recognition under longstanding public policy essential to comity among nations.

The parties' arbitration agreement was negotiated at arm's length and carefully limited. They agreed only to arbitrate disputes "aris[ing] under" or "out of" their agreements – that is, disputes over "the interpretation of the[ir] contract and matters of performance." *In re Kinoshita*, 287

F.2d 951, 953 (2d Cir. 1961); *accord Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983); *see* JA268 & 294.

And those are the issues the parties actually submitted to the tribunal for resolution. They brought claims and counterclaims for breach of contract and damages, and their submissions, evidence, and arguments centered on those issues. JA130–36. The binding Terms of Reference agreed on by the parties and tribunal that governed the arbitration also expressly limited arbitration to those performance issues. JA406.

But the awards are the byproduct of the tribunal's *sua sponte* resolution of issues worlds away from the limited contract matters submitted for arbitration. The majority determined Korea's actions were "unauthorized," "*ultra vires*," and violated American constitutional due process. JA176, 178, 204 & 206–09. It determined the transfer of title to KS-3 was "perfectly lawful" because "no existing mandatory Korean law, regulation, rule, or practice was violated." JA204.

Yet, the parties' agreements, Terms of Reference, and submissions not surprisingly do not authorize the tribunal to decide whether or not Korea's actions were unauthorized, let alone comported with American due process. JA215. The Terms of Reference do not identify the validity of Korea's actions or whether they met American constitutional due process standards as issues for arbitration.

JA406. And, again, unsurprisingly, the parties did not ask the tribunal to decide any of those issues, or submit evidence or argument on them. To the contrary, the parties' submissions and evidence depended upon and uniformly demonstrated the validity of Korea's actions. The parties *relied* on Korea's actions in presenting their arguments on the contract and damages issues they submitted for resolution by the tribunal.

The Second Circuit overlooked this excess of mandate in upholding the awards, even though "[c]onsent is essential under the FAA because arbitrators wield only the authority they are given." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019). The parties never consented to have a commercial arbitration tribunal sit as an international supervisory appellate court with a roving commission to offer subjective judgments of Korea's actions. They expressly agreed otherwise: to limit arbitration exclusively to matters of contract performance. Just as the tribunal ignored that its job was "to interpret and enforce a contract, not to make public policy," *Stolt-Nielsen*, 559 U.S. at 672, the Second Circuit disregarded this Court's instruction to keep arbitrators honest to their mandates when it blessed awards that were based on the express rejection of a foreign government's enforcement of its own laws. *See Oetjen*, 246 U.S. at 302–03; *Ricaud*, 246 U.S. at 309–10; *Underhill*, 168 U.S. at 252–54; *Hilton*, 159 U.S. at 164.

CONCLUSION

The Second Circuit sanctioned the tribunal's disregard for international comity through a foreign affairs frolic and detour lightyears beyond its limited, contractually-agreed mandate.

In doing so, that court further confused the proper scope and application of the international comity doctrine, with far-reaching and dangerous consequences for foreign affairs and comity among nations. The Second Circuit's ruling invites arbitral bodies to act as roving commissions to override legitimate actions of foreign nations based on their own subjective judgments under the pretext of resolving mundane commercial disputes.

Given the fundamental importance of the international comity doctrine as well as the ever-increasing role of arbitration in dispute resolution, the Court should take this opportunity to dispel confusion over how courts are to review awards that reject foreign decrees and mandate violations of foreign law.

KTSAT respectfully requests the Court to grant its petition for a writ of certiorari.

Respectfully submitted,

PAUL A. WERNER
Counsel of Record
IMAD S. MATINI
MATTHEW G. HALGREN
SHEPPARD, MULLIN, RICHTER &
HAMPTON LLP
2099 Pennsylvania Avenue
Suite 100
Washington, DC 20006
202.757.1900
pwerner@sheppardmullin.com
imatini@sheppardmullin.com
mhalgren@sheppardmullin.com

Counsel for Petitioners

December 11, 2019

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED SEPTEMBER 12, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

18-2300-cv

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of September, two thousand nineteen.

KT CORPORATION, KTSAT CORPORATION,

Petitioners-Appellants,

v.

ABS HOLDINGS, LTD., ABS GLOBAL, LTD.,

Respondents-Appellees.

September 12, 2019, Decided

PRESENT: RICHARD C. WESLEY,
DENNY CHIN,
JOSEPH F. BIANCO,
Circuit Judges.

Appendix A

SUMMARY ORDER

Appeal from the United States District Court for the Southern District of New York. (Schofield, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the orders of the district court are **AFFIRMED**.

Petitioners-appellants KT Corp. and KTSAT Corp. (together, "KT") appeal the district court's opinions and orders confirming two arbitration awards (the "Awards") in favor of respondents-appellees ABS Holdings, Ltd. and ABS Global, Ltd. (together, "ABS"). KT argues that the district court erred because (1) the arbitration panel exceeded its powers in issuing the Awards, (2) the Awards are based on a manifest disregard of the law, and (3) the Awards violate public policy. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

BACKGROUND

A. *The Facts*

The facts are largely undisputed. KT is a Korean satellite communications provider that manages the Korean satellite fleet. ABS is a satellite communications provider incorporated in Bermuda and headquartered in Hong Kong. In 2010, ABS and KT entered into two agreements (the "Agreements"): (1) a Purchase Agreement whereby KT agreed to sell to ABS a geostationary satellite (the

"Satellite"), and (2) an Operations Agreement whereby KT agreed to operate the Satellite on behalf of ABS. Both agreements contained a New York choice-of-law provision and a mandatory arbitration clause. Under the Purchase Agreement, KT was responsible for obtaining "all necessary licenses, consents and approvals for the sale of the Satellite" and for "maintaining . . . all governmental and regulatory licenses and authorizations required" to perform its obligations. App. at 254, 261. The Purchase Agreement further provided that the title of the Satellite "shall transfer to ABS . . . [on] September 4, 2011, provided that (a) KT receives the required payment . . . and (b) any necessary approvals . . . have been received." App. at 260.

On February 18, 2011, KT delivered the Satellite to ABS. In September 2011, ABS paid the $500,000 purchase price and KT delivered two bills of sale transferring title of the Satellite to ABS.

On December 18, 2013, two years after the completion of the transaction, the Republic of Korea's Ministry of Science, ICT and Future Planning (the "MSIP") issued an order (the "MSIP Order") that, among other things, declared the Purchase Agreement "null and void" on the grounds it was "in violation of the mandatory law (Foreign Trade Act)" (the "FTA") because KT failed to obtain an export permit. App. at 306. The MSIP Order cancelled KT's permission to use certain frequencies to operate the Satellite and directed KT to return the Satellite to its original operating condition. App. at 307.

