# APPENDIX

APPENDIX A

[PUBLISH]

# In the
# United States Court of Appeals
## For the Eleventh Circuit

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No. 20-11080

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GULFSTREAM AEROSPACE CORPORATION,

Plaintiff-Appellee,

*versus*

OCELTIP AVIATION 1 PTY LTD,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 4:16-cv-00127-WTM-CLR

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Before WILSON, ROSENBAUM, and ED CARNES, Circuit Judges.

**PER CURIAM:**

Long story, short: if you want certain rules to apply to the handling of your arbitration, the contract must say so clearly and unmistakably. Otherwise, the Federal Arbitration Act ("FAA") will apply.

The parties here did not do that. So the FAA's arbitral-award standards for review govern. And because Defendant-Appellant Oceltip Aviation 1 Pty Ltd. waived any argument under the FAA's arbitral-award standards that the arbitral award here should be vacated, the district court properly denied Oceltip's application to vacate the award and granted Plaintiff-Appellee Gulfstream Aerospace Corporation's application to confirm the award. We therefore affirm the judgment of the district court.

**I.**

Gulfstream is a Georgia corporation based in Savannah, and Oceltip is an Australian limited liability company. They entered into a sales agreement ("Agreement"). Under that Agreement, Gulfstream was to manufacture and sell a new G550 business jet aircraft to Tinkler Gulfstream 650 Pty Ltd, Oceltip's former name. The Agreement, as amended, required Oceltip to pay $27.15 million by January 15, 2013.

Though Oceltip paid Gulfstream about $7 million, it failed to make the full $27.15 million payment on time. Nor did it pay the required amount within the ten-day cure period allowed under the Agreement. So Gulfstream terminated the Agreement.

Not pleased with this result, Oceltip considered its options under the Agreement. Within that contract,

under the subheading "Arbitration," two clauses relevant to this appeal appear. The first—Section 4.3.1—requires arbitration "by the American Arbitration Association ("AAA") in accordance with the provisions of its Commercial Arbitration Rules . . . ." and specifies that "judgment on the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof." The second—Section 4.3.3—directs that the contract "shall be governed by the laws of the State of Georgia, and the U.N. Convention on Contracts for the International Sale of Goods . . . shall not apply, without reference to rules regarding conflicts of law."

In accordance with Section 4.3.1, Oceltip submitted a demand for arbitration to the AAA. It sought a finding that Gulfstream had anticipatorily repudiated the Agreement, and that this conduct suspended Oceltip's duties, allowed Oceltip to recoup the $7 million it had paid, and entitled Oceltip to damages. Oceltip also sought a finding that the contract's liquidated-damages provision— Section 3.3.2—was a penalty and therefore unenforceable.

The liquidated-damages provision states that "[i]n the Event of Default by [Oceltip], Gulfstream shall be entitled to [as relevant here] . . . retain or collect, as liquidated damages and not as a penalty," $8 million. The amended Agreement reaffirms this understanding, specifying that "Gulfstream's damages in the Event of Default by Buyer will be difficult to ascertain, that the amounts agreed to as liquidated damages are a reasonable pre-estimate of the probable loss, and that the Parties intend to provide for reasonable liquidated damages and not a penalty."

For its part, Gulfstream sought $8 million in liquidated damages under that provision, plus attorney's fees and costs, from the arbitration.

The arbitration hearing occurred in Savannah, Georgia. Following it, the three-member arbitration tribunal awarded Gulfstream liquidated damages totaling $8 million, plus attorney's fees, costs, and unreimbursed arbitration expenses. The panel denied relief to Oceltip.

Gulfstream applied in the United States District Court for the Southern District of Georgia to confirm the arbitration award. Meanwhile, in the Superior Court of Chatham County, Georgia, Oceltip sought to vacate the arbitration award.

Gulfstream removed Oceltip's state-court proceeding to the Southern District of Georgia. On Gulfstream's motion, the district court ordered the two cases consolidated.

Oceltip moved to remand, challenging the district court's subject-matter jurisdiction. It argued that, based on the choice-of-law clause in Section 4.3.3, the Agreement incorporated the Georgia Arbitration Code, and that provided for exclusive jurisdiction in the Georgia state courts. In opposition, Gulfstream contended that the FAA authorized federal jurisdiction.

The parties also briefed their respective applications to confirm and vacate the arbitration award. In their briefing, the parties disputed whether federal law (the FAA) or state law (the Georgia Arbitration Code) supplied the standards governing whether the arbitrators' decision should be vacated or confirmed. And if the Georgia Arbitration Code

governed the standards, the parties disagreed over whether the arbitrators had manifestly disregarded the law.

The district court denied Oceltip's motion to remand, granted Gulfstream's application to confirm the arbitration award, and denied Oceltip's application to vacate it. After holding that it had jurisdiction over the dispute, the court determined that the FAA's standards for vacatur applied to its decision. But even assuming the Georgia Arbitration Code's standards applied, the court concluded, Oceltip had not shown that the arbitrators manifestly disregarded the law.

Oceltip timely appealed.[1] On appeal, Oceltip again asserts that federal jurisdiction is lacking. It also argues that the district court erred in confirming the arbitration award and denying vacatur because, in Oceltip's view, the Georgia Arbitration Code's standards for vacatur—not the FAA's—govern, and the arbitrators manifestly disregarded the law.

## II.

We begin with jurisdiction—because if we lack that, of course, we cannot consider the merits and must dismiss the appeal. We review our subject-matter jurisdiction de novo. *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291, 1298 n.8 (11th Cir. 2019).

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[1] Although this case was originally scheduled for oral argument, Oceltip moved to submit it on the briefs, and Gulfstream did not oppose. We granted that motion.

On appeal, Oceltip does not suggest that this matter does not satisfy the requirements for federal-court jurisdiction. Nor could it do so successfully. As we describe below, we have jurisdiction under Chapter 2 of the FAA.

To explain our jurisdiction, we start with a little background. In 1970, the United States acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also called the "New York Convention." *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998). The Convention's purpose "is to encourage the recognition and enforcement of international arbitral awards to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation." *Id.* (cleaned up).

The same year that the United States acceded to the Convention, Congress enacted Chapter 2 of the FAA, codified at 9 U.S.C. §§ 201–208. That chapter incorporates the Convention into federal law, "mandat[ing] the enforcement of the New York Convention in United States courts." *Indus. Risk*, 141 F.3d at 1440. To facilitate that, Chapter 2 creates "original subject-matter jurisdiction over any action arising under the Convention." *Id.* Indeed, 9 U.S.C. § 203 states that "[a]n action or proceeding falling under the convention shall be deemed to arise under the laws and treaties of the United States." And it directs that "[t]he district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203.

We have construed Chapter 2 as extending to all arbitral awards not "entirely between citizens of the United States." *Indus. Risk*, 141 F.3d at 1440–41; *see also* 9 U.S.C. § 202 (stating that arbi-tral awards "arising out of [a commercial] relationship which is entirely between citizens of the United States" fall outside the Convention). The arbitral award here—which concerns a contract for the sale of an aircraft—arises out of the commercial relationship between Gulfstream and Oceltip. As we have mentioned, Oceltip is an Australian company, and Gulfstream is a United States corporation. So their relationship is not "entirely between citizens of the United States," and the exception to Convention jurisdiction does not apply.

