No. 17-569

In The
Supreme Court of the United States

BAMBERGER ROSENHEIM, LTD.,

Petitioner,

v.

OA DEVELOPMENT, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

SIMON H. BLOOM
Counsel of Record
TROY R. COVINGTON
BLOOM SUGARMAN, LLP
977 Ponce de Leon Avenue, NE
Atlanta, Georgia 30306
(404) 577-7710
sbloom@bloomsugarman.com
tcovington@bloomsugarman.com

Counsel for Respondent
OA Development, Inc.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In this international arbitration case, an American company and an Israeli company entered an agreement with an arbitration clause. The clause contains a venue provision requiring that any disputes with respect to performance of the parties under the agreement be submitted to binding arbitration under the rules of the International Chamber of Commerce ("ICC"). The proceedings were to take place in Tel Aviv, Israel if the dispute was submitted by the American company and in Atlanta, Georgia if the dispute was submitted by the Israeli company.

The Israeli company submitted a dispute in Atlanta, and the American company answered and filed a counterclaim arising out of the same dispute, as was allowed by the parties' agreed ICC rules. The Arbitrator rejected the Israeli company's objections to arbitration of the counterclaim in Atlanta and later entered judgment in favor of the American company on the claim.

The district court confirmed the award on the counterclaim, and the Eleventh Circuit affirmed. The Court of Appeals joined four other circuits in concluding that disputes over the interpretation of forum selection clauses in arbitration agreements raise presumptively arbitrable procedural questions. The question presented is:

Whether federal courts exercise limited review over arbitrators' decisions on venue disputes regarding international arbitrations as procedural issues or whether courts should exercise *de novo* review over such disputes as substantive disputes about arbitrability.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent OA Development, Inc. states that it does not have a parent company, and no publicly-held company owns ten percent or more of its stock.

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STATUTORY PROVISIONS INVOLVED

In addition to Article V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, set forth in the Petition, Section 10(a) of the Federal Arbitration Act is involved in this matter and provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –
>
> > (1) where the award was procured by corruption, fraud, or undue means;
> >
> > (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> >
> > (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> >
> > (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and

> definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

STATEMENT OF THE CASE

I. Factual Background

1. OA Development, Inc. ("OAD") is in the business of real estate acquisition, development, and management in the United States. Pet. App. 52a. Bamberger Rosenheim, Ltd. ("Profimex") is a "capital aggregator" which solicits individuals in Israel to invest in real estate and related businesses in countries around the world. Pet. App. 51a. On March 31, 2008, OAD and Profimex entered a Solicitation Agreement, under which OAD appointed Profimex as its exclusive placement agent to secure investors in Israel to invest in OAD real estate projects in the United States. Pet. App. 52a. The Solicitation Agreement contains an arbitration provision:

> This agreement shall be construed in accordance with the laws of the State of New York without giving effect to choice of law principles. Any disputes with respect to this Agreement or the performance of the parties hereunder shall be submitted to binding arbitration proceedings conducted in accordance with the rules of the International Chamber of Commerce. Any such proceedings shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta,

> Georgia, in the event the dispute is submitted by Profimex.

Pet. App. 48a-49a.

Under the Solicitation Agreement, OAD would present a property it wished to purchase to Profimex. Pet. App. 52a. Profimex could then turn to its investor network in Israel to raise a portion of the capital necessary to acquire, develop, and maintain the property. *Id.* Between March 31, 2008, and March 31, 2013, the date the Solicitation Agreement was terminated, the parties participated in eight real estate projects together. Pet. App. 54a.

2. In mid-2012, the relationship between OAD and Profimex began to deteriorate. During that period investments began to mature and produce results ranging from very successful to very unsuccessful. Pet. App. 56a. By 2013, Profimex commissioned accounting firm Prager Metis CPAs, LLC ("Prager Metis") of Plainview, New York to conduct forensic examinations of OAD's books and records regarding two real estate projects in which OAD partnered with Profimex. Pet. App. 101a. Profimex then took the Prager Metis reports and used them to make many defamatory statements regarding OAD to OAD's investors, even though the reports made no findings of any misuse of funds, fraud, theft, or deceit on the part of OAD. Pet. App. 104a-105a.

Another of the real estate projects sold in February 2014. Pet. App. 58a. The sale of this property led Profimex to seek payment from OAD of two fees it

claimed were due under the Solicitation Agreement and the project's limited partnership agreement. *Id.* To attempt to resolve the conflict caused by the false statements made by Profimex, OAD proposed that the two parties sign a mutual release of all claims prior to any payment being made to Profimex. Doc. 28-3 – Pg 17 and Ex. 6. Profimex refused to sign the Mutual General Release. Doc. 28-3 – Pg 17.

On March 28, 2014, counsel for OAD sent a letter to Profimex detailing Profimex's many acts of defamation and demanding that Profimex retract its damaging and false statements. Doc. 28-3 – Pg 18 and Ex. 8. Profimex did not respond to this letter or alter its behavior toward OAD in any way. Doc. 28-3 – Pg 18.

3. Profimex then submitted a Request for Arbitration dated April 18, 2014, to the ICC. Doc. 1-2. Profimex brought claims for breach of contract, promissory estoppel, and litigation expenses, seeking two fees it claimed were due from OAD as a result of the project sale. Doc. 1-2 – Pgs 16-18. Profimex's Request for Arbitration addressed the larger dispute between the parties and acknowledged that OAD had put it on notice that OAD had potential claims for defamation against it. Doc. 1-2 – Pgs 14-15.

On June 13, 2014, OAD submitted its Answer to Request for Arbitration and Counterclaim. Doc. 28-3. OAD's Counterclaim set out a claim for defamation under New York law. Doc. 28-3 – Pgs 20-22.

