Appeal Case No. 20-13039

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CORPORACIÓN AIC, SA,

Petitioner-Appellant,

v.

HIDROELECTRICA SANTA RITA S.A.,

Respondent-Appellee.

On Appeal from the U.S. District Court for the Southern District of Florida
No. 1:19-cv-20294-RNS

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE ATLANTA INTERNATIONAL ARBITRATION SOCIETY ("AtlAS") In Support of Appellee and In Opposition to Rehearing En Banc

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Cir. R. 26.1, *amicus curiae* Atlanta International Arbitration Society ("AtlAS") discloses that it is a Georgia nonprofit corporation, has no parent corporation, and does not issue shares of stock.

On behalf of *amicus curiae*, the undersigned incorporates the Certificate of Interested Persons and Corporate Disclosure Statement included within Respondent-Appellee's Brief.

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I. Statement of the Identity of the Amicus Curiae, its Interest in the Case

The Atlanta International Arbitration Society ("AtlAS") is a non-profit organization established in 2011. Its Board of Directors includes representatives of several dozen law firms, law schools, arbitral institutions, and other organizations. (*See* AtlAS website, available at www.arbitrateatlanta.org.)

AtlAS represents the international arbitration community in the southeastern U.S., working with leaders in government, the State Bar and the judiciary to ensure legislation and rules are supportive of international arbitration and that parties selecting Georgia as an arbitral seat will find an environment 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 of a vibrant international arbitration center to Atlanta, the State of Georgia, the southeastern United States, and beyond.

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

> We promote and enhance Atlanta as a place to resolve the world's business disputes using international arbitration and mediation. How do we do it? AtlAS: informs the global community that Atlanta offers a major business, transportation and conference center that delivers uncommon value as a venue for arbitrations and mediations; works to continuously improve Atlanta's most favorable legislative and judicial

> climate for obtaining and enforcing arbitral awards; forms partnerships with arbitral groups, legal firms, and educational institutions to make Atlanta a leading arbitral center. We schedule regular meetings addressing fundamental and pressing issues, hold annual conferences on timely topics, publish an annual practitioner's manual, and draft legislation and briefs supporting international arbitration and mediation.

(AtlAS website, available at https://arbitrateatlanta.org/atlas-mission-vision-values/.)

AtlAS requests leave to submit its Amicus Brief to address Appellant's Statement of the Issue Asserted to Merit En Banc Reconsideration. (Appellant's Petition for Rehearing En Banc ("En Banc Petition"), at 1-2.) Appellant argues that en banc review is necessary to overrule Eleventh Circuit precedent, *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434 (11th Cir. 1998), which holds that the standards for vacating an international arbitration award rendered in the U.S. mirror those in Article V of the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention").

The resolution of this issue implicates several aspects of AtlAS's mission, including in particular, working to enhance and maintain the local legal infrastructure for international arbitration.

II. Statement of Reason this Amicus Brief is Desirable and Relevant to the Disposition of the Petition for Rehearing En Banc

AltAS's proposed Amicus Brief is relevant to the disposition of the petition for rehearing en banc because it speaks directly to Appellants statement of the issue

asserted to merit en banc reconsideration—whether non-domestic arbitral awards can be vacated exclusively by the standards set forth in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") applicable to the recognition and enforcement of foreign arbitral awards.

The proposed Amicus Brief would be helpful to the Court because it brings to bear the collective experience and expertise of AtlAS and its members regarding the interpretation of the Convention and the Federal Arbitration Act and the potential consequences of the Court's decision in this Appeal, including with respect to the attractiveness of U.S. arbitral seats to parties negotiating the venue provision in international arbitration clauses.

A copy of AtlAS's proposed Amicus Brief is attached hereto as Exhibit A.

III. Conclusion

For the reasons stated above and more fully explained in the attached proposed Amicus Brief, AtlAS respectfully requests leave to file its Amicus Brief in opposition to rehearing en banc.

Dated: August 15, 2022

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AtlAS submits this Brief to address Appellant's Statement of the Issue Asserted to Merit En Banc Reconsideration. (Appellant's Petition for Rehearing En Banc ("En Banc Petition"), at 1-2.) Appellant argues that en banc review is necessary to overrule *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434 (11th Cir. 1998), which holds that the standards for vacating an international arbitration award rendered in the U.S. mirror those in Article V of the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention").