B. *Arbitration Proceedings*

On December 22, 2013, KT and ABS proceeded to arbitration before the International Chamber of Commerce ("ICC") to resolve their disputes arising out of the Agreements. On July 18, 2017, the three-member ICC panel (the "panel") issued a partial award (the "Partial Award"), which dealt solely with the issue of title to the Satellite. The panel concluded that ABS held title to and thus owned the Satellite. The panel reasoned that title lawfully passed to ABS in 2011 when all the conditions precedent to the sale were met and the bills of sale were issued because no mandatory Korean export permit requirement was then in existence. In the alternative, the panel concluded that even "if the MSIP Order was mandatory law, the outcome in the . . . case would not be changed . . . because the Order was issued *ex post facto*, retroactively without time limit, and most importantly, with no notice to the Parties," which is "clearly in violation of New York law." App. at 207.

On March 9, 2018, the panel issued a final award (the "Final Award"), which, by its terms, dealt with "all of the issues and Parties' claims not addressed in the Partial Award." App. at 793. The panel concluded, *inter alia*, that KT breached the Agreements by failing to obtain and maintain all necessary governmental approvals as required under the Agreements, ABS took reasonable mitigation efforts, and KT was liable for damages for breaching the Agreements.

C. *Proceedings Below*

KT filed a petition to vacate the Partial Award, and ABS filed a cross-petition to confirm the it. Thereafter, ABS filed a petition to confirm the Final Award, and KT filed a cross-petition to vacate it.

The district court denied KT's petition to vacate the Partial Award and granted ABS's cross-petition to confirm the Partial Award. *KT Corp. v. ABS Holdings, Ltd.* ("*Partial Award Decision*"), No. 17-civ-7859, 2018 U.S. Dist. LEXIS 115268, 2018 WL 3364390, at *7 (S.D.N.Y. July 10, 2018). Soon after, the district court granted ABS's petition to confirm the Final Award and denied KT's cross-petition to vacate the Final Award. *KT Corp. v. ABS Holdings, Ltd.* ("*Final Award Decision*"), No. 17-civ-7859, 2018 U.S. Dist. LEXIS 116386, 2018 WL 3435405, at *6 (S.D.N.Y. July 12, 2018). This appeal followed.

DISCUSSION

KT argues that the district court erred in confirming and not vacating the Partial and Final Awards because (1) the panel exceeded its authority, (2) the Awards are based on a manifest disregard of the law, and (3) the Awards violate public policy. We are not persuaded.

A. *Standard of Review*

We review "a district court's decision to confirm or vacate an arbitration award *de novo* on questions of law and

for clear error on findings of fact." *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 536 (2d Cir. 2016). "[A]n arbitration award should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached." *Landy Michaels Realty Corp. v. Local 32B-32J, Serv. Emps. Int'l*, 954 F.2d 794, 797 (2d Cir. 1992) (internal quotation marks omitted).

B. ***Applicable Law***

The parties cross-petition to vacate or confirm the Awards pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Award ("New York Convention") and the Federal Arbitration Act ("FAA"). "[T]he FAA and the New York Convention work in tandem, and they have overlapping coverage to the extent that they do not conflict." *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 102 n.1 (2d Cir. 2006) (internal quotation marks omitted). Indeed, the FAA expressly incorporates the terms of the New York Convention, *see* 9 U.S.C. § 201 *et seq.*, and a court applying the New York Convention may vacate an arbitration award based on the grounds provided in the FAA, *see Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 70 (2d Cir. 2012).

The FAA provides that an arbitration award may be vacated when "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). An award will not be vacated

even where there is "serious error," but only where the panel "effectively dispense[s] [its] own brand of industrial justice." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) (internal quotation marks omitted). Under the FAA, an award may be vacated "when an arbitrator has exhibited a manifest disregard of law." *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 (2d Cir. 2011). Vacatur on this ground requires a showing that (1) "the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether," and (2) "the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 589 (2d Cir. 2016).

The New York Convention provides that a court may refuse to confirm an award where, among other things, "[t]he recognition or enforcement of the award would be contrary to the public policy of [the confirming] country." New York Convention, Art. V(2)(b). This affirmative defense "must be construed very narrowly to encompass only those circumstances where enforcement would violate our most basic notions of morality and justice." *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 411 (2d Cir. 2009) (internal quotation marks omitted). The party seeking to "vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high." *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 648 F.3d 68, 74 (2d Cir. 2011). Accordingly, the defense is frequently invoked but rarely successful, in view of the strong policy favoring arbitration. *Telenor*, 584 F.3d at 407-10.

C. *Application*

We discuss the Partial and Final Awards in tandem and conclude that the district court did not err in confirming the Awards and in denying KT's petition and cross-petition to vacate the Awards.

1. *Exceeding Authority*

KT argues that the panel exceeded its authority in concluding that the MSIP Order was "unauthorized," "*ultra vires*," and in violation of due process principles. It argues that this conclusion was essential to the panel's determinations that ABS held title to the Satellite and that KT breached the Agreements. We are unconvinced. Despite arguing that the panel exceeded its authority, counsel for KT refused to challenge the MSIP Order before either an agency or court in the Republic of Korea, and represented to counsel for ABS that "the validity of the Purchase Contract is a subject matter to be conclusively determined in the arbitration proceedings pending between [KT] and ABS." App. at 611-12. And even assuming these statements regarding the MSIP Order did exceed the panel's authority, the panel's conclusions did not rest on them; they were part of the panel's alternative holding in "a coda at the end of the [Partial] Award." *Partial Award Decision*, 2018 U.S. Dist. LEXIS 115268, 2018 WL 3364390, at *4; *see also* App. at 206 (noting that "the foregoing is sufficient to ground the majority's decision" and proceeding to discuss validity of MSIP Order).

The panel's principal holding in the Partial Award was that title passed to ABS in 2011 after the parties agreed that all conditions precedent to the passing of title were satisfied and bills of sale transferred, and that no later-passed law or regulation affected the legal passage of title to ABS. The panel's conclusion in the Final Award was that KT breached the Agreements by failing to "compl[y] with [its] obligation to obtain and maintain authority from the Korean government to operate the Satellite on ABS's behalf" as required under the Agreements. App. at 748. These conclusions, based on the application of New York law to the Agreements between the parties, at least "arguably construe[d] or appl[ied] the contract" and thus did not exceed the panel's authority. *See Eastern Associated Coal Corp. v. UMW, Dist. 17*, 531 U.S. 57, 62, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000).

2. *Manifest Disregard of the Law*

KT argues that the panel's failure to give effect to the MSIP Order manifestly disregarded Korean law, New York contract law, and a presumption in favor of the validity and regularity of agency actions. KT also argues that the panel's conclusion that KT is not entitled to damages for technical engineering fees under the Operations Agreement manifestly disregarded New York contract law and equitable principles. These arguments fail for substantially the reasons given by the district court in its thorough and well-reasoned decisions. *See Partial Award Decision*, 2018 U.S. Dist. LEXIS 115268, 2018 WL 3364390, at *5; *Final Award Decision*, 2018 U.S. Dist. LEXIS 116386, 2018 WL 3435405, at *4-5. Under Korean law, the mandatory and retroactive nature of the

MSIP Order is far from "well defined, explicit, and clearly applicable." *Zurich Am. Ins. Co.*, 811 F.3d at 589; *see* App. at 170 (KT's own legal expert noting that the MSIP Order was a "controversial and debatable interpretation of [Korean] law"). The panel applied New York law to the Agreements, it did not ignore any well-defined and clearly applicable law, *Zurich Am. Ins. Co.*, 811 F.3d at 589, and there was at least a "colorable justification" for the outcome reached, *Landy Michaels Realty Corp.*, 954 F.2d at 797.

