IN THE SUPREME COURT FOR THE STATE OF GEORGIA

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CASE NO. S21G0015
(Court of Appeals Case No. A20A0037)

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**ADVENTURE MOTORSPORTS REINSURANCE, LTD and SOUTHERN MOUNTAIN ADVENTURES, LLC**,
*Appellants,*

v.

**INTERSTATE NATIONAL DEALER SERVICES, INC.**,
*Appellee.*

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# BRIEF OF AMICUS CURIAE ATLANTA INTERNATIONAL ARBITRATION SOCIETY, INC. ("AtlAS") In Support of Appellants and Reversal

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## I. STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

The Atlanta International Arbitration Society, Inc. ("AtlAS") is a Georgia non-profit corporation established in 2011. The AtlAS Board of Directors includes representatives of approximately two dozen law firms, law schools, arbitral institutions, and litigation advisory service firms. (*See* AtlAS website, available at www.arbitrateatlanta.org.)

AtlAS represents the international arbitration community in the southeastern United States, working with leaders in government, the State Bar, and the judiciary to ensure that state legislation and bar rules are supportive of international arbitration and that parties selecting Georgia as an arbitral seat will find an environment that is conducive to the fair, efficient, and cost-effective resolution of cross-border business disputes. AtlAS also educates neutrals, lawyers in private practice, corporate counsel, and law students regarding the substantive law, practice, and culture of international arbitration, as well as civic, business, and government leaders regarding the benefits to Atlanta, Georgia, and the rest of the southeastern United States of a vibrant international arbitration center.

As set forth on its website, AtlAS has adopted the following mission statement:

> To serve the global business community in providing world-class quality and efficient service, in a highly cost-competitive and value-driven environment by:
>
> - promoting the use of international arbitration and the selection of Atlanta as the *situs* for international arbitration proceedings;
> - providing a forum where practitioners, neutrals, corporate counsel and others interested in international arbitration can network and exchange ideas and information (including interaction between external and in-house counsel on improving the efficiency of the process);
> - working to enhance the local legal infrastructure for international arbitration through legislation and judicial education;
> - enhancing the Georgia bar's knowledge of international arbitration;
> - interacting with and supporting local academic programs on international arbitration at area universities, and;
> - promoting and organizing international arbitration conferences in Atlanta.

(AtlAS website, available at https://arbitrateatlanta.org/the-atlanta-international-arbitration-society/.)

AtlAS submits this Brief in support of Adventure Motorsports Reinsurance, Ltd.'s request that this Court review the Court of Appeals' determination that the arbitrator in the parties' underlying arbitration acted in manifest disregard of the law. The underlying arbitration was an international arbitration, because Petitioner Adventure Motorsports Reinsurance, Ltd, is organized under the laws of The Turks and Caicos Islands ("Turks and Caicos"). The Court of Appeals' decision that the

award should not have been confirmed therefore implicates several aspects of AtlAS's mission, including in particular the organization's work to enhance and maintain the local legal infrastructure for international arbitration.

The source of AtlAS's authority to file this Brief is an affirmative vote of its Executive Committee, the members of which are identified on the AtlAS website. (*See* https://arbitrateatlanta.org/the-atlanta-international-arbitration-society/board-of-directors/).[1]

## II. STATEMENT AFFIRMING THE INDEPENDENCE OF THE AMICUS CURIAE

No part of this Brief was authored by counsel for the Parties to this proceeding. This Brief was prepared on a *pro bono* basis, and no person, including the Parties or their counsel, funded this Brief, either directly or indirectly.

## III. ARGUMENT

The Court of Appeals erred by considering an arbitrator's manifest disregard of the law ("manifest disregard") as a ground to set aside the award in the first instance. Because Adventure Motorsports Reinsurance, Ltd. (the "Reinsurer") is a foreign company, organized under the laws of Turks and Caicos, the arbitration was "international" within the meaning of the Georgia International Arbitration Code,

[1] The views expressed in this brief are solely those of the AtlAS organization. Neither this brief nor the decision to file it should be interpreted to reflect the views of any individual member of AtlAS, the organizations with which those members are affiliated, or of any of AtlAS's member organizations.

and "non-domestic" within the meaning of Chapter 2 of the Federal Arbitration Act ("FAA"). Manifest disregard is not a basis for setting aside international arbitration awards under Georgia law or non-domestic awards under federal law.

Under federal law, in the Eleventh Circuit, non-domestic awards may be set aside *only* on the grounds listed in Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2518, commonly referred to as the "New York Convention." Manifest disregard is not one of those grounds. Under Georgia law, international arbitration awards may be set aside *only* on the grounds listed in O.C.G.A. § 9-9-56. Again, manifest disregard is not one of those grounds. Because manifest disregard is not available as a ground to set aside an international award, the Court of Appeals erred in applying the doctrine.[2] Therefore, regardless of whether federal or Georgia state law governs,[3] manifest disregard is unavailable.

