

(ICC22466/20910)

ICC 22466/ASM/JPA (C-22967/JPA) (“Panama II”) &

ICC 20910/ASM/JPA (C-20911/ASM) (“Panama I”)

(1)Grupo Unidos por el Canal, S.A., (2) Sacyr, S.A., (3) Webuild, S.p.A., (4) Jan De Nul, N.V. (“Claimants”)

v.

Autoridad del Canal de Panama (“Respondent” or “ACP”)

Dr. Robert Gaitskell Q.C.’s Response re Claimants’ Challenge letters of 28 October 2020:

1. Introduction

- a. By separate email letters of 28 October 2020 the Claimants in the above two arbitral disputes, between the same parties and involving the same legal representatives and same Tribunal, informed the ICC, Paris, that pursuant to Article 14 of the ICC Rules the Claimants submitted a challenge to the arbitral tribunal in each of the two above-named cases. The terms of each letter were virtually identical, save that the case number was different.
- b. By two separate email letters dated 5 November 2020, one each in respect of the above two disputes, but in virtually the same terms, the ICC (specifically: Amanda Jimenez Pinton) invited the members of the arbitral tribunal to comment on the Claimants’ challenges of 28 October 2020 by 16 November 2020, pursuant to Article 14(3).
- c. Accordingly, this document is my response to the ICC’s invitation to comment on the challenges in both cases.
- d. The basis of the Claimants’ challenge in each case is that all three members of the Tribunal *“failed to disclose important connections between themselves, the arbitrators of the previous Cofferdam Tribunal, and counsel for the Respondent. These circumstances are highly problematic and call into question the arbitrators’ independence in the eyes of the Claimants, and give rise to reasonable doubts as to their impartiality”*. (Claimants’ letters, 28 October 2020, para. 6.)

2. Chronology

- a. 26 March 2015: my statement of impartiality and independence in ICC 20910 (Panama I), disclosing involvement in the associated earlier Panama case (Cofferdam): *“As the parties are aware, I am already a co-arbitrator in the associated case of 19962/ASM”*. (Claimants did not object.)
- b. 15 May 2015: my statement of impartiality and independence in ICC 20911: *“As the parties are aware, I am already a co-arbitrator in the associated cases of 19962/ASM and 20910/ASM”*. (Claimants did not object.)
- c. 27 January 2017: my statement of independence and impartiality in ICC 22466 (Panama II): *“I am a co-arbitrator in the associated cases of ICC 19962/ASM, & 20910/ASM & 20911/ASM, as both parties are aware”*. (Claimants did not object.)

- d. 25 July 2017: Cofferdam (ICC19962/ASM) Final Award
- e. 28 September 2020: ICC Secretariat notifies partial award in ICC 20910, (Panama I)
- f. 15 October 2020: Letter by Ms Lamm of White & Case on behalf of Claimants asking the Tribunal for updated disclosure in ICC 22466 (Panama II).
- g. 24 October 2020: my response to Claimants' 15 October request.
- h. 26 October 2020: Claimants' further disclosure request to me.
- i. 28 October 2020: Claimants' letters to the ICC in Panama I and II challenging the Tribunal.
- j. 29 October 2020: I respond to Claimants' 26 October request.
- k. 2 November 2020: Claimants ask me for yet further 'disclosure'.
- l. 3 November 2020: I respond to Claimants' 2 November request.

3. Complaints regarding my disclosure

Each of the matters complained about in respect of my disclosure are dealt with seriatim below. In the Claimants' challenge letters of 28 October 2020 at paragraphs 57 – 65 the specific complaints concerning me are set out. There are some elaborations of these points elsewhere in the letters and these are also picked up below.

4. Complaint I: My role as a co-arbitrator in other Panama arbitrations

- a. The Claimants make this point in the 28 October 2020 letters ("the Letters") at paragraphs 57 and 58. They also allude to this point at page 2, paragraph 11 and footnote 3.
- b. The Claimants accept that at each stage of these multiple proceedings, when it was proposed that I should be nominated as a co-arbitrator by the Respondent, I gave disclosure of the fact that I was already involved: see the Letters at paragraphs 57 and 58 and footnote 51, which refer to my three statements of impartiality and independence:
 - i. 26 March 2015: my statement of impartiality and independence in ICC 20910 (Panama I), disclosing involvement in associated Panama case (Cofferdam): "*As the parties are aware, I am already a co-arbitrator in the associated case of 19962/ASM*". (Claimants did not object and I was appointed.)
 - ii. 15 May 2015: my statement of impartiality and independence in ICC 20911: "*As the parties are aware, I am already a co-arbitrator in the associated cases of 19962/ASM and 20910/ASM*" (Panama I). (Claimants did not object and I was appointed.)
 - iii. 27 January 2017: my statement of independence and impartiality in ICC 22466 (Panama II): "*I am a co-arbitrator in the associated cases of ICC 19962/ASM, & 20910/ASM & 20911/ASM, as both parties are aware*". (Claimants did not object and I was appointed.)
- c. In paragraph 58 of the Letters the Claimants accept that after each of the above disclosures they did not oppose my confirmation by the ICC Court. They say that the position would have been different if they had known about "*the circumstances that have now emerged*". Those circumstances form the substance of the Complaints II – V immediately below. Thus, the position is that the Claimants accept Complaint I in itself does not raise anything objectionable