We have also held that §§ 203 and 205 confer subject-matter jurisdiction over arbitration vacatur actions removed from state court, *Inversiones*, 921 F.3d at 1299–1300, and § 203 endows federal courts with jurisdiction over actions to confirm an arbitral award, *see Escobar Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1286 (11th Cir. 2015); *see also* 9 U.S.C. § 207. So there's really no dispute that federal law provides for jurisdiction over this action.

Perhaps for that reason, Oceltip argues instead that the Agreement's choice-of-law provision eradicates our otherwise-existing jurisdiction. Oceltip relies on Sections 4.3.1 and 4.3.3 of the Agreement in support of this position. As a reminder, Section 4.3.1 states that "judgment on the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof." And Section 4.3.3 provides that "[t]his contract shall be governed by the laws of the State of Georgia, . . . without reference to rules

regarding conflicts of law." Oceltip reads these two provisions together to deprive the federal courts of jurisdiction. In Oceltip's view, under the contract, the Georgia Arbitration Code governs jurisdiction, and under it, "only state superior courts have jurisdiction to confirm and vacate arbitration awards."

We disagree. Even assuming without deciding (at this point) that the Agreement's choice-of-law clause incorporates the Georgia Arbitration Code, state law cannot strip a federal court of federal jurisdiction. *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) ("The jurisdiction so conferred upon the national courts cannot be abridged or impaired by any statute of a state."). As Oceltip's mistaken argument is the only basis for its contention that we lack jurisdiction, and we have otherwise established our jurisdiction under § 203 of the FAA, we proceed to the merits.

**III.**

Next, Oceltip argues that the district court wrongly refused to vacate and incorrectly confirmed the arbitral award. We review the court's underlying legal conclusions de novo and its findings of fact for clear error. *Bamberger Rosenheim, Ltd., (Israel) v. OA Dev., Inc., (United States)*, 862 F.3d 1284, 1286 (11th Cir. 2017).

More specifically, Oceltip contends that the Agreement's choice-of-law provision incorporated all Georgia law—including the Georgia Arbitration Code and its standards. In contrast, Gulfstream argues that while Georgia law governs resolution of the merits of the dispute, the federal standards (meaning the FAA's standards) control our review of the arbitral award.

Resolution of this disagreement determines whether arbitrators' "manifest disregard of the law" supplies a basis for vacating the award.[2] Ga. Code Ann. § 9-9-13(b)(5). Under the Georgia Arbitration Code, it does. But federal law—the New York Convention and its implementing statute (Chapter 2 of the FAA)—sets forth seven exclusive grounds for vacatur. *Indus. Risk*, 141 F.3d at 1446; *see Inversiones*, 921 F.3d at 1302. They do not include "manifest disregard of the law." *See M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 848 (6th Cir. 1996).

Before the district court, and now on appeal, Oceltip has not argued that any of the New York Convention's enumerated grounds for vacatur apply. So if the Agreement's choice-of-law clause does not displace the federal standards, then without further analysis, we will confirm the award. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014) (holding that issues not raised in briefing on appeal are abandoned and therefore waived or forfeited). Alternatively, if the Georgia Arbitration Code's standards do apply, then the parties dispute whether the arbitrators manifestly disregarded the

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[2] Because it makes no difference to the outcome here (and the parties did not brief the issue), we assume without deciding that parties can agree to standards for review of the arbitral award that differ from federal standards (meaning the standards that the FAA imposes). But see *Bowen v. Amoco Pipeline Co., 254 F.3d 925, 934–36 (10th Cir. 2001)* (holding that parties cannot agree to expanded judicial review, beyond what the FAA permits, of an arbitral award).

law in analyzing the Agreement's liquidated damages clause. As it turns out, we need not reach the alternative issue because we conclude that the Agreement's choice-of-law provision does not supplant federal standards for confirmation or vacatur of an arbitral award.

The Supreme Court has described Section 2 of the FAA, 9 U.S.C. § 2, as "a congressional declaration of a liberal federal policy 254 F.3d 925, 934–36 (10th Cir. 2001) (holding that parties cannot agree to expanded judicial review, beyond what the FAA permits, of an arbitral award). favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). But the Supreme Court has recognized that this policy is grounded in a theory of consent. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). So parties may "specify by contract the rules under which [an agreed] arbitration will be conducted." *Id.*

We look first to the plain meaning of the contractual language to ascertain the parties' intent about whether the FAA or the Georgia Arbitration Code standards of review govern. *See Inter-naves de Mex. s.a. de C.V. v. Andromeda Steamship Corp.*, 898 F.3d 1087, 1093 (11th Cir. 2018) (stating general common law of contracts). Here, despite Oceltip's insistence to the contrary, the plain language of the Agreement does not support Oceltip's position.

Oceltip points to the language that "[t]his contract shall be governed by the laws of the State of Georgia, . . . without reference to rules regarding

conflicts of law." It notes that these words appear in the portion of the Agreement labeled "Arbitration" and urges that this text necessarily means that the parties agreed that the Georgia Arbitration Code governs the standards of review of the arbitral award (as opposed to Georgia law's application to only the merits of the arbitration).

We disagree. The context in which the quoted language appears is important. Restored to its relevant context, the quoted sentence says, "This contract shall be governed by the laws of the State of Georgia, and the U.N. Convention on Contracts for the International Sale of Goods ["CISG"] . . . shall not apply, without reference to rules regarding conflicts of law."

First, this passage indicates that "without reference to rules regarding conflicts of law" refers to any decision between the applicability of the CISG, on the one hand, and another body of law— such as Georgia law—on the other, that might have been required in the absence of the provision. In other words, the parties chose for Georgia law, not the CISG, to govern the contract, regardless of whether conflicts-of-law analysis would have favored application of the CISG.

Second, the provision's comparison of Georgia law to the CISG is instructive. The CISG does not establish standards for the review of arbitral awards; it is a set of "uniform rules which govern contracts for the international sale of goods," *see* CISG, at Preamble. So if the CISG had applied instead, it couldn't have supplied standards for review of the arbitral award. And the Agreement's contrast of the CISG with the

laws of the State of Georgia indicates that the parties viewed Georgia law and the CISG to serve the same function in construing the Agreement. To put a finer point on it, because the CISG could not have provided standards for the review of the arbitral award, the clause suggests that the parties did not intend for Georgia law to supply standards for review of the arbitral award.

Third, Section 4.3.1 of the Agreement requires arbitration "by the American Arbitration Association ("AAA") in accordance with the provisions of its Commercial Arbitration Rules." So the parties at least implicitly chose not to have the Georgia Arbitration Code cover the arbitration itself. Indeed, the Georgia Arbitration Code is not mentioned once in the Agreement. Given that the parties specified arbitration rules—and those rules weren't the Georgia Arbitration Code—it makes little sense that the parties would have intended and expected that the Georgia Arbitration Code nonetheless would govern review of any award resulting from arbitration.

