Nos. 20-39 and 20-40

# In the Supreme Court of the United States

AVIC INTERNATIONAL HOLDING CORPORATION, ET AL., PETITIONERS

*v.*

SOARING WIND ENERGY, L.L.C., ET AL.

CATIC USA INCORPORATED, ALSO KNOWN AS AVIC INTERNATIONAL USA, INCORPORATED, PETITIONER

*v.*

SOARING WIND ENERGY, L.L.C., ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION


JIM MOSELEY
WILLIAM B. CHANEY
GRAY, REED & MCGRAW, PC
Thanksgiving Tower, 46th Floor
1601 Elm Street, Suite 4600
Dallas, TX 75201

LEWIS T. LECLAIR
*Counsel of Record*
CHELSEA A. PRIEST
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
(214) 978-4984
*lleclair@mckoolsmith.com*

## QUESTIONS PRESENTED

1. This fact-bound dispute involves an arbitration award against a top-level, state-owned Chinese entity and several of its affiliates (including foreign entities) that participated in the parties' relationship and caused the breach of contract that led to the arbitration.

The question presented is whether federal jurisdiction exists under the New York Convention, 9 U.S.C. § 202, to confirm the arbitration award, because the award arises out of a legal relationship that "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."

2. The arbitration panel issued an award finding that AVIC USA, a signatory to the arbitration agreement, breached the agreement, and that several of its non-signatory affiliates were jointly and severally liable as alter egos. The district court confirmed the award against AVIC USA, but severed and stayed the petition seeking to confirm the award against the non-signatories.

The question presented is whether the district court was obligated to decide whether the non-signatories were proper parties to the arbitration before confirming the award against AVIC USA, who was independently liable and undisputedly required to arbitrate.

3. This "bespoke" arbitration agreement "between extremely sophisticated parties" laid out a specific process for selecting arbitrators, which the arbitration panel, the district court, and the appellate court

each determined was followed in this particular proceeding.

The question presented is whether this Court should revisit the fact-bound, routine interpretation of this "bespoke" contract or disregard its plain language on the basis of an alleged, amorphous "international public policy."

## RULE 29.6 STATEMENT

Respondents Soaring Wind Energy, LLC, Tang Energy Group, Limited, the Nolan Group Incorporated, and Jan Family Interests, Limited have no parent corporations, and no publicly held company holds 10% or more of their stock.[1] The remaining respondents are individuals.

## RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

*AVIC International USA, Inc. v. Tang Energy Group, Ltd.*, No. 3:14-CV-2815-K (Feb. 5, 2015)

*Soaring Wind Energy, LLC v. CATIC USA, Inc.*, No. 3:15-CV-4033-K (Aug. 9, 2018) (order confirming arbitration award)

*Soaring Wind Energy, LLC v. CATIC USA, Inc.*, No. 3:15-CV-4033-K (Sept. 17, 2018) (amended final judgment)

United States Court of Appeals (5th Cir.):

*AVIC International USA, Inc. v. Tang Energy Group, Ltd.*, No. 15-10190 (Aug. 25, 2015)

*Soaring Wind Energy, LLC v. CATIC USA, Inc.*, No. 18-11192 (Jan. 7, 2020)

---

[1] AVIC International USA, Inc., was a member of Soaring Wind Energy, LLC; its ownership interest was divested in these proceedings.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**STATUTES**

# In the Supreme Court of the United States

No. 20-39

AVIC INTERNATIONAL HOLDING CORPORATION, ET AL., PETITIONERS

*v.*

SOARING WIND ENERGY, L.L.C., ET AL.

No. 20-40

CATIC USA INCORPORATED, ALSO KNOWN AS AVIC INTERNATIONAL USA, INCORPORATED, PETITIONER

*v.*

SOARING WIND ENERGY, L.L.C., ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

## INTRODUCTION

These petitions present a grab bag of splitless, fact-bound questions that are not remotely certworthy. This case involves confirmation of an arbitration award entered nearly five years ago. Petitioners raise a smattering of fact-specific objections to the district court's and Fifth Circuit's confirmation of that award. In doing so, they fail to satisfy a single

one of the factors this Court typically considers in deciding whether to grant review.

As petitioners tacitly concede, no genuine split of authority exists on any of the questions presented—which is why the petitions make practically no attempt to demonstrate a split. And this case is a poor vehicle for deciding any of those splitless questions. Petitioners mischaracterize the arbitration panel's factual findings, and ignore what the Fifth Circuit actually held. No final judgment has even been entered against most of the petitioners. And petitioners are silent about having waived at least some of these questions in the district court.

The questions presented in any event are insignificant. They turn on the specific nature of the parties' relationship and the fact-bound particulars of this unusual case. The petitions identify no pure legal question likely to have any broader importance beyond this case-specific dispute.

Finally, the decision below was correct. The Fifth Circuit held that federal-question jurisdiction exists under the New York Convention. Not only did the arbitration award find liability directly against foreign entities (including a top-level, state-owned entity of the People's Republic of China), the arbitral relationship included deep involvement by Chinese entities—controlled by the Chinese government—in key aspects of the joint relationship. These facts provide ample basis for federal jurisdiction here. The courts below afforded the arbitration award the deference it is entitled under this Court's long-standing precedents. The courts recognized a clear factual predicate for the award, and properly deferred to the arbitrators' interpretation of the agreement's arbitrator-selection provision—the plain language of

which required the exact process used here. There is no basis for disturbing those findings.

At bottom, the petitions are the latest in petitioners' long-running attempt to delay the inevitable. Despite the arbitration panel awarding over $70 million nearly 5 years ago, AVIC USA has paid nothing, secured no part of the judgment, and continued to trot out every procedural obstacle in an effort to avoid paying the judgment. The petitions present no reason to draw out this long-running dispute any longer. Certiorari should be denied.

## STATEMENT

The parties' relationship began in 1997, when respondent Tang Energy Group and an arm of AVIC, a Chinese state-owned enterprise, pursued a joint venture to build a gas-power plant in China. Pet. App. 127a.[2] A few years later, Tang Energy and AVIC jointly pursued another venture in China to manufacture wind turbines. *Ibid.*

In 2007, Tang Energy and AVIC decided to partner again, this time to develop wind-power projects. Pet. App. 127. Thus, in January 2008, Tang Energy and an AVIC subsidiary, AVIC USA, signed a memorandum of understanding (MOU) outlining their plans for a new entity called Soaring Wind. *Id.* at 128a. Under the MOU, Soaring Wind would "be the exclusive vehicle for both Tang Energy and CATIC interest in the wind industry." *Ibid.*

In June 2008, the parties formed Soaring Wind, a Delaware LLC, by entering into the Soaring Wind Agreement. Pet. App. 129a. AVIC USA, Tang Ener-

[2] All citations are to the petition appendix in No. 20-39 unless otherwise noted.

gy, Keith Young, Mitchell Carter, Jan Family Interests, and the Nolan Group, and Paul Thompson were named as members. *Ibid.* Soaring Wind's business purpose was "to provide worldwide marketing of wind energy equipment, services and materials related to wind energy, including, but not limited to, marketing wind turbine generator blades and wind turbine generators and developing wind farms." *Id.* at 130a.