(since they did not object at the time) and that their real complaints are those below.

5. Complaint II: me sitting with the Mr Gunter in an unrelated case, ICC 24400.
 - a. The Claimants make this point in the Letters at paragraphs 59 and 60. They also allude to this point at page 5, paragraph 24, second bullet point, and page 11, paragraph 52, second bullet point, and paragraphs 53 and 54.
 - b. This other case, ICC24400, has absolutely nothing to do with the Panama cases. This is the only case, besides the Panama cases, where Mr Gunter and I are sitting together. We have never sat together in any other case. This is important, because, as evidenced by the IBA Guidelines on Conflicts of Interest, a situation like the present (two arbitrators in one case sitting together in an unrelated case) does not even feature in any of the lists (Red, Orange or Green). The circumstances complained of (two arbitrators also sitting in one other unrelated case) do not, in my view, have an impact upon my impartiality or independence of judgment and no disclosure is required.
 - c. Incidentally, the Claimants incorrectly suggest in the Letters in paragraph 24, second bullet point, that I sat with both Mr Gunter and Prof. Hanotiau in some other case. The Claimants say : *"Mr Gunter has been appointed as president sitting together with Dr Gaitskell (together with Prof Hanotiau, the author of the Cofferdam Majority Award) in an unrelated ICC case (No. 24400), which seems to be still ongoing"*. The third arbitrator in that ICC 24400 case is Mr Perry (not Prof Hanotiau). I have never sat with Prof Hanotiau other than in the Cofferdam case.
6. Complaint III: I am an arbitrator in an unrelated case where Respondent's counsel, Manus McMullan QC of Atkin Chambers, is representing one party.
 - a. The Claimants make this point in the Letters at paragraph 61.
 - b. Again, this situation is entirely unremarkable. The IBA Traffic Light Code does not even mention such a situation in any of its sections.
 - c. Note that Mr McMullan (of Atkin Chambers) is in an entirely different set of chambers from me (Keating Chambers). Also note that I have never sat with Mr McMullan as arbitrators together.
 - d. Once more, the circumstances complained of (an arbitrator in case A sitting in an unrelated case, B, with different parties, where counsel for a party in B is also counsel in case A) do not, in my view, have an impact upon my impartiality or independence of judgment and no disclosure is required.
7. Complaint IV: RG was in an arbitral tribunal in an unrelated case with a co-arbitrator from Atkin Chambers.
 - a. The Claimants make this point in the Letters at paragraph 63.
 - b. Firstly, this complaint is founded on a misconception by the Claimants. They state in paragraph 63: *"Dr Gaitskell was named as president in at least two ICC cases by his co-arbitrators, where one of the co-arbitrators was Andrew White QC, a member of Atkin Chambers"*. In fact it was one case only, as I pointed out to the Claimants in my email of 29 October 2020: *"You ask about Andrew White, and refer to two links to the ICC database. These both refer to the same W&C case (so you will have details in your firm's records). I believe Andrew White was nominated by W&C."*