3. *Public Policy*

KT argues that public policy requires deference to foreign rulings and decrees and the panel violated public policy by concluding that the MSIP Order did not serve to unwind the transaction. Appellant's Br. at 48 (arguing that the panel was "not free simply to disagree with Korea's laws and enforcement actions"). We disagree.

The public policy defense "is limited to situations where the contract as interpreted [by the arbitrators] would violate some explicit public policy that is *well defined and dominant*, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) (emphasis added) (quotation marks and citations omitted). Though it is the well-defined and dominant public policy of the United States to enforce foreign court judgements not repugnant to U.S. policy, *see Voorhees v. Jackson*, 35 U.S. 449, 472, 9 L. Ed. 490 (1836); *Ackermann v. Levine*, 788

F.2d 830, 841 (2d Cir. 1986), the extent to which this policy extends to the enforcement of foreign regulatory actions is unclear. In any event, even assuming it is well-defined policy to give effect to foreign administrative decrees, *see Bank of Augusta v. Earle*, 38 U.S. 519, 589, 10 L. Ed. 274 (1839) (noting that "Courts of justice presume the tacit adoption of [foreign laws]"), it is far from clear that the MSIP Order was an enforceable administrative decree under Korean law. Indeed, KT's legal expert declared that the position taken by MSIP that the Satellite is a Korean export subject to the FTA is "a controversial and debatable interpretation of the law," and ABS's legal expert testified that ABS's "failure to obtain an FTA export permit prior to transferring title did not violate the FTA." App. at 170. Given this legal uncertainty, the panel's conclusion that the MSIP Order did not apply retroactively to unwind the Agreements does not "violate our most basic notions of morality and justice." *Telenor*, 584 F.3d at 411.

Accordingly, the district court did not err in confirming the Awards and in denying KT's petitions to vacate the Awards.

* * *

We have considered KT's remaining arguments and find them to be without merit. For the reasons set forth above, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK GRANTING PETITION TO CONFIRM FINAL AWARD AND DENYING CROSS-PETITION TO VACATE FINAL AWARD, FILED JULY 12, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17 Civ. 7859 (LGS)

KT CORPORATION, *et al.*,

Petitioners,

v.

ABS HOLDINGS, LTD., *et al.*,

Respondents.

July 12, 2018, Decided;
July 12, 2018, Filed

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

This case arises out of a Final Arbitration Award (the "Final Award") issued in a dispute between Petitioners KT Corporation and KTSAT Corporation (collectively, "KT") and Respondents Asia Broadcast Satellite Global, Ltd. and Asia Broadcast Satellite Holdings, Ltd. (collectively,

"ABS") over title to a geostationary satellite and related issues. ABS petitions to confirm the Final Award and moves to recoup attorneys' fees and costs. KT cross-petitions to vacate the Final Award and seeks remand of this case to the International Chamber of Commerce ("ICC"). For the reasons stated below, ABS's Petition to confirm is granted, and KT's cross-petition to vacate is denied.

I. BACKGROUND

A. The Purchase and Operation Agreements and the MSIP Order

KT is a Korean satellite communications provider that manages the Korean satellite fleet. ABS is a satellite communications provider that is incorporated in Bermuda and based in Hong Kong. In 2010, ABS and KT entered into two agreements: (1) a Purchase Agreement whereby KT sold to ABS a geostationary satellite, then known as KOREASAT-3 ("KS-3"); and (2) an Operation Services Agreement, which provided that KT would operate KS-3 on behalf of ABS (collectively, "Agreements"). Both agreements contain a mandatory arbitration clause, and a choice of law provision selecting New York law without giving effect to its conflict of law principles.

The Agreements contain various provisions related to governmental authorizations and approvals related to the sale and operation of KS-3. Under the Purchase Agreement, KT is "responsible for obtaining and maintaining . . . all governmental and regulatory licenses

and authorizations required" to perform its obligations under the Purchase Agreement. The Purchase Agreement provides that the total purchase price is $500,000. The Operation Agreement states that KT is obligated to "obtain and maintain, in all material respects, all necessary licenses, clearances, permits, authorizations or permissions, that are applicable to KT with respect to its performance of the Services under this Agreement" and that KT will perform its obligations in exchange for $800,000 annual fee and various technical engineering fees provided in Exhibit B to the Operation Agreement. In 2011, KT delivered to ABS the satellite and related bills of sale, in exchange for $500,000.

On December 18, 2013, two years after the transaction closed, Korea's Ministry of Science, ICT and Future Planning ("MSIP") issued an order (the "MSIP Order") that, among other things, declared the Purchase Agreement "null and void and in violation of the mandatory law (Foreign Trade Act)" ("FTA") because KT had failed to obtain an FTA permit; cancelled KT's allocation of the spectrum for the KT Band; and directed KT to return the satellite to its original operating condition. In 2016, the Seoul Central District Court entered a criminal judgment against key KT executives who had been involved in the sale of KS-3.

On June 18, 2014, KT and ABS submitted issues arising under the Purchase Agreement and the Operation Agreement to the ICC Arbitration Panel (the "Panel"). Neither party questioned the tribunal's authority to issue a determination on both the KS-3 title issue and claims

under the Operation Agreement. The arbitral proceedings were governed by New York law, seated in New York, and presided over by a three-member tribunal.

B. The Partial Arbitration Award

The Panel, by majority,[1] held that title transferred to ABS in 2011 when all the contractual conditions precedent to transfer were satisfied, and that no existing Korean mandatory law was violated when title passed to ABS. The Partial Award declared that ABS holds title to, and thus owns, KS-3, and ordered KT not to interfere with the ongoing operation of KS-3.

C. The Opinion and Order, dated April 10, 2018

On October 12, 2017, KT petitioned in this action to vacate the Partial Award and sought remand of this case to the ICC. On November 6, 2017, ABS cross-petitioned to confirm the Partial Award and moved to recover attorneys' fees and costs.

By Opinion and Order, dated April 10, 2018 (the "Opinion"),[2] KT's petition was denied and ABS's cross-motion was granted. The Opinion held that the Panel had not exceeded its authority, because the parties had jointly

1. All further references in this Opinion to the "Panel" refer to the panel acting by majority.

2. A corrected opinion was filed on July 10, 2018, correcting the Opinion. The Corrected Opinion does not change the legal analysis and the result of the Opinion.

submitted the issue of KS-3 title to the Panel pursuant to the arbitration provisions in the Agreements, and the Panel's holding that title had passed under New York law did not depend on the validity of the MSIP Order. The Opinion also concluded that the Panel had not manifestly disregarded the law, because the Panel did not ignore the MSIP Order; instead, the Panel concluded that the MSIP Order was not the governing law because it did not to apply when title passed, and did not apply retroactively to unwind the sale of the satellite.