The Soaring Wind Agreement embodied the MOU's promise of exclusivity. In Section 6.10, the Members "agree[d] that during the term of this Agreement, each shall only conduct activities constituting the Business in and through [Soaring Wind] and its Controlled subsidiaries." Pet. App. 131a. And, in Section 6.12, the Class A members promised "that neither they nor their Affiliates … will participate in wind farm land development projects … except through an entity owned by both [Soaring Wind] and [AVIC USA]." *Id.* at 134a. "Affiliates" was defined both expressly and broadly: "with respect to any Person, any other Person that directly or indirectly controls, is controlled by, or is under common Control with that first person." *Id.* at 129a.

Lastly, the Soaring Wind Agreement contained detailed dispute-resolution terms, including exactly how arbitrators would be selected. Pet. App. 135a-37a. These terms apply to all "Disputes," defined as "any controversy, dispute or claim arising under or related to" the Soaring Wind Agreement, including "any dispute regarding the construction, interpretation, performance, validity or enforceability of any provision" of the agreement. *Id.* at 135a-36a.

**AVIC USA's breach of the Soaring Wind Agreement**

There is no genuine dispute whether the AVIC USA affiliates (the "AVIC Alter Egos," petitioners in No. 20-39) pursued wind-power projects outside Soaring Wind. AVIC IHC, a first-tier AVIC subsidiary, owned 100 percent of AVIC USA. Pet. App. 126a. Soon after the parties signed the Soaring Wind Agreement, Wu Guangchuan became AVIC IHC's new president. *Id.* at 153a. And, as the arbitral record showed, "when leadership changes, management changes, and the new leaders don't care about the commitments their predecessors made to their partners." *Ibid.* (brackets and quotation marks omitted). So around 2009, AVIC IHC discarded AVIC USA (and thus Soaring Wind) and began pursuing wind-power projects through other channels. *Id.* at 153a-54a.

AVIC IHC formed AVIC IRE in 2010 as a majority-owned subsidiary. Pet. App. 153a-54a. AVIC IRE's stated purpose—like Soaring Wind's—was to develop wind-energy projects around the world. *Ibid.* It did so at least in part through a new U.S. subsidiary called Ascendant. *Ibid.* An AVIC IRE vice president admitted in a November 2013 email that, by that point, AVIC IRE had "already provided a total of 50 million USD in financing to wind power projects in the US and will keep[] trying in the future." *Id.* at 3a, 154a.

The arbitral record showed that, in all, "AVIC IRE and/or Ascendant and/or single-asset entities created by those entities developed the Ralls Wind Farm and Cirrus Wind I." Pet. App. 154a. AVIC IRE's website also revealed "a 1.5-megawatt turbine project in Minnesota, 10 sets of one-megawatt turbines in Lubbock, Texas, and a one-megawatt tur-

bine in Tooele, Utah." *Ibid.* Lastly, AVIC IRE's website showed "that it developed wind power projects in Bulgaria, Mongolia, Romania, New Zealand, Australia, Canada, Brazil, Chile, and South Africa." *Id.* at 155a.

**The arbitration demand and selection of arbitrators**

In June 2014, Tang Energy filed its arbitration demand against AVIC USA, the AVIC Alter Egos, Thompson, and Ascendant (the Demand). Pet. App. 122a. The Demand alleged, among other things, that AVIC USA breached the Soaring Wind Agreement's exclusivity provisions by competing with Soaring Wind through Ascendant. *See ibid.*

As the Soaring Wind Agreement required, Tang Energy named an arbitrator in the Demand. *See* Pet. App. 136a. A few days later, citing the Soaring Wind Agreement, the AAA directed all other Disputing Members to "provide the name and contact information of your selected arbitrator to all counsel" and the AAA. D. Ct. Dkt. 212-9 at 13. The other four Tang Claimants—Young, Carter, Jan Family Interests, and the Nolan Group—then joined Tang Energy's arbitration demand and named arbitrators. D. Ct. Dkt. 363 at 4. AVIC USA and Thompson answered the demand and also named arbitrators. D. Ct. Dkt. 212-9 at 23, 95.

At this point, the seven disputing members had each named an arbitrator. Soon after, the AAA confirmed "that the arbitrators have all been in contact with one another, [and] are beginning to complete their disclosures and discuss the selection of the additional two arbitrators." D. Ct. Dkt. 212-9 at 31. The AAA followed up at the end of July 2014, noting that it was appointing the final two arbitrators. *Id.* at 81.

The arbitrator-selection process outlined in the Soaring Wind Agreement was thus complete.

**The Award**

The arbitrators held a five-day hearing in August 2015. Pet. App. 5a. The hearing produced a transcript of more than 1,600 pages. *See* D. Ct. Dkts. 22-3, 22-4. The arbitral record also contains many thousands of pages of exhibits and deposition transcripts. In all, the arbitral record comprises some 27,000 pages.

In December 2015, the arbitrators issued their final award. *See* Pet. App. 119a-80a. The arbitrators construed the Soaring Wind Agreement to include a promise by AVIC USA that both it *and its Affiliates* would "only conduct the 'Business' through [Soaring Wind]." *Id.* at 142a. The arbitrators then found that AVIC USA breached that agreement because, although it had not engaged in the "Business" outside Soaring Wind, its affiliates had. *Ibid.* As the arbitrators explained, "AVIC USA breached the [Soaring Wind] Agreement by its Affiliates engaging in the 'Business' of [Soaring Wind]." *Id.* at 143a.

