No. 20-40

IN THE

Supreme Court of the United States

CATIC USA INCORPORATED, also known as AVIC INTERNATIONAL USA, INCORPORATED,

Petitioner,

v.

SOARING WIND ENERGY, L.L.C., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Brief for the Respondents in Opposition ("Respondents' Brief") simply parrots back the Fifth Circuit's rulings on federal jurisdiction, the improper reliance on adverse inferences based on the non-participation of non-signatory foreign companies, and the due process violations arising from a lopsided arbitration panel designed to benefit Respondents.

Respondents do not address the arguments or case law raised by Catic USA Inc. (also known as AVIC International USA, Inc.) ("AVIC USA") that show the Fifth Circuit improperly extended federal question jurisdiction based on tangential relationships that are not reasonably read into the governing agreement, which directs the development of domestic projects between domestic parties. Indeed, Respondents gloss over the Fifth Circuit's statement that the Agreement[1] has a domestic character and makes no reference to any foreign place or entity.

Respondents join the Fifth Circuit in side-stepping the Panel's improper assertion of jurisdiction over the non-signatories and then penalizing AVIC USA based on the non-signatories non-participation. The Panel's decision to flout a federal district court's directive that only the court had the power to compel a party to arbitration tainted the proceeding from the outset.

Lastly, the Respondents take a *caveat emptor* attitude toward the inequitable composition of the arbitration panel and ignore due process and reasonable contract interpretation. Respondents suggest that the intent of the parties to fairly resolve disputes between them is

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[1] The "Agreement" is the Limited Liability Company Agreement of Soaring Wind Energy, LLC. ROA.299.

eclipsed by an implausible and unreasonable interpretation that is technically justified by the contract. This Court and others have held that the integrity of the arbitration process and the necessity of fairness and equity negate such an interpretation of the arbitration selection provision as was adopted here.

ARGUMENT

I. Respondents Fail to Address the Fifth Circuit's Unprecedented Expansion of Federal Jurisdiction Based on Peripheral and Hypothetical Foreign Relationships.

Parties invoking federal jurisdiction bear the burden of persuasion on jurisdiction because federal courts, having limited jurisdiction, are presumed to lack subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994). The Fifth Circuit's opinion ignored this maxim and made every inference possible to find subject matter jurisdiction where it did not exist. Indeed, far from Respondents' claim that the Chinese government had "pervasive involvement," (Respondents' Brief at 14), the Fifth Circuit based its opinions on AVIC USA's relationships with foreign companies which "could" have involvement with some of the LLC's projects. The Fifth Circuit also improperly relied on the arbitral award finding the non-signatory Chinese entities jointly and severally liable. As noted in AVIC USA's Petition for a Writ of Certiorari, such a finding was impermissible and no basis for a federal court to establish its own jurisdiction.

As to the underlying Agreement at issue here, the Fifth Circuit correctly found:

> The Agreement makes explicit reference *neither to China nor to any Chinese citizen, nor even*

> *to any foreign place or entity*. Aside from a generic, stated purpose "to provide worldwide marketing" in wind energy, the Agreement appears to evince a domestic character: It creates a Delaware company, comprised entirely of U.S. citizen-members, with a principal place of business in Texas. . . . The underlying arbitration proceeded in Texas, under Delaware substantive law. In short, it would appear on its face that the Agreement bears no relation to China (or any other foreign state).

Pet. App. 15-16a (emphasis added).

Despite these findings, the Fifth Circuit somehow detected a reasonable relation to a foreign country that created jurisdiction because the Agreement contained an exclusivity provision that potentially restricted unnamed non-signatory "affiliates" from competitive conduct, and the parties knew that some "affiliates" were Chinese entities. Pet. App. 16a. Such an attenuated foreign relationship is not sufficient to establish jurisdiction under the New York Convention and Respondents fail to cite any case to the contrary. Indeed, the cases cited by AVIC USA which are largely unaddressed by Respondents are directly to the contrary. *See e.g. Freudenspring v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 339 (5th Cir. 2004) (finding jurisdiction under New York Convention where one party to contract was foreign Citizen). Here, Soaring Wind Energy, LLC ("Soaring Wind"), AVIC USA, and all of Soaring Wind's other members are U.S. citizens. (ROA.360-361). Respondents cannot dispute that the only foreign entities at issue never signed the Agreement and no Court has concluded that these non-signatories were properly subject to the arbitration or bound by the arbitral award. *See Bridas S.A.P.I.C. v. Gov't of*

Turkmenistan ("Bridas I"), 345 F.3d 347, 356 (5th Cir. 2003).

