No. _____

In the
Supreme Court of the United States

VINOD KUMAR DAHIYA,
Petitioner,
v.

TALMIDGE INTERNATIONAL, LTD., NEPTUNE SHIPMANAGEMENT SERVICES (PTE) LTD., AMERICAN EAGLE TANKERS, INC., LTD., AMERICAN EAGLE TANKERS AGENCIES, INC. AND THE BRITANNIA STEAMSHIP INSURANCE ASSOCIATION, LTD.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

KEVIN O'BRYON (LSBA 10151)
Counsel of Record
O'BRYON & SCHNABEL, APLC
935 Gravier St., Suite 900
New Orleans, LA 70112-4541
Telephone: (504) 799-4200
Facsimile: (504) 799-4211
Email: kob@obryonlaw.com

Attorney for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Relying on a minority view of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) definition of an arbitration agreement, the court below confirmed a foreign arbitral award and disregarded Louisiana and federal law as to the preclusive effect of an interlocutory order compelling arbitration.

1. Can a foreign arbitration award be enforced pursuant to the Convention (9 USC 207) where the arbitration agreement does not meet the Convention's definitional requisite [Art. II(2)] of bilateral signatures? And, is that defect jurisdictional, or merely fatal to the merits of the enforcement action?

2. Is a 9 USC 206 order staying litigation and compelling arbitration preclusive, or subject to judicial review following issuance of an arbitration award?

3. Does a court sitting in secondary jurisdiction have authority to effectively amend an arbitration award by making rulings that the arbitrators did not make, such as a failure to prosecute a claim in the arbitration?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption of this matter contains the name of all parties to the proceeding. Respondents (plaintiffs in the district court) were the defendants in Dahiya's underlying maritime personal injury suit.

In compliance with Rule 29.6 of the Rules of the Supreme Court, there are no non-party parent corporation or publicly-traded companies that are required to be identified.

STATEMENT OF RELATED PROCEEDINGS

Neptune ShipManagement Services PTE., Ltd. v. Vinod Kumar Dahiya,
US 5th Cir. #20-30776 (opinion affirming district court issued Oct. 1, 2021, reh. denied Nov. 4, 2021).

Neptune ShipManagement Services PTE., Ltd. v. Vinod Kumar Dahiya,
USDC E.D.La. #20-CV-1525 (order and reasons granting summary judgment Oct. 14, 2020).

Dahiya v. Talmidge International, Ltd., La. 25th JDC for the Parish of Plaquemines #48,357 (money judgment Dec. 28, 2004), La. 4th Circuit Ct. of Appeal #2005-0514 (reversing judgment, staying litigation and compelling arbitration May 26, 2006), La. S. Ct. #2006-1913 (denying cert. Dec. 8, 2006) US S. Ct. #06-1224 (denying cert. May 29, 2007), removed to USDC E.D.La. #20-1527 (administratively closed Oct.14, 2020).
Prior removal to USDC E.D.La. #02-2135 (remanded Oct. 11, 2002), US 5th Cir. #02-31068 (dismissing appeal May 18, 2004, reh. den. July 27, 2004), US S. Ct. #04-567 (denying cert. Jan. 10, 2005).
Prior state court appellate action: La. 4th Cir. Ct. Appeal #2003-1578 (denying writ Oct. 20, 2003), La. S. Ct. #2003-3180 (denying cert. Feb. 6, 2004).

Vinod Kumar Dahiya v Neptune ShipMangement Services (PTE), Ltd.
Arbitral demand before Capt. Karanjit Singh, sole arbitrator
(dismissed Sept. 30, 2007)

Vinod Kumar Dahiya v Neptune ShipManagement Services (PTE), Ltd.
Delhi (India) High Court #OMP 2/2008
(order setting aside arbitral award of 9/30/07, dated Jan. 2, 2017)

Vinod Kumar Dahiya v Neptune ShipMangagement Services (PTE), Ltd.
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15 F. 4th 630 (5th Cir. 2021) (reh. denied).

Neptune ShipManagement Services PTE., Ltd. v. Vinod Kumar Dahiya,
20-CV-1525 (E.D.La. 10/14/20), 2020 WL 6059647.

Dahiya v. Talmidge International, Ltd., 2005-0514 (La. App. 4th Cir. 5/26/06), 931 So.2d 1163, reh. den., cert. den., 2006-1913 (La. 12/8/06), 943 So.2d 1088, cert. den., 550 U.S. 968, 127 S.Ct. 2878, 167 L.Ed.2d 1152 (2007).

PETITION FOR A WRIT OF CERTIORARI

Review of the subject US 5th Circuit decision is justified under Rule 10. The decision perpetuates an open and acknowledged circuit conflict regarding the scope of the Convention. The decision also conflicts with and materially complicates settled arbitration jurisprudence. It disregards the decision of the Louisiana Supreme Court on an important federal issue, the preclusive effect of an order staying litigation and compelling arbitration. And, under the guise of an injunction against litigation, it opens the door to expanding the judicial review of arbitration awards to encompass review of arbitration procedural matters previously reserved to the arbitrator.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1), Supreme Court Rule XIII(1) and U.S. Constitution, Article III, Section 1.

