NO. ______

In the
Supreme Court of the United States

NEUSOFT MEDICAL SYSTEM COMPANY, LTD.;
NEUSOFT MEDICAL SYSTEMS, U.S.A., INC.;
TOM BUSE; AND KEITH MILDENBERGER,

Petitioners,

v.

NEUISYS, LLC,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of North Carolina

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has repeatedly emphasized that all doubts about the scope of arbitrable issues must be "resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). That presumption effectuates the "liberal federal policy favoring arbitration" as expressed in the Federal Arbitration Act ("FAA") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011). And those concerns are at their zenith in the international context, where the presumption in favor of arbitration "applies with special force." *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985).

This Court has further held that state courts must adhere to federal arbitration law and may not substitute state-law rules that thwart the federal statutory scheme. *See, e.g.*, *Nitro-Lift Techs. v. Howard*, 133 S. Ct. 500, 503 (2012) (per curiam). Yet, in the decisions below, the North Carolina state courts did just that—they wholly ignored the FAA and the Convention, and instead relied on state-law procedural rules to deny Petitioners' motions to enforce an international arbitration agreement or stay proceedings pending arbitration in China.

The question presented is whether the North Carolina state courts improperly disregarded the FAA and Convention by refusing to stay state court proceedings pending international arbitration in China of claims arising from a contract containing a valid arbitration clause.

PARTIES TO THE PROCEEDING

Petitioner Neusoft Medical System Company, Ltd. (“Neusoft China”) was third-party defendant before the North Carolina trial court, and appellant before the North Carolina Court of Appeals and North Carolina Supreme Court. Petitioner Neusoft Medical Systems, U.S.A., Inc. (“Neusoft USA”) was plaintiff and counterclaim defendant before the North Carolina trial court, and appellant before the North Carolina Court of Appeals and North Carolina Supreme Court. Petitioners Tom Buse and Keith Mildenberger were counterclaim defendants before the North Carolina trial court, and appellants before the North Carolina Court of Appeals and North Carolina Supreme Court.

Respondent NeuIsys, LLC was defendant, counterclaim plaintiff, and third-party plaintiff before the North Carolina trial court, and appellee before the North Carolina Court of Appeals and the North Carolina Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Neusoft Medical Systems, U.S.A., Inc. is a wholly owned subsidiary of Neusoft Medical System Co., Ltd. Neusoft Medical System Co., Ltd. is a subsidiary of Neusoft Corporation, a publicly held corporation incorporated under the laws of the People's Republic of China. No other publicly traded corporation owns 10% or more of the stock of Neusoft Medical System Co., Ltd.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES viii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 3

JURISDICTION 4

STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 4

A. The International Distribution Agreement Between Neusoft China and NeuIsys 4

B. Neusoft China's Initial Motion To Compel Arbitration 7

C. Neusoft China's Renewed Motion To Compel Arbitration Based on New Facts Revealed in Discovery 8

D. Proceedings Before the North Carolina Court of Appeals and North Carolina Supreme Court 12

REASONS FOR GRANTING THE PETITION 14

I. The North Carolina State Courts' Complete Disregard Of The FAA, The Convention, And This Court's Arbitration Precedents Warrants Summary Reversal. 19

A. The North Carolina Courts Ignored Bedrock Principles of Federal Arbitration Law and International Law by Invoking a State-Law Procedural Rule To Override a Valid Arbitration Clause. 20

B. The North Carolina Courts' Failure To Give Due Regard to the Strong Federal Policy in Favor of Arbitration Warrants Summary Reversal. 26

C. In the Alternative, the Court Should Grant Certiorari To Address the Legal Standard That Governs Renewed Motions To Compel Arbitration. 29

II. This Court's Intervention Is Needed To Prevent Evasion Of Binding Arbitration Agreements And Vindicate Several Important Federal Interests. 30

III. This Court Should Reverse The North Carolina Courts' Denial Of Motions For A Stay Pending Arbitration Filed By Neusoft USA, Buse, And Mildenberger. 33

CONCLUSION 35

APPENDIX

Appendix A

Opinion of the Court of Appeals of North Carolina, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. COA14-779 (July 7, 2015) App-1

Appendix B

Order of the Supreme Court of North Carolina Regarding NeuIsys's Motion to Dismiss Appeal and Neusoft China's Petition for Discretionary Review, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. 288P15 (Nov. 5, 2015) App-19

Appendix C

Order of the Supreme Court of North Carolina Regarding Neusoft USA's Petition for Discretionary Review, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. 288P15 (Nov. 5, 2015) App-22

Appendix D

Order of the Supreme Court of North Carolina Regarding Buse and Mildenberger's Petitions for Discretionary Review, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. 288P15 (Nov. 5, 2015) App-24

Appendix E

Order of the North Carolina General Court of Justice Superior Court Division Denying Neusoft China's Renewed Motion to Dismiss or Stay Claims and Compel Arbitration, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. 11-CVS-11405 (Jan. 10, 2014)..................................... App-26

Appendix F

Order of the North Carolina General Court of Justice Superior Court Division Denying Neusoft USA's Motion to Stay Counterclaims, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. 11-CVS-11405 (Jan. 10, 2014) App-32

Appendix G

Order of the North Carolina General Court of Justice Superior Court Division Denying Buse and Mildenberger's Motions to Stay Counterclaims, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. 11-CVS-11405 (Jan. 10, 2014)...... App-34

Appendix H

9 U.S.C. §2 .... App-36

Appendix I

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 .... App-37

TABLE OF AUTHORITIES

Cases

Allied-Bruce Terminix v. Dobson,
513 U.S. 265 (1995)... 21

AT&T Mobility v. Concepcion,
563 U.S. 333 (2011)....................................... 2, 3, 15

AT&T Techs. v. Commc'ns Workers,
475 U.S. 643 (1986)... 20

Dillon v. BMO Harris Bank,
787 F.3d 707 (4th Cir. 2015)........................... 17, 29

Elliot v. KB Homes,
752 S.E.2d 694 (N.C. Ct. App. 2013)..................... 28

James v. Boise,
136 S. Ct. 685 (2016).. 27

KPMG LLC v. Cocchi,
132 S. Ct. 2 (2011)... *passim*

Marmet Health Care Ctr. v. Brown,
132 S. Ct. 1201 (2012)..................................... 16, 26

Martin v. Hunter's Lessee,
14 U.S. (1 Wheat.) 304 (1816) 27

Mitsubishi Motors
v. Soler Chrysler-Plymouth,
473 U.S. 614 (1985)....................................... *passim*

Moses H. Cone Mem'l Hosp.
v. Mercury Constr. Corp.,
460 U.S. 1, 24-25 (1983) .... *passim*

Nitro-Lift Techs. v. Howard,
133 S. Ct. 50 (2012)....................................... *passim*

Scherk v. Alberto-Culver Co.,
417 U.S. 50 (1974)... *passim*

Southland Corp. v. Keating,
465 U.S. 1 (1984) 21, 30

United Steelworkers v. Warrior & Gulf Navigation,
363 U.S. 574 (1960) 20

Statutes & Rule

9 U.S.C. §2 .... 2, 22

9 U.S.C. §§201-208 24

S. Ct. R. 10(b) 17, 30

Other Authority

Convention on the Recognition and Enforcement of Foreign Arbitral Awards June 10, 1958, 21 U.S.T. 2517,
330 U.N.T.S. 3 2

PETITION FOR WRIT OF CERTIORARI

In 2003, Petitioner Neusoft Medical System Company, Ltd. ("Neusoft China") and Respondent NeuIsys, LLC, entered into an international distribution agreement that gave NeuIsys exclusive rights to distribute medical imaging devices manufactured by Neusoft China in portions of the United States. The 2003 Agreement was extended and amended in 2010. Both the 2003 Agreement and the 2010 Amendment (collectively, the "International Distribution Agreement") were governed by an arbitration clause providing that any dispute "aris[ing] in connection with the interpretation or implementation" of the Agreement would be referred, at either party's request, to the China International Economic and Trade Arbitration Commission ("CIETAC") for binding international arbitration under Chinese law. R.157, 159.

After NeuIsys filed a third-party complaint against Neusoft China in North Carolina state court, Neusoft China successfully moved to stay four of the six claims pending their resolution in international arbitration. As to the two remaining claims, it became clear during subsequent discovery that those claims were also subject to arbitration because they attacked the validity of the 2010 Amendment to the International Distribution Agreement and therefore arose in connection with the "interpretation or implementation" of the Agreement. Neusoft China thus renewed its motion to compel arbitration on those two claims or, in the alternative, stay litigation of those claims pending arbitration. The trial court denied that motion, the North Carolina Court of

Appeals affirmed, and the North Carolina Supreme Court denied review.

Even though the two claims at issue squarely implicate an international arbitration agreement, the North Carolina Court of Appeals effectively ignored the Federal Arbitration Act ("FAA"), 9 U.S.C. §2, and did not even *mention* the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3. The North Carolina courts repeated those same errors in denying motions by Petitioners Neusoft Medical Systems, U.S.A., Inc. ("Neusoft USA"), Tom Buse, and Keith Mildenberger to stay the claims against them pending arbitration.

The decision below blatantly disregards the FAA and Convention, and should be summarily reversed. Despite this Court's oft-repeated admonition that all doubts about arbitrable issues must be "resolved in favor of arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), the North Carolina state courts effectively inverted that rule. Rather than applying a presumption in *favor* of arbitration, the state courts denied Neusoft China's renewed motion for arbitration under North Carolina's "substantial change in circumstances" test that effectively constitutes a presumption *against* arbitration. In doing so, the North Carolina courts gave no consideration whatsoever to the "liberal federal policy favoring arbitration" expressed in the FAA and Convention. *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011). They also disregarded this Court's precedents holding that state courts must adhere to substantive federal arbitration law and may

not substitute state-law procedural rules that thwart the federal statutory scheme. *See, e.g.*, *Nitro-Lift Techs. v. Howard*, 133 S. Ct. 500, 503 (2012) (per curiam).

The North Carolina courts' disregard of federal law would be troubling in any context, but is particularly egregious in the international context, where the presumption in favor of arbitration "applies with special force." *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985). As this Court has long emphasized, a refusal by state courts to properly enforce cross-border agreements containing arbitration clauses "would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974).

* * *

The North Carolina state courts' decisions in the proceedings below evince exactly the type of "judicial hostility towards arbitration" that this Court has stepped in to correct on numerous occasions. *See*, *e.g.*, *Nitro-Lift*, 133 S. Ct. at 503; *Concepcion*, 563 U.S. at 342. Summary reversal is warranted in light of the North Carolina courts' total disregard of the FAA, the Convention, and this Court's precedents. Alternatively, this Court should grant certiorari to firmly remind state courts, yet again, that they are obligated to respect and enforce the strong federal policy in favor of arbitration.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at 774 S.E.2d 851 and reproduced

at Pet.App.1-18. The relevant orders of the North Carolina General Court of Justice, Superior Court Division, are unpublished and reproduced at Pet.App.26-35.