Nor does AVIC USA's legal relationship with Respondents through Soaring Wind involve any property located abroad. Thus the entire premise of the Fifth Circuit's jurisdictional ruling and Respondents' Brief collapses to the possibility that some performance under the Agreement could have been abroad though no specific country, project, or relationship is identified anywhere in the Agreement. The Fifth Circuit's extremely broad view of what constitutes a legal relationship having a "reasonable relation" to a foreign country is the central issue in this appeal, and is virtually ignored by Respondents except to aver that the statute has been satisfied because the Fifth Circuit said so.

Where arbitration is only between United States citizens, as here, and without a court ruling on jurisdiction over *all* of the Non-Signatories, the New York Convention may still confer jurisdiction when the parties' legal relationship "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign countries." 9 U.S.C. § 202.[2] AVIC USA cited numerous cases showing that jurisdiction under the New York Convention should be narrowly construed. Tellingly, Respondents completely ignore these cases.

The adoption and implementation of the New York Convention in the U.S. was done primarily to "encourage the recognition and enforcement of commercial arbitration agreements in *international contracts*," not

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[2] *See also Freudensprung*, 379 F.3d at 339-41, *Matabang v. Carnival Corp.*, 630 F. Supp. 2d 1361, 1364 (S.D. Fla. 2009) (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 n.7 (1st Cir. 2005)).

to create jurisdiction over awards, as here, made in domestic arbitrations for domestic parties that have domestic purposes. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (emphasis added). It follows then, that jurisdiction under the reasonable relation exception is not conferred by any tangential or minimal relation to a foreign state—there must be an "important foreign element involved." *Jones v. Sea Tow Services Freeport NY Inc.*, 30 F.3d 360, 366 (2d Cir. 1994). In essence, the requirement is that the Convention only applies in "the narrow context of ***truly*** international disputes . . . ." *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 577 (7th Cir. 2007) (emphasis added). Although AVIC USA cited *Scherk*, *Jones*, and *Certain Underwriters* in its petition, Respondents simply ignore these cases.

Other courts looking at this "reasonable relation" test primarily focus on the actual performance of the contract and whether a central purpose of the contract creates a relation to a foreign state. *See* and *compare Lander Co. v. MMP Investments, Inc.*, 107 F.3d 476, 478 (7th Cir. 1997) (finding jurisdiction where contract included distribution of product in Poland), and *S & T Oil Equip. & Mach., Ltd. v. Juridica Investments Ltd.*, 456 Fed. Appx. 481, 484 (5th Cir. 2012) (finding reasonable relation to foreign country where "Investment Agreement specifically states that it was executed in Guernsey and would be performed . . . exclusively and wholly in and from Guernsey."), with *Jones*, 30 F.3d at 361 (finding no jurisdiction where arbitration would use English law, an English arbitrator, and would be in England), and *Armstrong v. NCL (Bahamas) Ltd.*, 998 F. Supp. 2d 1335, 1338–39 (S.D. Fla. 2013) (finding no jurisdiction where seaman in international waters docked at international ports because the focus

of work was not on foreign soil). These cases were also all cited by AVIC USA but ignored by Respondents.

For this question, evidence of an important foreign element such as performance abroad is critical. *See, e.g.*, *Brittania-U Nigeria, Ltd v. Chevron USA, Inc.*, 866 F.3d 709, 713 (5th Cir. 2017) (leases at issue "were for sale in Nigeria and all performance was to occur in Nigeria"); *S & T Oil Equip. & Mach., Ltd. v. Juridica Investments Ltd.*, 456 F. App'x 481, 484 (5th Cir. 2012) (Convention applied when agreement was to be performed "in and from Guernsey") (cited by AVIC USA but not addressed by Respondents).