Profimex submitted a Reply to Respondent's Counterclaim, objecting to the venue of OAD's counterclaim

being in Atlanta and asserting that the Solicitation Agreement required the counterclaim to be brought in Tel Aviv, Israel. Doc. 1-4 – Pg 2. During a hearing on the matter, each of the parties stipulated that the Arbitrator had jurisdiction to determine the arbitrability of OAD's counterclaim. Doc. 28-4 – Pg 2. Following the submission of letter briefing by the parties, the Arbitrator concluded that venue over the counterclaim was proper in Atlanta. Doc. 1-7.

Following extensive discovery, the Arbitrator conducted a week-long trial, during which the parties presented testimony from seven live witnesses including the parties' principals. Pet. App. 49a. The parties also tendered into evidence the deposition testimony of twenty-three additional witnesses, the affidavit testimony of four witnesses, and the supplemental deposition testimony of principals of the parties. Pet. App. 49a-50a. Based on this voluminous record, the Arbitrator found in favor of OAD on its defamation claim and awarded it $500,000 in general damages, $200,000 in punitive damages, and $250,000 in attorney's fees, for a total award of $950,000. Pet. App. 131a.

II. Procedural History

1. Profimex filed its Petition to Vacate or Modify Arbitration Award and Application to Confirm Award Against OAD on December 23, 2015. OAD filed its Motion to Confirm Arbitration Award on February 2, 2016. Profimex challenged OAD's award under multiple bases, including Article V(1)(d) of the Convention

on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and Section 10(a) of the Federal Arbitration Act ("FAA"), codified at 9 U.S.C. § 10(a). Following briefing and an oral hearing, the District Court entered an order denying Profimex's motion to vacate the defamation award to OAD and granting OAD's motion to confirm it with certain modifications. Pet. App. Ex. B. The District Court determined that the Arbitrator engaged with the language of the parties' arbitration provision and that his construction of the venue clause holds under the deferential standard required for review of procedural matters. Pet. App. 25a-29a.

2. The Eleventh Circuit Court of Appeals rejected Profimex's challenge to the arbitration award to OAD based on the arbitration's venue, concluding that questions of arbitral venue, even those arising in international arbitration, are presumptively for the arbitrator to decide. *Bamberger Rosenheim, Ltd. (Israel) v. OA Development, Inc. (U.S.)*, 862 F.3d 1284, 1286 (11th Cir. 2017). The court determined that because the Arbitrator arguably interpreted the arbitral-venue provision at issue, courts must defer to that interpretation. *Id.* (citing *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013)).

The Court of Appeals noted that Profimex challenged the Arbitrator's application of the venue clause under both Article V(1)(d) of the New York Convention and Chapter 1 of the FAA, governing domestic arbitrations. *Id.* at 1287. The court saw no reason to analyze Profimex's arguments under the New York Convention

and the FAA separately, as both arguments were premised on Profimex's position that the venue provision required arbitration of OAD's defamation counterclaim in Tel Aviv. *Id.*

The Court of Appeals determined that the dispositive issue in this case is whether a court must defer to the arbitrator's venue decision. *Id.* While parties may determine whether a particular matter is for an arbitrator or courts to decide, if the contract is silent on who is to make the decision, courts determine the parties' intent with the help of presumptions. *Id.* at 1287-88 (citing *BG Grp., PLC v. Republic of Arg.*, 134 S. Ct. 1198, 1206 (2014)). The court relied upon this Court's binding precedent in setting forth the rule that ordinarily, parties intend the courts, not arbitrators, to decide questions of "arbitrability," such as whether an arbitration clause applies to a particular type of controversy. *Id.* at 1288 (citing *BG Grp.*, 134 S. Ct. at 1206). However, courts presume that the parties intend arbitrators, not courts, to "decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." *Id.* (quoting *BG Grp.*, 134 S. Ct. at 1207).

Profimex conceded that the arbitration clause was binding and did not dispute that the clause applied to the defamation counterclaim but instead argued that the arbitration of OAD's counterclaim was conducted in the wrong venue. *Id.* The court held, consistent with at least four other circuits, that "disputes over the interpretation of forum selection clauses in arbitration agreements raise presumptively arbitrable procedural

questions." *Id.* (citing *UBS Fin. Servs., Inc. v. West Va. Univ. Hosps., Inc.*, 660 F.3d 643, 655 (2d Cir. 2011); *Cent. W. Va. Energy, Inc. v. Bayer Cropscience LP*, 645 F.3d 267, 273-74 (4th Cir. 2011); *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1178 & n.3 (10th Cir. 2007); *Richard C. Young & Co., Ltd. v. Leventhal*, 389 F.3d 1, 5 (1st Cir. 2004)).

The Court of Appeals therefore determined that its review of the Arbitrator's venue decision was limited to whether he even arguably "interpreted the parties' contract, not whether he got its meaning right or wrong." *Id.* (quoting *Oxford Health Plans*, 133 S. Ct. at 2068). Here, the Arbitrator evaluated Profimex's challenge to the arbitration of OAD's counterclaim in Atlanta by engaging with the language of the venue provision and determining that the "dispute" was submitted by Profimex. *Id.* Thus, the "briefest glance at the [award] reveals that the arbitrator in this case arguably 'interpreted the [venue provision].'" *Id.* (citation omitted). The court simply applied this Court's rule that the "arbitrator's construction holds, however good, bad, or ugly." *Id.* (quoting *Oxford Health Plans*, 133 S. Ct. at 2071).

The Court of Appeals declined to follow *Polimaster Ltd. v. RAE Systems, Inc.*, 623 F.3d 832 (9th Cir. 2010) "to the extent it is indistinguishable." The court noted that the arbitral venue provisions in the two cases were different and further pointed out that the *Polimaster* majority "failed to engage in any analysis as to whether arbitral venue is a question of arbitrability." 862 F.3d at 1289.