So Oceltip next urges that *Volt*, 489 U.S. 468, as "affirm[ed]" by *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995), Appellant's Br. at 39, requires us to conclude that the Agreement demonstrates that the parties chose to be governed by the Georgia Arbitration Code in the conducting of the arbitration. We are not persuaded.

In *Volt*, Volt and Stanford University entered into a construction contract. 489 U.S. at 470. The contract specified that it would be governed by "the law of the place where the project is located," *id.* at 472, and it included an agreement to arbitrate all disputes

between the parties "arising out of or relating to this contract or the breach thereof," *id.* at 470. When a dispute between the parties arose, Volt made a formal demand for arbitration. *Id.* In response, Stanford filed suit against Volt in California state court, alleging breach of contract and fraud. *Id.* at 470–71. Stanford also sought indemnity from other companies involved in the construction project, with whom they had no arbitration agreements. *Id.* at 471. Faced with Stanford's suit, Volt sought for the California court to compel arbitration. *Id.* And Stanford responded by moving to stay arbitration under California law, which provided for a party to do so pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, under circumstances applicable there. *Id.*

The California trial court denied Volt's motion to compel and stayed the arbitration proceedings until resolution of the litigation. *Id.* And the California appellate court affirmed. *Id.* It held that, by stating that the contract would be governed by "the law of the place where the project is located," the parties had incorporated the California rules of arbitration into their arbitration agreement. *Id.* at 472. The Supreme Court affirmed. *Id.* at 473.

Oceltip suggests that the Agreement's Georgia-law provision, similarly to how the contract clause in *Volt* permitted state arbitration procedural rules to be applied, requires application of state arbitration review standards instead of FAA review standards. Oceltip is mistaken.

First, as the Supreme Court explained six years later in *Mastrobuono*, *Volt*'s procedural posture was

integral to the Court's decision there. *Mastrobuono*, 514 U.S. at 60 n.4. In *Volt*, the Supreme Court received the case on review from the California Supreme Court, which had already construed its own state law. *See id.* So the Court deferred to the state court's construction of its own state law and did not interpret the contract there de novo. *Id.* But here, as in *Mastrobuono*, *see id.*, we review a federal court's interpretation of the governing contract. And as we have explained, our de novo review of the choice-of-law provision here does not support the notion that the parties agreed that the Georgia Arbitration Code would govern the standards of review of the arbitral award.

Second, we disagree with Oceltip that *Mastrobuono* somehow suggests that *Volt*'s rule applies here. Just the opposite.

In *Mastrobuono*, Shearson Lehman and the Mastrobuonos entered into a contract for the Mastrobuonos to trade securities. *See* 514 U.S. at 54. The contract included an arbitration clause and a choice-of-law provision, which stated that the contract "shall be governed by the laws of the State of New York." *Id.* at 58–59. The next sentence stated that "any controversy" arising out of the transactions between the parties "shall be settled by arbitration" in accordance with the rules of the National Association of Securities Dealers ("NASD"), or the Boards of Directors of the New York Stock Exchange, or the American Stock Exchange. *Id.* at 59.

When things went south and the parties arbitrated, the arbitration panel there awarded the Mastrobuonos, among other relief, punitive damages.

*Id.* at 54. But Shearson Lehman contended that the choice-of-law provision precluded the award of punitive damages under New York arbitration rules (because arbitration panels in New York could not award punitive damages), so it sought in federal district court to vacate that aspect of the award. *Id.* at 54– 55. Based on their mistaken understanding of *Volt*, the district and circuit courts in *Mastrobuono* concluded that New York's arbitration rules governed the arbitration. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 812 F. Supp. 845, 848 (N.D. III. 1993); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 20 F.3d 713, 717 (7th Cir. 1994).

The Supreme Court reversed. 514 U.S. at 55. It first reviewed the choice-of-law provision. *See id.* at 59–60. After considering the plain meaning of that provision, the Supreme Court determined that the clause was "not, in itself, an unequivocal exclusion of punitive damages claims." *Id.* at 60. Then it turned to the arbitration provision. *See id.* The Court concluded that, rather than support Shearson Lehman's position that New York arbitration rules applied, the arbitration clause "strongly implie[d] that an arbitral award of punitive damages [wa]s appropriate [because] [i]t explicitly authorize[d] arbitration in accordance with NASD rules," and "NASD's Code of Arbitration Procedure indicate[d] that arbitrators may award 'damages and other relief.'" *Id.* at 60–61. Ultimately, the Court reasoned that, "[a]t most, the choice-of-law clause introduce[d] an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards." *Id.* at 62. But that was not enough for the Court to conclude that New York arbitration rules governed. *See id.*

The Court also concluded that "the best way to harmonize the choice-of-law provision with the arbitration provision [was] to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators."[3] *Id.* at 63–64.

*Mastrobuono* is not materially distinguishable from Oceltip's case. Indeed, the Agreement's clause stating that it "shall be governed by the laws of the State of Georgia" is distinguishable from the provision in *Mastrobuono* that said that the contract there "shall be governed by the State of New York" only in that the clause in the Agreement further specifies that the CISG shall not control the Agreement. But as we have explained, that distinction makes the case stronger for application of federal standards of arbitral-award review. And as with the arbitration provision in *Mastrobuono*, the arbitration clause here can be harmonized with the choice-of-law provision to give effect to both: "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other." *Id.* at 64. In sum, then, the Agreement does not evidence a clear intent by the parties that the Georgia Arbitration Code—as opposed to federal arbitral-award vacatur standards—control.

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[3] In addition, the Court explained that Shearson Lehman had drafted the contract, so ambiguities were to be construed against it. *Mastrobuono*, 514 U.S. at 62. But that served as a separate rationale for the Court's decision.

One final note: our decision today puts us in good company. All eight other Circuits that have opined on the proper reading of *Volt* and *Mastrobuono* have concluded, as we do, that *Volt* has no application when, as here, a federal court reviews contractual language de novo. *See*, *e.g.*, *PaineWebber, Inc. v. Elahi*, 87 F.3d 589, 594 n.5 (1st Cir. 1996); *Nat'l Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 134 (2d Cir. 1996); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 295 (3d Cir. 2001), *abrogated on other grounds by Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 383 n.6 (4th Cir. 1998); *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 342 n.15 (5th Cir. 2004); *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 936 (6th Cir.1998); *UHC Mgmt. Co., Inc. v. Comput. Scis. Corp.*, 148 F.3d 992, 996 (8th Cir. 1998); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1212–13 (9th Cir. 1998). In short, the district court correctly determined that the FAA's review standards govern here.

**IV.**

For the foregoing reasons, we affirm the judgment of the district court.