Having determined that AVIC USA was directly liable, the arbitrators then assessed whether the AVIC Alter Egos were jointly and severally liable for damages caused by AVIC USA's breach. The arbitrators found that "the evidence overwhelmingly shows that" the AVIC entities "operated as one entity with respect to" the contracts at issue. Pet. App. 145a; *see also id.* at 145a-54a. They pointed to, among other things, the complete control exercised by "AVIC HQ," referring to Aviation Industry Corporation of China Group Company. AVIC HQ, they said, is an extension of the Chinese Communist Party and "sits atop a pyramid of subsidiary companies." *Id.* at 145a. It

directs all those companies' activities—including the activities at issue—allocating funds, employees, and other resources among them. *Id.* at 145a-54a. The arbitrators even found that "[t]he MOU came about as a direct result of AVIC HQ's desire to compete in the wind power industry." *Id.* at 146a. They therefore held that AVIC USA and the AVIC Alter Egos "are the same legal entity," and thus that the AVIC Alter Egos were jointly and severally liable for the damages award. *Id.* at 167a.

**The proceedings below**

The Tang Claimants moved the district court to confirm the award against both AVIC USA and the AVIC Alter Egos (collectively, "AVIC" or "petitioners"). Pet. App. 6a. Petitioners opposed, raising a smattering of challenges to the award.

In August 2018, the district court confirmed the award against AVIC USA. *See* Pet. App. 48a-81a. Despite petitioners' numerous attacks, the court found "no grounds upon which" to "vacate, modify, or correct the arbitration award as to Respondent AVIC USA." *Id.* at 48a-49a. On the same day, the district court severed and stayed the case against the AVIC Alter Egos. *Id.* at 45a-47a. As the court explained, there was no need for it to resolve the AVIC Alter Egos' objections to the award—"most notably those arguments related to their joint and several liability pursuant to the arbitration award based on an alter-ego theory"—before confirming the award against AVIC USA. *Id.* at 46a.

The AVIC entities appealed. The Fifth Circuit *sua sponte* requested that the parties address the basis for federal jurisdiction. Pet. App. 6a. After briefing and oral argument, the Fifth Circuit affirmed. *Id.* at 1a-25a.

The court first found that it had federal-question jurisdiction under the New York Convention. As the court explained, "[i]t is undisputed that the action to confirm the award 'relates to' the award"; "the question is whether that award 'falls under' the Convention." *Id.* at 10a. On that subject, the court noted that "[t]here is no question that the relationship among the parties broadly relates to China." *Id.* at 11a. For example, the court pointed to the fact that the MOU "envisioned that 9.5% of Soaring Wind's equity would be owned by AVIC HQ, whose 'offices and employees in China [would] be available for support as needed.'" *Id.* at 11a-12a.

The court recognized that the only signatories to the Soaring Wind Agreement were domestic entities. But it explained that the Agreement made promises with respect to "Affiliates'" behavior, and that these "Affiliates" "include[d] a variety of Chinese entities, a fact of which the contracting parties were well aware." *Id.* at 14a. In fact, the court explained, "[a] Chinese entity's actions on foreign soil could (and did) trigger breach for one of the LLC's (domestic) members." *Ibid.* Additionally, the court noted that "the arbitral award holds those Chinese affiliates jointly and severally liable for damages to the claimants." *Ibid.* Given these circumstances, the court found, the Agreement "bear[s] a relation to China sufficient for federal jurisdiction under the NY Convention." *Ibid.*

The court then addressed the parties' arguments on the merits. Critically here, it explicitly rejected AVIC's argument that the arbitration panel's award turned entirely on an "adverse inference" arising from the AVIC Alter Egos' refusal to participate. Pet. App. 15a-16a. On the contrary, the court explained,

the panel's findings "w[ere] based on more than the affiliates' non-participation in the arbitration," specifically identifying (i) an email from an AVIC affiliate admitting that AVIC had invested at least $50 million into wind-power projects in the United States, and (ii) press releases and AVIC's online publications touting "ongoing (non-Soaring Wind) wind-power development projects." *Id.* at 16a. That rendered "irrelevant" whether AVIC USA's "non-signatory affiliates themselves [were] subject to the arbitration": "The company signed an agreement specifying that the actions of its affiliates *could constitute its own breach*." *Ibid.* (emphasis added); *see also id.* at 16a n.26 (declaring it "immaterial" "whether [the] Chinese affiliates were subject to the Agreement"). Because AVIC USA itself "'assum[ed] the obligation of its affiliates' performance,'" the evidence established AVIC USA's "own" violation. *Id.* at 16a. The court thus held that "[t]he arbitration panel reasonably found that a breach had occurred. *Ibid.*

The court next rejected AVIC's argument that the arbitration panel was improperly constituted because it allowed one "side" to choose more arbitrators than the other "side." Pet. App. 17a-20a. Consistent with the Fifth Circuit's decision on an earlier appeal, the court held that the Agreement's plain language allowed each "Disputing Member" to appoint an arbitrator. *Id.* at 18a. The court refused AVIC's attempt to rewrite those clear terms, explaining that "[i]t is not the court's role to rewrite the contract between sophisticated market participants, allocating the risk of an agreement after the fact, to suit the court's sense of equity or fairness.'" *Id.* at 19a (citation omitted).

Finally, the court rejected the AVIC Alter Egos' argument that the Agreement's selection process violated due process or public policy. "The Agreement was not a contract of adhesion but a bespoke deal made between extremely sophisticated parties," the court explained, and it "did not inherently favor one party or another; it just so happened that [AVIC] USA was outnumbered." *Id.* at 20a. Because "[t]he agreed-upon selection process was followed to the letter," the court held that the parties "received the process they were due." *Ibid.*[3]

Petitioners filed a joint petition for rehearing en banc, which the court of appeals denied without recorded dissent. Pet. App. 85a.

## ARGUMENT

### I. THE JURISDICTIONAL QUESTION DOES NOT MERIT THIS COURT'S REVIEW

The Fifth Circuit held that federal jurisdiction exists under the New York Convention on these particular facts. That case-specific finding does not merit this Court's review. The court of appeals did not break any new legal ground in its decision; it did not announce a broad legal holding of what the Convention means, or articulate any new legal test or standard that might have any relevance to future disputes. It simply applied an established standard to the (unusual) facts of this case.

AVIC USA, notably, barely even suggests otherwise. It does not maintain (nor could it) that there is a circuit conflict on this question. At best, it makes a

[3] The court also rejected petitioners' challenges to the arbitrators' damages award, but petitioners have not advanced those arguments here.

feeble attempt to manufacture an indirect split, asserting, generally, that "most federal circuits" have construed the New York Convention "more narrowly." 20-40 Pet. 17. But it fails to identify a single decision in which any court reached a different outcome based on similar facts (much less based on a different legal rule or standard). Instead, its true objection is that it disagrees with the Fifth Circuit's purely fact-driven decision. *See* 20-40 Pet. 19-21.