The judgment sought to be reviewed was entered by the U.S. Court of Appeals, Fifth Circuit on October 1, 2021. That Court denied rehearing and rehearing en banc on November 4, 2021.

RELEVANT PROVISIONS

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). (see Appendix)

9 USC 16 (b)

(b) Except as otherwise provided in section 1292 (b) of title 28, an appeal may not be taken from an interlocutory order–
(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title.

9 USC 207 Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Arbitration and Conciliation Act, 1996. (See Appendix)

STATEMENT OF THE CASE

Respondent Neptune filed its action in U.S. District Court pursuant to federal question jurisdiction, seeking to confirm and enforce a foreign arbitral award pursuant to the Convention, 9 USC 207. The claims of the four non-parties to the foreign arbitral award were

asserted pursuant to supplemental jurisdiction, 28 USC 1367(a).

The foreign arbitral award was rendered in connection with the maritime personal injury claim of Vinod Dahiya, an Indian seaman. In 1999, Dahiya signed an employment agreement in India (the "Deed") with a Singapore-based ship crewing agency, Neptune ShipManagement Services PTE., Ltd. Neptune dispatched Dahiya to Texas to join a vessel owned by Talmidge International, Ltd., bareboat chartered to American Eagle Tankers, and subject of P&I coverage written by The Britannia Steamship Insurance Association.

The Deed was signed only by Dahiya. It referenced Neptune, but contained no mention of Talmidge, American Eagle or Britannia. It contained an arbitration clause, stating:

> Any dispute arising out of this Agreement shall be subject to arbitration under the Arbitration and Conciliation Act, 1996. The said proceedings shall take place either in Singapore or in India at the option of the Company. Capt. Karanjit Singh, A 64/3 SFS Flats, Saket, New Delhi, shall be appointed as the arbitrator in these proceedings. The submissions by the parties to such jurisdiction shall not limit the right of the Company to commence any proceedings or enforce any judgment arising out of or in connection with this Bond in any other jurisdiction it may consider appropriate.

The Arbitration and Conciliation Act, 1996 is an Indian statute (referred to herein as "IAA"), similar to our Federal Arbitration Act.

The vessel Dahiya sailed on was part of the American Eagle fleet of oil tankers serving U.S. refineries along the Gulf of Mexico. Dahiya suffered serious burn injuries in 1999 while operating the vessel's incinerator in the Gulf, en route to port in Louisiana. He underwent extensive medical treatment in Louisiana. Dahiya filed a maritime personal injury claim in Louisiana state court against the five respondents in the instant action (sometimes jointly referred to as the "Vessel Interests"). Dahiya's suit was removed to federal court, but remanded. Following a full trial on the merits in state court, Dahiya obtained a judgment in the amount of $579,988.00, divided equally between Neptune and Talmidge. In 2006, the Louisiana state court of appeal reversed the judgment and stayed the litigation in favor of arbitration in India. Dahiya sought but was not allowed to continue

the litigation against the non-party, nonsignatories[1] to the Deed pending the arbitration.

Dahiya dutifully initiated arbitration by submitting his statement of claim to Neptune's pre-selected arbitrator. The submission named Neptune as respondent and set out Dahiya's defenses to arbitration and arbitrability, including a disclaimer of any obligation to arbitrate with the nonsignatories. But, Neptune's arbitrator preemptively dismissed the claim sua sponte during the initial statement of claims process, before any evidence or briefing.

Dahiya had to resort to the notoriously congested Indian court system in order to have the corrupt dismissal set aside. The case was pending for ten years before the Delhi High Court ultimately granted Dahiya relief and directed the appointment of a new, impartial arbitrator to conduct the arbitration. Dahiya again asserted a statement of claim against Neptune, only, disclaiming any obligation to arbitrate with the nonsignatories. No objection to the disclaimer was raised. Despite actual knowledge of the proceeding, the

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[1] Dahiya uses the term "nonsignatory" as customarily utilized in arbitration jurisprudence, to reference parties who did not sign the arbitration agreement. In this case, that refers to Talmidge International, Ltd., American Eagle Tankers, Inc., Ltd., American Eagle Tankers Agencies, Inc. and the Britannia Steam Ship Insurance Association, Ltd. None of these parties signed the arbitration agreement, none participated in the arbitration proceedings, and none were subject of the arbitration award. As used herein, the term nonsignatories does not include Neptune ShipManagement Services (PTE), Ltd., who also did not sign the arbitration agreement, but was party to the arbitration and was named in the Award.

non-signatory Vessel Interests did not object, intervene, seek a declaration that Dahiya had not prosecuted his claim, or take action of any kind. In 2020, the arbitrator issued an award in favor of Dahiya and against Neptune in the amount of 95 Lakh (approximately $130,000.00).