JURISDICTION

The North Carolina Court of Appeals issued its decision on July 7, 2015. On November 5, 2015, the North Carolina Supreme Court denied a timely notice of appeal and petitions for discretionary review filed by Petitioners. On January 15, 2016, the Chief Justice extended the deadline for filing a petition for writ of certiorari to March 4, 2016. *See* No. 15A735. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

The relevant provision of the Federal Arbitration Act, 9 U.S.C. §2, is reproduced at Pet.App.36. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards is reproduced at Pet.App.37-46.

STATEMENT OF THE CASE

A. The International Distribution Agreement Between Neusoft China and NeuIsys

Neusoft China is a leading producer of medical imaging devices. In 2003, Neusoft China and NeuIsys entered into an International Distribution Agreement, under which NeuIsys would be the exclusive distributor of Neusoft China's medical imaging equipment in several U.S. markets.

The International Distribution Agreement contained the following arbitration clause:

> In the event a dispute arises in connection with the interpretation or implementation of this Agreement [that cannot be resolved through friendly consultations within 30 days] ... then either Party may refer the dispute to the China International Economic and Trade Arbitration Commission ("CIETAC") in Beijing in accordance with its arbitration rules (the "Rules") as at present in force and as may be amended by the rest of this clause. Any such arbitration shall be administered by CIETAC in accordance with the Rules in force at the date of this contract unless otherwise agreed to by the Parties.

R.159.[1] Unless expressly altered, the arbitration clause would also apply to any amendment to the Agreement. *See id.* (requiring all supplements, modifications, and amendments to the agreement to be "executed in writing by a duly authorized representative of each Party"). The Agreement further provided that all disputes would be governed by Chinese law. R.157.

In 2009, Neusoft China explored the possibility of acquiring NeuIsys. During those discussions, the parties entered into a non-disclosure agreement ("2009 NDA"), under which NeuIsys agreed to disclose information about its business, and Neusoft China

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[1] "R." refers to the Record on Appeal before the North Carolina Court of Appeals. "R.Supp." refers to the Rule 9(d) supplement to the Record on Appeal.

agreed to use the information "solely for the purpose of evaluating, negotiating and implementing" the potential acquisition. R.66. NeuIsys has contended that the information it subsequently sent under the NDA was previously unknown to Neusoft China. The 2009 NDA did not contain an arbitration clause.

After acquisition discussions proved unsuccessful, Neusoft China and NeuIsys agreed in May 2010 to amend the International Distribution Agreement and extend its term. *See* R.451. The 2010 Amendment also terminated NeuIsys's exclusive distribution rights and restricted the products that NeuIsys could sell. *Id.* It is undisputed that the 2010 Amendment was governed by the arbitration clause in the International Distribution Agreement. *See id.*; R.159 (2003 Agreement's arbitration and amendment clauses).

After the 2010 Amendment was adopted, Neusoft China began distributing and servicing Neusoft equipment in the United States through its subsidiary Neusoft USA. During that period, Neusoft USA hired several employees who had previously worked for NeuIsys, including Petitioners Tom Buse and Keith Mildenberger. In September 2011, representatives of Neusoft USA, including Buse, met with NeuIsys representatives. During a break in the meeting, NeuIsys's CEO accessed the computers of Buse and another Neusoft USA employee without authorization and transferred certain information from those computers onto a thumb drive, purportedly to determine whether Neusoft USA was using any of NeuIsys's confidential information.

B. Neusoft China's Initial Motion To Compel Arbitration

In November 2011, Neusoft USA sued NeuIsys in North Carolina state court, alleging a number of state-law claims related to NeuIsys's unauthorized access of Neusoft USA employees' computers. In December 2011, NeuIsys answered and asserted counterclaims against Neusoft USA.[2] NeuIsys also filed a third-party complaint against Neusoft China, asserting six claims: (1) breach of express warranty; (2) breach of implied warranty of merchantability; (3) breach of the International Distribution Agreement; (4) breach of the 2009 NDA; (5) breach of a 2011 "Field Change Order" agreement; and (6) unfair and deceptive trade practices under North Carolina General Statute §75-1.1. R.59-65; *see also* R.233-39 (NeuIsys's 2013 amended third-party complaint).

In October 2012, after a hearing, the trial court held that the International Distribution Agreement "contains a valid and enforceable arbitration clause," and that any claims arising from the interpretation or implementation of that Agreement were subject to arbitration. R.171. The court held that NeuIsys's first, second, third, and fifth claims against Neusoft China arose under the International Distribution Agreement and were thus subject to arbitration. *Id.* But the court further held that the other two claims—for breach of the 2009 NDA and for unfair trade practices—did not "arise in connection with the interpretation or implementation" of the International

[2] In March 2013, with leave of the trial court, NeuIsys also asserted claims against Buse and Mildenberger.

Distribution Agreement. *Id.* The trial court thus denied Neusoft China's motions to compel arbitration of and stay proceedings on those two claims. *See* R.170-72.

C. Neusoft China's Renewed Motion To Compel Arbitration Based on New Facts Revealed in Discovery

At the time of the trial court's initial ruling on arbitrability, no discovery had been conducted; the court's decision was based solely on the allegations in NeuIsys's third-party complaint against Neusoft China. As discovery proceeded, however, it became crystal clear that NeuIsys's two non-stayed claims had been artfully pleaded to appear as though they did not arise out of the International Distribution Agreement, even though they in fact did (and were thus subject to arbitration).

1. Based solely on the allegations in NeuIsys's third-party complaint against Neusoft China, it was difficult to ascertain the precise basis for the two non-stayed claims. In the first non-stayed claim, NeuIsys alleged that Neusoft China breached the 2009 NDA by improperly using information it had received from NeuIsys pursuant to the NDA. NeuIsys vaguely alleged that Neusoft China improperly used confidential information "for a purpose other than evaluating, negotiation [sic] or implementing the acquisition of Neuisys." R.236; R.61. The complaint further alleged that Neusoft China "disclos[ed] Neuisys' confidential information ... to Neusoft USA," and used that information "to formulate a plan to drive Neuisys out of business." R.236; R.61. At that high level of generality, NeuIsys's NDA claims

appeared to be separate and distinct from its claims relating to the International Distribution Agreement.

The second non-stayed claim alleged that Neusoft China engaged in unfair or deceptive trade practices. In support of that claim, NeuIsys merely repeated many of the same allegations it had made in support of its breach-of-NDA claim. For example, NeuIsys alleged that Neusoft China used purportedly confidential information in an attempt to drive NeuIsys out of business and engaged in "unfair and deceptive conduct by stealing ... Neuisys' employees and customers." R.238; R.63. Again, based solely on the allegations in NeuIsys's complaint, the unfair-trade-practices claim appeared to be separate and distinct from any claim arising out of the implementation of the International Distribution Agreement.

2. By the end of discovery, however, NeuIsys had revealed the *actual* basis for its claims, and it became apparent that the two non-stayed claims directly implicated the negotiation and validity of the 2010 Amendment to the International Distribution Agreement. The key moment was a December 15, 2013 deposition of NeuIsys's CEO, Kim Russell. Until that point, NeuIsys had merely parroted, without any supporting evidence, the vague allegations in its complaint. *See, e.g.*, R.Supp.178-79. Indeed, Russell initially testified at his December 2013 deposition that he could not "produce a fact" that would have shown a breach of the 2009 NDA. R.Supp.41.

Shortly thereafter, Russell changed his story. In particular, Russell testified for the first time that Neusoft China improperly used NeuIsys's confidential

information *during the negotiation of the 2010 Amendment to the International Distribution Agreement*. Russell testified that, at a meeting in April 2010, a Neusoft China representative "threatened" NeuIsys with the loss of its servicing business for Neusoft equipment if NeuIsys did not agree to amend the International Distribution Agreement on the terms Neusoft China had proposed. R.Supp.45-46.[3] That "threat" during the negotiations over the 2010 Amendment—which was purportedly based on information about NeuIsys's service business—served as the basis for NeuIsys's two non-stayed claims.

Discovery also revealed that NeuIsys's theory of damages on its unfair-trade-practices claim and breach-of-NDA claim was just an indirect challenge to the validity of the 2010 Amendment. NeuIsys claimed to suffer harm because it agreed to the 2010 Amendment and thus lost the exclusive territory it had been granted in the 2003 Agreement. Specifically, NeuIsys's lost-profits theory of damages is based on the forecasted sales of certain Neusoft device models in certain territories that were allegedly within NeuIsys's distribution footprint under the 2003 Agreement, *but were no longer part of NeuIsys's territory under the 2010 Amendment*. In other words, NeuIsys is seeking to use its unfair-trade-practices and breach-of-NDA claims as a roundabout effort to invalidate the 2010 Amendment and reinstate and

[3] What NeuIsys described as a "threat" was actually just a *question* from Neusoft China about how NeuIsys would be able to carry out its servicing business after the end of the distribution relationship.

collect damages based on the exclusive distribution provisions of the 2003 Agreement.

The two non-stayed claims thus arose out of the interpretation or implementation of the International Distribution Agreement and were accordingly covered by the Agreement's arbitration clause. The negotiation of the 2010 Amendment unquestionably arose "in connection with the ... implementation of" the International Distribution Agreement. R.159. Indeed, the whole purpose of that negotiation was to *amend or terminate* the International Distribution Agreement. *See* R.Supp.45-46; R.156-59 (Agreement's termination, arbitration, and amendment clauses). Moreover, the result of the negotiation was the 2010 Amendment, and there is no dispute that the 2010 Amendment is itself governed by the International Distribution Agreement's arbitration clause. Any challenges to the validity of the 2010 Amendment—or any attempt to collect damages for a breach of the original, exclusive 2003 Agreement—were accordingly subject to arbitration.

3. Upon discovering the actual basis for NeuIsys's two non-stayed claims in December 2013, Neusoft China immediately filed a renewed motion to compel arbitration or stay litigation pending arbitration. Neusoft USA, Buse, and Mildenberger also moved to stay NeuIsys's claims against them pending arbitration between NeuIsys and Neusoft China, arguing that there was substantial overlap between the claims pending against them and damages sought from them, on the one hand, and the issues that would be resolved in the international arbitration proceeding, on the other.