**AFFIRMED**.

APPENDIX B

# In The United States District Court For The Southern District Of Georgia Savannah Division

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| GULFSTREAM AEROSPACE CORPORATION,<br><br>Plaintiff,<br><br>v.<br><br>OCELTIP AVIATION 1 PTY LTD,<br><br>Defendant. | ) | CASE NO. CV416-127 |

**ORDER**

Before the Court is Plaintiff's Amended Application to Confirm Arbitration Award (4:16-cv-127, Doc. 1, as amended, Doc. 14), Defendant's Application to Vacate (4:16-cv-177, Doc. 1), and Defendant's Motion to Remand (4:16-cv-177, Doc. 17). By recent order of Magistrate Judge Ray, the parties were instructed to file consolidated briefs on the above pending matters. (4:16-cv-127, Doc. 34 at 2.) Plaintiff Gulfstream Aerospace Corporation ("Gulfstream") and Defendant OCELTIP Aviation 1 PTY Ltd ("OCELTIP") have complied (4:16-cv-127, Doc. 35, Doc. 37) and the above motions are ripe for review. After careful consideration, the Court finds that Plaintiff Gulfstream's Amended Application to Confirm Arbitration Award (4:16-cv-127, Doc. 14) is **GRANTED**, Defendant OCELTIP's Application to

Vacate (4:16-cv-177, Doc. 1) is **DENIED**, and Defendant OCELTIP's Motion to Remand (4:16-cv-177, Doc. 17) is **DENIED.**

## BACKGROUND

On October 17, 2011, the parties entered into a sales agreement for the purchase of a Gulfstream G550 aircraft and subsequently amended that agreement on September 28, 2012 (collectively the "Sales Agreement"). (4:17-cv-127, Doc. 1 at 2.) Pursuant to the Sales Agreement, Plaintiff Gulfstream was to manufacture and sell to Defendant OCELTIP a new G550 business jet aircraft. (4:16-cv-177, Doc. 1, Attach. 1 at 34.) Defendant OCELTIP is an Australian limited liability company and Plaintiff Gulfstream is a Georgia corporation. (Id.) The underlying dispute arose when Plaintiff Gulfstream terminated the Sales Agreement after Defendant OCELTIP failed to make a payment when due and subsequently failed to cure.[1] (Id. at 54.) OCELTIP submitted its demand for arbitration to the American Arbitration Association ("AAA") on September 10, 2014 and the arbitration ultimately occurred on November 2-4, 2015 in Savannah, Georgia. (4:16-cv-177, Doc. 1, Attach. 1 at 36, 40.)

Section 4.3.1. of the Sales Agreement provided that:

> Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American

[1] The full factual background of the underlying dispute can be found in the Final Award. (See 4:16-cv-177, Doc. 1, Attach. 1 at 42-63.)

> Arbitration Association ("AAA") in accordance with the provisions of its Commercial Arbitration Rules, including as appropriate its Procedures for Large, Complex Commercial Disputes or its International Dispute Resolution Procedures, and judgment on the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

(4:17-cv-177, Doc. 1, Attach. 1 at 92.) In section 4.3.3, the Sales Agreement provides, in relevant part, that:

> The place of arbitration shall be Savannah, Georgia. This contract shall be governed by the laws of the State of Georgia, and the U.N. Convention on Contracts for the International Sale of Goods (frequently referred to as the "UNCISG") shall not apply, without reference to rules regarding conflicts of law.

(Id.)

The arbitral tribunal of three neutral arbitrators (the "Tribunal") issued a final arbitration award in Savannah, Georgia on March 15, 2016 in Oceltip Aviation .1 Pty Ltd v. Gulfstream Aerospace Corporation, ICDR Case No. 01-14-0001-3711 (the "Final Award"). (4:16-cv-177, Doc. 1, Attach. 1 at 33-84.) The Tribunal found for Plaintiff Gulfstream and against Defendant OCELTIP and awarded Plaintiff Gulfstream the total sum of $1,096,160.32 comprised of: (1) $1,000,000.00 on Plaintiff Gulfstream's claim for the unpaid portion of the $8 million liquidated

damages amount specified in Section 3.3.2(i) of the Sales Agreement, (2) $94,467.00 under Procedural Order No. 6 as attorneys' fees and costs related to defending OCELTIP's claim for anticipatory repudiation, and (3) $1,693.32 as the amount of hearing expenses due to Plaintiff Gulfstream pursuant to the parties' e-mail agreement. (Id. at 77.) The Tribunal also found that Plaintiff Gulfstream was to pay Defendant OCELTIP $2,750.01 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Defendant OCELTIP for the shared administrative fees and costs of the arbitration. (Id. at 78.)

On May 31, 2016, Plaintiff Gulfstream filed its Application to Confirm Final Arbitration Award Against OCELTIP. (4:16-cv-127, Doc. 1, as amended, Doc. 14.) Opposing confirmation, Defendant OCELTIP filed an Application to Vacate the final arbitration award in the Superior Court of Chatham County in June 2016. (4:17-cv-177, Doc. 1.) Plaintiff Gulfstream subsequently removed the Application to Vacate to this Court and it was filed under Civil Action Number 4:16-cv-177. (Id.) Defendant OCELTIP filed its Motion to Remand to Superior Court (4:16-cv-177, Doc. 17), to which Plaintiff Gulfstream responded (4:16-cv-177, Doc. 19). By order dated August 22, 2016, Magistrate Judge Smith consolidated 4:16-cv-177 into this instant case, 4:16-cv-127. (4:16-cv-177, Doc. 21). By recent order of Magistrate Judge Ray, the parties were instructed to file consolidated briefs on the above pending matters. (4:16-cv-127, Doc. 34 at 2.) Plaintiff Gulfstream and Defendant OCELTIP have complied (4:16-cv-127, Doc. 35, Doc. 37).

## ANALYSIS

### I. DEFENDANT OCELTIP'S MOTION TO REMAND

In the companion case, Defendant OCELTIP moved to remand the application to vacate the arbitration award back to the Superior Court of Chatham County, Georgia. (4:17-cv-177, Doc. 17.) Defendant OCELTIP has also filed its Consolidated Brief in Support of its Motion to Remand and Application to Vacate Arbitration Award. (4:17-cv-127, Doc. 37.) Plaintiff Gulfstream has replied (4:17-cv-177, Doc. 19), and filed its own supplemental brief and replies (4:17-cv-127, Docs. 35, 39, 41). For the reasons that follow, Defendant OCELTIP's Motion to Remand is **DENIED.**

Defendant OCELTIP argues that remand is proper because the Sales Agreement specifies that Georgia arbitration law applies and that, accordingly, Georgia superior courts have exclusive jurisdiction to vacate arbitration awards or, alternatively, Plaintiff Gulfstream has waived the right of removal. Defendant OCELTIP contends that the Court lacks subject matter jurisdiction to consider Plaintiff Gulfstream's application to confirm the final arbitration award and also lacks removal jurisdiction to hear its application to vacate the arbitration award. (4:16-cv-127, Doc. 37 at 2.)

The Court first reaches the threshold issue of subject matter jurisdiction. The Court finds that it has subject matter jurisdiction over Plaintiff Gulfstream's application to confirm the final arbitration award as well as Defendant OCELTIP's application to vacate the arbitration award. As an

initial point, the Sales Agreement falls within the scope of the Federal Arbitration Act ("FAA"). The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") is implemented and enforced by Chapter 2 of the Federal Arbitration Act ("FAA Chapter 2"), 9 U.S.C. § 201 et seq. Chapter 2 of the FAA applies to international arbitral proceedings in which "one of the parties to the arbitration is domiciled or has its principal place of business outside of the United States." Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1441 (11th Cir. 1998); see also 9 U.S.C. § 202. In this case, Defendant OCELTIP is an Australian corporation organized under the laws of Australia. (4:16-cv-177, Doc. 1, Attach. 1 at 12.) Therefore, this Court finds that it has subject matter jurisdiction over Plaintiff Gulfstream's Application to Confirm the Final Award. Indus. Risk**,** 141 F.3d at 1441; 9 U.S.C. § 203.