With the arbitration concluded and the stay expired, Dahiya sought to resume his litigation in the Louisiana state court. The Vessel Interests again removed the suit, and separately filed the action subject of this application, seeking to enforce the Indian arbitration award and to enjoin Dahiya from further litigation against the nonsignatories. The U.S. District Court granted summary judgment to the Vessel Interests, confirming the arbitration award and enjoining Dahiya from further legal action arising from his 1999 injuries. The removed personal injury suit was administratively closed.

The U.S. Fifth Circuit affirmed the summary judgment, holding:

> The 2006 state appellate court ruling was preclusive as to whether the Deed contained an enforceable arbitration clause under the Convention, and whether Dahiya was required to arbitrate with the nonsignatories;
>
> Neptune's signature was not required on the arbitration agreement pursuant to the Convention, under Fifth Circuit precedent;
>
> and,

Dahiya's failure to arbitrate against the non-signatory Vessel Interests constituted a failure to prosecute his claims against those entities, barring his further litigation.

ARGUMENT

1. The 1999 Agreement lacks the Convention Article II(2) required signature of Neptune.

The district court erroneously exercised Convention-based federal question jurisdiction over the Award confirmation. The Convention defines the arbitration agreements to which it applies. Because the arbitration agreement ("Deed") was not signed by the parties as required by Convention Article II(2), the agreement did not meet the definitional requisite of the Convention.

There is a long-standing split of authority among the circuit courts as to whether parties must sign the contract in order to be subject to the Convention. The ruling below perpetuates an intolerable conflict. The immediate resolution of the conflict is necessary to prevent parties to international arbitration agreements from forum shopping U.S. jurisdictions to gain the advantage of a favorable interpretation. The conflict is an open invitation to mischief. The existence of the conflict disrupts the arbitral objective of a predictable framework of legal rules- the cardinal prerequisite to all dispute resolution.

Article II of the Convention pertinently states:

> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration

> agreement, signed by the parties or contained in an exchange of letters or telegrams.

The Fifth Circuit has held that Convention Article II does not require signatures of the parties when the arbitration agreement is a clause in a contract. Sphere Drake Insurance, PLC v. Marine Towing, Inc., 16 F.3d 666, 669-670 (5th Cir. 1994). But, every other Circuit Court of Appeal to consider this issue since Sphere Drake has come to the contrary conclusion: that signatures of the parties are required to satisfy the Convention's definition. The court below (at fn. 5) acknowledged the contrary authority while maintaining that it was precedent-bound to follow Sphere Drake.

Since Sphere Drake this clause has received attention in multiple courts. In Kahn Lucas Lancaster, Inc. v. Lark International Ltd., 186 F. 3d 210, (2nd Cir. 1999), abrogation on other grounds recognized by Sarhank Group v. Oracle Corp., 404 F.3d 657, 660 fn.2 (2d Cir. 2005), the Second Circuit conducted a thorough analysis of the text and legislative history of Article II. Kahn Lucas reversed an order compelling arbitration because, as here, the arbitration clause in the contract was not signed by one of the litigants.

Beginning with the text of Article II, the court concluded that the comma before the phrase "signed by the parties" signaled that it modified both "an arbitral clause in a contract" and "an arbitration agreement." 186 F. 3d at 217. The court relied on two common canons of construction. First, it explained that, under the rule of punctuation, a modifying phrase that is set off from a series of antecedents by a comma applies to

each of those antecedents. The court reasoned that interpreting the phrase "signed by the parties" to modify only an "arbitration agreement" rendered the comma superfluous, thereby violating the rule against surplusage. Next, the court considered not only the final English text of the Convention Treaty but also the official French and Spanish texts, each of which used a plural form of the word "signed," consistent with the conclusion that the signature requirement applies not only to an "arbitration agreement" but also to an "arbitral clause in a contract." Finally, the court analyzed the legislative history of Article II(2), which confirmed the drafters' intent to apply the signing requirement to both phrases.

Every circuit to consider Kahn Lucas's cogent analysis has adhered to it. See: Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 449 (3d Cir. 2003) (following Kahn Lucas to hold that the Convention Treaty's "signed by the parties" requirement applied to both "an arbitral clause within a contract or a separate arbitration agreement"); Czarina, LLC v. W.F. Poe Syndicate, 358 F.3d 1286, 1290–91 (11th Cir. 2004) (following Kahn Lucas to affirm the district court's refusal to enforce an arbitration award based on an unsigned arbitration clause).