- c. Secondly, this case had nothing to do with the Panama cases, and involves different parties, and Andrew White is in a different set of chambers from me.
 - d. Thirdly, such a situation, namely, an arbitrator in one case sitting in an unrelated case with someone from a different set of chambers (albeit the same set as Mr McMullan) is, like the other situations discussed above, not even mentioned in the IBA Traffic light Code.
 - e. Thus, the circumstances complained of do not, in my view, have an impact upon my impartiality or independence of judgment and no disclosure is required.
8. Complaint V: I am in a set of barristers' chambers and cannot give disclosure of what other members of chambers are doing
- a. The Claimants make this point in the Letters at paragraph 62. They also allude to this point at page 5, paragraph 25, second bullet point, and page 8, paragraphs 39 – 42.
 - b. Firstly, the only other member of Keating Chambers (in which I practise) who has had anything to do with the Panama cases is Stephen Furst, Q.C., who was an arbitral member in the Advance Payment Arbitration, ICC 22588/ASM/JPA). Mr Furst sat with Prof Kaufmann-Kohler and Prof Tawil (see footnote 3 on page 2 of the Letters). Of course, I had nothing to do with the nomination of Mr Furst. The Claimants would have been aware at the time of Mr Furst's nomination that he was in Keating Chambers since White & Case were acting for the Claimants and are very familiar with Keating Chambers, often instructing members of it in various cases. No complaints were raised at the time and the final award in that Advance Payment Arbitration was issued nearly two years ago on 10 December 2018. Thus, the circumstances complained of do not, in my view, have an impact upon my impartiality or independence of judgment and no disclosure is required.
 - c. Secondly, the Claimants raise a second point about Keating chambers. They say (the Letters, paragraph 25, second bullet point) I have declined to give disclosure about what other cases members of Keating Chambers have been in for the Respondents generally. As I explained to the Claimants (see copies of my emails to the Claimants appended hereto), I am not in a position to know (and cannot be in a position to know) what other members of Keating Chambers are doing professionally, since each barrister is self-employed. As I stated in my email of 29 October 2020 to the Claimants, paragraph number 2: *"You ask about the members of Keating Chambers. Barristers in England in private practice are individual practitioners, each of whom is self-employed. Each practitioner owes a duty of confidentiality to their clients (Bar Standard Board Core Duty 6) and by rule rC15.5 is obliged to protect "the confidentiality of each client's affairs except for such disclosures as are required by law or to which the client gives informed consent". Thus, were any other barrister in Keating Chambers to be asked to reveal whether he or she had acted for a particular party or firm they are forbidden to reveal that information by the rules. I can only repeat what I said in my email below. I do not know and cannot know in what cases other members of chambers are engaged since that is contrary to the way the English bar operates, since we are frequently on opposite sides. We are not in a "firm". Each of us is self-employed. The only other member of Keating of whom I am aware being involved in a relevant case is Stephen Furst, and as I mentioned earlier, he*

spends much of his time in Scotland and I have little to do with him. You quote para. 28 of the ICC Note, referring to "consider disclosing relationships with another arbitrator or counsel" (underlining added). I have only a distant professional relationship with Stephen Furst (who, in any event, has not been involved in any of the Panama arbitrations in which I have been involved)."

- d. Importantly, as noted above, the Rules of the Bar Standards Board (which govern practice at the English Bar) require each individual barrister to maintain confidentiality about their clients' affairs. Hence, even if asked, other members of Keating Chambers cannot give details of other cases in which they are involved. This is a point of principle. The Claimants say (the Letters, paragraph 40) that somehow the English Bar is like a law firm where partners "eat what they kill". This comparison is based upon a misconception. Members of law firms do not act against each other. By contrast, barristers in Keating Chambers (and other sets of chambers) regularly act against each other.
- e. In the Letters at paragraph 41 the Claimants refer to ICC Rule Article 11(2) about disclosing facts which might call into question the arbitrator's independence, "in the eyes of the parties" (The underlining is by the Claimants.) This is a surprising point, since White & Case regularly instructs members of the English Bar (and often instructs members of Keating Chambers) and is familiar with the way the English Bar operates, and is able to explain to the parties for whom they act the procedures of the English Bar. In my email of 24 October 2020 to the Claimants I stated: *"I have, over the years, been appointed arbitrator by White & Case in a number of arbitrations, and, though only on a few occasions, by Mayer Brown. I am currently in a SIAC case where Matthew Secomb and Philip Tan of White & Case represent one of the parties, and in another Singapore (SIAC) case where White and Case represent one party and appointed me as their nominated arbitrator. I am currently in an ICC arbitration in the Middle East where I was appointed by the side opposing White & Case. You will, within your firm, no doubt have records of such White & Case appointments."*
- f. Since the Bar Standards Board's Rules mean that one member of chambers has no knowledge of what other members of chambers are doing there is no room for one barrister's activities to influence another. Of course, in a situation (quite unlike anything complained about by the Claimants) where one member of, say, Keating Chambers were to be instructed as counsel in a case where, say, I was an arbitrator, this would immediately be apparent to me (and to both sides) and disclosure would be automatic. It is for this reason that when English barristers are appointed as arbitrators in arbitrations where they do not know who counsel are they generally ask the parties as soon as the arbitral tribunal is appointed to identify counsel, and then insert in the Terms of Reference a provision that if counsel are to be changed the tribunal must be immediately notified. Of course, nothing like that applies here: counsel on both sides in the Panama cases have nothing to do with Keating Chambers.
- g. In summary, there are good reasons why I am unable to give disclosure of what other members of Keating Chambers are doing professionally. This is not a limitation imposed by me but applies to the English Bar as a whole, and is a point of principle. In any event, the Claimants' concerns are entirely hypothetical since there is no suggestion that any other member of Keating Chambers is involved in the Panama cases other than Stephen Furst QC.