D. The Final Award

On March 9, 2018, the Panel rendered the Final Award, which "deals with all of the issues and the Parties' claims not addressed in the Partial Award." The 62-page Final Award declared that (1) the Agreements were properly terminated by ABS in response to KT's breach; (2) ABS took reasonable mitigation actions in light of KT's breaches, (3) ABS itself did not breach the Agreements; (4) ABS was owed $1,036,237.15 in damages, comprised of $748,564 in principal and $287,673.15 in interest compounded since December 1, 2013 through the date of the Final Award at a rate of 9% and (5) KT's claims for damages are meritless.

II. STANDARD

ABS brings the Petition to confirm the Final Award pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and the Federal Arbitration Act ("FAA"), 9

U.S.C. § 207 (incorporating the New York Convention). KT cross-petitions to vacate under the FAA as well as the overlapping grounds under the New York Convention.

Ordinarily, confirmation of an arbitration decision is "a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 132 (2d Cir. 2015). "A court's review of an arbitration award is . . . severely limited so as not to frustrate the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *United Bhd. of Carpenters & Joiners of Am. v. Tappan Zee Constructors, L.L.C.*, 804 F.3d 270, 274-75 (2d Cir. 2015). "The arbitrator's rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case." *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (internal quotation marks omitted).

The New York Convention provides limited grounds for refusing confirmation of an award, including that (1) "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration," (2) "the arbitral procedure was not in accordance with the agreement of the parties" and (3) "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." New York Convention, Art. V(1)(c)-(d), (2)(b). The FAA expressly incorporates the terms of the Convention. *See* 9 U.S.C. § 201 *et seq.*

Appendix B

The New York Convention does not articulate a basis for vacating arbitration awards, but a court applying the New York Convention may vacate an arbitration award based on the grounds provided in the FAA. *PDV Sweeny, Inc. v. ConocoPhillips Co.*, No. 14 Civ. 5183, 2015 U.S. Dist. LEXIS 116175, 2015 WL 5144023, at *6 (S.D.N.Y. Sept. 1, 2015), *aff'd*, 670 F. App'x 23 (2d Cir. 2016) (summary order); *see Scandinavian Reinsurance Co. v. Saint Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 70 (2d Cir. 2012). Under Section 10 of the FAA, an arbitration award may be vacated, as relevant here, when "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

In addition to the statutory provisions, an award "may be vacated when an arbitrator has exhibited a manifest disregard of the law." *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 (2d Cir. 2011) (internal quotation marks and citation omitted). This doctrine requires more than "error or misunderstanding with respect to the law." *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004). "[T]he award should be enforced, despite a court's disagreement with it on the merits, if there is *a barely colorable justification* for the outcome reached." *T.Co. Metals, L.L.C. v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010) (quoting *Wallace*, 378 F.3d at 190; emphasis in the original). "A motion to vacate filed in a federal court is not an occasion for de novo review of an arbitral award." *Wallace*, 378 F.3d at 189.

The party seeking to "vacate an arbitration award has the burden of proof, and the showing required to avoid

confirmation is very high." *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) L.L.C.*, 648 F.3d 68, 74 (2d Cir. 2011). Similarly, the party opposing confirmation of an arbitral award has the burden of proving that a defense applies. *Telenor Mobile Commc'ns AS v. Storm L.L.C.*, 584 F.3d 396, 405 (2d Cir. 2009).

III. DISCUSSION

A. Petition to Vacate the Final Award

KT asserts two grounds as a basis for vacating the Final Award:[3] (1) the Panel acted in manifest disregard of the New York contract law by failing to award KT the purchase price or other compensation for KS-3 after awarding ABS title to it; and (2) the Panel exceeded its authority by resting its holding on the invalidity of the MSIP Order. For the reasons below, KT has failed to carry its significant burden of showing any valid reason to vacate the Final Award.

1. Exceeding Authority

Section 10(a)(4) of the FAA allows for vacatur "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award

3. KT asserts a third ground for vacating the Award -- that it contravenes public policy. This is not a basis for vacatur of an award under the FAA, but rather a defense to confirmation of an award under the New York Convention. *See* New York Convention, Art. V(2)(b). Consequently, this argument is addressed below in the discussion of ABS's cross-petition to confirm the Final Award.

upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).[4] Applying that standard, the Supreme Court held that "[i]t is not enough for petitioners to show that the panel committed an error -- or even a serious error. It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice that his decision may be unenforceable." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) (internal quotation marks and citations omitted; all but first alteration in the original). An award will not be vacated as long as the panel "is even arguably construing or applying the contract and acting within the scope of [its] authority." *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000).

KT argues that the Panel acted beyond its authority in issuing the Final Award because its holdings -- that KT breached the Agreements, ABS undertook reasonable mitigation, and KT owes ABS damages -- were ultimately based on the Panel's earlier finding in the Partial Award that Korea's actions to nullify the parties' transaction were improper. KT further argues that the Panel was not empowered to make such a finding.

KT mischaracterizes the Final Award. The Panel found that KT had breached the Agreements because

4. As this provision corresponds to the defense to confirmation of an award in the New York Convention when "the arbitral procedure was not in accordance with the agreement of the parties," that defense is not discussed again *infra* regarding the cross-motion to confirm the Final Award. New York Convention, Art. V(1)(d).

KT failed to adduce any evidence that it was capable of providing "operational services to KS-3 pursuant to the Operation[] Agreement," or that KT "complied with [its] obligation to obtain and maintain authority from the Korean government to operate [KS-3] on ABS's behalf." Whether or not Korea's actions were lawful, or even that the MSIP Order may have caused KT's breach, are irrelevant to the finding that KT did not fulfill its contractual obligations. As with the Partial Award, the Panel did not exceed its authority because the basis for its holding was one of "construing [and] applying the contract," which was within the scope of the arbitration provisions in the parties' agreements.

KT also argues that the Panel acted beyond its authority because it interpreted the MSIP Order -- specifically, the Panel interpreted the order to require the satellite's coverage of the Korean Peninsula but not the Middle East, where ABS's customers are located. The Panel apparently found this restriction rendered KT unable to perform its obligations under the Agreements. KT asserts that the Panel's interpretation of the MSIP Order is incorrect. Regardless of who is correct, as discussed above, the Panel had other sufficient bases to find that KT had breached the Agreements, which was a question squarely within its authority.