The court determined that the international character of the arbitration did not change its calculus, despite Profimex's argument that in the international context, disputes regarding forum selection were more akin to questions of arbitrability than procedural questions. *Id.* The court noted this Court's statement in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) that a "contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." The Court of Appeals pointed out, however, that "*Scherk* did not concern the choice between different arbitral forums; rather, *Scherk* concerned whether a particular dispute should be resolved in arbitration or in court." 862 F.3d at 1289 (citing *Scherk*, 417 U.S. at 509-10).

The Court of Appeals also noted that venue may impact the rules and laws applicable in international arbitration but determined that there is "no reason why arbitral venue must be a question *presumptively* reserved to the courts." *Id.* (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). "If parties do not want an arbitrator to resolve arbitral-venue disputes, they 'may agree to limit the issues they choose to arbitrate.'" *Id.* (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 599 U.S. 662, 683 (2010)).

REASONS FOR DENYING THE WRIT

The Court should deny the petition for a writ of certiorari for at least three reasons. First, the decision of the Court of Appeals did not create a circuit split. The Ninth Circuit case that Profimex identifies as creating the split, *Polimaster*, is an exception to the Ninth Circuit's binding precedent on arbitral venue. The facts of *Polimaster* make it an outlier, and when the decision below is viewed in light of the Ninth Circuit's earlier decision, the circuits are in accord. Moreover, the Ninth Circuit in *Polimaster* did not conduct any analysis of the level of deference to be applied to an arbitrator's venue decision and did not expressly hold that a *de novo* review is proper, as Profimex argues this Court should hold.

Second, the Court should deny the petition because there is no need for a new analysis regarding the review of venue decisions by arbitrators. The Court's existing guidance regarding whether an issue is one of substantive arbitrability for a court to decide or one of procedure for an arbitrator was applied correctly by the Eleventh Circuit and the other four courts of appeals that have analyzed this question. Profimex has identified no good reason to treat the issue of substance versus procedure differently simply because the parties are from different countries. Profimex's proffered explanation, that venue is very important in the international context, falters because many issues this Court has held to be procedural are also important and potentially case dispositive. "Importance" is not the deciding factor.

Third, there is no pressing need for the Court to take up this matter. Profimex asserts that the kind of venue clause at issue in this case is "ubiquitous" in international arbitration agreements and that "countless" parties to these agreements will be left in limbo by the Eleventh Circuit's decision. Only three cases dealing with venue provisions in international agreements have ever been litigated in the courts of appeals. This is not a matter yearning for the Court's immediate attention. Moreover, to the extent that parties are unhappy with a court engaging in only limited review of an arbitrator's venue decision, parties can contract around the rule.

I. The Eleventh Circuit's Decision Did Not Create A Circuit Split.

Profimex argues that this Court should grant a writ of certiorari because the Eleventh Circuit's decision creates a circuit split by being at odds with the Ninth Circuit's decision in *Polimaster*. Pet. 9-12. One outlier case does not a circuit split make. The Ninth Circuit in *Polimaster* faced an arbitration clause that was quite different than the one in the instant case because the *Polimaster* clause did not specify either substantive law or procedural rules to govern the parties' arbitration. The parties' agreement in this case selected both New York substantive law and ICC procedural rules. The Ninth Circuit, though it reached a different conclusion regarding the appropriateness of a counterclaim under the clause at issue, did not engage in any analysis regarding the level of review to be

applied and did not announce a rule of heightened scrutiny for venue determinations based on the presence of an international party in the contractual relationship. The Ninth Circuit also did not hinge its decision upon the nationalities of the parties before it, undercutting Profimex's position that this should be the factor that triggers heightened judicial review of arbitrators' venue decisions.

1. Profimex characterizes the venue clause in *Polimaster* as "virtually identical" to the one at issue here, Pet. 8, and the "facts, circumstances, and procedural history in this case" as "all but identical to those in *Polimaster*." Pet. 11. A close examination of *Polimaster*, however, shows that it is both legally and factually distinguishable and that the arbitration clauses at issue in the two cases are quite different.

In *Polimaster*, a company from Belarus entered a contract with RAE, a company based in California. 623 F.3d at 834. The contract contained an arbitration provision stating: "In case of failure to settle . . . disputes by means of negotiations they should be settled by means of arbitration at the defendant's side." *Id.* The parties agreed that "defendant's side" meant "defendant's site," that is, the geographical location of the defendant's principal place of business. *Id.* Polimaster submitted a demand for arbitration in California, and RAE submitted an answer and counterclaims. *Id.* at 835. Polimaster asked the arbitrator to dismiss RAE's counterclaims on the basis that any claims by RAE against it could not be arbitrated at RAE's site in California, because the arbitration agreement required

that they be brought at the "defendant's site" in Belarus. The arbitrator refused to dismiss the counterclaims and later entered an award on them in favor of RAE. *Id.* Polimaster moved to vacate the award, but the district court denied that motion. *Id.*

On appeal, the Ninth Circuit reversed, holding that the arbitration agreement required that all requests for affirmative relief, whether called claims or counterclaims, be arbitrated at the defendant's site. *Id.* at 837. The court determined that the arbitration agreement required that any "dispute" be arbitrated at the defendant's site and that the term "dispute" encompasses both claims and counterclaims. *Id.* According to the court, "a party is a 'defendant' as to any dispute where another party seeks damages or some other form of relief against him. Therefore, Polimaster was clearly the 'defendant' as to RAE's 'counterclaims.' The 'dispute' embodied in those claims should not have been arbitrated at RAE's site in California." *Id.*