In January 2014, the trial court denied each of those motions. In doing so, the trial court did not cite either the FAA or the Convention, or the strong presumption in favor of arbitration. Instead, the trial court applied a North Carolina procedural rule that prevents one trial court judge from reconsidering an earlier decision by a different trial court judge unless the party seeking reconsideration makes an adequate showing of a "substantial change in circumstances." R.510. The court concluded that "there has been no substantial change in circumstances since the October 2012 Order was entered which would warrant a different or new disposition than that entered by [the earlier trial court judge]." *Id.* The court did not address the critical question under the FAA and Convention of whether the non-stayed claims actually arose out of the interpretation and implementation of the International Distribution Agreement. And, with respect to the motions filed by Neusoft USA, Buse, and Mildenberger, the trial court simply stated that those motions "should be denied." R.512, 514.

D. Proceedings Before the North Carolina Court of Appeals and North Carolina Supreme Court

Each of the Petitioners appealed, and the North Carolina Court of Appeals affirmed the denial of the motions to compel arbitration or stay the proceedings pending arbitration. Remarkably, the Court of Appeals made only two passing mentions of the FAA in footnotes, neither of which addressed the *substantive* pro-arbitration policies reflected in 9 U.S.C. §2 that apply in state court as well as federal court. *See* Pet.App.10 n.3; Pet.App.16 n.5. Indeed, the

Court of Appeals did not even purport to analyze whether the FAA or the Convention applied to Neusoft China's renewed motion to compel arbitration. The court concluded that the trial court did not err "in its omission of an express ruling on the applicability of the FAA" because there was purportedly no requirement to offer such an explanation "for an order granting or denying a motion for a stay." Pet.App.16 n.5.

The Convention received even shorter shrift. The Court of Appeals never even mentioned the Convention, much less the strong federal policies in favor of arbitration that apply with *greater* force in the international context. The court effectively treated this case as a garden-variety domestic dispute rather than one that implicates weighty issues of international comity and the United States' obligations under the Convention.

Rather than relying on substantive federal arbitration law as reflected in the FAA, the Convention, and this Court's decisions, the Court of Appeals relied exclusively on a state-law procedural rule governing motions for reconsideration. The court considered only "whether the trial court correctly concluded that Neusoft China had failed to show that a substantial change in circumstances had occurred." Pet.App.12. According to the Court of Appeals, one trial court judge can reconsider an interlocutory order entered by another trial court judge "'*only in the limited situation* where the party seeking to alter that prior ruling makes a sufficient showing of a *substantial change in circumstances during the*

interim which presently warrants a different or new disposition of the matter.'" Pet.App.11.

Applying that state-law procedural rule rather than the FAA or the Convention, the Court of Appeals concluded that there was no substantial change in circumstances from the denial of Neusoft China's original motion to compel arbitration and stay litigation. The court did not consider the merits of the renewed motion under the FAA and the Convention. The court also affirmed the denial of Neusoft USA, Buse, and Mildenberger's motions for a stay pending arbitration of NeuIsys's claims, again making no mention of the FAA or Convention.

Neusoft China filed a notice of appeal, and each of the Petitioners filed a petition for discretionary review in the North Carolina Supreme Court. The North Carolina Supreme Court denied review in full on November 5, 2015. Pet.App.19-25. This petition followed.

REASONS FOR GRANTING THE PETITION

The decision below blatantly disregards the FAA and Convention, as well as a long line of this Court's precedents. Even though the two claims at issue fall squarely within a valid and binding international arbitration agreement, the North Carolina Court of Appeals effectively ignored the FAA and did not even *mention* the Convention. This Court should summarily reverse the decision below or, in the alternative, grant certiorari.

I. Despite this Court's oft-repeated admonition that all doubts about arbitrability must be "resolved in favor of arbitration," *Moses H. Cone*, 460 U.S. at 24-25, the North Carolina state courts effectively

inverted that rule. Rather than applying a presumption in *favor* of arbitration, the North Carolina courts denied Neusoft China's renewed motion for arbitration under a "substantial change in circumstances" test that can be satisfied only in "limited situation[s]" and effectively constitutes a presumption *against* arbitration. Pet.App.11. In doing so, the state courts gave no consideration whatsoever to the "liberal federal policy favoring arbitration" that is reflected in the FAA. *Concepcion*, 563 U.S. at 339. They also disregarded this Court's precedents holding that state courts must adhere to substantive federal arbitration law and may not substitute state-law rules that thwart the federal statutory scheme. *See, e.g.*, *Nitro-Lift*, 133 S. Ct. at 503.

Under the proper standard, this should have been an easy case. There is no dispute that the International Distribution Agreement between Neusoft China and NeuIsys contains a valid arbitration clause providing that any dispute "aris[ing] in connection with the interpretation or implementation" of the agreement would be referred to CIETAC for binding international arbitration under Chinese law. R.157, 159. Despite the existence of that valid arbitration clause, the North Carolina state courts denied Neusoft China's renewed motion to refer to arbitration two claims that necessarily rested on the interpretation and implementation of the International Distribution Agreement. Had the North Carolina courts properly applied the strong presumption in favor of arbitration, there is no question that Petitioners' motions to compel

arbitration or stay the proceeding pending arbitration would have been granted.

The state courts' disregard of federal law would be troubling in any context, but is especially problematic in the international context, where the presumption in favor of arbitration "applies with special force." *Mitsubishi*, 473 U.S. at 631. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards—to which the United States and China are signatories—was designed "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts." *Scherk*, 417 U.S. at 520 n.15. In light of the Convention, as well as concerns of international comity, this Court has long recognized that international arbitration agreements "involve[] considerations and policies significantly different from" those in the purely domestic context, and that the refusal to enforce such agreements "would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.* at 515, 517.

The North Carolina state courts' blatant disregard of the FAA, the Convention, and this Court's precedents warrants summary reversal. This Court has on multiple occasions summarily reversed state court decisions that attempted to use a parochial procedural rule to shield a claim from arbitration without due consideration of the FAA. *See Nitro-Lift*, 133 S. Ct. at 503; *Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam). This Court has also summarily reversed state court decisions that

failed to properly analyze the applicability of the FAA to each and every claim in the complaint. *See KPMG LLC v. Cocchi*, 132 S. Ct. 23, 25-26 (2011) (per curiam). The North Carolina state courts' decisions in the proceedings below—which ignored the FAA and the Convention and instead relied on a "limited" state-law "substantial change in circumstances" test to deny Neusoft China's renewed motion to compel arbitration, Pet.App.11—demonstrate precisely the type of "judicial hostility towards arbitration" that this Court has stepped in to correct on numerous occasions.

In the alternative, if the Court does not summarily reverse the decision below, it should grant certiorari to address the legal standard that governs renewed motions to compel arbitration. The Fourth Circuit recently—and correctly—recognized that renewed motions to compel arbitration should be subject to the same pro-arbitration federal standards that would apply at the outset of the case. *See Dillon v. BMO Harris Bank*, 787 F.3d 707, 715-16 (4th Cir. 2015). By contrast, the North Carolina state courts incorrectly concluded that the pro-arbitration federal policies reflected in the FAA, the Convention, and this Court's precedents no longer apply with full force (or, indeed, any force) in the context of a renewed arbitration motion, and that Petitioners instead had to overcome a "substantial change in circumstances" test. Certiorari is warranted because the decision below conflicts with other appellate decisions and cannot be squared with this Court's precedents. *See* S. Ct. R. 10(b).

II. This case has significant implications for state enforcement of the strong federal policy in favor of

arbitration, particularly in the international context. This Court's intervention is needed to vindicate several bedrock principles of arbitration, to prevent state courts from using state-law procedural rules to override voluntarily negotiated international arbitration agreements, and to ensure that parties to binding arbitration agreements are not able to evade their obligations through artful pleading.

Respondent's thinly veiled attempt to circumvent a binding international arbitration agreement only underscores the need for this Court's review. Even though the state trial court held in 2012 that four of the six claims against Neusoft China were subject to arbitration, NeuIsys still has not initiated arbitration proceedings. But that omission is hardly surprising given that NeuIsys is attempting to litigate the arbitrable claims through the back door by raising the very same arguments (and seeking the very same relief) through its two non-stayed claims. NeuIsys's claims alleging unfair competition and breach of the 2009 NDA are nothing more than artfully pleaded claims that seek to invalidate the 2010 Amendment and reinstate the exclusive distribution provisions of the 2003 Agreement. Those are *precisely* the types of issues arising out of the "interpretation or implementation" of the Agreement that were supposed to be subject to arbitration in China. R.159. If allowed to stand, the decision below would permit parties who have signed arbitration agreements to evade their binding obligations by crafting roundabout ways of achieving the exact same ends in state court.

III. The same errors that led the North Carolina courts to deny Neusoft China's motion to compel

arbitration also infected those courts' denials of motions by Neusoft USA, Buse, and Mildenberger for a stay pending Neusoft China's arbitration. If the claims against Neusoft USA, Buse, and Mildenberger are allowed to proceed before the completion of Neusoft China's arbitration proceedings, then the validity of the 2010 Amendment—which must be resolved in a CIETAC arbitration proceeding under Chinese law—will be improperly determined by a North Carolina jury, thereby creating a substantial risk of inconsistent judgments and effectively gutting the trial court's initial referral of four claims to arbitration. If this Court summarily reverses the decision below or grants certiorari to address Neusoft China's renewed motion to compel arbitration, it should also vacate and remand the decisions below with respect to Neusoft USA, Buse, and Mildenberger.

I. The North Carolina State Courts' Complete Disregard Of The FAA, The Convention, And This Court's Arbitration Precedents Warrants Summary Reversal.

This case should begin—and end—with the North Carolina courts' utter disregard for the FAA, the Convention, and this Court's arbitration decisions. By ignoring the FAA and the Convention, and the substantive pro-arbitration policies reflected therein, the North Carolina state courts directly contravened a long line of this Court's decisions, thereby warranting summary reversal.

A. The North Carolina Courts Ignored Bedrock Principles of Federal Arbitration Law and International Law by Invoking a State-Law Procedural Rule To Override a Valid Arbitration Clause.

1. As this Court has repeatedly emphasized, the FAA "reflects an 'emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG*, 132 S. Ct. at 25. In enacting the FAA, Congress made clear that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Mitsubishi*, 473 U.S. at 626. The FAA thus "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved *in favor of arbitration*, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25 (emphasis added).

In other words, the parties to an arbitration agreement must submit disputes to arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 574, 582-83 (1960). When interpreting a broadly worded arbitration clause—like the one at issue here—"only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail [against an arbitration motion]." *AT&T Techs. v. Commc'ns Workers*, 475 U.S. 643, 650 (1986).