While fact-bound attacks are poor subjects of a cert. petition, this fact-bound attack is particularly misplaced. AVIC USA seeks review based on a selective presentation of incomplete facts that fails to counter the Fifth Circuit's clear factual predicate for establishing jurisdiction. The court held the New York Convention applies because the award expressly found that state-owned entities of the Chinese government acted as controlling alter egos; it confirmed the pervasive involvement of the Chinese government and its state-owned aviation industry in the relationship underlying the arbitration award; and it found, explicitly, that "[a] Chinese entity's actions on foreign soil could (and did) trigger breach for one of the LLC's (domestic) members." Pet. App. 14a. Those findings establish an obvious "relation to China sufficient for federal jurisdiction." *Ibid.* Further review is plainly unwarranted.

1. The standards for establishing federal-question jurisdiction under the Convention (9 U.S.C. §§ 201, 203) are straightforward: An arbitration agreement or award falls under the Convention if it arises out of a commercial-legal relationship not "entirely between citizens of the United States," or if that relationship "involves property located abroad, envisages performance or enforcement abroad, or has some

other reasonable relation with one or more foreign states." 9 U.S.C. § 202.

More specifically, a court "engage[s] in a two-step inquiry," "limiting its examination to the pleadings." *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1324 (11th Cir. 2018). First, the court must ask whether the pleadings describe an arbitration agreement that "'falls under the Convention.'" *Ibid.* An arbitration agreement falls under the Convention if (1) the agreement is written; (2) the agreement requires arbitration within a Convention signatory; (3) the agreement arises out of a commercial-legal relationship; and (4) that relationship involves at least one non-United States citizen or has a reasonable relation to another country. *Ibid.* Second, the court "must determine whether that agreement sufficiently 'relates to' the case." *Ibid.*; *accord Stemcor USA Inc. v. Cia Siderurgica do Para Cosipar*, 895 F.3d 375, 378 (5th Cir. 2018) ("For a federal court to have jurisdiction under the Convention two requirements must be met: (1) there must be an arbitration agreement or award that falls under the Convention, and (2) the dispute must relate to that arbitration agreement.").

2. Here, "[i]t is undisputed that the action to confirm the award 'relates to' the award; the question is whether that award 'falls under' the Convention." Pet. App. 10a. So the sole dispute is whether the agreement arises from a legal relationship that either (i) involves a non-United States citizen or (ii) has a reasonable relation with a foreign state. Although the Fifth Circuit's decision readily establishes jurisdiction (Pet. App. 14a), it covers just the tip of the iceberg. The pleadings here plainly show that the parties' relationship meets both prongs: it involves

non-United States citizens and has a reasonable relation to China.

Although only United States citizens signed the Agreement, the parties' larger relationship both (i) involved several Chinese citizens, including arms of the Chinese government and (ii) had a reasonable relation to China. To meet these requirements, a foreign entity need not sign the arbitration agreement. As both the court below and AVIC USA acknowledge, the "analysis of the Agreement's relation to a foreign state does not … end at the four corners of the contract." Pet. App. 14a; *see also* 20-40 Pet. 17 n.6 ("Because the statute specifically talks of the relationship between the parties, it is necessarily broader than just the four corners of their contract.").

Here, the arbitrator's award established the Chinese state's pervasive involvement in the parties' relationship:

> AVIC was formerly the Ministry of Aviation Industry in China. The first Aviation Industry Corporation was created in 1993, and the former Ministry was abolished in 1999. All of China's state-run aviation industry operates under the direction of AVIC HQ, which sits at the top of a pyramid of companies. AVIC HQ is one of 112 companies owned by the Chinese government through the State Asset Supervision and Administration Commission ("SASAC"). AVIC HQ is one of 45 corporations controlled through SASAC which evolved from industrial ministries within the Chinese government and which still enjoy a "rank" within the government equal to vice-ministerial status. The top management of AVIC HQ is appointed by the Organization Department of the central Chinese Communist Party. AVIC

> HQ is the top level of one of the nine centrally run defense industry conglomerates in China.

Pet. App. 125a; *see also id.* at 146a ("AVIC HQ previously argued to the Sixth Circuit that it is a part of the Chinese Government.").[4]

AVIC HQ controls all the other AVIC entities. AVIC USA, for example, is a subsidiary of AVIC IHC, which is itself a subsidiary of AVIC HQ. Pet. App. 126a-28a; *see also* 20-40 Pet. 5. And as the arbitrators found, "[t]he evidence overwhelmingly shows that AVIC HQ, AVIC [IHC], AVIC IRE, AVIC TED, and Ascendant operated as one entity." Pet. App. 145a. "AVIC HQ exercised such complete control over the other entity Respondents in this case the AVIC Respondents operate as one entity." *Ibid.* "When AVIC USA signed the [Soaring Wind] Agreement, it was doing so on orders from AVIC HQ." *Id.* at 147a. These findings alone show the Chinese entities' involvement in the relationship at issue in the arbitration.

Beyond that, the Chinese entities played *direct* roles in the parties' relationship. Soaring Wind "was directed by both AVIC USA *and AVIC [IHC]* to present proposals for projects under the agreement to Xu Hang at AVIC [IHC, a Chinese entity,] rather than Sherman Zhang at AVIC USA." Pet. App. 152a. Chinese entities even signed certain agreements defining the parties' relationship. Although AVIC USA was nominally the AVIC entity that signed the MOU, for example, Liu Rongchun, an AVIC IHC of-

---

[4] "An arbitrator's finding of fact must be accepted as true." *Apache Bohai Corp. LDC v. Texaco China BV*, 480 F.3d 397, 409 (5th Cir. 2007); *see also BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 28 (2018) (reiterating the "deference that courts ordinarily owe arbitration decisions").

ficer having no position with AVIC USA, signed for AVIC USA. *Id.* at 128a, 146a-47a. The MOU "reference[d]" AVIC TED and proposed that AVIC TED receive an equity interest in Soaring Wind (the United States subsidiary, AVIC USA, was only later substituted when the parties signed the Soaring Wind Agreement). *Id.* at 128a. The MOU also recognized that AVIC TED (then known as CATIC) "offices and employees *in China* will be available for support as needed." *Id.* at 128a-29a (emphasis added).