2. Manifest Disregard of the Law

A court may vacate an award based on manifest disregard of the law "only if the court 'finds both that (1) the arbitrators knew of a governing legal principle yet

refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'" *Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 589 (2d Cir. 2016) (quoting *Wallace*, 378 F.3d at 189). "[T]he award should be enforced, despite a court's disagreement with it on the merits, if there is a *barely colorable justification* for the outcome reached." *Wallace*, 378 F.3d at 190 (internal quotation marks omitted; emphasis in the original). KT has failed to show that the Final Award was based on a manifest disregard of the law and lacked any colorable justification for its outcome.

a. New York Law

KT argues that it is entitled to additional technical engineering fees as a part of KS-3 purchase price, because the Agreements provided for both an initial payment of $500,000 plus technical engineering fees of almost $7 million payable over time. Under New York law, "a written agreement . . . must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 780 N.E.2d 166, 170, 750 N.Y.S.2d 565 (N.Y. 2002). Here, the Purchase Agreement provided for a "Total Purchase Price" of $500,000, which the parties agree was paid. The Operation Agreement provided that KT would continue operating KS-3 on ABS's behalf, in exchange for various technical engineering fees detailed in Exhibit B to the Operation Agreement.

The Panel's conclusion that KT is not entitled to additional technical engineering fees under the Operation

Agreement is not in manifest disregard of the law. Under the Operation Agreement, KT was obligated to provide certain operational services and obtain and maintain all necessary permits and authorizations to perform its obligations thereunder. The Panel held that ABS had properly terminated the agreement because KT had breached these obligations. The Panel found that KT had failed to adduce any evidence that it was capable of providing operational services to KS-3 pursuant to the Operation Agreement, or that KT complied with its obligation to obtain and maintain authority from the Korean government to operate KS-3 on ABS's behalf. The Panel concluded that "[b]ecause . . . Claimants properly terminated the Operation[] Agreement, Respondents' claims for damages on the theory that they were owed service fees after an improper termination of the Agreement fail." KT's argument that the Panel did not provide any explanation for the denial of additional technical engineering fees is thus incorrect. KT's argument that it is entitled to the engineering fees under an equitable theory of quantum meruit is similarly flawed, because KT did not adduce evidence that it could have or did provide the operational services in question. KT's argument that the Panel's holding is in manifest disregard of New York law, unjust and without colorable justification is entirely without substance.

b. Korean Law

KT seems to assert that the Final Award was in manifest disregard of Korean law because the Panel "simply . . . ignore[d] Korea's mandatory laws . . . to unwind

the transaction and punish the parties for undertaking it." This argument was made and rejected with regard to the Partial Order on the grounds that (i) "the Panel did not ignore the MSIP Order, but rather determined that it was not a 'governing legal principle' because it did not apply retroactively to unwind a completed transaction," and (ii) KT did not show that the relevant Korean law "was well defined, explicit, and clearly applicable." *Zurich Am. Ins. Co.*, 811 F.3d at 589. The Court's holding and analysis are incorporated by reference here. *See* Docket No. 80, at 12.

B. Cross-Petition to Confirm the Final Award

ABS cross-moves to confirm the Final Award. "[A] district court is strictly limited to the seven defenses under the New York Convention when considering whether to confirm a foreign award," *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 92 (2d Cir. 2005) (citing 9 U.S.C. § 208), including that "[t]he recognition or enforcement of the award would be contrary to the public policy of that country," New York Convention, Art. V(2)(b). Because KT has not carried its burden to establish this defense, ABS's cross-petition to confirm the Final Award is granted.

The public policy defense "must be construed very narrowly to encompass only those circumstances where enforcement would violate our most basic notions of morality and justice." *Telenor*, 584 F.3d at 411 (internal quotation marks omitted). "[A] judgment that tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual

rights of personal liberty or of private property is against public policy." *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion*, 832 F.3d 92, 106 (2d Cir. 2016) (internal quotation marks omitted).

KT argues that the Final Award violates the public policy "of American courts to respect a valid foreign decree." *Sea Dragon, Inc. v. Gebr. Van Weelde Scheepvaartkantoor B.V.*, 574 F. Supp. 367, 372 (S.D.N.Y. 1983). This argument is identical to that raised in its opposition to confirm the Partial Award, and therefore rejected for the same reasons stated in the Opinion and Order, dated April 10, 2018. *See* Docket No. 80, at 12-13.

Among the several factors listed in the Opinion that support the Panel's declining to apply the MSIP Order was that it was issued without notice to ABS. KT now asserts that ABS had notice of and participated in the regulatory proceedings before the MSIP. ABS counters that its "participation" was limited to "indirect attempts at communicating with the MSIP via Korean counsel (the MSIP refused to interact with ABS), which were aimed at convincing the MSIP to continue to allow KT to operate the Satellite on ABS's behalf . . . ." Regardless of how this conduct is characterized, it does not tip the balance toward a finding that the Panel's declining to apply the MSIP Order "would violate our most basic notions of morality and justice." *Eurocar Italia S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998) (internal quotations marks omitted).

IV. CONCLUSION

For the foregoing reasons, ABS's Petition to confirm the Final Award is GRANTED. KT's Cross-Petition to vacate the Final Award is DENIED. For reasons stated in the Opinion and Order, dated April 10, 2018, ABS's motion for attorneys' fees and costs is GRANTED. The parties shall make their best efforts to agree on the amount of fees and costs and shall report to the Court within 30 days of this order whether they have done so.

The Clerk of Court is respectfully directed to close the motion at Docket No. 71.

Dated: July 12, 2018
New York, New York

/s/ Lorna G. Schofield
LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

APPENDIX C — CORRECTED OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING PETITION TO VACATE PARTIAL AWARD AND GRANTING CROSS-PETITION TO CONFIRM PARTIAL AWARD, FILED JULY 10, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17 Civ. 7859 (LGS)

KT CORPORATION, *et al.*,

Petitioners,

v.

ABS HOLDINGS, LTD., *et al.*,

Respondents.

July 10, 2018, Decided;
July 10, 2018, Filed

CORRECTED OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

This case arises out of a Partial Arbitration's Award (the "Award") issued in a dispute between Petitioners KT Corporation and KTSAT Corporation (collectively, "KT") and Respondents Asia Broadcast Satellite Global, Ltd. and Asia Broadcast Satellite Holdings, Ltd. (collectively,

"ABS") over title to a geostationary satellite. KT petitions to vacate the Award and seeks remand of this case to the International Chamber of Commerce. KT cross-petitions to confirm the Award and moves to recoup attorneys' fees and costs. For the reasons stated below, KT's Petition to vacate is denied; and ABS's cross-petition to confirm and its motion for attorneys' fees and costs is granted.

I. BACKGROUND

A. The Purchase and Operation Agreements and the MSIP Order

KT is a Korean satellite communications provider that manages the Korean satellite fleet. ABS is a satellite communications provider that is incorporated in Bermuda and based in Hong Kong. In 2010, ABS and KT entered into two agreements: (1) a Purchase Agreement whereby KT sold to ABS a geostationary satellite, then known as KOREASAT-3 ("KS-3"), and related baseband equipment; and (2) an Operations Agreement, which provided that KT would operate KS-3 on behalf of ABS (collectively, "Agreements"). Both agreements contain a mandatory arbitration clause, and a choice of law provision selecting New York law without giving effect to its conflict of law principles.