The Ninth Circuit acknowledged that the arbitration clause before it was an "unusual one" that did not provide for a choice of law or choice of procedural rules. *Id.* at 839. Rather, the clause provided only for a choice of forum: defendant's site. *Id.* at 840. The arbitrator therefore relied upon the Federal Rules of Civil Procedure, the California Rules of Civil Procedure, and the arbitration forum's rules regarding bringing counterclaims in a single proceeding. *Id.* at 838. The Ninth Circuit pointed out that the parties did not incorporate those rules into their agreement and that the assumption that counterclaims could be brought into a pending

proceeding went against the parties' contractual language. *Id.* The court held that the parties' sparse agreement "effectively removed the decision regarding forum from the procedural decisions delegated to the arbitrator." *Id.* at 841. The arbitrator "could not override the parties' express agreement in favor of general procedural rules. Indeed, adherence to the parties' agreed-upon procedures is regularly enforced, such as where relevant to the choice of forum of arbitration." *Id.* (citations omitted).

Here, on the other hand, OAD and Profimex specifically agreed that the ICC's arbitration rules would govern any arbitration proceedings. The ICC rules include a mandatory counterclaim rule: "Any counterclaims made by the respondent shall be submitted with the Answer . . . " ICC Article 5(5) (emphasis added). The rule is clear both that counterclaims are permitted and that they must be filed along with an answer by the party asserting them. *See id.*

There is thus no support for Profimex's argument that the Arbitrator "rewrote the parties' forum selection clause by adding a right to counterclaim in the parties' arbitration agreement, which he inferred from generally applicable rules of procedure, though the forum selection clause in the case at issue has no exception for such treatment." Pet. 11. First, the Arbitrator clearly interpreted the parties' contract as to the venue provision as written. The Arbitrator started with the language of the arbitration agreement's venue provision: "Any such proceedings shall take place in Tel Aviv, Israel, in the event the dispute is submitted by

OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex." Doc. 1-7 – Pg 9. The Arbitrator then stated that the "dispute" before him was "submitted by" Profimex for arbitration in Atlanta. *Id.* As the Arbitrator pointed out, the arbitration clause "does not affirmatively negate the right of a party to assert a counterclaim in a matter submitted for arbitration." *Id.* The parties also agreed to have disputes arbitrated under the ICC rules, which "specifically permit and provide for adjudication of counterclaims submitted by a Respondent." Doc. 1-7 – Pg 10. Given these factors, the Arbitrator concluded that venue was proper as to OAD's counterclaim in the dispute submitted by Profimex in Atlanta. *Id.*

Second, the Arbitrator did not infer a right to counterclaim from "generally applicable rules of procedure" or any other source. Instead, in the absence of an express prohibition on counterclaims in the parties' agreement, the Arbitrator looked to the parties' chosen ICC rules, which do expressly allow for counterclaims and require any counterclaims to be filed at the time the responding party files its answer. Doc. 1-7 – Pg 10. The Arbitrator therefore concluded that venue was proper as to the OAD counterclaim in the dispute submitted by Profimex in Atlanta, and the Arbitrator made no mention whatsoever of any "generally applicable rules of procedure" in so doing. *Id.* The Arbitrator did not have to look to any generalized rules, because all he had to do was to apply the specific rules which the parties themselves chose and made part of their agreement.

2. The Ninth Circuit made no mention that its holding was in any way based on the nationalities of the parties to the arbitration agreement before it. No circuit, including the Ninth Circuit, has ever held that the level of judicial review of an arbitrator's decision should be based upon the nationalities of the parties. The *Polimaster* ruling, which purported only to review the arbitrator's interpretation of the skeletal arbitration agreement involved in that case, and not all international arbitration agreements' treatment of forum clauses, was thus limited to its "unusual" facts.

The fact-bound nature of *Polimaster* is illustrated by its majority's efforts to distinguish its decision from its circuit precedent in *China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc.*, 379 F.3d 796 (9th Cir. 2004). In that case, Apex Digital, Inc. ("Apex"), an American importer, argued that the arbitrating body, the China International Economic and Trade Arbitration Commission ("CIETAC"), disregarded Apex's arbitration clause with China National Metal Products Import/Export Company ("China National"), a Chinese exporter, by permitting separate arbitrations of Apex's and China National's claims in Shanghai and Beijing. *Id.* at 797-98. Apex thus asserted that it had a defense to confirmation of the arbitral award obtained by China National under Article V(1)(d) of the New York Convention. *Id.* at 797.

The applicable arbitration clause provided:

> All dispute[s] arising from or in connection with this Contract shall be submitted to

> [CIETAC] for arbitration which shall be conducted by the Commission in Beijing or by its Shenzhen Sub-Commission in Shenzhen or by its Shanghai Sub-Commission in Shanghai at the Claimant's option in accordance with [CIETAC's] arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

Id. at 800. Apex argued that the arbitrators used the arbitration clause's "general reference" to CIETAC's standard arbitration rules to trump the specific contractual provisions of the parties' clause and that CIETAC's award obtained in Beijing should not be recognized because Apex had previously filed a claim in Shanghai. *Id.* Apex argued that the parties had agreed to arbitrate their disputes in one of three fora and that the first party to file could select the forum. *Id.* at 799.