AVIC TED also signed the "Preliminary Agreement for Wind Power Project Development" (the Chicago Agreement). Pet. App. 138a-39a. "The Chicago Agreement is part of the sequence of agreements between the Tang 'side' and the AVIC 'side', which began with the MOU, followed by the [Soaring Wind] Agreement, and completed by the Chicago Agreement." *Id.* at 140a. AVIC TED is a Chinese LLC with its principal place of business, officers, directors, and assets in China. *See* C.A. ROA.29292; C.A. ROA.29342-43.

In sum, the Chinese entities' involvement pervaded the parties' relationship from the start. AVIC HQ, AVIC IHC, and AVIC TED—all operating at the Chinese government's ultimate direction—not only directed and controlled AVIC USA, and orchestrated the Soaring Wind Agreement itself, but also played direct roles in the parties' relationship, even signing certain contracts. Thus, the record indisputably shows a basis for jurisdiction under the Convention. A relationship involving Chinese entities operating at the Chinese government's direction is exactly the type of case that Congress would expect to fall under

the Convention and thus merit federal jurisdiction. The court of appeals' disposition was correct.[5]

3. Petitioner fails to establish any plausible conflict warranting review—and, indeed, the decision below is consistent with decisions from other courts. Courts have found jurisdiction under the Convention when, for example, domestic parties to the contract were subsidiaries of foreign parents, planning occurred overseas, and the contract identified foreign vendors. *See Outokumpu Stainless USA LLC v. Converteam SAS*, 2017 U.S. Dist. LEXIS 11995, at *15-16 (S.D. Ala. Jan. 30, 2017), *aff'd in relevant part*, 902 F.3d 1316 (11th Cir. 2018), *rev'd on other grounds*, 140 S. Ct. 1637 (2020).[6]

Similarly, a court found that the qualifying legal relationship involved a non-United States citizen (FIFA) where the agreement referred to nonsignato-

---

[5] This Court could reach the same conclusion without delving into the facts at all, on the alternative ground that AVIC judicially admitted the parties' legal relationship has a "reasonable relation" to a foreign state. In its main merits brief in district court, for example, AVIC USA sought vacatur under the Convention, claiming "it applies here because the underlying agreement of the relevant parties[,] and the award, both have a 'reasonable relationship' with a foreign state, in this case, The People's Republic of China." *See, e.g.*, C.A. ROA.29380 n.1. As AVIC USA explained, "AVIC is a state owned enterprise (SOE) of the PRC and the other Non-Signatories against whom confirmation is sought are PRC companies." C.A. ROA.29551; *see also* C.A. ROA.29597-98. The Court need look no further than these judicial admissions—which embody *both* factual and legal conclusions (*contra* Pet. App. 6a-7a)—to confirm federal jurisdiction.

[6] When this Court granted review in *Outokumpu* to decide whether the Convention conflicts with domestic equitable-estoppel doctrines, it expressed no doubt that the Convention applied to that case.

ry FIFA, which "directly profited" from the agreement and thus "had a broader stake in th[e] relationship." *Championsworld, LLC v. U.S. Soccer Fed'n, Inc.*, 890 F. Supp. 2d 912, 927 (N.D. Ill. 2012). The Court also held that the parties' relationship had "a reasonable relation to foreign states through FIFA, its members, and their affiliated teams." *Ibid.* Because "FIFA was an interested party throughout," the court explained, the case was not one "where the parties' only connection to any foreign country was the seat of arbitration or their choice of law." *Ibid.*

By finding that the Convention applies on these facts, the court below reached a decision consistent with those from other courts—supplementing its independent finding that jurisdiction exists because "[a] Chinese entity's actions on foreign soil could (and did) trigger breach for one of the LLC's (domestic) members." Pet. App. 14a.

4. Finally, this case is a poor vehicle for the question presented, because the decision would not be outcome-determinative. AVIC USA admits that even if the Convention does not apply on the current record, if the AVIC Alter Egos were proper parties to the arbitration, the Convention would indeed apply. At best, then, even if AVIC USA were successful in this Court, the result would be a remand. *See* 20-40 Pet. 20-21. The arbitrators' detailed factual findings establish that the AVIC Alter Egos were proper parties to the arbitration, and there is every reason to believe the district court would adopt the arbitrators' conclusion. The only practical result would be that AVIC would have gained yet another delay in this long-running saga. Six years is far too long for an arbitration to drag on. The petition should be denied.

## II. THE ALTER EGO QUESTION DOES NOT MERIT THIS COURT'S REVIEW

The Fifth Circuit held it was unnecessary for the district court to decide whether the AVIC Alter Egos were proper parties to the arbitration before confirming the award against AVIC USA—who was independently liable and undisputedly a proper party. Pet. App. 16a. That splitless question does not warrant review. For one, it is not properly presented on these facts: the Fifth Circuit held, unambiguously, that it was "irrelevant" and "immaterial" whether the non-signatories were subject to arbitration—*because AVIC USA was itself directly liable under the agreement*. *Id.* at 16a & n.27. The award thus stands irrespective of the non-signatories' status in the arbitration, and the judgment below stands without knowing if the non-signatories are separately subject to any judgment. This question is thus wholly academic on this record.

The issue anyway is not the subject of any conflict, and the court below decided it correctly. Petitioners premise their argument on a mischaracterization of the arbitrators' factual findings and the procedural posture of the case. The question presented is insubstantial, and the Court should deny review.

1. Petitioners, first and foremost, do not even attempt to muster a circuit conflict on this question. The particular disposition of this complex dispute matters in this case alone, and it does not promise to resolve any broad legal issue for any other significant group of cases. Which, of course, is likely why petitioners could not identify a single appellate decision squarely going the other way on this issue. If the question warrants this Court's review at all—and it

assuredly does not—additional percolation is plainly warranted.

2. The district court correctly held that it "need not" decide the AVIC Alter Egos' motion to vacate before deciding "whether to confirm" the award against AVIC USA. Pet. App. 46a. There is no dispute that the AVIC Alter Egos, as non-signatories, are entitled to independent court review of the arbitrators' power over them. *See Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 354 (5th Cir. 2003). But petitioners ignore that they will indeed get that review. No judgment has yet been entered against them, and no one is trying to enforce the award *against the AVIC Alter Egos* until the district court enters an appropriate judgment. There is no need for this Court to review that question now—and it is wholly improper to review the validity of a (hypothetical) judgment against the AVIC Alter Egos where the only *live* judgment is against *AVIC USA*.

3. Because the district court has not entered judgment against the AVIC Alter Egos, petitioners seek to wedge this issue into the confirmation process *against AVIC USA*. In doing so, they misstate the award and ignore the arbitral record.