The Agreements contain various provisions related to governmental authorizations and approvals related to the sale and operation of KS-3. The Purchase Agreement states that KT is obligated to "obtain all necessary licenses, consents and approvals for the sale

of the Satellite and the Baseband Equipment." KT is also "responsible for obtaining and maintaining . . . all governmental and regulatory licenses and authorizations required" to perform its obligations under the Purchase Agreement. Title would transfer from KT to ABS only if "any necessary approvals and licenses, including the U.S. State Department approval and the approvals and consents required for and during the Orbital Slot Use Period, have been received."

The parties received the U.S. State Department approval in 2010. In 2011, KT delivered KS-3 to ABS in exchange for $500,000. KT also delivered Bills of Sale for KS-3 and the related baseboard equipment.

On December 18, 2013, two years after the transaction closed, Korea's Ministry of Science, ICT and Future Planning ("MSIP") issued an order (the "MSIP Order") that, among other things, declared the Purchase Agreement "null and void and in violation of the mandatory law (Foreign Trade Act)" ("FTA") because KT had failed to obtain an FTA permit; cancelled KT's allocation of the spectrum for the KT Band; and directed KT to return the satellite to its original operating condition. In 2016, the Seoul Central District Court entered a criminal judgment against key KT executives who had been involved in the sale of KS-3.

B. The Arbitration Award

The parties submitted the issue of title to KS-3 for arbitration. Neither party questioned the tribunal's

authority to issue a determination on the title issue. The arbitral proceedings were governed by New York law, seated in New York, and presided over by a three-member tribunal. The tribunal, by majority, issued the Award on the sole issue of title, finding in favor of ABS. One of the three tribunal members dissented.

In a letter dated March 14, 2016, KT explained to ABS that it had determined not to appeal the MSIP Order, stating "[W]e are of the view that the validity of the Purchase Contract is a subject matter to be conclusively determined in the arbitration proceedings between [KT] and ABS, and not in any lawsuit filed by [KT] with an administrative court in Korea." Similarly, the Award states, "The Parties agreed in their written submissions that the Arbitral Tribunal has jurisdiction to consider claims alleging breaches of the [Agreements], including claims for ownership of the Satellite and Baseband Equipment."

The 116-page Award is briefly summarized as follows: the panel, by majority,[1] held that title transferred to ABS in 2011 when all the contractual conditions precedent to transfer were satisfied, and that no existing Korean mandatory law was violated when title passed to ABS. Specifically, the conditions satisfied in 2011 included the following: KT delivered KS-3 to ABS; ABS paid the purchase price of $500,000; U.S. regulatory approval for the sale of KS-3 as a U.S. export had been secured in

1. All further references in this Opinion to the "Panel" refer to the panel acting by majority.

2010; KT represented that it had obtained all necessary approvals; and KT delivered to ABS, and ABS formally accepted, two warranty Bills of Sale, which effected the transfer of title to KS-3. No Korean mandatory law was violated when title passed in 2011 because (1) no Korean regulatory authority had questioned or required an FTA permit of the prior purchase and sale between ABS and KT of the KS-1 and KS-2 satellites, (2) no Korean authority mentioned any approval requirement in 2011 when the highly publicized transfer of KS-3 occurred, (3) the parties were unaware of any requirement for Korean approval in 2011 and (4) the MSIP Order was not issued until two years after title to KS-3 had passed. The Award observed: "It cannot forever be open to a government agency to discovery new 'mandatory rules' . . . and invoke them long after the fact as a basis for invalidating a contract already fulfilled by the parties . . . thereby rendering any such agreement illusory." The Award further explained, "[T]he way to understand this set of facts as a matter of law is to view the FTA export permit requirement as a new rule, which was not the law when the Purchase Contract entered into force, or when the contractually required conditions for passage of title to ABS were all met . . . ."

The Award (1) declared that ABS holds title to, and thus owns, KS-3 and the related baseband equipment, (2) ordered KT not to interfere with the ongoing operation of KS-3 and (3) ordered KT to deliver to ABS the related baseband equipment and all associated flight data related to the operation of KS-3.

II. STANDARD

The parties cross-petition to vacate or confirm the Award pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Award ("New York Convention") and the Federal Arbitration Act ("FAA").[2] Ordinarily, confirmation of an arbitration decision is "a

2. The Corrected Opinion and Order applies the New York Convention to the parties' motions, instead of the Inter-American Convention on International Commercial Arbitration ("Inter-American Convention"). "The domestic enforcement of foreign arbitral awards is governed by two international Conventions: the Inter-American Convention . . . and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention')." *Corporacion Mexicana de Mantenimiento Integral, S. de C.V. v. Pemex-Exploracion y Producion*, 832 F.3d 92, 105 (2d Cir. 2016) (citation omitted). Under Section 305 of the FAA, the Inter-American Convention applies where the parties are "citizens of a State or States that have ratified" the Inter-American Convention and "are member States of the Organization of American States." 9 U.S.C. § 305(1). However, "[i]n all other cases the [New York Convention] shall apply." *Id.* § 305(2). Because the parties are neither citizens of a state that has ratified the Inter-American Convention nor member states of the Organization of American States, the New York Convention applies.

Because "[t]here is no substantive difference between [the Inter-American Convention and the New York Convention]," *Pemex-Exploracion y Producion*, 832 F.3d at 105, "precedents under one are generally applicable to the other," *Coporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion*, 962 F. Supp. 2d 642, 654 (S.D.N.Y. 2013) (citing *Productos Mercantiles e Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994)). Accordingly, the correction does not change the legal analysis or the outcome of the original opinion.

summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 132 (2d Cir. 2015). "A court's review of an arbitration award is . . . severely limited so as not to frustrate the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *United Bhd. of Carpenters & Joiners of Am. v. Tappan Zee Constructors, LLC*, 804 F.3d 270, 274-75 (2d Cir. 2015). "The arbitrator's rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case." *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (internal quotation marks omitted).

The New York Convention provides limited grounds for refusing confirmation of an award, including that (1) "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration," (2) "the arbitral procedure was not in accordance with the agreement of the parties" and (3) "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." New York Convention, Art. V(1)(c)-(d), (2)(b). The FAA expressly incorporates the terms of the New York Convention. *See* 9 U.S.C. § 201 *et seq.*

The New York Convention does not articulate a basis for vacating arbitration awards, but a court applying the New York Convention may vacate an arbitration award based on the grounds provided in the FAA. *PDV Sweeny, Inc. v. ConocoPhillips Co.*, No. 14 Civ. 5183, 2015 U.S. Dist.

LEXIS 116175, 2015 WL 5144023, at *6 (S.D.N.Y. Sept. 1, 2015), *aff'd*, 670 F. App'x 23 (2d Cir. 2016) (summary order); *see Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 70 (2d Cir. 2012). Under Section 10 of the FAA, an arbitration award may be vacated, as relevant here, when "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

In addition to the statutory provisions, an award "may be vacated when an arbitrator has exhibited a manifest disregard of the law." *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 (2d Cir. 2011) (internal quotation marks and citation omitted). This doctrine requires more than "error or misunderstanding with respect to the law." *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004). An arbitration award should be confirmed as long as there is "a barely colorable justification" for the award. *Gottdiener*, 462 F.3d at 110. "A motion to vacate filed in a federal court is not an occasion for de novo review of an arbitral award." *Wallace*, 378 F.3d at 189.