Most recently, the Ninth Circuit has followed Kahn Lucas and criticized Sphere Drake. In order to obtain relief under the Convention, a party must 'prove the existence and validity' of 'an agreement in writing within the meaning of the Convention' which the Convention defines to mean "an arbitral clause in a

contract...*signed by the parties* or contained in an exchange of letters or telegrams." Yang v. Majestic Blue Fisheries, LLC, 876 F.3d 996, 999 (9th Cir. 2017) [abrogated on other grounds by G.E. Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA, LLC, ___ U.S. ___, 140 S.Ct. 1637, 207 L.Ed.2d 1 (2020)].

The Yang opinion pointed out that since deciding Sphere Drake the Fifth Circuit has expressly adopted the punctuation canon concerning the grammatical function of the crucial comma in Convention Article II(2). Yang quoted Sobranes Recovery Pool I, LLC v. Todd & Hughes Const. Corp., 509 F.3d 216, 223 (5th Cir. 2007): "[W]hen there is a serial list followed by modifying language that is set off from the last item in the list by a comma, this suggests that the modification applies to the whole list and not only the last item.". This Court has also utilized the series-qualifier canon of grammar discussed in, and adopted by, those decisions. See, Facebook v. Duguid, ___ U.S. ___, 141 S.Ct. 1163, 209 L.Ed.2d 272 (2021).

Part III(A) of the opinion below cited to Sphere Drake as 5th Circuit authority that Convention Article II(2) does not require the signature of all named parties to the arbitration agreement. According to the 5th Circuit's outlier caselaw, even though the Deed was signed only by Dahiya, it still met the Convention's definition of an "agreement in writing."

All other circuit courts considering the issue disagree. They hold that the lack of signatures of the parties invalidates the arbitration agreement and the resulting arbitration award under the Convention.

The decision below acknowledged (fn.5) that Sphere Drake is in conflict with the decisions of the other circuit courts on the same important matter. Supreme Court Rule 10(a) authorizes the grant of certiorari to resolve the conflict. The open and acknowledged conflict will continue, as the 5th Circuit has declined every opportunity to reconsider Sphere Drake en banc. Only action by this court will resolve the conflict.

A subsidiary circuit conflict exists as to whether the lack of bilateral signatures in a Convention case deprives the court of subject matter jurisdiction or is simply fatal to the merits. The 11th Circuit held the defect to be jurisdictional in Czarina, LLC v. W.F. Poe Syndicate, 358 F.3d 1286, 1292 (11th Cir. 2004). The 2nd and 9th Circuits have disagreed, finding the defect to be fatal on the merits but not to jurisdiction. Sarhank Group v. Oracle Corp., 404 F.3d 657, 660 (2nd Cir. 2005); Al-Qarqani v. Chevron Corp., 8 F.4th 1018 (9th Cir. 2021).

This unsettled and important question of federal jurisdiction under the Convention also merits Rule 10(a) resolution by this Court. The court has recently noted the issue without deciding it, in GE Energy v. Outokumpu, supra, 140 S.Ct. 1637, at footnote 3 (2020).

2. The 2006 Decision staying litigation and compelling arbitration is interlocutory and not preclusive.

The 5th Circuit's decision directly conflicts with a decision by a state court of last resort on an important federal question, justifying review under Rule 10 (a).

The foundation for the 5th Circuit decision on the Convention was the disregard of controlling state law precedent on the lack of preclusive effect of a decision to stay litigation and compel arbitration. Allowing the decision below to stand as precedent would create a conflict with decisions of this Court and multiple circuit courts, in addition to the Louisiana Supreme Court.

The 5th Circuit's finding that the state appellate order compelling arbitration had preclusive effect is patently wrong. The direct conflict of the 5th Circuit's decision with the decisions of the Louisiana Supreme Court merits the intervention of this Court pursuant to Supreme Court Rule 10(a).

Part III of the Circuit Court's opinion held that the 2006 state appellate decision is a preclusive judgment pursuant to Louisiana law. 15 F.4th at 637. The opinion correctly noted that the preclusive effect of a state court judgment is subject to the state law on preclusion. This was followed by citation to a correct but inapposite general statement about the res judicata effect of *final* judgments under Louisiana law.

In making this holding the 5th Circuit somehow overlooked Louisiana Supreme Court precedent which has squarely held that an order compelling arbitration and staying litigation is interlocutory and not preclusive. Collins v. Prudential Insurance Company of America, 99-1423 (La. 1/19/00), 752 So.2d 825. Louisiana requires a *final* judgment for preclusion purposes. Burguieres v. Pollingue, 02-1385 (La. 2/25/03), 843 So.2d 1049. Louisiana Code of Civil Procedure Article 1841 defines a final judgment as one which determines the merits in whole or in part. A

judgment that is not final is not preclusive for purposes of Louisiana's res judicata statute (La. R.S. 13:4231). Burguieres, 843 So.2d at 1053.