Simply put, the award against AVIC USA, a signatory, did not depend on the arbitrators' exercise of power over the AVIC Alter Egos. The arbitrators found AVIC USA *directly* liable under the Soaring Wind Agreement, regardless of the AVIC Alter Egos' liability, and then held the AVIC Alter Egos jointly and severally liable under alter ego principles. That finding is not premised in any way on an improper "adverse inference." Confirmation against AVIC USA thus presents run-of-the-mill FAA confirmation issues that the courts below correctly resolved.

Petitioners' argument turns on whether AVIC USA breached the Agreement, but the arbitrators' contract interpretation is virtually unreviewable. Courts must defer to the arbitrators' findings and provide "just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008). "As long as the arbitrator's award 'draws its essence from the … agreement,' and is not merely 'his own brand of industrial justice,' the award is legitimate." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (quoting *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

Here, the arbitrators carefully analyzed the Agreement's exclusivity terms and determined that AVIC USA breached the Agreement. Section 6.12 stated that the Class A Members "agree that neither they *nor their Affiliates* or Representatives will participate in wind farm land development projects … except through an entity owned by" Soaring Wind and AVIC USA. Pet. App. 134a (emphasis added). Based on that provision and others, the arbitrators interpreted the contract as a promise by Soaring Wind's Members that the "Members, *their Affiliates* and Representatives will only conduct the 'Business' through [Soaring Wind]." *Id.* at 142a (emphasis added). Given that interpretation, the arbitrators found that, although "AVIC USA itself did not violate" the non-compete provision by competing with Soaring Wind, "*AVIC USA breached* the [Soaring Wind] Agreement by its Affiliates engaging in the 'Business' of [Soaring Wind]." *Id.* at 142a-43a (emphasis added).

The courts below correctly applied the deferential standard of review to the arbitrators' findings. The district court explained that "AVIC USA's argument essentially amounts to assertions that the Panel's interpretation was flawed," but that the court "may not second-guess the panel's conclusions on any issues involving contract interpretation in this very narrow review." Pet. App. 66a. The Fifth Circuit likewise found that AVIC USA "signed an agreement specifying that the actions of its affiliates could constitute its own breach." *Id.* at 16a. Thus, the court explained, whether the AVIC Alter Egos "themselves be subject to the arbitration is irrelevant," because AVIC USA "'assum[ed] the obligation of its affiliates' performance.'" *Ibid.* (citation omitted). As a result, the court held that the "arbitration panel reasonably found that a breach had occurred," and "given the deference owed to the panel, [it] decline[d] to disturb that finding." *Ibid.* (footnote omitted).

The arbitrators' contract interpretation is sound. In fact, although petitioners insist that arbitral jurisdiction over the AVIC Alter Egos was crucial to confirmation, they do not seriously contest the arbitrators' contract interpretation. Instead, they largely ignore it. And especially given the extraordinary deference owed the arbitrators' interpretation, both the district court and court of appeals correctly left the judgment undisturbed.

4. Petitioners incorrectly assert that the arbitrators based their finding that AVIC USA breached the Agreement *solely* on an "adverse inference" arising from the AVIC Alter Egos' non-participation. *See, e.g.*, 20-40 Pet. 25-27. They claim, again incorrectly, that there was *no* other evidence of breach or damages. Thus, they say, the "adverse inference" was the

award's "linchpin" and its "*sole* basis." *See* 20-40 Pet. 26. According to petitioners, the arbitrators could draw this "adverse inference" only if they had power to make the AVIC Alter Egos provide discovery in the first place. *Id.* at 23-25. So, they claim, the finding that AVIC USA breached the Soaring Wind Agreement can stand only if the "adverse inference" can stand, and the "adverse inference" can stand only if the Court confirms the arbitrators' power over the AVIC Alter Egos. *Id.* at 21-27.

This argument mischaracterizes the award and ignores the 27,000-page arbitral record. The arbitrators based their breach and damages findings not on any "adverse inference," but on the record. For example, they said "*the evidence establishes* that AVIC IRE and/or Ascendant and/or single-asset entities created by those entities developed the Ralls Wind Farm and Cirrus Wind I." Pet. App. 154a (emphasis added). And although the award does not recite in detail *all* the testimony and exhibits that supported these findings, it points, for example, to AVIC IRE's website as evidence of AVIC IRE's actions. *Ibid.* The arbitrators also treated as an "admission" the November 2013 email from AVIC IRE vice president Xu Hang claiming that AVIC IRE had invested $50 million in United States wind-power projects. *Ibid.*

Thus, the court of appeals correctly recognized that "[t]he panel's inference that one or more of [AVIC] USA's affiliates financed a wind power development project in violation of the Agreement was based on more than the affiliates' non-participation in the arbitration," pointing specifically to Hang's email and press releases and online publications referencing ongoing wind-power development projects. Pet. App. 16a. It would be extraordinary for this

Court to grant review to decide whether the court of appeals' review of that fact-bound issue was correct.

Moreover, the arbitrators discussed "adverse inferences" in just *one paragraph* of their award. Pet. App. 161a. And, as the district court observed, the arbitrators purported to draw just one inference: that AVIC IRE's admission of a $50 million investment was "accurate without any *additional evidence*." *Id.* at 70a-73a (emphasis added). So the arbitrators did not "adversely infer" a $50 million investment—the email itself showed that much.

Nor did the arbitrators suggest that the outcome depended on this "inference." The arbitrators' short discussion of adverse inferences appears in a separate section *after* their discussions of both breach and damages. And, again, the arbitrators expressly based their breach and damages analyses on the record, never mentioning any "adverse inference" in those sections. The arbitrators never said that AVIC IRE's admission, standing alone, could not prove the $50 million investment, or that they would have discredited the admission without the "inference" of accuracy. Nor did they say the award otherwise depended on any "adverse inference." Thus, confirmation of the award against AVIC USA in no way depends on whether the AVIC Alter Egos were proper parties to the arbitration.

There was no need for the district court to resolve that "irrelevant" and "immaterial" question before confirming the award against AVIC USA. Pet. App. 16a & n.27.

## III. THE PANEL COMPOSITION QUESTION DOES NOT MERIT THIS COURT'S REVIEW

The Fifth Circuit further held that the arbitration panel was properly constituted under the strict

terms of the parties' "bespoke" agreement, and the district court was not obligated to set aside that agreement as a matter of federal due process or international public policy. Pet. App. 17a-20a. In addition to being waived below, this splitless, case-specific challenge does not warrant this Court's review.

1. First, petitioners again fail to identify any conflict on this question. AVIC USA understandably cannot identify any split on the proper construction of this particular contract; there is no need for this Court to revisit the lower court's construction of a "bespoke" agreement "between extremely sophisticated parties." Pet. App. 20a.