The party seeking to "vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high." *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 648 F.3d 68, 74 (2d Cir. 2011). Similarly, the party opposing confirmation of an arbitral award has the burden of proving that a defense applies. *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 405 (2d Cir. 2009).

Appendix C

III. DISCUSSION

A. Petition to Vacate the Award

The Panel's factual findings and legal conclusions that title to KS-3 passed to ABS in 2011 are largely undisputed. The sole issue, in substance, is whether KT has sustained its burden to show that the Panel lacked any colorable justification for refusing to apply the MSIP Order retroactively to reverse the sale of the satellite, which had occurred two years before the MSIP Order. For the reasons stated in the Award and summarized above, the Award easily meets the standard of having "any colorable justification." *Gottdiener*, 462 F.3d at 110.

KT asserts two grounds as a basis for vacating the Award:[3] (1) the Panel exceeded its authority by holding that the MSIP Order was unauthorized and unconstitutional, and (2) the Panel acted in manifest disregard of the law by failing to recognize mandatory Korean law, and disregarding New York law concerning transfer of title and illegal contracts. For the reasons explained below, KT has failed to carry its significant burden of showing that any valid basis exists to vacate the Award.

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3. KT asserts a third ground for vacating the Award -- that it contravenes public policy. This is not grounds for vacatur of an award under the FAA, but rather a defense to confirmation of an award under the New York Convention. *See* New York Convention, Art. V(2)(b). Consequently, this argument is addressed below in the discussion of ABS's cross-petition to confirm the Award.

Appendix C

1. Exceeding Authority

Section 10(a)(4) of the FAA allows for vacatur "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).[4] Applying that standard, the Supreme Court has held that "[i]t is not enough for petitioners to show that the panel committed an error -- or even a serious error. It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice that his decision may be unenforceable." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) (internal quotation marks and citations omitted; alterations in original). An award will not be vacated as long as the panel "is even arguably construing or applying the contract and acting within the scope of [its] authority." *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000).

Here, the Panel did not exceed its authority. The parties submitted the issue of title to KS-3 for arbitration. Neither party questioned the tribunal's authority to determine title pursuant to the arbitration provisions in the parties' agreements or for any reason. KT explicitly

4. As this provision corresponds to the defense to confirmation of an award in the New York Convention when "the arbitral procedure was not in accordance with the terms of the agreement of the parties," that defense is not discussed again *infra* regarding the cross-motion to confirm the Award. The New York Convention, Art. V(1)(d).

acknowledged and invoked the tribunal's authority to determine title. The Panel determined only the issue of title, and no other independent claims, such as the tort claims, that the parties had raised.

KT's quarrel is that, in deciding the issue of title, the Panel concluded that the MSIP Order was invalid, specifically that MSIP was not the Korean governmental agency with authority over export approvals, and that MSIP's approval requirements, because they were retroactive, violated American notions of due process. In effect, KT argues that the Panel was empowered to determine which of the parties holds title to KS-3, but was not authorized to consider all of the possible reasons because certain arguments were off limits. Regardless of the merits of this argument, it is misplaced because the Panel's principal holding did not depend on the validity of the MSIP Order. The Panel applied New York law, as provided by the parties' agreements, to determine that title had passed to ABS in 2011, and that a post facto regulation or decree -- whether valid or not -- did not reverse the completed passage of title, which had occurred two years earlier. The Panel found that all conditions precedent to the transfer of title had been satisfied and construed the contractual requirements for all "necessary approvals and licenses" to mean those necessary at the time title passed and not some indefinite time in the future.

The Panel held only in the alternative that, "even if Korean law governed, which it did not," the MSIP Order was unauthorized. Similarly, the Panel's due process discussion appears as a coda at the end of the Award,

"[e]ven if it is assumed, against the weight of evidence and for the sake of the argument, that the MSIP Order" was mandatory law that overrides contractual obligations. The Panel did not exceed its authority because its principal holding was squarely one of "construing [and] applying the contract," which was within the scope of the arbitration provisions in the parties' agreements. *See E. Associated Coal Corp.*, 531 U.S. at 62.

2. Manifest Disregard of the Law

A court may vacate an award based on manifest disregard of the law "only if the court finds both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 589 (2d Cir. 2016) (internal quotation marks omitted). "[T]he award should be enforced, despite a court's disagreement with it on the merits, if there is a *barely colorable justification* for the outcome reached." *Wallace*, 378 F.3d at 190 (emphasis in the original). KT has failed to show that the Award was based on manifest disregard of the law and lacked any colorable justification for awarding title to ABS.

a. Korean Law

KT argues that the Panel disregarded the MSIP Order, the FTA and related Korean regulations. This argument is unpersuasive because as discussed above, the Panel did not ignore the MSIP Order, but rather determined that

it was not a "governing legal principle" because it did not apply retroactively to unwind a completed transaction. Nor has KT shown that the relevant Korean law "was well defined, explicit, and clearly applicable to the case." *Zurich Am. Ins. Co.*, 811 F.3d at 589. KT's own legal expert, Professor Kyongjin Choi, stated that the MSIP Order, which stated that the sale of KS-3 was a Korean export regulated by the FTA, was a "controversial and debatable interpretation of the [Korean] law." Also, the MSIP Order was not "clearly applicable to the case" at the relevant time, because the order did not exist, nor was it even contemplated, when KT transferred title to the satellite. The Panel's decision not to apply the MSIP Order retroactively was not in manifest disregard of well defined, explicit and clearly applicable governing law.

b. Presumption of Validity and Regularity in Government Action

KT argues that, in finding the MSIP Order to be invalid, the Award disregards the presumptions of validity and regularity enjoyed by agency actions. This argument fails for two reasons. First, KT has not cited any authority for the proposition that the presumption of the validity of agency action also requires its retroactive application. To the contrary, "[t]here is no principle of law better settled, than that every act of a court of competent jurisdiction, shall be presumed to have been rightly done *till the contrary appears*." *Voorhees v. Jackson*, 35 U.S. 449, 449, 9 L. Ed. 490 (1836) (emphasis added).

Second, as discussed above, the Panel's findings concerning the validity of the MSIP Order were not

necessary to the Panel's primary holding that all conditions precedent had been satisfied at the time title passed. To the extent that the Panel may have disregarded a presumption in reaching a secondary and alternative basis for the Award, that does not undermine the principle justification for the outcome reached. *See Wallace*, 378 F.3d at 190 ("[T]he award should be enforced, despite a court's disagreement with it on the merits, if there is a *barely colorable justification* for the outcome reached.")

c. New York Contract Law

KT argues that the Panel disregarded New York law in finding an allegedly illegal contract to be enforceable. This argument is yet another way of arguing that the MSIP Order should have been applied retroactively to render the Purchase Agreement "illegal" and reverse the transfer of title. As discussed above, KT has failed to show that the Award, and its refusal to apply the MSIP Order retroactively, lacked any colorable justification.