When the contract is territorially neutral for performance, courts look to other indicia that the parties envisaged performance abroad. Without that, the New York Convention does not apply. *See, e.g., Freudenspring,* 379 F.3d at 332*; Matabang*, 630 F. Supp. 2d at 1364. In *Freudenspring*, work orders, including one specifically for West Africa, became part of the contract. In *Johnson v. NCL (Bahamas) Ltd.*, 163 F. Supp. 3d 338, 360–61 (E.D. La. 2016), the contract did not specify any particular country, but the vessel on which the plaintiff worked had an itinerary that took it to ten different foreign ports (cited by AVIC USA but not addressed by Respondents).

Indeed the cases cited by Respondents do not support the Fifth Circuit's decision. In *Outokumu Stainless USA, LLC v. Converteam SAS,* 902 F.3d 1316, 1324 (11th Cir. 2018), the Court specifically relied on the agreement having terms that "contemplate[d] performance by foreign subcontractors [who were included within the definition of parties in the agreement] in foreign states." Thus, the agreement both defined the foreign subcontractors as parties and contemplated their participation. The facts here are not even close.

Respondents' only other case is a district court case from Illinois that is similarly inapposite here. In *Championsworld, LLC v. U.S. Soccer Fed'n, Inc.,* 890 F. Supp.2d 912 (N.D. Ill. 2012), the signatories to the agreement were both U.S. citizens, but the court noted that the agreement specifically incorporated FIFA, a foreign entity, by name as the "Match Agent" and FIFA was an "interested party" because the very purpose of the plaintiff's business was to bring FIFA-affiliated foreign teams to play matches in the U.S. And the arbitration itself was rendered in Switzerland. Respondents' reliance only on these inapposite cases for its proposition that speculative and tangential foreign involvement is sufficient to support finding jurisdiction is telling.

Moreover, Respondents do not—and cannot—dispute any of AVIC USA's contentions regarding the actual record relating to the Agreement itself. Specifically, that the parties only marketed to the U.S. (ROA.4238-39, 4257, 4564); all of the parties to the Agreement were U.S. entities or residents; the LLC itself was based in Texas; and the Agreement was governed by Delaware law. (ROA.316, 349, 357). Rather than presume that subject matter jurisdiction is lacking based on these undisputed facts, the Fifth Circuit went out of its way to infer jurisdiction based purely on speculation that AVIC USA's foreign sister companies would become involved in the LLC's business. Under this unprecedented expansion of subject matter jurisdiction, any transaction involving a company with foreign subsidiaries, parents or sister companies would fall under the New York Convention.

II. Respondents Have Failed to Address the Impact of the Arbitral Panel's Adverse Inference Finding.

The Fifth Circuit opinion and Respondents' Brief fail to recognize that the arbitration panel cited as a basis for its ruling on AVIC USA's liability an improper adverse inference it applied based on the non-signatories actions. And that adverse inference flowed directly from the panel's improper ruling that it could assert jurisdiction over the non-signatories. Respondents claim vaguely that the ruling was based on "the entire record" and not only the adverse inference - though the Panel's own opinion indicates otherwise.

Indeed, the Fifth Circuit identified only two other pieces of information that purportedly supported the panel's ruling: an email that refers to unspecified financing of US projects and an AVIC Group press release about wind power development projects. But those pieces of evidence were specifically credited by the panel *only because of the adverse inference.* The Panel inferred that a statement in an email[3] that "AVIC International has already provided a total of $50 million USD in financing to [sic] wind power projects in the US" was "accurate without any additional evidence." Pet. App. 133-34a, ROA.1147. Based on the Non-Signatories' refusal to participate in discovery, the Panel then calculated damages based solely on the $50 million figure. Pet. App. 127a. The Fifth Circuit never stated that absent the improper adverse inference the panel could have been able to make a finding of liability against AVIC USA. Respondents' Brief sidesteps this entire issue. The Panel's critical error in forcing non-parties to participate in the arbitration

[3] Translated from Chinese to English.

without a legal basis infected the entire proceeding and tainted any liability finding against AVIC USA.