Nor is there any conflict regarding the demands of federal due process or international public policy. The AVIC Alter Egos do not even assert that a true domestic conflict exists. Instead, they contend that the decision below "splits from international law." 20-39 Pet. 28. But their only support is a 1992 decision from the French Court of Cassation and the views of certain academics who allegedly believe parties must have equal say in choosing arbitrators.

Even if the AVIC Alter Egos' description of those authorities is accurate, petitioners miss the point. The Convention allows a court to refuse to enforce an award if doing so "would be contrary to the public policy *of that country*." Art. V(2)(b) (emphasis added). Whether enforcing an award would be contrary to the public policy of a *different* country says nothing about whether doing so would be contrary to *U.S.* public policy. As this Court recently recognized, the "Convention was drafted against the backdrop of domestic law." *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140

S. Ct. 1637, 1645 (2020). "[T]he Convention requires courts to rely on domestic law to fill the gaps; it does not set out a comprehensive regime that displaces domestic law."[7] *Ibid.* As further explained below, it is not contrary to U.S. public policy to enforce the plain language of the parties' agreement specifying an arbitrator-selection process.

2. AVIC USA, for its part, relies on *Murray v. United Food & Commercial Workers Int'l Union, Local 400*, 289 F.3d 297, 303 (4th Cir. 2002), and *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 938 (4th Cir. 1999), in which courts refused to enforce arbitration clauses giving the more-powerful party control over arbitrator selection, at least as to federal statutory claims. Those cases do not remotely reflect a legitimate split: (1) the more-powerful party had *exclusive* control over arbitrator selection; (2) the contracts at issue were between an employer and employee, parties with inherently unequal bargaining power; (3) the employers' status as "repeat players" in arbitrations created a risk of ongoing relationships between the arbitrators and the employers; and (4) each of the cases involved federal statutory claims under Title VII, which implicate substantive safeguards to statutory rights that are absent in com-

[7] To be sure, U.S. courts occasionally rely on other signatories' "postratification understanding" of a treaty. *GE Energy*, 140 S. Ct. at 1646. But because the treaty provision at issue here involves interpreting the public policy of the enforcing country, other countries' interpretations of their own public policy are irrelevant. Additionally, the single court decision on which petitioners rely issued in 1992, "decades after the finalization of the New York Convention's text in 1958," "diminish[ing] the value of th[is] source[] as evidence of the original shared understanding of the treaty's meaning." *Id.* at 1647.

mercial arbitrations. *See Murray*, 289 F.3d at 302 ("[A]greements to arbitrate federal statutory claims, such as those pursued under Title VII, may be revoked if the prospective litigant demonstrates that it cannot effectively vindicate his or her statutory cause of action in the arbitral forum.").[8] None of those facts exist here. This dispute relates to a breach of contract between sophisticated parties, each with an opportunity to weigh in on the arbitrator-selection process, consistent with the parties' agreement. And if any arbitrator violates his or her commitment to adjudicate a matter impartially and objectively, each party has every right to challenge the award on that concrete basis—there is no reason to presume in advance that an arbitrator selected by one side is inherently and automatically biased against the other—a contention that would threaten to undermine the core foundation of the arbitration system.

3. Unsurprisingly, the decision below is consistent with decisions from numerous courts. Several courts have upheld arbitral awards despite one party's greater influence over the arbitrator-selection process. *UBS Financial Services, Inc. v. Padussis*, 842 F.3d 336, 339-41 (4th Cir. 2016) (finding "no basis for overturning the arbitral decision" where the FINRA

---

[8] AVIC USA also quotes from *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), but that case involved *actual* arbitrator bias (a "close financial relationship" between a party and an arbitrator) that was not disclosed until after the hearing. *Id.* at 146-47. By contrast, no such allegations of actual bias exist in this case. Petitioners could have objected to any "non-neutral" arbitrator under AAA Rule 13(b), or moved for vacatur based on arbitrator "partiality or corruption," 9 U.S.C. § 10(a)(2). They did not.

director appointed arbitrators to the panel without one party's input); *Kentucky River Mills v. Jackson*, 206 F.2d 111, 116-20 (6th Cir. 1953) (upholding an award issued by one party-appointed arbitrator after the other party refused to name an arbitrator, explaining this process "was not contrary to public policy, for such ex parte arbitrations were permitted under the common law"); *Kushlin v. Bialer*, 301 N.Y.S.2d 181, 183 (N.Y. App. Div. 1969) (rejecting argument that "the contract provision for selection of arbitrators is unfair and should not be enforced" because two parties were aligned against a third, and each party selected an arbitrator, explaining that "[t]he parties to the agreement were free to adopt their own method of selection of arbitrators, and the court is required to enforce the agreement of the parties").

There is no circuit conflict at all, much less a mature conflict ripe for this Court's review.

4. In any event, this case is a poor vehicle for considering this question because petitioners waived their due process and public-policy arguments. *See* Pet. App. 63a-64a (district court so finding). While the Fifth Circuit rejected petitioners' argument on the merits without reaching waiver, the preservation issue still exists—and respondents could independently prevail on that ground. *See* Resps.' C.A. Br. 54-58. If this Court wishes to address the appointment question at all, it should await a case where a serious procedural obstacle does not exist.

5. This question, anyhow, is unimportant and rare. It arises only where parties have deliberately crafted a contract (here, a "bespoke deal," Pet. App. 20a) to permit parties to appoint what some perceive as an "unbalanced" arbitration panel. In the mine-

run of arbitration cases, appointment clauses are standard and avoid unusual situations involving multi-party disputes. This issue arises infrequently and is subject to self-regulation via contract drafting. This Court need not devote its scarce resources to this issue.

6. Finally, review is unwarranted because the decision below was correct. Whether the arbitrators followed the contractual-selection method is a procedural question on which courts defer to arbitrators. The district court correctly found no ground to disturb the arbitrators' interpretation. Petitioners cannot meet the Convention's narrow standards for relief, as there was no unfairness in the process used here, which was exactly the process AVIC USA bargained for.

AVIC USA claims that the arbitrators were not selected using the method required by the Agreement, and that a court must vacate any award made by arbitrators not appointed according to the parties' contract. But AVIC USA ignores that the arbitrators get the first shot at resolving procedural disputes, including disputes over the contractual method for appointing arbitrators. That is especially true here, where the Agreement laid out the selection process and then charged the arbitrators with deciding "any controversy dispute, or claim arising under or related to this Agreement," including "any dispute regarding the construction, interpretation, performance, validity or enforceability of any provision of this Agreement." Pet. App. 159a. Thus, it was the arbitrators' job to decide whether the parties correctly abided by the Agreement's selection process. They found that "[t]he composition of the panel is in accord with the [Soaring Wind] Agreement." *Id.* at 160a.