The 2006 state appellate decision sustained the Vessel Interests' exception of arbitration and stayed the proceedings. It did not decide the merits. It did not dismiss Dahiya's suit. Louisiana's Supreme Court holds that such an order is interlocutory and not subject of immediate appeal. Collins v. Prudential held that a district court order compelling arbitration and staying litigation "was clearly not a final judgment; it did not dispose of the merits of the case in whole or in part." 752 So.2d at 829.

In Collins, the Louisiana Supreme Court noted that its holding is fully consistent with the Federal Arbitration Act. 9 USC 16(b)(3) specifically prohibits appeals from interlocutory orders compelling arbitration pursuant to the Convention under 9 USC 206, as the state appellate court directed in 2006. Such an order is subject to review after the arbitration award has issued. Collins v. Prudential, supra, 752 So.2d at 829: "Whether a particular type of claim is properly within the scope of the parties' contractual agreement is a matter that can be reviewed on appeal after the conclusion of the arbitration."

The 2006 decision further held that the Convention and the Federal Arbitration Act preempted state law and governed adjudication of the Deed. Dahiya v. Talmidge International Ltd., 05-514 (La. App. 4th Cir. 5/26/06), 931 So.2d 1163, 1173.

Louisiana law is fully congruent with federal law on this point. Orders staying litigation or directing arbitration are interlocutory and not appealable. 9 USC 16 (b)(1), (2). An order compelling arbitration is final and appealable, *if* the lawsuit is dismissed. Green Tree Financial Corporation of Alabama v. Randolph, 531 U.S. 79, 88-89, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). A final decision is one which ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment. 531 U.S. at 87. But footnote "2" of that opinion recognizes that 9 USC 16(b)(1) provides that an order which stayed the litigation instead of dismissing it would not be appealable. This was exactly what the state appellate court did in 2006. The decision of the 5th Circuit on this important federal question of the finality and appealability of orders staying proceedings pending arbitration is in conflict with this Court's decision in Green Tree, meriting the intervention of this Court pursuant to Supreme Court Rule 10(c).

The 5th Circuit's ruling also conflicts with myriad circuit court decisions holding that a party's involuntary participation in arbitration pursuant to an order compelling arbitration does not prevent review of such order following issuance of a final arbitral award. See, Terrebonne v. K-Sea Transportation Corp., 477 F.3d 271, fn.9 (5th Cir. 2007), Sanford v. Memberworks, Inc., 483 F.3d 956, 960-961 (9th Cir. 2007); American Int'l. Specialty Lines Ins. Co. v. Electronic Data Systems Corp., 347 F.3d 665, 669 (7th Cir. 2003), and Sleeper Farms v. Agway, Inc., 506 F.3d 98, 102 (1st Cir. 2007).

Louisiana and federal law are consistent in deferring review of an order compelling arbitration and staying litigation until an arbitration award issues. The interlocutory nature of the 2006 state appellate decision accordingly authorizes its reconsideration, and deprives it of any preclusive effect.

3. A court sitting in secondary jurisdiction lacks authority to conclude a party's failure to prosecute his claim in arbitration.

The 5th Circuit's assertion of jurisdiction over the conduct of the India arbitration was a complete departure from the usual course of review of arbitral awards, calling for the exercise of this court's supervisory power under Rule 10(a). Only the arbitrator had authority to determine a failure to prosecute in the arbitration. A reviewing court is limited to either enforcing, or refusing to enforce, the Award.

The essence of the 5th Circuit's ruling was to bring the nonsignatories under the umbrella of Neptune's favorable arbitration award. The effect of the ruling was to limit Dahiya's recovery against all parties to the relatively modest amount awarded against Neptune.[2]

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[2] Under the proportionate share rule applicable to maritime torts, per McDermott, Inc. v. AmClyde, 511 U.S. 202, 114 S. Ct. 1461, 128 L. Ed. 2d 148 (1994), where there are multiple responsible parties a claimant recovers a share of his damages from each. The effect of the 5th Circuit ruling is to deny Dahiya recovery of the portion of his damages caused by parties other than Neptune.

It is black letter law that a reviewing court cannot collaterally change the substance of an arbitration award. A reviewing court's authority is limited to confirming a domestic award, or vacating or modifying it on the limited and exclusive grounds of 9 USC 10 and 11. Hall Street Associates, LLC v Mattel, Inc., 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). In a case arising under the Convention, review is even more limited when enforcement is sought in a secondary jurisdiction- the parties can only contest whether the state should enforce the award. 9 USC 207, Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F. 3d 357, 364 (5th Cir. 2003).

The 5th Circuit exercised only limited secondary jurisdiction under 9 USC 207. As such, the court below had the power to enforce the 2020 arbitration Award, but not to amend it. See, Convention Articles V, VI, Gulf Petro Trading Company, Inc. v. Nigerian Nat'l Petroleum Corp, 512 F.3d 742 (5th Cir. 2008); CBF Industria de Gusa, S.A. v. AMCI Holdings, Inc., 850 F.3d 58, 71 (2nd Cir. 2017); and Texas Brine Company, LLC v. American Arbitration Association, Inc., 955 F.3d 482, 488-490 (5th Cir. 2020).