The Ninth Circuit held that nothing in the parties' contract either specifically designated Shanghai as the only appropriate arbitral forum or articulated a rule of decision for determining an appropriate forum. *Id.* at 800. Apex was mistaken that the arbitration clause was sufficiently specific such that CIETAC could determine the arbitral forum without reference to its arbitral rules. *Id.* The clause gave the choice of one of three fora to the "claimant," but did not define "claimant," so that either party could be a claimant. *Id.* Both Apex and China National asserted that they were "claimants." Apex asserted that it alone was the claimant, but China National argued that it too was a rightful claimant because its claims brought in Beijing

involved different issues than Apex asserted in Shanghai; the Ninth Circuit determined that both positions were arguable and the text of the arbitration provision on its face did not resolve the matter. *Id.* at 801. The court stated:

> Significantly, though, the arbitration clause recognizes that the clause itself might not adequately settle forum disputes and directs that CIETAC conduct the arbitration "at the Claimants option in accordance with [CIETAC's] arbitration rules. . . ." The clause did not merely incorporate the text of CIETAC's rules into the parties' purchase orders. Rather the arbitral clause calls upon CIETAC to apply, or interpret, the applicability of its own rules. By agreeing to the purchase orders, the parties agreed to CIETAC's interpretations of its rules. Thus, CIETAC did not trump specific terms of the parties' purchase orders by turning to its own rules because the arbitral clause did not resolve the parties' dispute itself.

Id. The parties' positions involved arguable constructions of CIETAC's arbitral rules, and the Ninth Circuit held that it need not resolve that interpretive dilemma because the parties agreed to CIETAC's interpretation of its own rules. *Id.* at 802.

The Ninth Circuit thus has held that where parties specify the procedural rules to apply to the arbitration, those rules may be referred to for resolving ambiguities about what the parties agreed. As the *Polimaster* majority noted in distinguishing *China National*, "the parties in *China National* adopted

CIETAC rules in their arbitration agreement; CIETAC did not trump the specific terms of the parties' agreement. Here, [in *Polimaster*], the parties made no similar choice of applicable procedures. Thus, the arbitrator's reference to compulsory counterclaim procedures went outside of the parties' agreement, and violated the specific agreement of the parties." 623 F.3d at 842. *Polimaster* accordingly held that where the parties do not agree to any procedural rules, the arbitrator's formulation of a procedural rule outside the agreement is prohibited, in that it would supplant the actual agreement of the parties.

In the case at bar, the text of the arbitration agreement does not mention how counterclaims are to be treated but does state that arbitrations are to be undertaken "in accordance with" ICC rules. Consequently, like in *China National*, that amounts to an agreement that ambiguities are to be resolved by the ICC arbitrator familiar with ICC rules. Deference to the arbitrator's decision on this basis does not violate the agreement of the parties but, instead, brings the arbitration into conformance with ICC rules, as the parties agreed, and gives maximum effect to all provisions of the parties' arbitration agreement.

In sum, *China National*,[1] which was decided prior to *Polimaster* and which was binding precedent for the

[1] *China National* is of course a federal court of appeals case in which the interpretation and enforcement of a forum selection clause in an international arbitration agreement was at issue. Contrary to Profimex's representation, Pet. 10, *Polimaster* was not the only such case decided prior to the instant case. *See* S. Ct. R.

Polimaster court, makes clear that the real import of *Polimaster* is that where an arbitration agreement does not select procedural rules to govern an arbitration, the arbitrator may not reach outside of the parties' agreement to select rules to assist in the interpretation of that agreement. If the *Polimaster* parties had provided procedural rules to govern their arbitration and provide guidance on the propriety of counterclaims, the *Polimaster* majority would have been required to give deference to the arbitrator's use of those rules to interpret the agreement. *See Polimaster*, 623 F.3d at 843. Indeed, if the case at bar had been decided by the Ninth Circuit in light of both *China National* and *Polimaster*, the Ninth Circuit likely would have reached the same result as the Eleventh Circuit did. There is no clear difference in the circuits sufficient to constitute a split of authority to justify a writ of certiorari.

3. Profimex's position is that this Court should grant certiorari review to decide that arbitrators' interpretation of venue selection clauses in international arbitration agreements is substantive and subject to *de novo* judicial review. Pet. i. Yet, the Ninth Circuit in *Polimaster* did not expressly hold that arbitral venue is presumptively for a court to decide in "international" cases, and no other court of appeals has adopted this standard, either. As the Eleventh Circuit noted, the

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14(4) ("The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.").

Polimaster majority "failed to engage in any analysis as to whether arbitral venue is a question of arbitrability." *Bamberger*, 862 F.3d at 1289. The Ninth Circuit in *Polimaster* held that an arbitrator incorrectly applied an arbitral-venue provision and in so doing substituted its own judgment for that of the arbitrator, without first asking the question of whether it was entitled to do so. 623 F.3d at 837. The *Polimaster* court skipped entirely the threshold question of the proper level of review to be applied to an arbitrator's interpretation of a venue provision, likely because of the "unusual" arbitration clause which the court acknowledged. Indeed, this lack of analysis means that the Ninth Circuit has not squarely held that arbitration venue is an issue for courts and not for arbitrators.

Five circuits agree that disputes over the interpretation of forum selection clauses in arbitration agreements raise presumptively arbitrable procedural questions. *See Bamberger*, 862 F.3d at 1288 (citing cases). Because the *Polimaster* majority did not address the cases decided before it and did not address the issue of level of deference in any way, this further evidences that *Polimaster* does not support Profimex's proposed rule.

4. Even if the Eleventh Circuit's decision in this case can be said to have created a circuit split with the Ninth Circuit due to *Polimaster*, this is a split of the shallowest dimension possible, with only two cases in two circuits for the Court to consider. The decision in *Polimaster* is now almost eight years old, but no other circuit court of appeals has ever even so much as cited

it prior to the Eleventh Circuit in this case. No other court of appeals has taken the approach of the *Polimaster* court, and as discussed above, *Polimaster* is the outlier from the five circuits that have now held that disputes over the interpretation of forum selection clauses in arbitration agreements raise presumptively arbitrable procedural questions. *See Bamberger*, 862 F.3d at 1288. Therefore, to the extent that there is a conflict in the decisions of the Ninth and Eleventh Circuits, this conflict is certainly not ripe for review by this Court without further consideration and development of the issue by the courts below.