The Court also finds that it has jurisdiction over the removed case–Defendant OCELTIP's Application to Vacate. Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH, 921 F.3d 1291, 1300 (11th Cir.), cert. denied, 140 S. Ct. 124, 205 L. Ed. 2d 130 (2019) (finding that the district court had subject-matter jurisdiction over the removed petition to vacate the arbitration award that was filed in state court); see also 9 U.S.C. § 205 (providing that removal to a district court is proper where the subject matter of an action or proceeding pending in a state court relates to an arbitration agreement or award falling under the Convention).

Defendant OCELTIP also argues that the Sales Agreement contains a choice of law provision selecting

Georgia law and that the provision thus incorporated the Georgia Arbitration Code ("GAC") into the parties' agreement to arbitrate. (4:16-cv-177, Doc. 17 at 6.) As a result, Defendant OCELTIP argues that, under GAC § 4 (a) (1) and (b)(1), the superior court for the county where the arbitration took place has exclusive jurisdiction to hear vacatur actions under the GAC. (Id.) The question now is whether the parties contractually agreed in the Sales Agreement that the GAC applies to any arbitration rather than Chapter 2 of the FAA.

Section 4.3.1. of the Sales Agreement provides that:

> Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association ("AAA") in accordance with the provisions of its Commercial Arbitration Rules, including as appropriate its Procedures for Large, Complex Commercial Disputes or its International Dispute Resolution Procedures, and judgment on the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

(4:17-cv-177, Doc. 19, Attach. 1 at 4.) In section 4.3.3, the section provides, in relevant part, that:

> The place of arbitration shall be Savannah, Georgia. This contract shall be governed by the laws of the State of Georgia, and the U.N. Convention on Contracts for the International Sale of

> Goods (frequently referred to as the "UNCISG") shall not apply, without reference to rules regarding conflicts of law.

(Id.) As stated, Defendant OCELTIP contends the reference to Georgia law was an incorporation of all Georgia law–including the GAC. For the reasons that follow, this Court is not persuaded.

Defendant OCELTIP relies heavily on Volt Info. Scis., Inc. v. Bd. Of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477, 109 S. Ct. 1248, 1255, 103 L. Ed. 2d 488 (1989). In Volt, the contract included a provision to arbitrate all disputes between the parties "arising out of or relating to this contract or the breach thereof." 489 U.S. at 470, 109 S. Ct. at 1251. The contract also contained a choice-of-law provision that provided that the contract was to be governed "by the law of the place where the Project is located." Id. After a dispute arose, one party, Volt, made a demand for arbitration, and the other party, Stanford, filed an action in California state court. Id., 489 U.S. at 470-71, 109 S. Ct. at 1251. Volt petitioned the superior court to compel arbitration and Stanford, in turn, moved to stay arbitration pursuant to a provision of California arbitration law. Id.

The superior court stayed the arbitration pending the outcome of the litigation, and the California Court of Appeal affirmed, finding that the parties had incorporated the California rules of arbitration into the agreement by specifying that their contract would be governed by the law of the place where the project is located. Id., 489 U.S. at 471-72, 109 S. Ct. at 1252. Volt appealed to the United States Supreme Court. Id.

The United States Supreme Court affirmed the California Court of Appeal and found that "[w]here, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." Id., 489 U.S. at 479, 109 S. Ct. at 1256.

After Volt, the Supreme Court decided Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 53, 115 S. Ct. 1212, 1214, 131 L. Ed. 2d 76 (1995). The contract in Mastrobuono contained a general New York choice of law clause and also provided that arbitration would be completed in accordance with the rules of the National Association of Securities Dealers. 514 U.S. at 58, 115 S. Ct. at 1217. A dispute arose and the issue was arbitrated. The panel of arbitrators awarded punitive damages and the respondents argued before the United States Supreme Court that the arbitral panel had no authority to award punitive damages because New York law limited the power to award punitive damages to judicial tribunals. Id., 514 U.S. at 54-55, 115 S. Ct. at 1215. In response, petitioners contended that the FAA preempted New York law to the extent that it prohibited arbitrators from awarding punitive damages because the arbitral rules specifically chosen in the contract, the rules of the National Association of Securities Dealers, does not bar the award of punitive damages. Id., 514 U.S. at 56, 115 S. Ct. at 1215.

Ultimately, the Supreme Court found that

> the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.

Mastrobuono, 514 U.S. at 63-64, 115 S. Ct. at 1219.

Since Volt and Mastrobuono, federal circuits have routinely held that parties may agree to state law rules for arbitration even if such rules are inconsistent with those set forth in the FAA, but that the parties must clearly evince their intent to be bound by such rules. Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1269 (9th Cir. 2002), opinion amended on denial of reh'g, 289 F.3d 615 (9th Cir. 2002) (finding that a general choice of law provision within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration); Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926, 937 (6th Cir. 1998); Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account, 618 F.3d 277, 293 (3d Cir. 2010), as amended (Dec. 7, 2010) ("We require the parties to express a `clear intent' to apply state law vacatur standards instead of those of the FAA."). Likewise, the United States Court of Appeals for the Fifth Circuit in Action Indus., Inc. v. U.S. Fid. & Guar. Co., 358 F.3d 337, 342 (5th Cir. 2004), held that "[i]n the wake of Mastrobuono, this Court has held that a choice-of-law provision is

insufficient, by itself, to demonstrate the parties' clear intent to depart from the FAA's default rules." Thus, in the Fifth Circuit, arbitration under non-FAA rules is permitted "if a contract expressly references state arbitration law, or if its arbitration clause specifies with certain exactitude how the FAA rules are to be modified." Id. at 341. "[T]he strong default presumption is that the FAA, not state law, supplies the rules for arbitration." Sovak, 280 F.3d at 1269; see also Ario, 618 F.3d at 292 ("[T]he FAA standards control in the absence of contractual intent to the contrary." (internal quotation marks and citations omitted)).

Although neither party has provided this Court with binding caselaw from the Eleventh Circuit on this issue, nor has the Court found any, the Eleventh Circuit did cite to Action Indus., Inc. v. U.S. Fid. & Guar. Co., 358 F.3d 337, 342 (5th Cir. 2004), in the unpublished opinion Original Appalachian Artworks, Inc. v. JAKKS Pac., Inc., 718 F. App'x 776, 780 n.3 (11th Cir. 2017). In JAKKS, the Eleventh Circuit cited to Action Indus.'s holding "that a general choice-of-law provision did not express the parties' clear intent to depart from the Federal Arbitration Act's vacatur standard" when stating that it did not reach the question of whether the choice of law provisions were "sufficient to invoke review under the Georgia Arbitration Code." Id.