A court can intervene only if the arbitrators did not even arguably construe the contract. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008). The district court correctly held not only that the arbitrators' decision drew its essence from the Agreement, but also that the agreement clearly compelled the method used to empanel the arbitrators here. The Fifth Circuit agreed: "[AVIC USA] cannot escape the conclusion that the Agreement's written procedure was followed." Pet. App. 19a.

The arbitrators did not err—much less exceed their powers under this deferential standard—in interpreting the Agreement. Delaware law governs that contract. Pet. App. 137a. And Delaware law "seeks to ensure freedom of contract." *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 (Del. 2015). "To determine what contractual parties intended, Delaware courts start with the text." *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019). When a contract is unambiguous, Delaware law honors its plain meaning, ignoring extrinsic evidence. *Ibid.* "Absent some ambiguity, Delaware courts will not destroy or twist [a contract's] language under the guise of construing it." *Lazard Tech. Partners, LLC v. Qinetiq N. Am. Operations LLC*, 114 A.3d 193, 195 n.9 (Del. 2015).

The Agreement unambiguously compelled the arbitrator-selection method used here. The contract requires "*[t]he Disputing Member* desiring to initiate arbitration" to notify "the other Disputing Members in writing" of its arbitration demand. Pet. App. 30a (emphasis added). This notice must include "the name of the Arbitrator appointed by *the Disputing Member*." *Ibid.* (emphasis added). Thus, *one* "Disput-

ing Member" starts the arbitration and selects an arbitrator. Then "*each other Disputing Member* receiving notice of the Dispute shall name an Arbitrator." *Ibid.* (emphasis added). Lastly, "the Arbitrators selected by the Disputing Members shall cause the appointment of either one or two Arbitrators as necessary to constitute an odd number of total Arbitrators." *Ibid.*

Were this language not plain enough, the contract defines "Disputing Member" as "*each Member* that is a party to such Dispute." *Ibid.* (emphasis added). A "Member" is "either a Class A Member or a Class B Member." Pet. App. 130a. And Class A and Class B Members are the persons listed in "Exhibit A" to the Agreement—that is, AVIC USA, Thompson, and the five Tang Claimants. *See id.* at 129a. These definitions confirm that when, as here, each of these seven "Members" is involved in a dispute, each is a "Disputing Member" entitled to name an arbitrator. Yet AVIC USA altogether ignores that the contract defines "Disputing Member."

AVIC USA's interpretation—granting only one arbitrator appointment to each aligned "side"—ignores the contract's plain text. Simply put, the contract grants an arbitrator appointment to each "Disputing Member," not to each "side." AVIC USA's interpretation thus seeks to "destroy or twist [the contract's] language under the guise of construing it." *See Lazard*, 114 A.3d at 195 n.9; *see also Kushlin*, 301 N.Y.S.2d at 182-83 (holding, under similar circumstances, "that the contract unambiguously provides for the right of selection of an arbitrator by 'each of the partners,'" and thus rejecting a construction that would grant two aligned partners only one appointment).

Lastly, AVIC USA is wrong that the Court should adopt its interpretation to avoid "absurd results." 20-40 Pet. 27. AVIC USA's own cases show that this principle merely lets courts weed out "unreasonable" interpretations of ambiguous contracts. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010). AVIC USA cites no Delaware authority letting courts (or arbitrators) rewrite *unambiguous* terms on this ground. To the contrary, "[i]t is not the court's role to rewrite the contract between sophisticated market participants, allocating the risk of an agreement after the fact, to suit the court's sense of equity or fairness." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 624 (Del. Ch. 2005), *rev'd in part on other grounds*, 901 A.2d 106 (Del. 2006).

7. The court below also correctly held that complying with the parties' agreed-upon arbitrator-selection method did not violate "public policy" or "due process." As the court of appeals correctly held, petitioners' argument, "taken to its logical conclusion, would require th[e] court to invalidate any arbitral award not issued by an evenly appointed panel." Pet. App. 20a. The court rejected that argument, explaining that "[t]he Agreement did not inherently favor one party or another; it just so happened that [AVIC] USA was outnumbered." *Ibid.* Because "[t]he agreed-upon selection process was followed to the letter," the parties "received the process they were due." *Ibid.*

The court was correct. The Convention allows a court to refuse to enforce an arbitral award if it "would be contrary to the public policy of that country." 9 U.S.C. § 201, Art. V(2)(b). In the context of domestic labor arbitration awards, this Court limited the "public policy" exception to "'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 Paperworkers In't'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)). The grounds for vacating an arbitration award under the Convention are no broader.

No "well defined and dominant" public policy exists that would require this Court to ignore the plain language of the parties' contract. As explained above, petitioners' only supportive authorities are not relevant to whether the parties' agreed-upon selection provision is "contrary to the public policy of [*this*] country." 9 U.S.C. § 201, Art. V(2)(b). In fact, U.S. public policy requires courts to abide by the language of the parties' agreement: "If in the agreement provision be made for a method of naming or appointing an arbitrator," "such method *shall be followed*." 9 U.S.C. § 5 (emphasis added). Moreover, this is not the first case in which a court has affirmed an arbitration award from a "lopsided" panel. *See supra*.

Here, whatever petitioners think about the Agreement's arbitrator-selection method, the arbitral panel complied with that agreement. Petitioners may believe the agreement's selection process is unconscionable. But courts generally give effect to the parties' arbitrator-selection agreements, and the process here did not corrupt the arbitrators or guarantee any bias or favoritism. There is no indication that the panel did not decide the case based on its view of the law and the facts, which is precisely what the parties bargained for.

In any event, a "bespoke" agreement among sophisticated parties in a complex international dispute is hardly an appropriate backdrop for deciding, generally, the potential limits on standard clauses for appointing arbitrators.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

JIM MOSELEY
WILLIAM B. CHANEY
GRAY, REED & MCGRAW, PC
Thanksgiving Tower, 46th Floor
1601 Elm Street, Suite 4600
Dallas, TX 75201

LEWIS T. LECLAIR
*Counsel of Record*
CHELSEA A. PRIEST
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
(214) 978-4984
*lleclair@mckoolsmith.com*

SEPTEMBER 2020