II. Determination of Arbitral Venue is Procedural and not Substantive.

1. Having failed to identify any real split in authority in the circuits, Profimex then argues that the determination of arbitral venue in international disputes is so important that it should be categorized as a question of substantive arbitrability to be preserved for independent determination by courts. Pet. 12-15.

Profimex does not argue that the Eleventh Circuit misapplied this Court's guidelines for determining whether the issue of arbitral venue is procedural or substantive. Pet. 14-15; *see Bamberger*, 862 F.3d at 1288. As this Court has held, whether contracting parties are "bound by a given arbitration clause raises a question of arbitrability for a court to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S.

938, 943-46 (1995)). However, where an arbitration provision is valid, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator to decide." *Id.* (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)). The Court further explained:

> Linguistically speaking, one might call any potentially dispositive gateway question a "question of arbitrability," for its answer will determine whether the underlying controversy will proceed to arbitration on the merits. The Court's case law, however, makes clear that, for purposes of applying the interpretive rule, the phrase "question of arbitrability" has a far more limited scope. The Court has found the phrase applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided a gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and consequently, where reference of the gateway dispute to the court avoids *the risk of forcing parties to arbitrate a matter that they may well have not agreed to arbitrate*.

Id. at 83-84 (emphasis added and internal citation omitted).

The "relevant question here is *what kind of arbitration proceeding* the parties agreed to. That question does not concern a state statute or judicial procedures. It concerns contract interpretation and arbitration

procedures. Arbitrators are well situated to answer that question." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (plurality opinion) (citations omitted) (emphasis in original). Matters of procedural arbitrability include claims of "waiver, delay, or a like defense to arbitrability," and also include the satisfaction of "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014) (internal punctuation and citations omitted).

Here, Profimex conceded the arbitrability of OAD's defamation claim. *Bamberger*, 862 F.3d at 1288. Hence, there was no risk that Profimex was forced to arbitrate a claim it did not agree to arbitrate. *Howsam*, 537 U.S. at 83-84. Rather, the question was what kind of proceeding the parties had agreed to regarding the issue of the venue for OAD's defamation claim. *Green Tree Fin. Corp.*, 539 U.S. at 452-53. This question of contract interpretation and procedures is exactly the type of question arbitrators are well situated to answer. *Id.* This is especially true where the parties agreed that ICC rules would govern their agreement. This Court has held that arbitrators, "comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it. In the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that understanding." *Howsam*, 537 U.S. at 85 (citation omitted). All these points show that the Eleventh Circuit

properly joined four other circuits to hold that forum selection clauses in arbitration agreements raise presumptively procedural questions. *See Bamberger*, 862 F.3d at 1288.

According to Profimex, however, the analysis of substantive versus procedural arbitrability should be different in regard to international arbitration agreements because this Court "has repeatedly stressed the importance of enforcing international forum selection clauses." Pet. 12-13. The cases Profimex relies upon, however, do not modify or amend in any way the Court's guidelines for the analysis of the substantive versus procedural issues set forth above.

Profimex first relies upon *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974), in which this Court stated that a "contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." The Eleventh Circuit noted that *Scherk* "did not concern the choice between different arbitral forums; rather, *Scherk* concerned whether a particular dispute should be resolved in arbitration or in court." *Bamberger*, 862 F.3d at 1289 (citing *Scherk*, 417 U.S. at 509-10). *Scherk* held that an "agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk*, 417 U.S. at 519. This Court held the arbitration agreement in question to be

enforceable, but that holding in no way addressed the issue of substantive versus procedural arbitrability and does not speak at all to a choice between two different potential arbitration sites. *See id.* at 519-20.

The same is also true of *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), in which this Court enforced an agreement between an American company and a German company to litigate their disputes before the London Court of Justice. As Profimex points out, the Court, in so holding, noted that the elimination of uncertainty regarding the jurisdiction in which a lawsuit might be brought regarding the parties' transaction "by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id.* at 13-14. The Court in this case spoke not at all, however, to arbitration or how arbitral venue should be determined. In short, Profimex has pointed to no authority from this Court that would dictate that the Court's analysis of the difference between questions of substantive arbitrability and procedural arbitrability should be heightened simply because one of the parties to the arbitration agreement in question is from a foreign country. *See BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206-07 (2014) (applying the Court's generally-applicable cases to determine that an arbitration provision in a contract between a British company and Argentina is of the procedural variety).

2. Profimex further argues that venue is simply more important in international arbitration agreements, as the place of arbitration has substantive

consequences not associated with domestic arbitration. Pet. 15-16. Even assuming Profimex to be correct regarding the importance of venue in international agreements, Profimex disregards the fact that any forum or venue selection clause in any arbitration agreement is a vital part of the agreement that must be enforced. *See Luckie v. Smith Barney, Harris Upham & Co.*, 999 F.2d 509, 513 (11th Cir. 1993) ("A forum selection clause in an arbitration agreement, just like any other contract provision, is entitled to complete enforcement absent evidence that the contract was procured through fraud or excessive economic power."). Parties to all arbitration agreements doubtless consider their forum selection clauses to be strategic, substantive, outcome determinative bargained for agreements, and Profimex offers no binding or persuasive authority for its argument that venue provisions in international arbitration agreements should be treated as questions of substantive arbitrability when all other venue provisions are treated as procedural issues.