9. Conclusions

- a. The above points have been answered in my responses (see annexures hereto) to the Claimants' email letters asking for more information. For each point the circumstances complained of do not, in my view, have an impact upon my impartiality or independence of judgment and no disclosure is required.
- b. Accordingly, the challenge to my role as an arbitrator should be declined.

Annexures to RG's Response to the Claimants' challenge letters of 28.10.20

Annex I: 24.10.20

Dear Ms Lamm,

Re ICC 22466/ASM/JPA: Grupo Unidos por el Canal & Others v Autoridad del Canal de Panama & tribunals

1. Reference is made to Claimants' letter of 15 October 2020 referring to Article 11(3), ICC Rules, and para 23, ICC Note to Parties & Tribunals on the Conduct of the Arbitration and requesting updated disclosure of any facts or circumstances that may affect the arbitrator's independence in the eyes of any of the Parties or that could give rise to reasonable doubts as to their impartiality.
2. The short answer to the above enquiry is that there is nothing to disclose. Nevertheless, I note the questions raised in the Claimant's letter (which appear to go much wider than the disclosure obligations contemplated by the applicable rules) and so I now provide full transparency as regards my position.
3. As regards professional/personal relations with other members of the tribunal
 - a. I note you ask about "*other members of your Barrister Chambers*". I am afraid I have no knowledge of what other members of Keating Chambers do professionally. At the English bar each barrister is self-employed. We practise in sets of chambers for convenience but remain entirely independent of each other because we are often instructed on different sides of a dispute. Accordingly, I have no way of knowing what other members of the chambers are doing professionally.
 - b. As regards the other arbitrators in ICC 22466 (and 20910), I am a co-arbitrator in the ICC 24400 arbitration where Pierre-Yves Gunter is the President. That case has nothing to do with ICC 22466. I am not involved in any other arbitration with Claus Von Wobeser. Besides the above, I have never sat as an arbitrator with either of them.
4. Counsel

I have, over the years, been appointed arbitrator by White & Case in a number of arbitrations, and, though only on a few occasions, by Mayer Brown. I am currently in a SIAC case where Matthew Secomb and Philip Tan of White & Case represent one of the parties, and in another Singapore (SIAC) case where White and Case represent one party and appointed me as their nominated arbitrator. I am currently in an ICC arbitration in the Middle East where I was appointed by the side opposing White & Case. You will, within your firm, no doubt have records of such White & Case appointments. Manus McMullan QC of Atkin Chambers is currently representing a party in a dispute before me, where the subject matter and parties have nothing to do with ICC 22466. Some years ago, in both cases well before the commencement of the Panama arbitrations, I once sat in a tribunal with Richard Preston of Seyfarth Shaw, and also sat with James Loftis of Vinson & Elkins. As regards Schellenberg Wittmer, I have not encountered either Elliott Geisinger or Christopher Boog prior to ICC 22466, and have had no dealings with them outside of this case. Some time ago I sat in an arbitral tribunal where Prof. Nathalie Voser of that firm was the chair. So far as I am aware I have not sat with anyone from ACP, Bonelli Erede Studio Legale or Aleman, Codero, Galindo & Lee. I frequently speak at conferences where lawyers attend from many major firms and so I encounter

them but I do not keep records of such encounters. I do not have any close personal relationship with any counsel involved in ICC22466.

5. The Parties/Other Tribunals

- a. Your email of 19 October 2020 lists other arbitrators in the Panama disputes. As you are aware, I was a member of the 19962 tribunal with Bernard Cremades under Bernard Hanotiau, and am a member of the tribunal in 22465 with Bernard Audit and Bernardo Cremades. I note Stephen Furst was in 22588, and he is a member of Keating Chambers though I have no awareness of his professional activities (see above). He lives much of the time in Scotland and I have little to do with him. I have never sat with Gabrielle Kaufmann-Kohler or Guido Tawil.

6. Please confirm receipt.

Yours faithfully,
Robert Gaitskell

Annex II: 29.10.20

Dear Ms Lamm,

Re ICC 22466/ASM/JPA (C-22967/JPA)

With reference to your email below dated 26 October 2020, I confirm my earlier point that I have nothing to disclose. I further confirm that there are no facts or circumstances that may affect my independence in the eyes of any of the Parties or that could give rise to reasonable doubts about my impartiality. Nevertheless, in full transparency I now provide information in response to your queries.