B. Cross-Petition to Confirm the Award

ABS cross-moves to confirm the Award. "[A] district court is strictly limited to the seven defenses under the New York Convention when considering whether to confirm a foreign award," *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 92 (2d Cir. 2005) (citing 9 U.S.C. § 208), including that "the recognition or enforcement of the award would be contrary to the public policy of that country," New York Convention, Art. V(2)(b). Because KT has not carried its

burden to establish this defense, ABS's cross-petition to confirm the Award is granted.

The public policy defense "must be construed very narrowly to encompass only those circumstances where enforcement would violate our most basic notions of morality and justice." *Telenor*, 584 F.3d at 411 (internal quotation marks omitted). "[A] judgment that tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property is against public policy." *Corporacion*, 832 F.3d at 106.

KT argues that the Award violates the public policy "of American courts to respect a valid foreign decree." *Sea Dragon, Inc. v. Gebr. Van Weelde Scheepvaartkantoor B.V.*, 574 F. Supp. 367, 372 (S.D.N.Y. 1983). KT's argument is unpersuasive because the policy of American courts to recognize foreign orders -- whether judicial or administrative -- is not absolute. Foreign *judgments* are entitled to recognition by U.S. courts, except in specified circumstances. U.S. courts may refuse to recognize foreign judgments where the defendant did not receive sufficient notice of the proceedings to enable it to defend, the judgment is repugnant to the public policy of the United States or the foreign proceeding was contrary to the parties' agreement to submit the controversy to another forum. Restatement (Third) of Foreign Relations Law §§ 481-482 (1987); *accord* Restatement (Fourth) of Foreign Relations Law: Jurisdiction Appendix TD No. 1 (2014) §§ 401, 404. As foreign administrative orders may carry less force than foreign judicial orders, at

least the same exceptions to enforcement must apply. *See* Restatement (Third) § 481, Comment f ("[N]o rule either requires or prevents recognition and enforcement of decisions of foreign tribunals that do not possess all the characteristics of courts. A number of United States decisions have . . . recognized and enforced decisions of such tribunals, in circumstances where the essential fairness and reliability of the proceeding was established.").[5]

The MSIP Order is an administrative and not a judicial order. It was issued without notice to ABS. KT refused ABS's request to appeal the MSIP Order in the Korean courts after it was issued, and KT instead asserted that the issue of the validity of the Purchase Contract was to be "conclusively determined" in arbitration. Now KT maintains that the arbitrators had no choice but to enforce the MSIP Order retroactively and that MSIP has the last word as to what approvals were required in 2011 for the sale of the satellite. If KT's position were adopted, ABS would have had no avenue to protect or even assert its rights, and the parties' agreement to arbitrate any

5. The most recent tentative draft of the Restatement (Fourth) of Foreign Relations Law: Jurisdiction § 401 TD No 1 (2014), similarly provides:

> The general principles underlying recognition, particularly the desire to avoid unnecessary duplication of legal proceedings while protecting the rights of persons subject to an adverse foreign decision or order, apply in cases . . . where the process in the administrative proceeding, including the disinterested and independent nature of the tribunal, satisfies the general criteria for judgment recognition.

dispute between them would be undermined. KT has failed to show that enforcement of the Award, which declined to apply the MSIP Order, "would violate our most basic notions of morality and justice."[6] *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998) (internal quotation marks omitted); *accord PDV Sweeny, Inc.*, 2015 U.S. Dist. LEXIS 116175, 2015 WL 5144023, at *11 (internal quotation marks and citations omitted).

That enforcement of the Award will result in KT's being unable to comply with both the Award and the MSIP Order does not change the analysis. While KT is in an unenviable position, it has not cited any persuasive authority that its dilemma is a defense to enforcement of an arbitration award. *Cf. Telenor Mobile Commc'ns AS v. Storm LLC*, 524 F. Supp. 2d 332, 357 (S.D.N.Y. 2007) ("[E]ven if there is a direct conflict between Ukranian law and the Final Award, New York's public policy does not call for vacatur here. First, it is unclear whether an established public policy against enforcement of arbitral awards that compel a violation of foreign law even exists in New York."), *aff'd*, 584 F.3d 396 (2d Cir 2009). KT relies on *Sea Dragon* to support the argument that the Award should be vacated because it exposes KT "to the dilemma

6. The Award also addressed difficult issues that pose a greater challenge to the principle of comity underlying the recognition of foreign judgments and order -- finding, for example, that the proceedings leading to the MSIP Order were not disinterested and independent in view of the political environment, and that the proceedings violated American notions of due process. This Opinion does not need to reach those issues to conclude that KT has not sustained its burden of proving an applicable defense to confirmation of the Award.

of conflicting orders." 574 F. Supp. at 372. The court in *Telenor* rejected the same argument, stating:

> First, *Sea Dragon* is not controlling law, as it does not bind this Court, was decided over two decades ago, and has not been relied upon for the relevant proposition since it was decided. In addition, although Storm claims that the facts of this case "parallel[ ]" those in *Sea Dragon*, the facts of *Sea Dragon* vary significantly from the facts of this case. While the district court in *Sea Dragon* found that the petitioner in that case had been given adequate notice and an opportunity to be heard in the Dutch proceedings, Telenor had neither notice nor an opportunity to respond in the Ukrainian proceedings. Moreover, while the *Sea Dragon* court specifically found that the Dutch order was obtained "in compliance with ... American due process standards," the Ukrainian litigation, which was undertaken in a collusive and vexatious manner, did not comply with those standards.

Id. at 348 (internal citations omitted). Similarly here, *Sea Dragon* is not controlling law, has not been relied upon for many years, and is distinguishable because ABS did not have notice or an opportunity to respond to the MSIP Order.

C. Attorneys' Fees and Costs

ABS's request for attorneys' fees and costs it incurred in opposing KT's Petition and bringing its cross-petition

is granted. "In federal practice, the general rule is that each party bears his or her own attorneys['] fees. However, the parties may agree by contract to permit recovery of attorneys' fees. If the contract is valid under state law, the federal court will enforce the contract as to attorneys' fees." *Regan v. Conway*, 768 F. Supp. 2d 412, 415 (E.D.N.Y. 2011) (citing *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306 (2d Cir. 1993)). The parties did just that in the Purchase Agreement, which provides that "[a]ny costs, fees, or taxes incidental to enforcing the final award shall be charged against the Party resisting such enforcement." KT resisted the enforcement of the Award through its Petition and opposition to the cross-petition. KT is contractually bound to bear attorneys' fees and costs associated with this action.

IV CONCLUSION

For the foregoing reasons, KT's Petition to vacate the Award is DENIED. ABS's crosspetition to confirm the Award is GRANTED, and ABS's motion for attorneys' fees and costs is GRANTED.

The Clerk of Court is respectfully directed to close the motions at Docket Nos. 6 and 41, and strike Docket No. 56.

Dated: July 10, 2018
New York, New York

/s/ Lorna G. Schofiled
Lorna G. Schofiled
United States District Judge