This Court has also made clear that the FAA "creates a body of federal substantive law" that is "*applicable in state and federal court*." *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (emphasis added); *accord Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 446 (2006) ("[T]his arbitration law applies in state as well as federal courts."); *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265, 272-73 (1995). Time and again, this Court has instructed state courts that they must adhere to federal arbitration law and may not substitute state-law rules that thwart the federal statutory scheme. *See, e.g.*, *Nitro-Lift*, 133 S. Ct. at 503. That "well settled" principle requires state courts to "abide by the FAA, which is 'the supreme Law of the Land,' and by the opinions of this Court interpreting that law." *Id.* "It is a matter of great importance ... that state ... courts adhere to a correct interpretation of the [FAA]" because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration." *Id.* at 501.

2. In the proceedings below, the North Carolina state courts neglected to even *consider* the relevant principles of federal arbitration law under the FAA and this Court's precedents. In particular, the courts acknowledged neither the strong federal policy in favor of arbitration nor the presumption that any doubts be "resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25. But the Supremacy Clause, the FAA, and this Court's precedents leave no doubt that the *substantive policies* reflected in the FAA apply with full force in state court, and that state

courts are not free to ignore those policies. *See Nitro-Lift*, 133 S. Ct. at 503.

Rather than applying the substantive rule of decision from the FAA and this Court's precedents, the North Carolina courts instead applied a state-law procedural rule that allowed the courts to avoid considering the merits of Neusoft China's renewed motion to compel arbitration. Whereas the FAA requires that all courts (state and federal) apply a presumption in *favor* of arbitration, the state courts effectively inverted that presumption and applied a presumption *against* arbitration in the context of a renewed motion. The state courts held that a renewed motion for arbitration may be granted "'only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a *substantial change in circumstances* during the interim which presently warrants a different or new disposition of the matter.'" Pet.App.11 (emphasis added).

That rule is flatly contrary to Section 2 of the FAA, which provides that written arbitration provisions in commercial contracts "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Section 2 is a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive *or procedural policies* to the contrary." *Moses H. Cone*, 460 U.S. at 24 (emphasis added).

In short, the North Carolina courts' decisions below suggest that renewed motions for arbitration are subject to a different and less demanding standard

than motions for arbitration at the outset of a case. But the strong federal policy in favor of arbitration must apply with full force at *all stages* of the case, regardless of whether the need for arbitration is apparent at the outset or (as here) is revealed only after discovery is conducted. Nothing in Section 2 of the FAA or this Court's precedents suggests that a renewed motion to arbitrate may be relegated to a lower standard under state law.

3. For all the reasons noted above, the decision below would be deeply flawed as a matter of law even if this case had arisen in the context of a garden-variety domestic arbitration agreement. But the bedrock federal policies in favor of arbitration are even *stronger* in the international context, where the presumption in favor of arbitration "applies with special force." *Mitsubishi*, 473 U.S. at 631.

That heightened presumption is animated by "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Id.* at 629. Those considerations "require that [courts] enforce the parties' [international arbitration] agreement, *even assuming that a contrary result would be forthcoming in a domestic context*." *Id.* (emphasis added). Indeed, given the many complex jurisdictional and conflict-of-laws issues that can arise in cross-border business dealings, it is "almost indispensable" for courts to enforce "contractual provision[s] specifying in advance the forum in which disputes shall be litigated and the law to be applied." *Scherk*, 417 U.S. at 516; *see id.* (enforcement of

international arbitration agreements is a "precondition to achievement of the orderliness and predictability essential to any international business transaction").

The heightened presumption in favor of international arbitration is mandated by the United States' treaty obligations. In 1970, the United States entered into the Convention on the Recognition and Enforcement of Foreign Arbitral Awards "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts." *Id.* at 520 n.15. "[T]he goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was … to unify the standards by which agreements to arbitrate are observed … in the signatory countries." *Id.* The Convention has been ratified and implemented by Congress, *see* 9 U.S.C. §§201-208, and applies to the states pursuant to the Supremacy Clause.

The policies reflected in the Convention apply with full force here. The International Distribution Agreement is a cross-border contract between a Chinese company and its U.S. distributor, and it very clearly specifies that disputes arising out of the Agreement would be subject to arbitration in China and governed by Chinese law. In other words, Neusoft China and NeuIsys "specif[ied] in advance the forum in which disputes shall be litigated and the law to be applied." *Scherk*, 417 U.S. at 516. In its renewed motion to compel arbitration, Neusoft China invoked both the Convention and this Court's cases holding that the presumption in favor of arbitration applies

with "special force" in the international context. R.444-45.

Yet the North Carolina courts completely disregarded the United States' binding treaty obligation to enforce international arbitration agreements. Neither the trial court nor the Court of Appeals even *cited* the Convention. Nor did they acknowledge the critical fact that this dispute occurred against the backdrop of an international arbitration agreement in which the presumption in favor of arbitration "applies with special force." *Mitsubishi*, 473 U.S. at 631. That glaring omission unquestionably undermines the Convention's goal of "unify[ing] the standards by which agreements to arbitrate are observed." *Scherk*, 417 U.S. at 520 n.15.

Moreover, any interests in having this dispute litigated in North Carolina state court are *de minimis*. The evidence revealed in discovery made crystal clear that NeuIsys's breach of contract and unfair competition claims ultimately sought to challenge the validity of the 2010 Amendment to the International Distribution Agreement. But that contract is equally clear that all disputes arising out of the interpretation or implementation of the Agreement would be subject to arbitration in China and governed by Chinese law. This was a major cross-border contract between two sophisticated parties, and each side knew exactly what would happen in the event of a dispute. Yet NeuIsys sought to shirk its arbitration obligations through artful pleading and hiding the ball about the true nature of its claims, only to litigate the arbitrable issues through the back door after it avoided arbitration of the two non-stayed claims. The North

Carolina courts allowed that maneuver to succeed only by ignoring the FAA, the Convention, and this Court's precedents.

B. The North Carolina Courts' Failure To Give Due Regard to the Strong Federal Policy in Favor of Arbitration Warrants Summary Reversal.

The North Carolina courts' decisions evince exactly the type of "judicial hostility towards arbitration" that this Court has summarily corrected several times. *See*, *e.g.*, *Nitro-Lift*, 133 S. Ct. at 503; *KPMG*, 132 S. Ct. at 25-26; *Marmet*, 132 S. Ct. at 1202. Most notably, this Court has summarily reversed several state court decisions that invoked a parochial state-law rule to shield a claim from arbitration without giving due consideration to the FAA. *See Nitro-Lift*, 133 S. Ct. at 503 (summarily reversing decision that relied on a state's "[own] jurisprudence" rather than the FAA). "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." *Marmet*, 132 S. Ct. at 1202. The North Carolina Court of Appeals repeated precisely the same error here, choosing to apply a "limited" state-law "substantial change in circumstances" test that effectively inverts the strong federal policy in favor of arbitration. Pet.App.11.

This Court has also summarily reversed state court decisions that failed to properly analyze the applicability of the FAA to each and every claim in the complaint. In *KPMG*, for example, this Court held that the state court improperly ignored the FAA's "emphatic federal policy in favor of arbitral dispute

resolution" by failing to analyze each claim separately to determine its arbitrability under the FAA. 132 S. Ct. at 25-26. This case presents an even more egregious disregard of the policies underlying the FAA. In *KPMG*, the court below at least analyzed *some* of the claims under the FAA's exacting standard, and yet even that partial analysis did not save that decision from summary reversal. Here, despite exhaustive briefing on the FAA and the Convention at each stage of the proceedings below, the North Carolina courts disregarded the FAA and the Convention altogether as to *both* claims that were at issue in Neusoft China's renewed motion to compel arbitration. The FAA and the Convention did not just receive partial consideration; they received no consideration whatsoever.

Despite decades of this Court's precedent to the contrary, the North Carolina courts' decisions below suggest that state-law procedural doctrines can override a voluntarily negotiated international arbitration agreement. But, "[a]s Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, 'the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.'" *James v. Boise*, 136 S. Ct. 685, 686 (2016) (per curiam) (quoting *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816)). Yet the North Carolina courts have done precisely that

by ignoring the FAA, the Convention, and this Court's precedents.[4]

* * *

In short, this case features several of the very same flaws as other state court decisions that this Court has summarily reversed, *plus* the fact that it arises in the international context, where the presumption in favor of arbitration is supposed to apply with "special force." As the Court recognized in cases such as *Mitsubishi* and *Scherk*, enforcement of international arbitration agreements is critical to a free flow of international commerce and foreign investment, and there is a paramount need for uniformity and predictability in the enforcement of such agreements. It has been nearly 30 years since this Court last reaffirmed those principles in the international context, and the Court's intervention in this case would serve as a powerful reminder to state courts about the unique importance of enforcing valid international arbitration agreements. This Court should summarily reverse the decision below and remand the case for consideration of Neusoft China's renewed motion to compel arbitration under the proper pro-arbitration federal standard.

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[4] This is not the first time that North Carolina courts have disregarded the FAA or attempted to use state-law doctrines to bring disputes that are plainly arbitrable into state court. The North Carolina courts have previously held that they would not apply certain portions of the FAA in state court proceedings. *See Elliot v. KB Homes*, 752 S.E.2d 694 (N.C. Ct. App. 2013). This Court's review is needed to prevent further circumvention of federal and international arbitration law.

C. In the Alternative, the Court Should Grant Certiorari To Address the Legal Standard That Governs Renewed Motions To Compel Arbitration.

If the Court does not summarily reverse the decision below, it should grant certiorari to address the legal standard that applies to *renewed* motions to compel arbitration or stay litigation pending arbitration. As noted above, *see supra* pp.21-23, the North Carolina state courts apparently believed that renewed motions to stay or to compel arbitration are subject to ordinary state-law procedural rules rather than the liberal pro-arbitration policies reflected in the FAA.

Other courts, however, have correctly recognized that renewed motions to compel arbitration must be analyzed under the same federal standards that would apply at the outset of the case. For example, in *Dillon*, the Fourth Circuit reversed a North Carolina district court for refusing to consider the merits of a renewed motion to compel arbitration, and for improperly adjudicating that motion under the more limited standards that apply to a motion for reconsideration. 787 F.3d at 715-16. The Fourth Circuit held in no uncertain terms that any doubts or ambiguities must be resolved in favor of arbitration *even in the context of a renewed motion*. *Id.* at 716. That holding is flatly contrary to the approach taken by the North Carolina courts in this case, which applied a "limited" state-law "substantial change in circumstances" test rather than the federal rule of decision from this Court's precedents that the Fourth Circuit correctly applied in *Dillon*. Pet.App.11-12. Certiorari is thus warranted

because the North Carolina state courts have "decided an important federal question in a way that conflicts with the decision of … a United States court of appeals." S. Ct. R. 10(b).