1. You ask about cases since 2012 (3 years before ICC 20910): your original request was in relation to ICC 22466, rather than 20910. Nevertheless, these cases from 2012 are already mentioned collectively in my previous email, when I referred in paragraph numbered 4 to : *"I have, over the years, been appointed arbitrator by White and Case in a number of arbitrations, and, though only on a few occasions, by Mayer Brown,"* I now elaborate (for the items where my earlier email did not elaborate) the cases involving White & Case (of which you should be aware from your firm's records) and the one Meyer Brown case: (i) on or about 6 June 2012 I was appointed by two parties, one of whom was White & Case (W&C) as an ad hoc sole adjudicator; (ii) in or about January 2014 I was nominated by one party while W&C nominated a different co-arbitrator in an ICC arbitration, which settled; (iii) in or about February 2014 in ICC 19962 W&C nominated Bernardo Cremades while Vinson & Elkins nominated me. (iv) As regards Meyer Brown, in February 2011 they nominated me as a co-arbitrator in an ICC case which settled in October 2012.
2. You ask about the members of Keating Chambers. Barristers in England in private practice are individual practitioners, each of whom is self-employed. Each practitioner owes a duty of confidentiality to their clients (Bar Standard Board Core Duty 6) and by rule rC15.5 is obliged to protect "the confidentiality of each client's affairs except for such disclosures as are required by law or to which the client gives informed consent". Thus, were any other barrister in Keating Chambers to be asked to reveal whether he or she had acted for a particular party or firm they are forbidden to reveal that information by the rules. I can only repeat what I said in my email below. I do not know and cannot know in what cases other members of chambers are engaged since that is contrary to the way the English bar operates, since we are frequently on opposite sides. We are not in a "firm". Each of us is self-employed. The only other member of Keating of whom I am aware being involved in a relevant case is Stephen Furst, and as I mentioned earlier, he spends much of his time in Scotland and I have little to do with him. You quote para. 28 of the ICC Note, referring to "consider disclosing relationships with another arbitrator or counsel" (underlining added). I have only a distant professional relationship with Stephen Furst (who, in any event, has not been involved in any of the Panama arbitrations in which I have been involved).
3. You ask about Andrew White, and refer to two links to the ICC database. These both refer to the same W&C case (so you will have details in your firm's records). I believe Andrew White was nominated by

W&C. The two co-arbitrators asked me to replace an earlier president who found himself conflicted. Not that it is relevant, but I am currently in a tribunal with Nicholas Dennys QC (he is president) of Atkin Chambers (the same chambers as Mr McMullan QC). The case has nothing to do with ICC 22466, and concerns a dispute in Africa.

4. You ask about my and Mr Gunter's appointments in ICC 24400. I was nominated by a contractor and the employer nominated a lawyer in France. We wished to nominate as president a civil lawyer with experience of construction disputes and so approached Mr Gunter and he accepted. The case relates to a North African dispute and has nothing to do with ICC 22466.
5. You ask about my and Mr Loftis' appointments in a case: these were in an ICC case that commenced in or about July 2010 and ended July 2012. I was nominated as chair by the ICC. He was a party appointed arbitrator. The case had nothing to do with ICC 22466 and was concerned with the Middle East/India. Other than that case I have never sat with anyone from Vinson and Elkins.
6. You ask about my appointment as president in the UNCITRAL case where Mr McMullan QC is representing a party: I was appointed in or about December 2016 by the two co-arbitrators (who have nothing to do with ICC 22466) and, so far as I am aware, neither Mr McMullan nor the parties themselves had any role in my appointment.
7. Please confirm receipt.

Yours faithfully,

Robert Gaitskell (29 October 2020)

Annex III: 3.11.20

Dear Ms Lamm,

By reference to your email of 2 November 2020 raising two further queries, I now respond as below. As before, I confirm that I have nothing to disclose but provide this information as a matter of complete transparency.

1. The date on which my nomination was proposed and accepted/notified to the parties in ICC 24400: by ICC letter of 12 July 2019 the Parties and I were informed that the Secretary General confirmed me as co-arbitrator upon Claimant's nomination.
2. The process leading to my and Nicholas Dennys QC's appointments: I was asked by email of 18 July 2017 by the Claimant in that arbitration to confirm I would accept appointment as a co-arbitrator and by email of that day I did so confirm. Mr Dennys was chosen by the Parties themselves and I had nothing to do with it.

Please confirm safe receipt.

Best wishes,

Robert Gaitskell (3 November 2020)