Indeed, Respondents admit that the Panel had no right to force the non-signatories to participate in the arbitration. ROA.34391 ("All parties agree that the Court should conduct an independent review of the arbitration record" to determine whether the Non-Signatories were subject to the arbitration agreement.). Necessarily, the arbitrators therefore had no right to evaluate evidence through a lens of perceived misconduct which they imputed to AVIC USA. There is no doubt this arbitration was decided in just such a context—the Panel's written opinion directly describes the basis for its award, including that the Non-Signatories "refusal to participate in discovery, except when [they] felt it was to their benefit, prevented [the Tang Claimants] from getting the information to prove" the "factual basis for" their claims. Pet. App. 133-34a. Respondents only response is to simply surmise there must have been more to the panel's analysis in the "record as a whole" even though neither the Panel itself nor the Fifth Circuit identified anything.

III. Respondents Do Not Address Whether the Sides Were Unequal, Whether the Process Was Fair, or Whether the Panel Properly Avoided the Appearance of Bias.

Respondents do not even pretend that the interpretation of the arbitration provision (arrived at by a panel stacked in Respondents' favor) resulted in a fair or reasonable arbitration process. Nor do Respondents dispute they had a greater say in the make-up of the arbitration panel. They simply rely on the lower courts' rulings that AVIC USA is stuck with a stacked panel because the contract can be read to allow for such a lopsided result. Thus, Respondents argue the

Fifth Circuit was correct in holding that the arbitration here was reasonable and consistent with notions of due process despite Respondents directly controlling a super-majority of arbitrators sufficient to secure any damages award on their claims. Parties to arbitration agreements can take no comfort in a system that allows one side to improperly pre-ordain a dispute's outcome. As designed from the outset, Respondents' super-majority of chosen arbitrators found in their favor. Other than agreeing with the Fifth Circuit, Respondents have provided no argument to explain why such a process does not lead to an absurd result contrary to the parties' expectations.[4]

Respondents also improperly characterize the issue as a procedural matter. When an award is made "by arbitrators not appointed under the method provided in the parties' contract" it "must be vacated." *PoolRe Ins. Corp. v. Org. Strategies, Inc.*, 783 F.3d 256, 263 (5th Cir. 2015). This is because section 5 of the Federal Arbitration Act directs compliance with the method for appointment as set out in the arbitration agreement. *Id. at* 263. This is a substantive and not procedural issue that is for the courts to decide because it goes squarely to the power of the arbitrators to act. *See, e.g., AT&T Tech., Inc. v. Commc'n Workers*, 475 U.S. 643, 649 (1986); *Howsam v. Dean Witter*

[4] Under governing Delaware law, contract interpretation should favor meanings that render the operation of contracts fair and reasonable over interpretations that produce unreasonable, oppressive, or absurd results. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract."); *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010) (where there are two reasonable interpretations, "a court will not adopt the interpretation that leads to unreasonable results . . . .").

Reynolds, Inc., 537 U.S. 79, 83 (2002); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002). Respondents again ignore these cases.

This Court has long held that "*any* tribunal permitted by law to try cases and controversies not only must be unbiased but also *must avoid even the appearance of bias*." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) (emphasis added). This avoidance of bias is critical because parties that arbitrate "do not agree to forego their right to have their dispute fairly resolved by an impartial third party." *Murray v. United Food & Commercial Workers Int'l Union, Local 400*, 289 F.3d 297, 303 (4th Cir. 2002). Respondents attempt to distinguish *Murray* because in that case "the more powerful party had exclusive control over arbitrator selection." Respondents fail to explain any critical difference between one party having super-majority control as opposed to exclusive control. The concerns and resulting inequity are the same. Nor do Respondents explain why any of the other allegedly distinguishing factors would in any way alter or alleviate the central concern expressed by the Supreme Court—that an arbitration panel that is stacked with one side's arbitrators fails the standard that an arbitration must be resolved by an "impartial" third party and must avoid even the "appearance of bias."

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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