[1] *See also* AtlAS mission statement, available at https://arbitrateatlanta.org/atlas-mission-vision-values/.)

The source of AtlAS's authority to file this Brief is a vote of its Executive Committee, whose members are identified on its website. (*See* https://arbitrateatlanta.org/board-of-directors/)[2]

II. Statement Affirming the Independence of 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 directly or indirectly.

III. Argument

The district court correctly decided that the standards to vacate an arbitration award in Chapter One of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, do not apply to non-domestic arbitration awards. Instead, as leading commentators agree and as Eleventh Circuit precedent has long established, non-domestic awards must be tested in vacatur proceedings solely by the Convention's standards, which are incorporated into U.S. law in FAA Chapter Two, 9 U.S.C. §§ 201–208.

Article I(1) of the Convention invites signatories to apply its terms not only to "foreign" awards, but also to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." The U.S. legislation implementing the Convention—FAA Chapter Two—accepted that

[2] The views expressed in this Brief are solely those of individual members of the AtlAS Executive Committee.

invitation, providing that the Convention applies in the U.S. to both foreign awards and U.S.-made awards that have an international character. Specifically, FAA Section 202 provides that:

> An agreement or award arising out of a [commercial] 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.

9 U.S.C. § 202. Thus, FAA Section 202 effectively creates three classes of awards in the U.S.: 1) **foreign** awards made in another country; 2) **purely domestic** awards; and 3) **non-domestic** awards, neither purely domestic nor foreign, that are made in the U.S., but that involve one or more non-citizens, foreign property, or an underlying agreement which envisions performance outside the U.S. *See, e.g., Lander Co., Inc. v. MMP Investments, Inc.*, 107 F.3d 476, 477 (7th Cir.), *cert. denied*, 522 U.S. 811 (1997).

The award at issue here is a non-domestic award, issued in a Miami-based arbitration between Guatemalan companies. The question is whether the standards for vacatur of this award: (a) include the standards for vacatur of domestic awards (*i.e.*, those in 9 U.S.C. § 10, in FAA Chapter One); or (b) are limited to the standards in Convention Article V for denying recognition and enforcement of foreign awards. This Circuit answered "(b)" in 1998: non-domestic awards can be vacated exclusively on the same Convention grounds applicable to foreign awards. *See*

Industrial Risk, 141 F.3d at 1446. That holding has been reaffirmed in several cases. *See Inversiones Y Procesadora Tropical Inprotsa, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 124 (2019); *Earth Science Tech, Inc. v. Impact UA, Inc.*, 809 Fed. Appx. 600 (11th Cir. 2020); *Gulfstream Aerospace Corp. v. OCELTIP Aviation 1 Pty. Ltd.*, 31 F.4th 1323 (11th Cir. 2022).

Appellant argues that "*Industrial Risk* w[as] wrongly decided," citing *BG Group Plc v. Republic of Argentina*, 134 S. Ct. 1198 (2014). (En Banc Petition at 7.) Contrary to Appellant's argument, *Industrial Risk* was correctly decided and was not abrogated by the Supreme Court in *BG Group*.

A. The Panel Decision

The panel issued a 2-1 decision, with a concurring opinion. Both opinions properly conclude that Convention signatories are free to determine the standards their courts will apply to a request to vacate a non-domestic award, although they reach that conclusion through different analyses. *Corporación AIC, SA v. Hidroelectrica Santa Rita, S.A.*, 34 F.4th 1290 (11th Cir. 2022) ("Majority Op." or "Concurring Op."). As discussed below, the majority's analysis is based on the flawed premise that FAA Section 10(4)(a) is incorporated into the Convention. The Concurring Opinion is correct that the Convention does not incorporate domestic law. Concurring Op. at 38. Instead, the Convention leaves room for domestic law to serve as a "gap filler and determine[] the vacatur grounds for a New York Convention award." Concurring Op.

at 38. But both opinions reach the wrong ultimate conclusion regarding what constitutes U.S. domestic law in this context.