II. This Court's Intervention Is Needed To Prevent Evasion Of Binding Arbitration Agreements And Vindicate Several Important Federal Interests.

Time and again, this Court has emphasized the importance of enforcing arbitration agreements as written. The FAA was enacted to put an end to "the old common law hostility toward arbitration" and to correct "the failure of state arbitration statutes to mandate enforcement of arbitration agreements." *Southland*, 465 U.S. at 14. And, in the international context, the enforcement of forum-selection provisions is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk*, 417 U.S. at 516. By enacting the FAA and implementing the Convention, Congress has expressed its firm commitment to honoring contracting parties' chosen forums for dispute resolution and to holding those parties to their bargains.

Respondent's attempt to evade a binding international arbitration agreement—and the fact that the North Carolina state courts allowed this maneuver to succeed—underscores the importance of this Court's review. In its initial ruling in October 2012, the trial court held that four of NeuIsys's six claims against Neusoft China arose under the International Distribution Agreement and were thus

subject to arbitration. R.171. But, tellingly, after that ruling, NeuIsys did not initiate—and, to this day, has not initiated—arbitration proceedings in China on even one of those claims.

There is a clear reason for NeuIsys's failure to initiate arbitration: NeuIsys had no need to do so because the North Carolina courts have permitted NeuIsys to litigate the arbitrable issues in state court under the guise of its other breach-of-contract and unfair-competition claims. As explained above, the non-stayed claims implicate the exact same issues relating to the exact same contracts that are subject to arbitration. *See supra* pp.9-11. NeuIsys's claims alleging unfair competition and breach of the 2009 NDA are nothing more than artfully pleaded claims that, at their heart, seek to invalidate the 2010 Amendment and reinstate and collect damages based on the exclusive distribution provisions of the 2003 Agreement. Those are *precisely* the types of issues arising out of the "interpretation or implementation" of the Agreement that were supposed to be subject to arbitration in China and governed by Chinese law under the plain terms of the parties' contract. R.159.

NeuIsys's strategy of artfully evading its arbitration obligations becomes even more apparent in light of the damages that NeuIsys seeks for the two claims that the North Carolina courts allowed to proceed. Those damages would provide NeuIsys with all of the relief it could receive in an arbitration proceeding, thereby allowing it to avoid arbitration altogether. Indeed, NeuIsys's damages experts have admitted as much, claiming that the company is entitled to $15 million in damages for "lost profits" on

its two non-stayed claims. R.Supp.17; R.301-03. Those experts arrived at that figure by forecasting what NeuIsys could have sold under its interpretation of the 2003 Agreement and by disregarding the territory and product limitations to which NeuIsys agreed in the 2010 Amendment.

NeuIsys's own damages figures thus effectively require the invalidation of the 2010 Amendment and the restoration of the 2003 Agreement, which is the very same relief that NeuIsys sought in the claims the trial court had already stayed pursuant to the International Distribution Agreement. *See* R.301-03; R.Supp.27-29. The parties have agreed that CIETAC must apply Chinese law and resolve the fundamental question of whether the 2010 Amendment is valid. The state courts' erroneous denial of Neusoft China's renewed motion to compel arbitration, however, puts that issue squarely before a North Carolina jury that faces the daunting challenge of faithfully applying Chinese law. That result makes no sense and is directly contrary to the parties' agreement to arbitrate all disputes "aris[ing] in connection with the interpretation or implementation" of the International Distribution Agreement. R.159.

In sum, this case involves a blatant attempt by NeuIsys to make an end-run around a valid arbitration clause by concocting alternative claims that would effectively resolve all of the issues that should have been subject to international arbitration. The state courts allowed this to happen by turning a blind eye to controlling federal law. If allowed to stand, the decision below would permit parties who have signed arbitration agreements to evade their

binding obligations by crafting roundabout ways of achieving the exact same ends in state court. This Court should summarily reverse the decision below or grant certiorari to make clear that such gamesmanship will not be tolerated.

III. This Court Should Reverse The North Carolina Courts' Denial Of Motions For A Stay Pending Arbitration Filed By Neusoft USA, Buse, And Mildenberger.

The same errors that led the North Carolina courts to deny Neusoft China's renewed motion to compel arbitration and for a stay pending arbitration also infected those courts' consideration of motions by Neusoft USA, Buse, and Mildenberger for a stay pending Neusoft China's arbitration with NeuIsys. NeuIsys's claims against Neusoft USA, Buse, and Mildenberger are directly related to its claims against Neusoft China that are subject to arbitration.

As a threshold matter, an arbitration panel in China must apply Chinese law to adjudicate NeuIys's challenge to the 2010 Amendment to the International Distribution Agreement before the claims against Neusoft USA, Buse, and Mildenberger can proceed. Otherwise, a North Carolina jury will improperly be deciding questions that are plainly subject to arbitration. Allowing the claims against Neusoft USA, Buse, and Mildenberger to go forward without a ruling from the Chinese arbitral forum would produce a substantial risk of inconsistent verdicts and would undermine the primacy of the arbitration process.

Thus, if this Court summarily reverses the decision below or grants certiorari to address Neusoft China's renewed motion to compel arbitration, it

should also vacate and remand the decisions below with respect to Neusoft USA, Buse, and Mildenberger for further consideration in light of this Court's decision.

CONCLUSION

For the foregoing reasons, this Court should summarily reverse the decision below, or alternatively grant the petition for certiorari.

Respectfully submitted,

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March 4, 2016

APPENDIX

TABLE OF APPENDICES

Appendix A

Opinion of the Court of Appeals of North Carolina, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. COA14-779 (July 7, 2015) App-1

Appendix B

Order of the Supreme Court of North Carolina Regarding NeuIsys's Motion to Dismiss Appeal and Neusoft China's Petition for Discretionary Review, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. 288P15 (Nov. 5, 2015)................ App-19

Appendix C

Order of the Supreme Court of North Carolina Regarding Neusoft USA's Petition for Discretionary Review, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. 288P15 (Nov. 5, 2015)................ App-22

Appendix D

Order of the Supreme Court of North Carolina Regarding Buse and Mildenberger's Petitions for Discretionary Review, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. 288P15 (Nov. 5, 2015)... App-24

Appendix E

Order of the North Carolina General Court of Justice Superior Court Division Denying Neusoft China's Renewed Motion to Dismiss or Stay Claims and Compel Arbitration, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. 11-CVS-11405 (Jan. 10, 2014) App-26

Appendix F

Order of the North Carolina General Court of Justice Superior Court Division Denying Neusoft USA's Motion to Stay Counterclaims, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. 11-CVS-11405 (Jan. 10, 2014) App-32

Appendix G

Order of the North Carolina General Court of Justice Superior Court Division Denying Buse and Mildenberger's Motions to Stay Counterclaims, *Neusoft Med. Sys., USA, Inc. v. NeuIsys, LLC,* No. 11-CVS-11405 (Jan. 10, 2014) App-34

Appendix H

9 U.S.C. §2 .... App-36

Appendix I

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 .... App-37

Appendix A

**IN THE COURT OF APPEALS
OF NORTH CAROLINA**

No. COA14-779

Filed: July 7, 2015

NEUSOFT MEDICAL SYSTEMS, USA, INC.,
Plaintiff,

v.

NEUISYS, LLC,
Defendant.

NEUISYS, LLC,
Counterclaim-Plaintiff,

v.

NEUSOFT MEDICAL SYSTEMS, USA, INC., TOM BUSE, AND KEITH MILDENBURGER,
Counterclaim-Defendants.

NEUISYS, LLC,
Third-Party Plaintiff,

v.

NEUSOFT MEDICAL SYSTEM COMPANY, LTD.,
Third-Party Defendant.

OPINION OF THE COURT

Appeal by Neusoft Medical Systems Co., Ltd. ("Neusoft China"); Neusoft Medical Systems, U.S.A., Inc. ("Neusoft USA"); and Tom Buse and Keith Mildenberger from orders entered 10 January 2014 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 5 February 2015.

DILLON, Judge.

This dispute involves a business relationship between China-based Neusoft China, a manufacturer of medical imaging equipment (e.g., CT scanners) and North Carolina-based Neuisys, LLC ("NC Distributor"), a distributor of Neusoft China equipment in the United States.

In this action, NC Distributor has asserted six claims against Neusoft China. NC Distributor has also asserted claims against Neusoft USA (a wholly-owned subsidiary of Neusoft China) and against two Neusoft USA employees (Tom Buse and Keith Mildenberger) who formerly worked for NC Distributor.

I. Summary of Opinion

A. Appeal by Neusoft China

In 2012, the trial court entered an order (the "2012 order") staying four of NC Distributor's six claims against Neusoft China, concluding that the four claims were subject to arbitration based on the arbitration clause in their distribution agreement. The trial court, however, denied Neusoft China's motion to stay the two other claims, concluding that those two claims were not subject to arbitration.

In 2014, the trial court entered another order (the "2014 order") denying a renewed motion by Neusoft

China to refer to arbitration or, in the alternative, stay the two claims that the court had concluded were nonarbitrable in its 2012 order.

Neusoft China has appealed the 2014 order. We hold that we have jurisdiction over this appeal. On the merits, we hold that the trial court did not err in denying Neusoft China's renewed motion. Accordingly, we affirm that order.

B. Appeals by Neusoft USA and Messrs. Buse and Mildenberger

In 2013, Neusoft USA and Messrs. Buse and Mildenberger moved the trial court to stay NC Distributor's claims against *them* pending arbitration of NC Distributor's four arbitrable claims against Neusoft China. In 2014, the trial court denied these motions. Neusoft USA and Messrs. Buse and Mildenberger appeal from these interlocutory orders. We hold that we have jurisdiction over these appeals; however, on the merits, we hold that the trial court did not err in denying the motions to stay. Accordingly, we affirm those orders.

II. Background

A. Facts

In 2003, Neusoft China entered into an agreement (the "2003 Distribution Agreement") with NC Distributor authorizing NC Distributor to become the exclusive distributor of its equipment in various markets in the United States. The 2003 Distribution Agreement contained a clause whereby the parties agreed to settle disputes arising thereunder through arbitration in China.

In the years that followed, in addition to selling Neusoft China's equipment in the United States, NC Distributor also developed a profitable business—outside the 2003 Distribution Agreement—contracting with the end users of the equipment to provide warranty repair and service work.