This Court finds the Fifth Circuit and other circuits' reasoning persuasive and finds that the parties' choice of law provision does not express the parties' intent to depart from the FAA's standard of vacatur. Moreover, the Court is not persuaded that Rintin Corp., S.A. v. Domar, Ltd., 476 F.3d 1254, 1256

(11th Cir. 2007) requires a different result. Defendant OCELTIP argues that Rintin provides that "parties may contract for the application of state arbitration law in lieu of otherwise applicable Federal arbitration law," and that, accordingly, Rintin requires this Court to find that the GAC applies. (Doc. 40 at 6.) In Rintin, the Eleventh Circuit did apply Florida arbitration law. However, the arbitration clause in the parties' agreement specified that " '[a]ny dispute which may arise from the interpretation, execution or termination of this agreement or from the breach thereof . . shall be submitted to arbitration . . . **according to the provisions of the Florida International Arbitration Act** and in compliance with the rules of the American Arbitration Association (AAA).' "Rintin, 476 F.3d at 1256 (emphasis added). Thus, in Rintin, the parties specifically stated that the Florida International Arbitration Act was to apply. The parties did not so specify in the Sales Agreement here. Therefore, the Court finds that Rintin does not conflict with this Court's holding, but rather demonstrates the Eleventh Circuit's position that, like the Fifth Circuit, where parties' contract "expressly references state arbitration law," arbitration under non-FAA rules is permitted. Action Indus., 358 F.3d at 341. See also Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp., 562 F. App'x 828, 832 (11th Cir. 2014) ("Parties that want their arbitration agreements enforced by an authority that allows for more expansive judicial review must specifically designate such state statutory or common law alternatives to the FAA in their arbitration agreements.")

Moreover, construing the Sales Agreement as a whole and giving effect to each provision to harmonize the provisions together, the Court is not convinced that the reference to Georgia law was a clear intent to apply the GAC and not merely to apply Georgia substantive law to any dispute arising under the Sales Agreement. First, the provision delineating the rules for the arbitration, Section 4.3.1. of the Sales Agreement, stated that the arbitration was to be administered by the AAA and that the judgment could be entered by "any court having jurisdiction." The choice of law provision, while nested under the arbitration heading, is contained in another section in which the parties chose Georgia law to govern and disclaimed the application of the U.N. Convention on Contracts for the International Sale of Goods ("UNCISG"). Section 4.3.3's specific exclusion of the UNCISG in the same sentence as the selection of Georgia law to govern "without reference to rules regarding conflicts of law" counsels against a finding that this choice of law clause is more than "a substitute for ordinary conflict-of-laws analysis" and was intended to displace the FAA in lieu of the GAC. Mastrobuono, 514 U.S. at 59, 115 S. Ct. at 1217. The parties expressly disclaimed application of the UNCISG and could have disclaimed the FAA if the GAC was intended to apply.

Finally, the Court briefly addresses Defendant OCELTIP's argument that this Court must defer to the Panel's statement in the final award that "the arbitration [is] to be governed by the laws of the State of Georgia . . ."(Doc. 17 at 1.) The final award does state this but elsewhere provides that the arbitration was administered under the International Centre for

Dispute Resolution's ("ICDR") International Rules, the ICDR's Guidelines for Arbitrators Concerning Exchange of Information, and the Code of Ethics for Arbitrators in Commercial Disputes. (4:16-cv-177, Doc. 1, Attach. 1 at 33, 35.) Additionally, the Tribunal certified "for purposes of Article I of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, and consistent with Section 4.3 of the Sales Agreement . . . ." (Id. at 79-81.) Thus, it is not clear that the Tribunal actually applied Georgia arbitration law and whether the statement above was indicating the application of Georgia substantive law to the dispute. For the reasons stated above, the Court **DENIES** Defendant OCELTIP's Motion to Remand.

## II. DEFENDANT OCELTIP'S APPLICATION TO VACATE

Defendant OCELTIP argues in its Application to Vacate Final Arbitration Award that the Tribunal manifestly disregarded the law and that the award should be vacated pursuant to O.C.G.A. § 9-9-13(b)(5). (4:16-cv-177, Doc. 1, Attach. 1 at 17.) Defendant OCELTIP makes no argument that the award should be vacated pursuant to the FAA Chapter 2 or the New York Convention. The Court shall review both and, upon finding no grounds to vacate or refuse confirmation, takes up Plaintiff Gulfstream's Amended Application to Confirm.

**A. The GAC**

First, the Court finds that O.C.G.A. § 9-9-13(b)(5) does not warrant vacating this award.[2] Even if the

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[2] The Court also notes skepticism that the GAC, and not the Georgia International Commercial Arbitration Code ("GIAC"), O.C.G.A. § 9-9-20 et seq., would apply to an application to vacate the final award in this action. The GIAC applies to international commercial arbitrations. O.C.G.A. § 9-9-21(a). An arbitration is considered international if, among other things, the parties "have their places of business in different countries at the time of the conclusion of such arbitration agreement." O.C.G.A. § 9-9-21(c)(1). As stated above, Defendant is an Australian-based company organized under the laws of Australia (4:16-cv-177, Doc. 1, Attach. 1 at 17) and Plaintiff Gulfstream is a domestic corporation (Id. at 34). Defendant OCELTIP contends that the GIAC does not apply to this case as it was enacted in July 2012 and the Sales Agreement was executed in 2011. (Doc. 22 at 7, 17.) However, Defendant OCELTIP also states that the parties entered into Amendment No. 1 of the Sales Agreement on September 28, 2012. (4:16-cv-177, Doc. 1, Attach. 1 at 6.) Thus, at the time that the parties executed their amendment to the Sales Agreement, the GIAC was in effect. Nevertheless, because the GIAC's grounds for opposing confirmation of an arbitration award is substantially the same as the grounds provided for Chapter 2 of the FAA, the Court need not provide the same analysis again. Compare O.C.G.A. § 9-9-56 with 9 U.S.C. § 207 ("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.") and New York Convention, Art. V(1)-(2). Should the GIAC apply, Defendant OCELTIP's application to vacate is

GAC governed the vacatur of the Final Award, Defendant OCELTIP's arguments for vacating the final arbitration award pursuant to O.C.G.A. § 9-9-13(b)(5) fail.

In its Application to Vacate, Defendant OCELTIP contends that the Tribunal manifestly disregarded the law on five separate and dispositive issues. (4:16-cv-177, Doc. 1, Attach. 1 at 14.) O.C.G.A. § 9-9-13(b)(5) provides that an arbitration award shall be vacated by the court upon application of one of the parties if the court finds that the rights of the parties have been prejudiced by "[t]he arbitrator's manifest disregard of the law." The "disregard must be both evident and intentional. An arbitration board that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and deliberately ignore it." Savannah Dodge, Inc. v. Bynes, 291 Ga. App. 281, 282, 661 S.E.2d 660, 661 (Ga. Ct. App. 2008) (internal citations and quotation marks omitted). There must be clear evidence of the arbitrator's intent to purposefully disregard the law. Id., 291 Ga. App. at 283, 661 S.E.2d at 662. The "concrete evidence" of the arbitrator's intent can come from the findings of the arbitrator or in the transcription of the arbitration hearing. Id.