B. Article V(1)(e) of the Convention Does Not Direct U.S. Courts to Apply FAA Section 10 to Convention Awards

Article V of the Convention enumerates the only grounds to refuse recognition of a qualifying award. Article V(1)(e) is one of those grounds: an award may be denied recognition where it "has been set aside [i.e., vacated] . . . by a competent authority of the country in which, or under the law of which, that award was made." The Majority Opinion stated that *Industrial Risk* "failed to consider that domestic defenses to enforcement of arbitration awards were nestled in Article V(1)(e)" (Majority Op. at 15) and that Article V(1)(e) "incorporate[s] domestic law." *Id*. at 18.

This Amicus urges this Court to reject any analysis that posits that Article V(1)(e) incorporates domestic law. By its plain terms, Article V(1)(e) simply allows a court to refuse to *recognize* an award that has *in fact* been vacated by a competent authority in the issuing ("primary") jurisdiction.

The application of Article V(1)(e) by a court in an enforcement ("secondary") jurisdiction is straightforward. To illustrate, if a U.S. court is asked to enforce an award made in Spain, it may refuse if "the award has been set aside" by a Spanish court. In that case, Article V(1)(e) does not instruct the U.S. court to apply Spanish law to decide whether the award *should be* set aside. The court is only asked to determine whether the award *has previously been* set aside in Spain.

Article V(1)(e) serves the same function when applied by a "primary" jurisdiction. If a U.S. court is asked to confirm or vacate a non-domestic award, it may vacate if "the award has been set aside" by a competent U.S. authority. Article V(1)(e) itself does not instruct the U.S. court to determine the contents of, or apply, U.S. domestic law to decide whether the award *should be* set aside (i.e., vacated). The court determines only whether the award *has previously been* set aside under U.S. law.

To be sure, each Convention signatory has domestic law that governs a request to vacate a non-domestic award. And while Article V(1)(e) reflects that premise, it does not supply or point to any particular domestic laws. There is nothing of the sort "nestled" in Article V(1)(e).

The Concurring Opinion gets this right: "Article V(1)(e) does not incorporate domestic vacatur grounds into the … Convention. Instead, the primary jurisdiction's domestic law directly supplies the grounds for vacating" a Convention award. Concurring Op. at 22. Yet the Concurring Opinion, like the Majority Opinion, ultimately reaches the wrong conclusion that "domestic law" in this context means FAA Section 10.

C. The Article V Defenses Govern Confirmation and Vacatur of Non-Domestic Awards

The Convention grounds for refusing recognition of foreign awards have been incorporated *into* U.S. domestic law as the standards governing vacatur of U.S.-made non-domestic awards. FAA Section 207 converts the Convention's list of

grounds for refusing recognition of an award "falling under the Convention"—which includes non-domestic awards—into a statutory command ("the court shall confirm the award"). This precludes any other basis to challenge the award, including those set forth in FAA Section 10.

Furthermore, whereas FAA Section 9 provides that a court must confirm an award "unless the award is vacated ... as prescribed in [§ 10]"), FAA Section 207 contains no such exception. Rather, Section 207 flatly states that "[t]he 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." There are no exceptions, including no "unless-the-award-is-vacated-under-§10" proviso. The absence of any such proviso, notwithstanding its presence in FAA Section 9, reinforces the conclusion that Congress intended the Convention standards to be the *sole* grounds for challenging a non-domestic award. As stated by one commentator:

> There is an obvious and presumably intended parallelism between § 9 in Chapter 1 and § 207 in Chapter 2. They have almost precisely the same title: "Award of arbitrators; confirmation; jurisdiction; procedure ["proceeding" in § 207]." … Each section imposes a mandatory duty on the court to confirm the award unless it falls afoul of the applicable statutory standard. Under § 9 "the court must grant such an order [of confirmation] unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of this title." Under § 207 "[t]he 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."

Richard Hulbert, *The Case for a Coherent Application of Chapter 2 of the FAA*, 22 AM. REV. INT'L ARB. 45, 67 (2011).

Furthermore, "[d]efining non-domestic awards made in the United States as Convention awards, but then treating those awards as subject to domestic vacatur standards, would take away virtually everything that is conferred by the initial categorization as a Convention award—and it certainly takes away the most important attribute of a Convention award, being the Convention's international recognition standards." Gary Born, INT'L COMM. ARB. (3d Ed.), at 3212 (2021). Simply stated, why would Congress have subjected non-domestic awards to the Convention if it intended those awards "to be treated in the same way that they would be if they were not subject to the Convention?" *Id*. Indeed, "[t]he easiest reading of the Convention is that where a Contracting State has chosen to categorize an award (by definition, not a foreign award) as non-domestic, it will only deny recognition in accordance with the international standards in Article V [of the Convention], and not based on domestic [vacatur] standards." *Id.* at 3213-14.