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[2] Even if manifest disregard were applicable, AtlAS concurs with Appellants that the Court of Appeals erred in *how* it applied that doctrine; however, the application of manifest disregard to domestic awards is outside the scope of the present *amicus* brief.

[3] The question of whether federal law preempts state law for setting aside an arbitration award is a difficult issue and not necessary to resolve on the present appeal because, as explained is Sections III.A & III.B, *infra*, manifest disregard should not apply under either state or federal law to this international award. For further discussion on the relationship between federal and state arbitration law, see Douglas H. Yarn, GEORGIA ALTERNATIVE DISPUTE RESOLUTION § 9:10 (2020 ed.).

### A. In the Eleventh Circuit, Federal Law Precludes Manifest Disregard as a Ground to Set Aside an International Arbitration Award.

The FAA sets forth federal law governing arbitration. 9 U.S.C. § 1, *et seq.* Chapter One governs domestic arbitrations; Chapter Two governs international arbitrations through incorporation of the New York Convention.[4] 9 U.S.C. §§ 1 & 201.

Article I(1) of the New York Convention invites signatories to apply the terms of the Convention not only to "foreign" awards, but also "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." The U.S. legislation implementing the New York Convention—Chapter Two of the FAA—accepted that invitation, providing that the New York Convention applies in the United States to both foreign awards and awards made in this country, provided they have an international character. Specifically, FAA Section 202 provides that:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial … falls under the [New York] Convention. An agreement or award arising out of such a

[4] Though not relevant to the present appeal, Chapter Three of the FAA incorporates the Inter-American Convention on International Commercial Arbitration, commonly referred to as the "Panama Convention," to govern international arbitrations for signatories to the Panama Convention. 9 U.S.C. § 301. FAA Chapter Three and the Panama Convention are consistent with FAA Chapter Two and the New York Convention for all matters relevant herein.

> relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Thus, FAA Section 202 effectively creates three classes of awards in the United States: 1) *foreign* awards made on the territory of another country; 2) *purely domestic* awards; and 3) *non-domestic* awards that are neither purely domestic nor foreign. The third category—non-domestic awards—specifically includes "an arbitral award made in the United States, under American law . . . when one of the parties to the arbitration is domiciled or has its principal place of business outside of the United States." *See Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH,* 141 F.3d 1434, 1441 (11th Cir. 1998); (citing *Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir. 1995); *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc*., 887 F.2d 1357, 1362 (9th Cir. 1989); *Bergesen v. Joseph Muller Corp.,* 710 F.2d 928, 932 (2d Cir. 1983); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186–87 (1st Cir. 1982)).

Because the Reinsurer is organized in Turks and Caicos, the arbitration award is non-domestic. As interpreted by the Eleventh Circuit, the FAA limits the grounds for vacatur of a non-domestic arbitration award exclusively to those set forth in the

New York Convention. *Industrial Risk*, 141 F.3d at 1446; *see also Earth Science Tech, Inc. v. Impact UA, Inc.*, 809 Fed. App'x 600, 605 (11th Cir. Apr. 14, 2020); *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291, 1302 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 124 (2019); Richard W. Hulbert, *The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act*, 22 AM. REV. INT'L ARB. 45, 83 (2011). The New York Convention permits a court to refuse recognition of an arbitration award *"only if"* the challenging party shows:

> (a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid . . .; 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 admission 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.

New York Convention, art. V (emphasis added). Manifest disregard is not listed. Because the Eleventh Circuit limits the *exclusive* grounds for vacatur of a non-domestic award to those set forth above, manifest disregard is not available.[5]

### B. Georgia Law Precludes Manifest Disregard as a Ground to Set Aside an International Arbitration Award.

Georgia has codified its arbitration law in Title 9, Chapter 9 of the Arbitration Code. Title 9 is divided into two parts: Part 1 applies to domestic arbitration

[5] Notably, even if the arbitration award here was purely domestic and governed by federal law (meaning that FAA Chapter One applied instead of FAA Chapter Two), the Eleventh Circuit limits the grounds for vacatur only to those set forth in FAA Section 10, which do not include manifest disregard. *See Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010); 9 U.S.C. § 10; *see also Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

agreements ("GAC"), and Part 2, designated as the Georgia International Commercial Arbitration Code ("GIAC"), which applies to international commercial arbitrations. *See* O.C.G.A. § 9-9-2; O.C.G.A. § 9-9-21(a). The GIAC "*shall* apply to international commercial arbitration[.]" O.C.G.A. § 9-9-21(a) (emphasis added). Under the GIAC, "[a]n arbitration shall be considered international if . . . [t]he parties to an arbitration agreement have their place of business in different countries at the time of the conclusion of such arbitration agreement[.]" *Id.* § 9-9-21(c)(1). In this case, the arbitration is international within the meaning of the GIAC because it involves a party organized under the laws of Turks and Caicos.