First, Defendant OCELTIP argues that the Tribunal manifestly disregarded the law by holding that the "liquidated damages provision would be unenforceable under certain circumstances, recited

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denied for the same reasons that it is denied pursuant to 9 U.S.C. § 207.

the contract provision where such circumstances existed, then disregarded its own holding and found the provision enforceable anyway." (Id. at 18.) Defendant OCELTIP contends that the Tribunal

> found that OCELTIP had cited four (4) cases for the rule that a purported liquidated damages provision does not liquidate damages when the non-breaching party may elect **between** liquidated damages and other damages . . .the Tribunal then interpreted the cases to hold that **only** where the non-breaching party may recover "**both** liquidated damages **and** other damages" does such a provision not liquidate damages.

(Id. at 19 (emphasis in original).) The Tribunal noted these four cited cases and then distinguished those cases from the instant case. (4:16-cv-177, Doc. 1, Attach. 1 at 70.) At the most, Defendant OCELTIP is arguing that the Tribunal incorrectly applied the law.[3] This is insufficient to show a manifest disregard

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[3] Defendant OCELTIP also argues that Section 3.3.2 of the Sales Agreement "permits Gulfstream to do just exactly what the Supreme Court forbids: retain and/or collect $8 million in liquidated damages under § 3.3.2(i) or sue (arbitrate) for a greater amount under § 3.3.2(ii)." (4:16-cv-177, Doc. 1, Attach. 1 at 20.) However, from this Court's review of the Sales Agreement, Section 3.3.2(ii) makes no reference to the ability of Gulfstream to sue or arbitrate for actual damages—the provision provides that, in lieu of collecting/retaining liquidated damages, Gulfstream can opt to resell the aircraft to a third-party

of the law. See Savannah Dodge, 291 Ga. App. at 282-283, 661 S.E.2d at 661-62; SCSJ Enters., Inc. v. Hansen & Hansen Enters., Inc., 319 Ga. App. 210, 215, 734 S.E.2d 214, 219-20 (Ga. Ct. App. 2012) (finding that the fact that the arbitrator rejected the legal arguments does not mean that he ignored the arguments and that "this is true even where the arbitrator misconstrues the law.").

Second, related to its first argument, Defendant OCELTIP argues that the Tribunal "ignored the [Se. Land Fund, Inc. v. Real Estate World, Inc., 237 Ga. 227, 230-31, 227 S.E.2d 340, 343 (Ga. 1976)] holding, intentionally and irrationally concocting a fiction that Se. Land Fund 'turned on the fact that the remedy provision in issue allowed the non-breaching party to recover both liquidated damages and other damages.' " (Id. at 21.) For the same reasons stated above, Defendant OCELTIP does not demonstrate that the Tribunal was conscious of the law and deliberately ignored it. The Tribunal addressed this case and distinguished it.

Third, Defendant OCELTIP argues that the Tribunal manifestly disregarded the law by ignoring O.C.G.A. § 13-6-7 and O.C.G.A. § 11-2-718(1). Specifically, Defendant OCELTIP again contends that the Tribunal ignored the authorities it cited. (4:16-cv-177, Doc. 1, Attach. 1 at 24.) Defendant OCELTIP has not presented "concrete evidence" of the Tribunal's intent to deliberately ignore these Georgia statutes.

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and keep the proceeds less OCELTIP's deposits as set out in the subsection.

Savannah Dodge, 291 Ga. App. at 283, 661 S.E.2d at 662.

Fourth, Defendant OCELTP contends that "[t]he Tribunal was aware of Georgia's policy against shotgun liquidated damages clauses, yet it ignored both [OCELTIP's] argument and dispositive authority." (Id. at 24.) Defendant OCELTIP argues that it explained the rule against shotgun liquidated damages provisions, that the Tribunal was conscious of the rule, and that the Tribunal deliberately ignored the rule and supporting authorities because it made no mention of the rule in the Final Award. (Id. at 28.) Assuming, as Defendant OCELTIP argues, that the Tribunal was conscious of the rule, Defendant OCELTIP must nevertheless demonstrate that the Tribunal "intentionally and knowingly chose to ignore" it. Savannah Dodge, 291 Ga. App. at 282, 661 S.E.2d at 661. Defendant OCELTIP argues that the Tribunal knowingly chose to ignore the rule because it did not reference the Georgia rule against shotgun liquidated damages provisions or otherwise address OCELTIP's argument. (4:16-cv-177, Doc. 1, Attach. 1 at 28.)

The Court first notes that Defendant OCELTIP presented the specific "shotgun liquidated damages provision" argument in support of its contention that "the parties did not pre-estimate anticipated or probable damages or attempt to set the liquidated damages amount based thereupon." (Id. at 199.) The argument was presented within the section of Defendant OCELTIP's brief arguing that $8 million was not a reasonable pre-estimate of probable loss. (Id. at 118-120.) The Tribunal did in fact consider the reasonableness of the $8 million in light of anticipated

harm and discussed at length the evidence of how the sum of $8 million was arrived at. (Id. at 72; 60-63.)

Additionally, Georgia law requires more than the mere omission of reference to parties' arguments to demonstrate a manifest disregard of the law. JAKKS, 718 F. App'x at 781 (stating that, under Georgia law, it is not enough that the correct rule was communicated to the arbitrator and that it must be shown that the arbitrator has the specific intent to disregard it) (citing ABCO Builders, Inc. v. Progressive Plumbing, Inc., 282 Ga. 308, 310, 647 S.E.2d 574, 576 (Ga. 2007)). Rather, the Tribunal went through the "tripartite inquiry" established by Se. Land Fund, 237 Ga. at 230, 227 S.E.2d at 343, to determine if the contract provision is enforceable. (4:16-cv-177, Doc. 1, Attach. 1 at 69-73.) Part of the inquiry includes finding that the "sum stipulated must be reasonable pre-estimate of the probable loss." Se. Land Fund, 237 Ga. at 230, 227 S.E.2d at 343. Defendant OCELTIP has not pointed to any concrete evidence that the Tribunal intentionally ignored Georgia's general policy against shotgun liquidated damages when finding that the $8 million liquidated damages amount was a reasonable estimate of anticipated harm. ABCO, 282 Ga. at 309-10, 647 S.E.2d at 576 (finding the arbitration panel did not manifestly disregard the law where the panel was presented with the proper legal formula to calculate damages, but from the face of the award, did not employ the formula because there was no concrete evidence that the panel purposefully intended to disregard applicable law).

Fifth, and finally, Defendant OCELTIP argues that the Tribunal manifestly disregarded the law

because it wholly ignored the ground supporting OCELTIP's allegation that Gulfstream failed to mitigate damages. (4:16-cv-177; Doc. 1, Attach. 1 at 29.) Defendant OCELTIP's argument attempts to split hairs—it argues that the Tribunal ignored its contention that "Gulfstream failed to mitigate damages because Gulfstream demanded a fee [of $1 million] as a pre-condition to mitigating damages" and instead based its finding on an argument it did not make to wit " 'that Gulfstream failed to mitigate its damages when it "refused" to assign the Agreement.' "(Id.) However, in the very next paragraph, Defendant OCELTIP argues that its argument was that "there was never an opportunity to enter into an assignment because Gulfstream refused to even consider the subject unless paid a fee." (Id. at 30.)