Yet, the 5th Circuit disregarded the prohibition against collateral attacks by the artifice of identifying a failure to prosecute that was not even mentioned in the district court decision (ROA.685). This finding is defective for multiple reasons. Allowing the reported 5th Circuit decision to stand as precedent will erode the efficacy of arbitration and longstanding precedent in arbitration jurisprudence.

a) What did the 2006 state court order say?

The assessment of the alleged failure to prosecute arbitration as ordered by the state appellate court in 2006 necessarily begins with what that court said. The ruling was silent on whether Dahiya was required to arbitrate with the nonsignatories.

The 2006 Decision specifically and precisely held:

"We find that pursuant to The Convention and the Federal Arbitration Act, the defendants' Exceptions of No Right of Action, Improper Venue and Arbitration should have been sustained and the case stayed pending arbitration."
Dahiya v. Talmidge, 931 So. 2d at 1173.

The 5th Circuit intuited, reframed, and thereby amended, the 2006 Decision as follows:

"After the Louisiana courts halted the litigation, ordering Dahiya to arbitrate his claims …."
Neptune v. Dahiya, 15 F.4th at 639 (5th Cir. 2021).

The 2006 decision did not expressly state that Dahiya was required to arbitrate with the nonsignatories. What the opinion actually said was only that Dahiya's suit was to be stayed pending arbitration. There was no mention of the nonsignatory issue. Dahiya pled multiple objections to arbitration, but the only defense to arbitration which was directly addressed by any court was the holding that the Louisiana statute invalidating arbitration clauses in employment contracts was preempted (that statute had been the basis of the prior rulings that the Convention did not apply).

Particularly with respect to Issue 1, the "agreement in writing," the state appellate court briefly noted some of the contractual features of the Deed, without even mentioning the issue of bilateral signatures which is subject of the Circuit split presented herein.

That Dahiya's entire suit was stayed pending arbitration does not mean he was required to arbitrate with all defendants. It is established that private arbitration agreements must be enforced even if the result is piecemeal or bifurcated litigation. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220-21, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). That a case may potentially be resolved by arbitration against one party defendant and via litigation versus other party defendants is an inevitable and permissible consequence. The relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 20, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

The silence of the 2006 state appellate decision on the issue of the non-signatories' entitlement to arbitration could have three explanations. (1) The court was unaware of the issue. This is very unlikely, since the issue was raised in the briefs, and was the focus of Dahiya's application for rehearing. (2) The court could have presumed that it was a gateway arbitrability issue delegated to the arbitrator for decision, per Moses H. Cone, supra. (See Section 3(b), below). It seems likely the court did not consider that it was to decide these issues, since the only one of the defenses pled to arbitration the opinion addressed was

the Louisiana statute held to be preempted and inapplicable. (3) As intuited by the U.S. 5th Circuit, the state appellate court could have intended to decide and reject each of Dahiya's multiple defenses to arbitration, without any mention or explanation of what it was doing. This seems highly unlikely. Given that the conclusion of the 2006 opinion expressly identified several issues on which it was pretermitting discussion, it would be surprisingly sloppy for that appellate court to dispose of briefed issues by implication, without explanation.

b) The Deed delegated authority to determine arbitrability and arbitral procedure to the India arbitral tribunal under the IAA.

By designating the Arbitration and Conciliation Act, 1996 ("IAA") as the rules governing arbitration, the Deed effected a contractual delegation of authority to determine arbitrability to the arbitrator. Section 16 of the IAA pertinently states:

> The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement...

The specific authorization for the arbitrator to determine his own jurisdiction necessarily includes the power to determine arbitrability. The Deed's reference to the IAA effects a contractual delegation of jurisdiction to the arbitrator to determine arbitrability. No court has the power to determine this question, only the arbitrator. "When the parties' contract delegates the arbitrability question to an arbitrator, a court may

not override the contract. In those circumstances, the court possesses no power to decide the arbitrability issue." Henry Schein, Inc. v. Archer and White Sales, Inc., ____ U.S. _____, 139 S.Ct. 524, 202 L.Ed.2d 480 (2019). Once the court determines whether the parties entered into any arbitration agreement at all, a valid delegation clause requires the court to refer a claim to arbitration to allow the arbitrator to decide gateway arbitrability issues.

Thus, even if the appellate court had made a pronouncement in the 2006 decision regarding the arbitrability of Dahiya's claims versus the nonsignatories, that ruling could not be preclusive. This was an issue that only the arbitrator had the power to decide.