The GAC and the GIAC contain different standards for the vacatur of arbitral awards, depending on whether an award is domestic or international. The GAC contains five grounds for the vacatur of arbitral awards, with the fifth ground being manifest disregard.[6] O.C.G.A. § 9-9-13(b). However, the GIAC does not include manifest disregard. Instead, an award may be set aside (synonymous with vacated), *only* if:

> (1) The party making the application furnishes proof that:
>
> > (A) A party to the arbitration agreement referred to in Code Section 9-9-28 was under some incapacity; or that said arbitration agreement is not valid under the law to

[6] Specifically, the GAC permits vacatur "if the court finds that the rights of [the party requesting vacatur] were prejudiced by: . . . (5) The arbitrator's manifest disregard of the law." O.C.G.A. § 9-9-13(b)(5).

> which the parties have subjected it or, failing any indication thereon, under the law of this state;
>
> (B) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;
>
> (C) The arbitration award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or 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, only that part of the arbitration award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (D) The composition of the arbitration tribunal or the arbitral procedure was not in accordance with the arbitration agreement of the parties, unless such arbitration agreement was in conflict with a provision of this part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this part; or
>
> (2) The court finds that:
>
> (A) The subject matter of the dispute is not capable of settlement by arbitration under the law of the United States; or
>
> (B) The arbitration award is in conflict with the public policy of the United States.

O.C.G.A. § 9-9-56(b). Importantly, these grounds are the *exclusive* grounds for vacatur of an international arbitration award governed by Georgia state law. *Id.* ("An arbitration award may be set aside . . . *only if* . . . ." (emphasis added)).

Although the GAC includes manifest disregard as a ground for vacatur for non-international arbitral awards, the GAC does not apply to international awards. Instead, the GIAC governs and provides the exclusive grounds to set aside an international award. Those grounds do not include manifest disregard.

### C. The Current Appellate Decision Injects Uncertainty into Georgia Law Governing International Arbitration.

International arbitration is the leading method for resolving cross-border business disputes, in part because companies tend to fear litigating in "foreign" courts (and in international business deals, the courts of one party's domicile will always be "foreign" to the other party). Arbitration allows the parties to resolve disputes in a neutral forum. International arbitration also provides an effective and reliable means of enforcing foreign arbitral awards through the New York Convention (as opposed to international litigation, which requires U.S. parties to rely on unpredictable principles of international comity, since the United States is not a party to any multilateral agreements on the enforcement of civil judgments). As noted by the United States Supreme Court, there is "federal policy in favor of arbitral dispute resolution, a policy that applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

The GIAC is carefully calibrated to align with the Eleventh Circuit's interpretation of the FAA and encourage parties to arbitrate cross-border business

disputes in Georgia by offering a consistent and predictable international arbitration regime—*i.e.*, the universally familiar New York Convention standards, whether under Georgia law or the FAA. Parties outside of the United States contemplating arbitration in Georgia (including foreign parties doing business with Georgia companies) will tend to be more comfortable having vacatur governed by the international standards to which they are accustomed—international standards which are also generally familiar to U.S. companies and multinationals involved in international business. *See* Sebastien Perry, *Coke—And Arbitration Are It*, GLOBAL ARB. REV., 2 (May 25, 2012) (noting, in connection with the advantages of arbitrating in the Eleventh Circuit, that it "is the only federal circuit to have interpreted the Federal Arbitration Act to mean that New York Convention awards rendered by tribunals seated in the US can only be set aside on the grounds set down in the Convention"); Andrew J. Tuck, Kristen Bromberek & Jamie George, *Int'l Arb.: The Role of the Fed. Courts and Strong Support from the 11th Circuit,* FED. LAWYER, 61, 64 (Aug. 2017); Shelby R. Grubbs & Glenn P. Hendrix, *Int'l Comm. Arb., Southern-Style,* TENN. B. J., 20, 21 (Sept. 2012) (noting, as a selling point for "keeping … arbitration close to home" that "[t]he 11th Circuit is the only federal circuit to eliminate domestic arbitration law as a basis for vacating international arbitration awards rendered in the United States"); Stephen L. Wright & Shelby S. Guilbert Jr., *Recent Advances in International Arbitration in Georgia: Winning the*

*Race to the Top*, GA. B. J., 18 (June 2013). Accordingly, this Court should take the opportunity to make clear the strong federal and Georgia public policy of promoting international arbitration and the enforcement of international arbitral awards.

## IV. CONCLUSION

For the foregoing reasons, the Atlanta International Arbitration Society, as amicus curiae, respectfully requests that this Court not permit an arbitrator's manifest disregard of the law as a ground to vacate an award issued in an arbitration, like this one, with a foreign party.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing *AMICUS* BRIEF OF THE ATLANTA INTERNATIONAL ARBITRATION SOCIETY, INC., to all counsel of record in this case by placing the same, with adequate postage affixed there to, in the United States Mail, and via electronic mail to the following addresses:

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