In 2009, Neusoft China entered into negotiations to acquire NC Distributor. During these negotiations, the parties entered into a second agreement (the "2009 Non-disclosure Agreement") whereby NC Distributor agreed to disclose its confidential information—including information about its warranty business—and whereby Neusoft China agreed to use the confidential information only for the purpose of "evaluating, negotiating and implementing" the potential acquisition. Unlike the 2003 Distribution Agreement, however, this 2009 Non-disclosure Agreement did *not* contain an arbitration clause. Ultimately, the negotiations did not lead to a deal.

In 2010, Neusoft China and NC Distributor amended the 2003 Distribution Agreement to extend its term. However, under the terms of the amendment, NC Distributor was no longer Neusoft China's *exclusive* distributor in any region.

Shortly thereafter, Neusoft China—through its subsidiary Neusoft USA—began competing directly with NC Distributor in the distribution *and* servicing of the equipment. During this time, Neusoft USA hired away employees of NC Distributor, including Messrs. Buse and Mildenberger.

In September of 2011, representatives of Neusoft USA, including Mr. Buse, met with representatives of NC Distributor. During a break in the meeting, a

representative of NC Distributor accessed Mr. Buse's computer without his authorization and transferred certain information from the computer onto a thumb drive, ostensibly to determine whether Neusoft USA was using any of NC Distributor's confidential information.

B. Statement of Proceedings

In November of 2011, Neusoft USA commenced this action against NC Distributor, asserting claims in connection with the access of Mr. Buse's computer.

In December of 2011, NC Distributor answered, asserting counterclaims against Neusoft USA. NC Distributor also brought in Neusoft China, asserting six claims.

In October of 2012, after a hearing, the trial court determined that four of NC Distributor's six claims against Neusoft China arose under the 2003 Distribution Agreement and were, therefore, subject to arbitration. However, the court ruled that two of the claims—NC Distributor's claims for breach of the 2009 Non-disclosure Agreement (which did not have an arbitration clause) and for unfair and deceptive practices in connection with this breach—*did not* "arise in connection with the interpretation or implementation" of the 2003 Distribution Agreement, denying Neusoft China's motion to stay proceedings on those two claims pending arbitration of the other four claims. This 2012 order was not appealed.

In March of 2013, with leave of court, NC Distributor filed an amended pleading, bringing in Mr. Buse and Mr. Mildenberger, and alleging claims against them.

In December of 2013, after engaging in additional discovery, Neusoft China once again moved the trial court to refer NC Distributor's claims for breach of the 2009 Non-disclosure Agreement and for unfair and deceptive practices to arbitration or, in the alternative, stay those claims pending arbitration of the four arbitrable claims. Neusoft USA and Messrs. Buse and Mildenberger also filed motions to stay NC Distributor's claims against *them* pending arbitration of NC Distributor's arbitrable claims against Neusoft China.

In January of 2014, after a hearing on the matter, the trial court entered orders denying all three motions, allowing both the claims for breach of the 2009 Nondisclosure Agreement and for unfair and deceptive practices to proceed. Neusoft China, Neusoft USA, and Messrs. Buse and Mildenberger entered timely notices of appeal.

III. Analysis

A. Right to Immediate Appeal

Each of the orders being appealed is interlocutory because none are dispositive as to all claims and all parties. *Bullard v. Tall House Bldg. Co., Inc.,* 196 N.C. App. 627, 637, 676 S.E.2d 96, 103 (2009) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."). Generally, there is no right to immediate appeal from an interlocutory order. *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.,* 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992). However, N.C. Gen. Stat. §§ 1-277 and 7A-27 set forth exceptions to this general rule. *Id.*

Applying these statutes, our Supreme Court has held that a right to an immediate appeal from an interlocutory order exists where the order "deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Id.* at 292, 420 S.E.2d at 428 (internal marks omitted).

Our Supreme Court has developed a "two-part test," *see id.*, to determine whether an interlocutory order is immediately appealable where an appellant claims to have been deprived of a substantial right: (1) "the right itself must be substantial"; and, (2) "the deprivation of that . . . right must potentially work injury . . . if not corrected before appeal from final judgment." *Frost v. Mazda Motors of America, Inc.,* 353 N.C. 188, 192, 540 S.E.2d 324, 327 (2000) (internal marks omitted). However, as the Supreme Court has recognized, "the 'substantial right' test is more easily stated than applied[,]" and appellate courts "must consider the particular facts of each case and the procedural history of the order from which an appeal is sought." *Travco Hotels,* 332 N.C. at 292, 420 S.E.2d at 428. Therefore, to determine whether we have jurisdiction over an appeal, we must discern the precise nature of the right the appellant claims as substantial.[1] To that end, each appellant bears the

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[1] However, we do not reach the *merits* of an appellant's claim to that substantial right in answering this threshold jurisdictional question. To do so would, in the words of the United States Supreme Court, "conflat[e] the jurisdictional question with the merits of the appeal." *Arthur Andersen LLP v. Carlisle,* 556 U.S. 624, 628, 129 S. Ct. 1896, 1900 (2009). For example, if a defendant claims sovereign immunity as a defense to an action, a denial of its motion to dismiss based on this defense would

burden of demonstrating that the interlocutory order appealed from "deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture,* 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

We address the propriety of Neusoft China's appeal separately from the appeals taken by Neusoft USA and by Mr. Muse and Mr. Mildenberger. We then address NC Distributor's motion to strike.

1. Neusoft China

In its brief, Neusoft China states that it is appealing the 2014 order denying its right to arbitrate. We have held that the right to arbitrate is substantial. *See, e.g., Prime South Homes, Inc. v. Byrd,* 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991). We agree that the 2014 order affects this substantial right. Specifically, the effect of the 2014 order is to require Neusoft China to proceed in defending two of NC Distributor's claims against it in court rather than in arbitration. As we have often noted regarding the need for immediate review in such cases, the right to arbitrate "may be lost if review is delayed[.]" *See, e.g., Edwards v. Taylor,* 182 N.C. App. 722, 724, 643 S.E.2d

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generally be immediately appealable. *See, e.g., Dep't of Transp. v. Blue,* 147 N.C. App. 596, 600, 556 S.E.2d 609, 615 (2001). This is true even where there is no *merit* to the defense because, e.g., the defendant belongs to an unrecognized Indian tribe. *Meherrin Indian Tribe v. Lewis,* 197 N.C. App. 380, 385-86, 677 S.E.2d 203, 207-08 (2009). Nevertheless, an appellant who makes a *frivolous* assertion of a substantial right for an improper purpose (e.g., delay) does so at the risk of being sanctioned by this Court. *See* N.C. R. App. P. 34.

51, 53 (2007). Therefore, we hold that Neusoft China has met its burden to demonstrate that we have jurisdiction over its appeal of the 2014 order.[2] Accordingly, we consider the merits of its appeal in Section III. B.

2. Neusoft USA and Messrs. Buse and Mildenberger

Neusoft USA and Messrs. Buse and Mildenberger appeal from interlocutory orders denying their motions to stay NC Distributor's claims against them pending arbitration of the claims asserted against Neusoft China. They argue, *inter alia*, that they have the right to have the issue of whether NC Distributor can recover damages for the loss of its exclusivity under the 2010 amendment to the Distribution Agreement decided by arbitration. These appellants essentially argue that *they* have the right to have this issue decided by arbitration even though they are not parties to the 2003 Distribution Agreement.

Generally, we do not recognize a right to immediate appeal from an interlocutory order denying a stay of litigation. *Howerton v. Grace Hosp., Inc.,* 124 N.C. App. 199, 201-02, 476 S.E.2d 440, 442-43 (1996). Moreover, the right to immediate appeal from an interlocutory order denying arbitration or denying a stay pending arbitration is predicated on the deprivation of the right to arbitrate, which inheres in

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[2] NC Distributor contends that we lack jurisdiction over Neusoft China's appeal because it is from a denial of a motion for reconsideration, citing this Court's decision in *Slaughter v. Swicegood,* 162 N.C. App. 457, 591 S.E.2d 577 (2004). However, assuming *arguendo* that the 2014 order is one denying a motion to reconsider, the effect of the 2014 order nonetheless requires Neusoft China to defend the claims in court.

the contract providing for arbitration. *See Moose v. Versailles Condo. Ass'n,* 171 N.C. App. 377, 381-82, 614 S.E.2d 418, 422 (2005). Nevertheless, we recognize that by operation of common law agency and contract principles, a contractual right to arbitrate may become enforceable by or against a non-signatory to the agreement. *Carter v. TD Ameritrade Holding Corp.,* 218 N.C. App. 222, 229, 721 S.E.2d 256, 261-62 (2012). Since the right to arbitrate a claim *or issue* is a substantial right if it is enforceable by or against an appellant who is a non-signatory to the agreement creating it, we hold that we have jurisdiction to review the merits of Neusoft USA and Messrs. Buse and Mildenberger's appeals.[3]

B. Merits of the Appeal

1. Neusoft China

Having determined that the 2014 order denying Neusoft China's renewed motion is immediately appealable, we now consider the merits of the appeal. For the reasons stated below, we hold that the trial court did not err in denying Neusoft China's renewed motion; and, therefore, we affirm the trial court's 2014 order.

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[3] We note that Neusoft China, Neusoft USA, and Messrs. Buse and Mildenberger all cite § 16 of the Federal Arbitration Act ("FAA"), *see* 9 U.S.C. 16(a)(1)(A) (2013), as an additional basis for our jurisdiction. However, § 16 of the FAA applies *in federal court. See Volt Info. Sci., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477 n. 6, 109 S. Ct. 1248, 1254 n. 6 (1989). State law governs the appealability of interlocutory orders in State court. *Elliott v. KB Home North Carolina, Inc.,* ___ N.C. App. ___, ___, 752 S.E.2d 694, 697 (2013).

Our Supreme Court has held that one trial court judge has the authority to reconsider an interlocutory order entered by another trial court judge "*only in the limited situation* where the party seeking to alter that prior ruling makes a sufficient showing of a *substantial change in circumstances during the interim* which presently warrants a different or new disposition of the matter." *State v. Duvall,* 304 N.C. 557, 562, 284 S.E.2d 495, 499 (1981) (emphasis added). As our Supreme Court observed, "if the rule were otherwise, the normal reviewing function of appellate courts would be usurped, and, in some instances, the orderly trial process could be converted into a chaotic, protracted affair as one party attempted to shop around for a more favorable ruling from another superior court judge." *Id.* at 562, 284 S.E.2d at 498.