Moreover, Profimex ignores the fact that the way domestic venue provisions are interpreted can have an effect on what courts review arbitration awards and the substantive law that applies to the review. *See* Pet. 5 (stating that in the review of domestic arbitration awards, "all states have essentially identical legal systems subject to review by this Court"). For example, if a domestic venue provision is interpreted to require arbitration to take place in Charlotte, North Carolina, then the Fourth Circuit's rule that manifest disregard of the law continues to exist either "as an independent

ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth in 9 U.S.C. § 10" would apply. *Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012). But, if the same venue provision is interpreted to require the arbitration to take place in Atlanta, Georgia, then manifest disregard of the law would not be an available basis for vacating any award. *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010). In either the domestic or international context, the interpretation of a venue provision has an impact on the scope of review of any arbitration award. Profimex has not pointed to sufficient reason to treat venue provisions in the international context as questions of *substantive* arbitrability for the court when domestic venue provisions are treated as procedural matters that are resolved by the arbitrator.

The real basis of Profimex's argument is that venue in international arbitrations is simply more important than in domestic arbitrations. Profimex does not argue that the courts that have determined that venue is a procedural issue to be decided by the arbitrator in the domestic context are wrong. Rather, Profimex argues for a two-tier system, under which venue is a procedural issue in domestic cases, with limited review of arbitrators' decisions, but an issue of substantive arbitrability in the international context, garnering *de novo* review.

The problem for Profimex is that the subjective "importance" of venue cannot support treating it so differently for review purposes in the international and

domestic contexts. Lots of issues that are treated as issues of procedural arbitrability are doubtless very important in either domestic or international arbitration. Time limits, notice, laches, or estoppel are all issues of procedural arbitrability under this Court's cases, and any one of these issues could lead to a claim being dismissed. These issues are all very important to the parties against whom they might be asserted, but this importance does not qualify any one of these issues to be treated as questions of substantive arbitrability deserving of heightened judicial review.

Profimex's argument that a minimal level of judicial review of arbitrators' venue decisions will undermine confidence of parties to international arbitration agreements, Pet. 20-21, is also unavailing. Again, the same could also be said regarding the confidence domestic parties have in resolving disputes through arbitration on any number of procedural arbitrability issues. However, this Court has held repeatedly that limited judicial review maintains "arbitration's essential virtue of resolving disputes straightaway." *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (quoting *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008)). "If parties could take 'full-bore legal and evidentiary appeals,' arbitration would become 'merely a prelude to a more cumbersome and time-consuming judicial review process.'" *Id.* (quoting *Hall Street Assocs., L.L.C.*, 552 U.S. at 588). Profimex would have this Court create a regime under which international venue determinations receive this more cumbersome and time-consuming judicial review

based on the alleged importance of the venue decision in the international context. But, the norm in arbitration is only limited judicial review, and importance cannot be the rationale for some issues in some contexts to receive stricter scrutiny from courts. All questions of procedural arbitrability can have very real, profound impacts on the arbitrations in which they are resolved, but this impact does not entitle every losing party in arbitration to a full-bore legal and evidentiary appeal of the outcome.[2] *See id.*

3. Profimex asserts that it "could not have imagined" that it would possibly be subject to counterclaims if it initiated an arbitration in Atlanta on its affirmative claims. Pet. 18. This argument is belied by the facts, the text of the parties' arbitration agreement, and the law.

As set out in detail in the facts above, the parties were involved in a dispute that encompassed both Profimex's claim for some fees due to it and OAD's claim for defamation arising out of the statements being made by Profimex. By the time of the sale of the project, Profimex had already hired New York litigation counsel to threaten OAD, Pet. App. 57a-58a, and

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[2] The argument also could be made that a heightened standard of judicial review could make foreign parties *less* likely to want to enter arbitration agreements with American companies. If a foreign company knows that the issue of arbitral venue can be readily re-litigated in federal courts, it could make the rational decision not to enter into an arbitration agreement that is more likely to entangle it in a foreign court in the future, even if it believes it would likely prevail.

commissioned the Prager Metis forensic examinations of two other projects, which it was claiming to investors showed OAD had engaged in major improprieties. Pet. App. 101a-103a. After the project sale closed, OAD proposed that the parties execute a release to put these issues behind them, but Profimex refused. OAD further demanded that Profimex cease defaming it, but Profimex refused that as well. After Profimex filed its demand for arbitration in Atlanta, OAD filed its counterclaim to resolve all of the issues between the parties that comprised the then-existing overall dispute between them.

As the Arbitrator recognized, this was within the language of the parties' arbitration clause. The arbitration clause does not use the terms claim or cause of action. The parties easily could have agreed to language stating that any separate claim or cause of action had to be brought against the defendant of that claim or cause of action on its home turf. The agreement does not say this, however, and its use of the term "dispute" is clearly meant to be broader. Once a "dispute" was submitted, the arbitration agreement allows for that entire dispute, including claims, counterclaims, and defenses, to be resolved in the city in which the dispute was submitted. Doc. 1-7 – Pgs 9-10.

Profimex agreed to arbitrate its disputes with OAD under the ICC arbitration rules, and those rules undisputedly both allow for counterclaims and require any counterclaim to be asserted along with the arbitration respondent's answer. *See* ICC Article 5(5). Moreover, Profimex knew that there is nothing in the

venue provision of the arbitration agreement to alter or amend the ICC rule on counterclaims to which Profimex had expressly agreed. To now argue that Profimex "could not have imagined" that it could subject itself to a counterclaim in Atlanta by submitting its dispute in Atlanta against this factual and legal background is simply specious.

Indeed, this is likely the reason that Profimex seeks to mischaracterize the terms of the venue provision throughout its Petition. First, Profimex states:

> At issue in this case is a frequently used provision in international arbitration agreements which requires a *party that seeks damages to do so in the nation of the party from which damages are sought*, while assuring a party from which damages are sought that the proceeding will occur in its own country.