In sum, the argument is that Gulfstream failed to mitigate damages because it failed to consider assignment without the payment of the $1 million. The crux of this argument is that Gulfstream failed to mitigate damages by failing to accept assignment of the Sales Agreement. Defendant OCELTIP's argument now that the Tribunal manifestly disregarded the law because it did not specifically reference the payment of the fee along with the matter of assignment is unavailing.

The Tribunal did consider Defendant OCELTIP's argument that Gulfstream refused to consider an assignment—specifically, the Tribunal found that "there was no agreement to assign at the time [OCELTIP] raised the matter of assignment with Gulfstream" because the Sales Agreement had already been terminated. (Id. at 67.) The Tribunal also found that the assignment was never intended to

be an assignment to mitigate damages, rather it was proposed "as an essential component of its [OCELTIP's] post-termination efforts to obtain financing so that [OCELTIP] could once again salvage its agreement and purchase a G550." (Id. at 68.) Again, Georgia law requires more than the mere omission of reference to parties' arguments to demonstrate a manifest disregard of the law. JAKKS, 718 F. App'x at 781. The only Georgia law or authority Defendant OCELTIP cites is O.C.G.A. § 13-6-5 which provides that a party injured by a breach of contract must lessen the damages by the use of ordinary care and diligence. The Tribunal discussed Plaintiff Gulfstream's duty to mitigate damages and found that there was no failure by Gulfstream to mitigate its damages. Accordingly, for the reasons stated, even if the GAC grounds for vacatur applied in this action, Defendant OCELTIP's arguments fail.

**B. FAA Chapter 2**

Chapter 2 of the FAA does not expressly provide for vacating awards, however, it does provide grounds for opposing the enforcement of awards. 9 U.S.C. § 207; Indus. Risk, 141 F.3d at 1441 (stating that the arbitral panel's award must be confirmed unless the appellants could "successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention."). The United States Court of Appeals for the Eleventh Circuit has recently confirmed that the seven defenses enumerated in Article V of the New York Convention provide the sole grounds for vacating an award subject to the New York Convention. Inversiones, 921 F.3d at 1301.

Article V of the New York Convention reads:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

   a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

   b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

   c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration

can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

a) The subject matter of the difference is not capable of

settlement by arbitration under the law of that country; or

b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Indus. Risk, 141 F.3d at 1442 n.8.

In its Memorandum in Support of its Application to Vacate Final Arbitration Award, Defendant OCELTIP did not advance any of the above grounds for opposing the confirmation of the Final Award. (4:16-cv-177, Doc. 1, Attach. 1.) Additionally, Defendant OCELTIP has not advanced any of these grounds for opposing confirmation in response to Plaintiff Gulfstream's Amended Application to Confirm Final Arbitration Award. (See 4:16-cv-127, Docs. 7, 18, 37, 40, 42.) Accordingly, the Court finds no bases for vacating or refusing to confirm the Final Award under either the GAC or the New York Convention. As a result, Defendant OCELTIP's Application to Vacate is **DENIED.**

## III. PLAINTIFF GULFSTREAM'S AMENDED APPLICATION TO CONFIRM ARBITRATION AWARD

In its Amended Application to Confirm, Plaintiff Gulfstream moves for confirmation of the Final Award pursuant to 9 U.S.C. § 207 and contends that none of the grounds for refusal or deferral of recognition of the award as specified in the New York Convention applies. (4:16-cv-127, Doc. 14 at 4.) As discussed above, Defendant OCELTIP did not advanced any grounds for opposing confirmation under the New York Convention and the Court finds no basis for otherwise vacating the award. This Court must

"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." 9 U.S.C. § 207. Accordingly, Plaintiff Gulfstream's Amended Application to Confirm is **GRANTED.**

Additionally, Plaintiff Gulfstream requests this Court include two items of interest in its order confirming the Final Award. First, Plaintiff Gulfstream requests that this Court include seven percent (7%) post-award, prejudgment interest on the award amount for the time period between the date of March 15, 2016, the date of the Final Award, and the date of this Court's confirmation of the Final Award. (4:16-cv-127, Doc. 14 at 5.) Second, Plaintiff Gulfstream requests that this Court include in its order an award of post-judgment interest pursuant to 28 U.S.C. § 1961.

First, the Court finds that Plaintiff Gulfstream should be awarded post-arbitral award, prejudgment interest under Eleventh Circuit case law. Because this Court's jurisdiction is based on Chapter 2 of the FAA, "federal law allows awards of post-arbitral-award, prejudgment interest." Indus. Risk, 141 F.3d at 1446. The award of prejudgment interest is committed to "the district court's sound discretion" but "should normally be awarded when damages have been liquidated by an international arbitral award." Id. at 1446-47 (internal citations omitted). As to the interest rate to be awarded, "[i]n the absence of a controlling statute, federal courts' choice of a rate at which to determine the amount of prejudgment interest to be awarded is also a matter for their discretion." Id. at 1447. The choice, however, is guided by "principles of reasonableness and fairness, by

relevant state law, and by the relevant fifty-two week United States Treasury bond rate, which is the rate that federal courts must use in awarding post-judgment interest." Id. Plaintiff Gulfstream has requested a rate of 7% based on O.C.G.A. § 7-4-2 and § 7-4-15. (4:16-cv-127, Doc. 14 at 5.) The Court finds the requested rate of 7% per annum of simple interest to be reasonable.

Next, as to the grant of post-judgment interest, Plaintiff Gulfstream is correct that such an award is governed by 28 U.S.C. § 1961. 28 U.S.C. § 1961(a) provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." Accordingly, Plaintiff Gulfstream will be able to pursue post-judgment interest on any judgment entered by this Court.

## CONCLUSION

For the reasons stated herein, Plaintiff Gulfstream's Amended Application to Confirm Arbitration Award (4:16-cv-127, Doc. 14) is **GRANTED,** Defendant OCELTIP's Application to Vacate (4:16-cv-177, Doc. 1) is **DENIED,** and Defendant OCELTIP's Motion to Remand (4:16-cv-177, Doc. 17) is **DENIED.**

As a result, the ICDR Final Award, OCELTIP Aviation 1 PTY Ltd v. Gulfstream Aerospace Corporation, ICDR Case No. 01-140001-3711 (Mar. 15, 2016) (4:16-cv-177, Doc. 1, Attach. 1 at 33-84) is **CONFIRMED** and the Clerk of Court is **DIRECTED** to enter judgment in favor of Plaintiff Gulfstream and against Defendant OCELTIP in the total amount of **$1,096,160.32** in accordance with that Final Award, together with post-award, prejudgment interest in the

amount of 7% per annum for the time period between the date of March 15, 2016 to the date of this Order and post-judgment interest as calculated pursuant to 28 U.S.C. § 1961(a). The Clerk of Court is **FURTHER DIRECTED** to close this case.

SO ORDERED this _____ of February 2020.

/s/ William T. Moore, Jr.
WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT COURT
SOUTHERN DIST