It is fundamental that arbitration is strictly a matter of consent. Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). It is a way to resolve those disputes - but only those disputes - that the parties have agreed to submit to arbitration. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). The parties can agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an

arbitrator. Henry Schein, Inc. v. Archer and White Sales, Inc., ____ U.S. ____, 139 S.Ct. 524, 202 L.Ed.2d 480 (2019). The circuit courts have uniformly held that an arbitration agreement which incorporates rules which provide that arbitrators have the power to resolve arbitrability questions sufficiently constitutes clear and unmistakable evidence of the delegation to the arbitrator, depriving the court of jurisdiction to decide arbitrability issues. Henry Schein, supra.

The 2006 decision of the state appellate court[3] to vacate Dahiya's money judgment and stay the action pending arbitration is fully consistent with the cited U.S. Supreme Court jurisprudence. The 2006 decision made no distinction among the various jointly-represented defendants or their jointly-filed procedural vehicles, holding only that the case should be stayed pending arbitration. 931 So. 2d at 1173:

> We find that pursuant to the Convention and the Federal Arbitration Act, the defendants' Exceptions of No Right of Action, Improper Venue, and Arbitration should have been sustained and the case stayed pending arbitration.

The state Court of Appeal could not and did not adjudicate anything beyond the existence of a valid arbitration agreement. That court could not and did not adjudicate the merits of Dahiya's claim against

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[3] Dahiya v. Talmidge International, Ltd., 2005-0514 (La. App. 4th Cir. 5/26/06), 931 So.2d 1163, reh. den., cert. den., 2006-1913 (La. 12/8/06), 943 So.2d 1088, cert. den., 550 U.S. 968, 127 S.Ct. 2878, 167 L.Ed.2d 1152 (2007).

Neptune, the arbitrability of Dahiya's claims against the nonsignatories, or any other issue. Those issues were necessarily subject to decision by the arbitrator.

c) Only the arbitrator had authority to determine default in the arbitration.

Part III(B) of the 5th Circuit opinion concluded that Dahiya failed to prosecute his claims against the non-signatories by failing to include them in the arbitration, even while they remained defendants in the stayed lawsuit.

IAA Section 19 vested the India arbitrator with exclusive jurisdiction to determine arbitral procedure and the corresponding arbitral default of any party. No court of secondary jurisdiction is empowered to make a ruling of arbitral default which the arbitrator did not make.

Per IAA Section 4, the nonsignatory Vessel Interests waived their right to arbitrate any and all claims or defenses, by their failure to initiate and prosecute to arbitral award such claims and defenses.

Under IAA Section 25 the India arbitral tribunal, versus any U.S. courts sitting in secondary jurisdiction, had jurisdiction to determine whether arbitral default occurred.

The designation of the IAA as controlling also amounted to a designation of Indian law as the parties' contractual choice of law, pursuant to Section 28 of the IAA. When an arbitration agreement contains a choice of law provision, that provision must be honored, and a court interpreting the agreement must follow the law

of the jurisdiction selected by the parties. Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Procedural questions which grow out of an arbitral dispute and bear on its final disposition are presumptively for an arbitrator, and not a judge, to decide. John Wiley and Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 918, 11 L.Ed.2d 898 (1964). The presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability. Moses H. Cone Memorial Hospital, supra, 460 U.S. at 24-25. As noted in Howsam v. Dean Witter Rentals, Inc., 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002), the comments to the Revised Uniform Arbitration Act provide that arbitrators are to decide issues of procedural arbitrability, such as whether prerequisites such as time limits, notice, laches, estoppel and other conditions precedent to an application to arbitration have been met. 537 U.S. at 85. Clearly, a party (like Dahiya) who has initiated arbitration and prosecuted it to an award submitted any alleged default or failure to prosecute within the confines of the arbitration to the jurisdiction of the arbitrator.

The state appellate court noted the Deed's provision that the arbitration was to be conducted in either Singapore or India, pursuant to Indian law. 931 So.2d at 1173. The contractual choice of law produced the same result as would have been obtained had the court utilized Louisiana's interest analysis for choice of law (pursuant to Louisiana Civil Code Article 3537) or the interest analysis of federal substantive law. India would obviously be the state whose policies were most

clearly affected by the interpretation of a contract executed in India between an Indian national and a Singaporean corporation for the employment of the Indian national at undetermined locations around the globe.

Consistent with the above, the final arbitral Award provided that when India functions as the arbitral forum, and the IAA governs the arbitral proceedings, the substantive law of India applies. See, ROA.205, 2020 Award at paragraphs "50"- "51."

What happened in this case was that the nonsignatory Vessel Interests made a tactical decision to sit out the arbitration and wait to see the result for Neptune. The nonsignatories had the alternative of intervening, or taking other action to let the arbitrator rule on whether they were entitled to require Dahiya to arbitrate with them, or to let the arbitrator decide their liability. After sitting on the sidelines for more than a decade, they leaped onto the bandwagon of the winning team once the arbitrator issued an award favorable to Neptune.