Pet. 9-10 (emphasis added). This is explicitly not the venue provision to which these parties agreed. For example, under its "summary" description, Profimex conceivably could have sought injunctive relief against OAD by filing a claim in Tel Aviv if it did not also seek money damages.[3] This action, though, would have been prohibited by the actual venue clause, which would have required Profimex to submit this dispute in Atlanta. Pet. App. 48a.

Second, Profimex states that the parties sought to avoid the risks of litigating in a foreign jurisdiction by agreeing "to require *claims* against companies of one

[3] The ICC rules permit claims for injunctive relief to be filed. *See* ICC Article 28(1).

nation to be heard by arbitrators in that very nation." Pet. 21 (emphasis added). Again, this is flatly not the language of the venue provision to which the parties agreed. As noted above, the parties easily could have agreed to this type of narrower provision, but they did not. They agreed that a "dispute," which is broader than a claim, must be brought by one party in the home country of the opposite party. Once Profimex submitted a dispute in Atlanta, the arbitration agreement allowed for the whole dispute to be decided in Atlanta. The implication of the parties agreeing where to file "claims" would have been far different.

4. Profimex makes the odd claim that the arbitration provision at issue here has a "qualifying clause" which is the "gateway" for arbitration. Pet. 18. According to Profimex, OAD had to submit its dispute in Tel Aviv to "qualify for arbitration." *Id.* Profimex seems to argue implicitly that without the prerequisite of OAD's claim being submitted in the proper venue, OAD's claim is not arbitrable at all. In doing so, Profimex conveniently forgets that it has conceded that the parties' arbitration clause applies to OAD's defamation claim. *Bamberger*, 862 F.3d at 1288. Profimex's argument before the Court of Appeals and before this Court is that the arbitration of the defamation claim took place in the wrong arbitral venue. *Id.*; Pet. 11-12. Profimex cannot now be heard to argue that improper venue of the

defamation claim would bar arbitration of the claim entirely.[4]

III. Parties Are Free to Contract Around Any Limitations on Review of Arbitral Decisions.

Profimex argues that the Eleventh Circuit's decision in this case will leave "countless" foreign business partners in limbo about the resolution of future disputes. Pet. 19. Profimex asserts that "[h]ome and home forum selection provisions are ubiquitous in international arbitration agreements" that will be susceptible to the manufacturing of venue outlined by this case. *Id.*

First, for all of Profimex's hand-wringing regarding the fate of the "ubiquitous" home and home forum selection clauses allegedly in use, there have been exactly three court of appeals cases dealing with the interpretation of venue provisions in international arbitration agreements. Pet. 10. The sheer lack of cases that have developed throughout the country undermines Profimex's position that there is a pressing need for this Court to address the issue of review of venue determinations in international arbitration at this time. If the consequences of lack of guidance from this Court on the issue were as dire as portrayed by Profimex, certainly there would be many more disputes in this

[4] Additionally, there appears to be no case, either from this Court or from any court of appeals, addressing a "qualifying clause" for purposes of arbitration.

arena, with varying results. Such is simply not the case.

Further, Profimex laments that the "uncertainties created by this case will undermine the willingness of future international business partners to resolve their own dispute through arbitration." Pet. 19. The answer to this concern is simple: parties to international arbitration agreements may contract around any uncertainty they perceive to exist in the law regarding arbitration venue. As the Eleventh Circuit suggested, if "parties do not want an arbitrator to resolve arbitral-venue disputes, they 'may agree to limit the issues they choose to arbitrate.'" *Bamberger*, 862 F.3d at 1289 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010)). Nervous future "international business partners" would be perfectly free to bargain and contract for a prohibition on an arbitrator making a venue decision and a reservation of that decision to a court. Given this freedom of contract, there is no need for this Court to upset the well-functioning structure it has set up for the determination of whether issues are procedural or substantive in arbitration or for the creation of a two-tiered review hierarchy featuring the heightened review standard for international arbitration agreement venue clauses proposed by Profimex.

Finally, Profimex engages in extensive speculation about how the resolution of OAD's defamation claim may have been different had it been heard in Tel Aviv. Pet. 22-24. Profimex would have the Court imagine a world in which an Israeli arbitrator heard testimony

about Profimex's defamatory statements in Hebrew and in which this hypothetical Israeli arbitrator could compel testimony from the individuals who heard the defamatory statements. *Id.* at 22-23. Profimex also asserts that the defamation award rendered by the Arbitrator "would have been unthinkable in Israel" and was higher than the highest libel judgment in Israel's history. *Id.* at 24.

In all of Profimex's invitation to speculation and conjecture, Profimex neglects to mention that, even if OAD's defamation claim had been arbitrated in Israel, it still would have been governed by New York substantive law and the procedural rules of the ICC. Pet. App. 48a-49a. Profimex's assumptions and suppositions about how things may have played out in Israel, particularly as to past libel judgments made under Israeli substantive law, are completely irrelevant. The fact is that under the arbitration clause agreed to by the parties, much about the arbitration of OAD's defamation claim would have played out in exactly the same way in Tel Aviv as it did in Atlanta. This Court should not accept Profimex's invitation to go down the rabbit hole into a hypothetical world that is wholly unrelated to the issue of the appropriate level of judicial review that Profimex supposedly filed its Petition to ask the Court to address.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON H. BLOOM
Counsel of Record
TROY R. COVINGTON
BLOOM SUGARMAN, LLP
977 Ponce de Leon Avenue, NE
Atlanta, Georgia 30306
(404) 577-7710
sbloom@bloomsugarman.com
tcovington@bloomsugarman.com

Counsel for Respondent
OA Development, Inc.