In the present case, the trial court concluded in its 2014 order that there had "been no substantial change in circumstances [] which would warrant a different or new disposition[.]" Neusoft China argues, however, that a substantial change warranting the modification of the trial court's 2012 order did occur. Specifically, Neusoft China contends as follows: Initially, NC Distributor merely asserted that the two claims were based on a theory that Neusoft China had shared NC Distributor's confidential information with its subsidiary, Neusoft USA. Accordingly, the trial court determined that they were not arbitrable since they did not relate to the 2003 Distribution Agreement. However, after the 2012 order was entered and the time to appeal that order had passed, a representative of NC Distributor stated in a deposition that these claims were based on Neusoft China's improper use of

the confidential information as leverage *during the 2010 renegotiation of the Distribution Agreement.* According to Neusoft China, this purported change in theory is a "substantial change" because it amounts to an admission by NC Distributor that the two claims based on the Non-disclosure Agreement and found by the trial court to be nonarbitrable in its 2012 order do, in fact, relate to the Distribution Agreement and are, therefore, subject to the arbitration clause contained in that agreement.

Generally, we review a trial court's decision to grant or deny a stay of nonarbitrable claims in a dispute pending arbitration of the arbitrable claims for an abuse of discretion. *Sloan Fin. Grp., Inc. v. Beckett,* 159 N.C. App. 470, 485, 583 S.E.2d 325, 334 (2003). However, the determination of whether a claim or issue in a dispute *is* arbitrable is a question of law we review *de novo*. *See, e.g., Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001). Therefore, we review *de novo* whether the trial court correctly concluded that Neusoft China had failed to show that a substantial change in circumstances had occurred.

NC Distributor's complaint against Neusoft China alleges that Neusoft China used confidential information, including but not limited to "customer data, financial data, and projected revenue data" that were shared for the sole purpose of "evaluating, negotiating, and implementing" the acquisition, "to formulate a plan to drive [NC Distributor] out of business for [Neusoft China's] own benefit," and by disclosing said information to Neusoft USA. NC Distributor's complaint also alleges that Neusoft China used the confidential information acquired in

connection with the potential acquisition "to establish [Neusoft USA]" and "to formulate a plan of forcing [NC Distributor] out of business and to otherwise steal [NC Distributor's] employees and customers," further alleging that it used said information to outbid NC Distributor, offering the same products to NC Distributor's customers below cost, and that this "conduct constitute[d] unfair methods of competition and unfair or deceptive acts or practices[.]" Thus, the allegations in NC Distributor's complaint put Neusoft China on notice that it was seeking damages for use of confidential information obtained pursuant to the Non-disclosure Agreement to compete unfairly with it rather than for the sole purpose of evaluating and negotiating a potential acquisition, and that this use of the information not only constituted breach of the agreement, but also independently qualified as an unfair and deceptive practice under North Carolina law.

Neusoft China traces the origins of the alleged change in NC Distributor's theory of the case to the deposition testimony of NC Distributor's CEO, Kim Russell. Specifically, Mr. Russell testified that Neusoft China used NC Distributor's confidential information provided pursuant to the Non-disclosure Agreement *as leverage* in negotiations over amending the Distribution Agreement, specifically using the word "threat" during his testimony. However, the "threat" to which the deponent referred did not introduce some new theory of liability. Rather, the context plainly demonstrates that the deponent's testimony was that Neusoft China used the confidential information to compete with NC Distributor rather than for purposes of evaluating and

negotiating the potential acquisition. The deponent was merely stating one way Neusoft China used the information competitively, namely as leverage in negotiations over the 2010 amendment to the Distribution Agreement. Therefore, we hold that the trial court did not err in denying Neusoft China's renewed motion to refer the claims continuing in litigation to arbitration or, in the alternative, to stay those claims pending arbitration.

Neusoft China also argues that the trial court erred in failing to conclude that NC Distributor was *equitably estopped* from denying the applicability of the arbitration clause in the Distribution Agreement to the claims for breach of the Nondisclosure Agreement and for unfair and deceptive practices. Specifically, Neusoft China contends that NC Distributor is using the Distribution Agreement as a reference point in calculating its damages. We do not believe the trial court committed reversible error in this regard.

> Equitable estoppel arises when one party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment. There need not be actual fraud, bad faith, or an intent to mislead or deceive for the doctrine of equitable estoppel to apply.

Gore v. Myrtle/Mueller, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007) (internal marks and citation omitted). In the context of arbitration, "the doctrine recognizes

that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Ellen v. A.C. Schultes of Maryland, Inc.,* 172 N.C. App. 317, 321, 615 S.E.2d 729, 732 (2005) (internal marks omitted). However, in *Ellen* we refused to extend the application of the doctrine where the plaintiffs were not "seeking any direct benefits from the contracts containing the relevant arbitration clause," or "asserting any rights arising under [those] . . . contracts." *Id.* at 322, 615 S.E.2d at 733.

In the present case, NC Distributor is not simultaneously denying the enforceability of the arbitration clause in the Distribution Agreement with Neusoft China while also claiming a right under the Distribution Agreement. That is, just as in *Ellen*, the claims for breach of the Non-disclosure Agreement and for unfair and deceptive practices do not necessarily "depend upon the [Distribution Agreement] containing the arbitration clause." *Id.* at 322, 615 S.E.2d at 733. Rather, these claims depend on legal duties imposed by an agreement which does *not* contain an arbitration clause and by North Carolina law prohibiting unfair and deceptive practices. As in *Ellen*, in prosecuting these claims NC Distributor is not "seeking any direct benefits from the contract[] containing the relevant arbitration clause," or "asserting any rights arising under [that] . . . contract[]." *Id.* at 322, 615 S.E.2d at 733. Accordingly, we hold that the trial court did not err in

failing to conclude that equitable estoppel applies to NC Distributor's claims.[4]

2. Merits of Neusoft USA's Appeal and Messrs. Buse and Mildenberger's Appeal

We have reviewed the arguments of Neusoft USA and Messrs. Buse and Mildenberger, and we conclude that the trial court did not err in denying their motions to stay NC Distributor's claims against them pending arbitration of the four arbitrable claims asserted against Neusoft China.

On appeal, Neusoft USA and Messrs. Buse and Mildenberger claim that NC Distributor is seeking damages from them, in part, because of lost profits *due to* the loss of its exclusivity under the 2003 Distribution Agreement; and, therefore, they argue that they are entitled to a stay until this issue is resolved by arbitration.[5] Specifically, they contend that a portion of the damages that NC Distributor seeks is dependent upon the invalidity of the 2010 amendment to the 2003 Distribution Agreement,

[4] Neusoft China also argues that the trial court erred in finding that it had waived the right to arbitrate the two remaining claims. We need not reach this argument, as we have concluded that the trial court did not err in concluding that Neusoft China otherwise has no right to compel arbitration of these claims.

[5] Messrs. Buse and Mildenberger also contend that the trial court's order denying their motion to stay the proceedings pending arbitration was erroneous in its omission of an express ruling on the applicability of the FAA. However, while a panel of this Court has held that a trial court's denial of a motion to compel arbitration must contain a finding as to the applicability of the FAA, *see Sillins v. Ness*, 164 N.C. App. 755, 759, 596 S.E.2d 874, 877 (2004), no such requirement exists for an order granting or denying a motion for a stay, and we decline to impose one.

which stripped NC Distributor of its status as Neusoft China's exclusive distributor. However, NC Distributor has made no such claim against these Defendants in its pleadings for damages. Rather, NC Distributor only seeks lost profits *due to* the appropriation by Neusoft USA and Messrs. Buse and Mildenberger of NC Distributor's confidential information, irrespective of any loss of any status under the 2003 Distribution Agreement.[6]

These Defendants contend that the validity of the 2010 amendment predominates the claims for breach of the Non-disclosure Agreement and for unfair and deceptive practices, that the validity of the 2010 amendment can only be determined in arbitration, and that a determination of the validity of the amendment would preclude NC Distributor's success on those claims. However, the claims for breach of the Non-disclosure Agreement and for unfair and deceptive practices present distinct legal issues from those presented by the arbitrable claims, namely whether Defendants or any of them impermissibly used NC Distributor's confidential information to compete with NC Distributor rather than for the permissible purposes of evaluating and negotiating a

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[6] Neusoft China, Neusoft USA, and Messrs. Buse and Mildenberger also argue at length regarding the eventual calculation of damages. However, "[t]he assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury, subject, of course, to the discretionary power of the judge to set its verdict aside, when in his opinion equity and justice so require." *Matthews v. Lineberry*, 35 N.C. App. 527, 528, 241 S.E.2d 735, 737 (1978). Moreover, we do not issue advisory opinions. *See, e.g., Lemon v. Combs*, 164 N.C. App. 615, 625-26, 596 S.E.2d 344, 350 (2004).

potential acquisition and whether such use constituted an unfair and deceptive practice under North Carolina law.

IV. Conclusion

We hold that the trial court did not err in denying the motion to refer the claims against Neusoft China for breach of the Non-disclosure Agreement and for unfair and deceptive practices to arbitration or, in the alternative, to stay those claims. Further, we hold that the trial court did not err in denying the other Defendants' motions to stay the claims against them pending the arbitration of four arbitrable claims against Neusoft China. Accordingly, we affirm the orders of the trial court.

AFFIRMED

Judges STEPHENS and MCCULLOUGH concur.

Appendix B

SUPREME COURT OF NORTH CAROLINA

No. 288P15

Filed: November 5, 2015

NEUSOFT MEDICAL SYSTEMS, USA, INC.,

Plaintiff,

v.

NEUISYS, LLC,

Defendant.

NEUISYS, LLC,

Counterclaim-Plaintiff,

v.

NEUSOFT MEDICAL SYSTEMS, USA, INC., TOM BUSE, AND KEITH MILDENBURGER,

Counterclaim-Defendants.

NEUISYS, LLC,

Third-Party Plaintiff,

v.

NEUSOFT MEDICAL SYSTEM COMPANY, LTD.,

Third-Party Defendant.

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Third Party Defendant on the 11th of August 2015 in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Third Party Plaintiff (Neuisys, LLC), the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 5th of November 2015."

s/ Ervin, J.
For the Court

Upon consideration of the petition filed on the 11th of August 2015 by Third Party Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 5th of November 2015."

s/ Ervin, J.
For the Court

WITNESS my hand and official seal of the Supreme Court of North Carolina, this the 13th of November 2015.

s/Christie Speir Cameron Roeder
Christie Speir Cameron Roeder
Clerk, Supreme Court of
North Carolina

M.C. Hackney
Assistant Clerk, Supreme Court
of North Carolina

Appendix C

SUPREME COURT OF NORTH CAROLINA

No. 288P15

Filed: November 5, 2015

NEUSOFT MEDICAL SYSTEMS, USA, INC.,

Plaintiff,

v.

NEUISYS, LLC,

Defendant.

NEUISYS, LLC,

Counterclaim-Plaintiff,

v.