Dahiya properly prosecuted arbitration in the India arbitral tribunal by: a. naming Neptune as a respondent; and b. giving notice of his objection to the arbitrability of his dispute with the other Vessel Interests. The nonsignatories had actual notice of Dahiya's disclaimer. The liability of each of the Vessel Interests is insured by the Britannia policy, and they have been jointly represented from the inception of litigation. The nonsignatory Vessel Interests waived their asserted contract right to arbitration by their failure to take action.

To whatever extent the 2006 state appellate decision ordered arbitration of the claims against the nonsignatories, that order affected all parties, not just Dahiya. The IAA provides remedies to parties to an Indian arbitration who are aggrieved by an adversary's failure to arbitrate. If the nonsignatory Vessel Interests had objection to the Dahiya arbitral submissions, they had the right to initiate arbitration by filing a statement of claim pursuant to IAA Sections 21 and 23, or otherwise object in a statement of defense. Any purported default in arbitration is equally attributable to the nonsignatories.

Regardless of the propriety of such procedure, whichever parties were subject to the Deed contracted to have the India arbitral tribunal decide the issue of arbitral default. Therefore, the Fifth Circuit lacked authority to conclude an FRCP 41(b) failure to prosecute occurred by reason of the postulated India arbitral default.

d) The 5th Circuit affirmed the 2020 Judgment on grounds absent from the record.

The district court's 2020 Order and Reasons granted summary judgment to the Vessel Interests without any mention of an alleged failure to prosecute.

The 5th Circuit did not identify a statutory basis for the failure to prosecute ruling, or provide explanation of its reasoning beyond citation to Griggs v. S.G.E. Management, 905 F.3d 835 (5th Cir. 2018). Griggs involved an easily distinguishable contumacious refusal to arbitrate. The claimant in Griggs persistently refused to arbitrate as ordered. He took no

action, and informed the court that he would not pursue arbitration. As a result, there was no arbitration and no arbitrator to rule on any default. By contrast, Dahiya tenaciously prosecuted his claim in arbitration, and specifically pled that he was not obligated to arbitrate with the nonsignatories in his statement of claim documents. Statements of claim and defense were exchanged, evidence and briefing were submitted, and the arbitrator issued a lengthy reasoned Award. There was no objection to Dahiya's contention regarding the nonsignatories from the Vessel Interests. No complaint was made to or raised by the arbitrator.

The 5th Circuit nevertheless affirmed the 2020 Judgment on the grounds that Dahiya failed to prosecute his claims against the nonsignatory Vessel Interests by not naming them as respondents in the India arbitration.

A district court judgment can be affirmed on any basis appearing in and supported by the record. The cited decision in Griggs relied on Federal Rule of Civil Procedure 41. But the record in this case contains no express findings or facts establishing the requisite conditions for a FRCP 41(b) conclusion of failure to prosecute. According to 5th Circuit precedent, factors to be considered include:

a. was the delay caused by Dahiya versus his attorney or the Vessel Interests (by its breach of its independent obligation to initiate arbitration)?;

b. did the Vessel Interests suffer detriment or benefit by avoiding payment of Dahiya's claim for twenty years?;

c. was the delay caused by intentional conduct versus misunderstanding of the vague 2006 Decision?;

d. were lesser sanctions available, offered and denied?; and/or

e. were periods of total inactivity present?

See, Berry v. CIGNA, 975 F.2d 1188, 1191-1192 (5th Cir. 1992); Campbell v. Wilkinson, 988 F.3d 798, 801-802 (5th Cir. 2021).

Lesser sanctions clearly would have been effective in this case. Dahiya would have named the nonsignatories as respondents in his arbitration statement of claim if expressly ordered by the U.S. court as a condition to avoiding dismissal of his claims against them.

There are no such facts of record. Without them there is no basis to conclude FRCP 41(b) failure to prosecute.

The 5th Circuit's dismissal of Dahiya's claims stands in conflict with that court's own precedent. Supreme Court Rule 10(c) accordingly commends the intervention of this Court to resolve the conflict on this important question of federal law.

CONCLUSION

Certiorari should be granted to resolve the circuit split on the interpretation of the Convention, to rectify

the failure to comply with this Court's precedents, and precedent of the Louisiana Supreme Court. The judgment below should be reversed, and the case remanded with instruction to dismiss, either for lack of subject matter jurisdiction under 9 USC 207 or on the merits.

Respectfully submitted:

KEVIN O'BRYON (LSBA 10151)
Counsel of Record
O'BRYON & SCHNABEL, APLC
935 Gravier St., Suite 900
New Orleans, LA 70112-4541
Telephone: (504) 799-4200
Facsimile: (504) 799-4211
Email: kob@obryonlaw.com

Attorney for Petitioner
Vinod Kumar Dahiya

February 2, 2022