D. The *Industrial Risk* Approach Promotes Consistency, Aligns with International Practice, and Enhances this Jurisdiction's Standing as an Arbitral Venue

It should be no surprise that Congress crafted FAA Chapter Two to avoid the illogical situation in which a petition to confirm a non-domestic award is governed by Convention standards, but the losing party's cross-petition to vacate the same award

is governed by FAA Section 10 standards, even though the petitions are filed in the same case. Most countries have rejected the application of inconsistent standards to the validity of an award falling under the Convention depending on whether the petition is to confirm the award or to vacate it. For example, the U.N. Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, adopted by 85 countries, unifies the grounds for refusing recognition and enforcement of a foreign award (Article 36) and for vacatur of an award (Article 35), with both Articles essentially following the Convention standards verbatim. *See* Model Law on International Commercial Arbitration, UNCITRAL, 18th Sess., Annex 1, U.N. Doc. A/40/17 (June 21, 1985); *see also* Concurring Op. pp. 19-20 (citing Model Law Arts. 35 and 36).

Industrial Risk's interpretation of the FAA also makes it easier for American parties seeking to persuade foreign counterparties to agree to arbitrate in the U.S. Non-U.S. parties contemplating arbitration in the U.S. generally are more comfortable having vacatur governed by the international standards to which they are accustomed, and these are also familiar to most U.S. companies involved in international business. *See, e.g.*, Andrew J. Tuck, Kristen Bromberek & Jamie George, *Int'l Arb.: The Role of Fed. Courts and Strong Support from the 11th Circuit*, FED. LAWYER, 61, 64 (Aug. 2017).

E. The Supreme Court Has Not Abrogated *Industrial Risk*

Appellant argues that in *BG Group Plc v. Republic of Argentina*, 134 S. Ct. 1198 (2014), the Supreme Court "'implicitly contradicted' *Industrial Risk*'s holding that a non-domestic award may be vacated only on the grounds explicitly enumerated in Article V of the Convention." (En Banc Petition p. 11 (citing Majority Op. at 11).) But both times the Supreme Court referenced FAA § 10(a)(4) in its *BG Group* decision, the Court was simply summarizing the arguments of the parties. *See id.* at 1207, 1212. The parties and the courts below had relied only on FAA Chapter One. Neither party raised the issue considered here—whether FAA Chapter One standards were properly applied. Since that issue was not before the Court, it did not consider it, and its decision cannot be considered to have abrogated *Industrial Risk*.

The Majority Opinion also assumes that because *BG Group* referenced the "exceeding powers ground" in FAA Section 10(a)(4), it "implicitly contradicted [this Circuit's] ruling in *Industrial Risk* that only those express grounds listed in Article V could allow a domestic court to vacate an international arbitration award." Majority Op. at 11. Yet many courts have concluded that the FAA Section 10 "exceeding powers" ground is largely (if not completely) congruent with the Convention grounds. *See, e.g.*, *Lander Co.* 107 F.3d at 481 (7th Cir. 1997) (the defense that "the arbitrator had exceeded his terms of reference … is a defense under both the [FAA] and the … Convention."); *Parsons & Whittemore Overseas Co.*, 508

F.2d at 976 ("This provision [Convention Article V(1)(c)] tracks in more detailed form [§ 10(a)(4)] of the [FAA]"). Thus, in *BG Group*, not only did neither party raise the issue of whether FAA Section 10 standards or the Convention Article V standards applied, but the issue was likely immaterial to the outcome. *See Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1025-26 (7th Cir. 2013) (in case involving an "exceeding powers" challenge to a non-domestic award, the court declined to decide whether "Chapters 2 and 3 of the FAA state that a Convention award may be vacated only on the grounds specified in the applicable Convention" because applying the FAA Section 10 and Convention standards yielded the same result).

Accordingly, the Supreme Court's references to the "exceeding powers" ground in *BG Group* should not be interpreted as abrogating *Industrial Risk.*

IV. Conclusion

AtlAS, as amicus curiae, respectfully requests that this Court leave undisturbed its precedent that the exclusive vacatur standards for non-domestic awards are those in Article V of the Convention.

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