NEUSOFT MEDICAL SYSTEMS, USA, INC., TOM BUSE, AND KEITH MILDENBURGER,

Counterclaim-Defendants.

NEUISYS, LLC,

Third-Party Plaintiff,

v.

NEUSOFT MEDICAL SYSTEM COMPANY, LTD.,

Third-Party Defendant.

ORDER

Upon consideration of the petition filed on the 11th of August 2015 by Plaintiff and Counterclaim Defendant's (Neusoft Medical Systems, USA, Inc.) in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 5th of November 2015."

s/ Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of November 2015.

s/Christie Speir Cameron Roeder
Christie Speir Cameron Roeder
Clerk, Supreme Court of
North Carolina

M.C. Hackney
Assistant Clerk, Supreme Court
of North Carolina

Appendix D

SUPREME COURT OF NORTH CAROLINA

No. 288P15

Filed: November 5, 2015

NEUSOFT MEDICAL SYSTEMS, USA, INC.,

Plaintiff,

v.

NEUISYS, LLC,

Defendant.

NEUISYS, LLC,

Counterclaim-Plaintiff,

v.

NEUSOFT MEDICAL SYSTEMS, USA, INC., TOM BUSE, AND KEITH MILDENBURGER,

Counterclaim-Defendants.

NEUISYS, LLC,

Third-Party Plaintiff,

v.

NEUSOFT MEDICAL SYSTEM COMPANY, LTD.,

Third-Party Defendant.

ORDER

Upon consideration of the petition filed on the 11th of August 2015 by Counterclaim Defendants (Tom Buse and Keith Mildenberger) in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 5th of November 2015."

s/ Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of November 2015.

s/Christie Speir Cameron Roeder
Christie Speir Cameron Roeder
Clerk, Supreme Court of
North Carolina

M.C. Hackney
Assistant Clerk, Supreme Court
of North Carolina

Appendix E

STATE OF NORTH CAROLINA COUNTY OF GUILFORD: IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION

No. 11 CVS 11405
Filed: January 10, 2014

NEUSOFT MEDICAL SYSTEMS, USA, INC.,
Plaintiff,
v.
NEUISYS, LLC,
Defendant.

NEUISYS, LLC,
Counterclaim-Plaintiff,
v.
NEUSOFT MEDICAL SYSTEMS, USA, INC., TOM BUSE, AND KEITH MILDENBURGER,
Counterclaim-Defendants.

NEUISYS, LLC,
Third-Party Plaintiff,
v.
NEUSOFT MEDICAL SYSTEM COMPANY, LTD.,
Third-Party Defendant.

ORDER

THIS MATTER COMING TO BE HEARD on January 9, 2014 before the Undersigned on Third-Party Defendant Neusoft Medical System Company, Ltd. ("Neusoft China") Renewed Motion to Dismiss Or Stay Claims And Compel Arbitration and Alternative Motion for Reconsideration and Alternative Motion to Stay (the "Motion"); and Neusoft China being present and represented by Alan Duncan and Stephen Russell; and Defendant/Counterclaim and Third-Party Plaintiff Neuisys, LLC ("Neuisys"), being present and represented by Philip Mohr and Brent Powell; and Plaintiff being present and represented by Daniel Taylor and Susan Boyles; and Counterclaim Defendants Tom Buse and Keith Mildenberger being present and represented by Dennis Bailey and Greer Taylor; and the undersigned, taking into account the arguments of counsel and having reviewed the court file, the filings and submissions of the Parties both prior to and during the hearing, is now prepared to make the following:

FINDINGS OF FACT

1. In July 2012, Neusoft China filed under Rule 12 a Motion To Dismiss Neuisys' Third-Party Complaint or, in the alternative, Motion To Stay Proceedings Pending Arbitration ("July 2012 Arbitration Motion"). In its July 2012 Arbitration Motion, Neusoft China contended all of Neuisys' Third-Party Claims were required to be arbitrated based upon the International Distribution Agreement's ("IDA") arbitration clause.

2. On September 24, 2012, Neusoft China filed under Rule 12 an Amended Motion To Dismiss Neuisys' Third-Party Complaint or, in the alternative, Motion To Stay Proceedings Pending Arbitration ("Amended Arbitration Motion"). The Amended Arbitration Motion, like the July 2012 Arbitration Motion, contended that all of Neuisys' Third-Party Claims were required to be arbitrated based upon the International Distribution Agreement's ("IDA") arbitration clause.
3. On October 1, 2012, the parties argued the Amended Motion to Compel Arbitration before Judge Anderson Cromer. Prior to the October 1, 2012 argument, both Neusoft China and Neuisys submitted briefs to Judge Cromer to consider, which the undersigned has reviewed.
4. On October 30, 2012, Judge Cromer entered an Order granting Neusoft China's July 2012 Arbitration Motion in part (as to Claims I, II, III, and V) and denying in part, as to Claims IV and VI ("October 2012 Order").
5. Neusoft China did not appeal the October 2012 Order.
6. Since October 30, 2012, Neuisys has not initiated an arbitration.
7. Over the course of the next fourteen (14) months, all parties participated in extensive discovery. Neusoft China propounded numerous document requests, interrogatories, and requests for admission. Neusoft China has also responded to numerous interrogatories and request for documents, propounded by Neuisys. Neusoft

China has participated in all of the depositions in this matter, including having individual and corporate witnesses deposed. All parties have obtained beneficial information from the use of these discovery devices. The Court notes that prior to November 1, 2013, Neusoft China, Neusoft USA, Buse, and Mildenberger were represented by the same counsel.

8. To the extent arbitration must be conducted pursuant to the IDA's arbitration clause, such arbitration must be conducted pursuant to the arbitration rules of CIETAC. Under the arbitration rules of CIET AC, there is no way for the arbitration panel to compel document exchange, pre-hearing depositions, or to compel a party to testify. As such, Neusoft China has made use of discovery procedures that are not available under CIETAC.

9. Since the entry of the October 2012 Order, Neuisys has incurred more than $500,000 in legal costs. Most of these costs would not have been incurred had this matter not continued after entry of the October 2012 Order.

10. As such, Neuisys has been prejudiced by Neusoft China's delay in seeking to stay Claims IV and VI pending arbitration.

11. In addition, Judge Cromer considered the same contentions and arguments that were made before the undersigned by Neusoft China in support of its Motion and Neuisys in opposition thereto, including whether the claims arising out of the breach of the NonDisclosure Agreement ("NDA") are governed by North Carolina law and whether

Neuisys' unfair and deceptive practices claim would be subject to North Carolina law. There has been no substantial change in circumstances since the October 2012 Order was entered which would warrant a different or new disposition of the matter.

Based upon the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The October 2012 Order was an interlocutory order. There is no allowance under the North Carolina Rules of Civil Procedure for a motion for reconsideration of an interlocutory order.
2. Neusoft China's failure to appeal the October 2012 Order within 30 days, and its decision to continue to litigate this matter to the extent as referenced above has caused prejudice to Neuisys such that Neusoft China has impliedly waived any contractual right to arbitration as to Claims IV and VI by its delay and/or by the actions it has taken which are inconsistent with arbitration.
3. Many of the arguments made in support of Neusoft China's Motion were the same arguments made to Judge Cromer and there has been no substantial change in circumstances since the October 2012 Order was entered which would warrant a different or new disposition than that entered by Judge Cromer.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby enters the following:

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Neusoft China's Renewed Motion to Dismiss or Stay Claims and Compel Arbitration and Alternative Motion for Reconsideration is DENIED.

Additionally, in its discretion, the Court DENIES Neusoft China's Alternative Motion to Stay.

This the 10th day of January, 2014.

s/Susan Bray

Judge Susan Bray,
Superior Court Judge Presiding

Appendix F

STATE OF NORTH CAROLINA COUNTY OF GUILFORD: IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION

No. 11-CVS-11405
Filed: January 10, 2014

NEUSOFT MEDICAL SYSTEMS, USA, INC.,
Plaintiff and Counterclaim Defendant,

v.

NEUISYS, LLC,
Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff,

v.

NEUSOFT MEDICAL SYSTEM CO., LTD.,
Third-Party Defendant.

NEUISYS, LLC,
Counterclaim Plaintiff,

v.

TOM BUSE AND KEITH MILDENBERGER,
Counterclaim Defendants.

THIS CAUSE, coming on to be heard, and being heard before the Honorable Susan E. Bray, Judge Presiding during the January 9, 2014 term of the Guilford County Superior Court, Greensboro Division, and being heard pursuant to Neusoft Medical Systems, U.S.A., Inc.'s ("Neusoft USA") Motion to Stay Counterclaims Pending Neuisys' Completion of Arbitration.

AND THE COURT, having considered the Motion, the briefs submitted by the parties and the arguments of counsel, is of the opinion that the Motion should be DENIED.

WHEREFORE, IT IS ORDERED, ADJUDGED and DECREED that Neusoft USA's Motion to Stay Counterclaims Pending Neuisys' Completion of Arbitration is DENIED.

This the 9 day of January, 2014

s/Susan E. Bray
Honorable Susan E. Bray
Resident Superior Court Judge

Appendix G

STATE OF NORTH CAROLINA COUNTY OF GUILFORD: IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION

No. 11-CVS-11405
Filed: January 10, 2014

NEUSOFT MEDICAL SYSTEMS, USA, INC.,
Plaintiff and Counterclaim Defendant,

v.

NEUISYS, LLC,
Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff,

v.

NEUSOFT MEDICAL SYSTEM CO., LTD.,
Third-Party Defendant.

NEUISYS, LLC,
Counterclaim Plaintiff,

v.

TOM BUSE AND KEITH MILDENBERGER,
Counterclaim Defendants.

ORDER

THIS MATTER CAME ON FOR HEARING before the Honorable Susan E. Bray, Judge Presiding, during the January 9, 2014, term of Guilford County Superior Court, Greensboro Division, on Counterclaim Defendants Tom Buse and Keith Mildenberger's Motion to Stay Counterclaims Pending Neuisys' Completion of Arbitration. And it appearing to the Court, after reviewing the Motion, the briefs submitted by the parties and the arguments of counsel, that the Motion should be DENIED.

IT IS THERFORE ORDERED, ADJUDGED and DECREED that Counterclaim Defendants Buse and Mildenberger's Motion to Stay Counterclaims Pending Neuisys' Completion of Arbitration be, and the same hereby is, DENIED.

This the 10 day of January, 2014

s/Susan E. Bray
Honorable Susan E. Bray
Resident Superior Court Judge

Appendix H

9 U.S.C. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Appendix I

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties

undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party

applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

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

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

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of

the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

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

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

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

   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

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

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) *(e)*, the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other

State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other

Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory

concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.