UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO: 1:20-cv-24867

GRUPO UNIDOS POR EL CANAL, S.A., SACYR, S.A., WEBUILD S.p.A., JAN DE NUL N.V.	
Movants,	
v.	
AUTORIDAD DEL CANAL DE PANAMA,	
Respondent.	

MOTION TO VACATE PARTIAL ARBITRAL AWARD AND INCORPORATED MEMORANDUM OF LAW

1. Movants Grupo Unidos por el Canal, S.A., Sacyr, S.A., Webuild, S.p.A., and Jan De Nul N.V. move pursuant to the Federal Arbitration Act (***FAA***), 9 U.S.C. §§ 9, 10, 201, 208 (2018), for an order vacating a final partial award (***Partial Award or Award***) rendered in ICC Case No. 20910/ASM/JPA (the ***Panama 1 Arbitration***) in Miami under Panamanian law.[1]

2. The Award arises out of the project for the Third Set of Locks of the Panama Canal (the ***Project***): a multi-billion-dollar project spanning a decade to enlarge the width and depth of and add a new channel to the Panama Canal, significantly increasing its vessel capacity. Movants—international construction firms domiciled in Panama, Spain, Italy, and Belgium, respectively[2]—

[1] This Motion incorporates the memorandum of law required by Southern District of Florida Local Rule 7.1(a)(1). A certified copy of the Partial Award in ICC Case No. 20910/ASM/JPA (C-20911/ASM) (hereinafter ***Award***) is submitted with this Motion as **Exhibit 1** to the attached Declaration of Nicolas Bouchardie (***Bouchardie Decl.***). (All subsequent references to "Exhibits" are exhibits to the Bouchardie declaration.) The Award was signed by the Tribunal on September 21, 2020 and was notified to Movants on September 28, 2020. *See* Bouchardie Decl., ¶ 1 (indicating the dates of filing and delivery of the Award).

[2] **Exhibit 1:** Award, ¶¶ 1–4.

successfully completed and delivered this historic public-works project to Respondent Autoridad del Canal de Panamá (***ACP***), an instrumentality and domiciliary of the Republic of Panama[3] and the operator of the Panama Canal.[4] ACP, however, refused to take responsibility for what Movants consider to be its material breaches of the Parties' contracts and of Panamanian law, causing Movants hundreds of millions of dollars in damages.

3. Movants were so shocked by the flawed reasoning and analysis of the arbitral tribunal's (***Tribunal***) Award, which went entirely against, and reversed, the reasoned decisions in Movants' favour by the underlying Dispute Adjudication Board (the dispute board established under the contract at issue (the ***Contract***)), that Movants were prompted to investigate whether the arbitrators acted with the requisite impartiality and independence. This investigation revealed that there were in fact several relationships between the arbitrators and other individuals involved in this dispute—relationships that were not but should have been disclosed. Especially considering the financial remuneration to the Tribunal president flowing from his undisclosed appointment as president of another ICC arbitration by ACP's arbitrator, there is an evident appearance of bias and lack of impartiality by the Tribunal.[5]

4. The Tribunal's failure to disclose multiple cross-appointments and inter-relationships among themselves and others involved in this dispute, the financial remuneration flowing from these undisclosed relationships, and the fundamentally flawed Award itself violate several provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (***New York Convention*** or ***Convention***) and the FAA. *First*, Movants seek vacatur of the Award as it was the product of the Tribunal's evident partiality, which arose from the arbitrators' failure to disclose material and lucrative relationships and other connections reflecting potential conflicts of interest, and which give rise to the clear impression of bias. *Second*, this evident partiality manifested itself in an Award marked by a pervasive pattern of

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[3] *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panamá*, No. 17-23996-CIV-SCOLA, 2018 WL 3059649, at *2 (S.D. Fla. June 20, 2018).

[4] Hereinafter, Movants and ACP collectively will be referred to as the ***Parties***.

[5] Movants expect to receive further information in the coming weeks in the context of the ICC challenge proceedings. If and when such information is released, we will update the Court accordingly.

unsustainable decision-making and lack of reasoning, which evidences a lack of independence and impartiality. Movants thus have been denied the opportunity to be heard on arguments that first appeared in the Award itself as well as on findings that are not adequately supported by Tribunal reasoning or in accordance with applicable or fundamental rules of due process. For these independent reasons, this Court should vacate the Award.

I. JURISDICTION AND VENUE

5. *Subject-matter jurisdiction*. This Court holds subject-matter jurisdiction over the present case by virtue of 28 U.S.C. §§ 1330(a), 1331. The case satisfies the requirements of § 1330(a) because (i) ACP is an organ of the Republic of Panama that comes within the definition of an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b) and is therefore a "foreign state" under 28 U.S.C. § 1603(a), making this proceeding a "nonjury civil action against a foreign state" 28 U.S.C. § 1330(a); and (ii) ACP is subject to jurisdiction under 28 U.S.C. §§ 1605(a)(1), (2), (6) by having waived its immunity through agreements to arbitrate in Miami under the FAA,[6] participated in a Miami-seated arbitration in connection with its commercial relationship with Movants,[7] and entered into agreements to arbitrate in the United States.[8] This case also satisfies the requirements of 28 U.S.C. § 1331 because the Award arises from a commercial relationship among parties which are not United States domiciliaries. The Award is accordingly subject to the New York Convention, and this case is thus a "proceeding falling under the Convention" and presenting a federal question under 9 U.S.C. §§ 202–03, 28 U.S.C. § 1331.

6. *Personal jurisdiction*. This Court holds personal jurisdiction over ACP by virtue of 28 U.S.C. §§ 1330(b), 1608(b)(2), 1608(b)(3)(B), as Movants are serving process on ACP in the manner prescribed by 28 U.S.C. §§ 1608(b)(2), 1608(b)(3)(B).

7. *Venue*. Venue is proper under 9 U.S.C. §§ 10(a), 204, 208 because the Parties' contracts specify Miami as the place of arbitration and Miami is the place where the Award was made.[9]

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[6] **Exhibit 1:** Award, ¶¶ 406, 408–09.

[7] *See* **Exhibit 1:** Award, ¶¶ 286, 414–43 (indicating that the merits hearing of the arbitration was held in Miami and detailing the commercial background of the Parties' contracts).

[8] **Exhibit 1:** Award, ¶¶ 406, 408–09.

[9] *See* **Exhibit 1:** Award, ¶ 565 (indicating that the Award was made in Miami).

II. ARGUMENT

A. INTRODUCTION

8. The Project (which was part of the broader Panama Canal expansion) was a truly historic undertaking. The Movants were selected from several bidding consortia after obtaining the highest technical score, with a bid close to ACP's own estimate (based on years of its own expert investigations and historical documents). Movants successfully completed the Project and handed it over to ACP. ACP now is reaping over one billion dollars in additional annual revenue from the expanded Canal.

9. As the Parties came from several different countries, they agreed to arbitration under the Rules of Arbitration of the International Chamber of Commerce (***ICC*** and ***ICC Rules***) to ensure that any disputes relating to this multi-billion-dollar project were resolved in a neutral forum by independent and impartial arbitrators.

10. In an international arbitration under the ICC Rules, Movants are entitled to important safeguards set out in Article V of the New York Convention, the FAA, and ICC Rules, particularly the right to unbiased and impartial arbitrators, the right to be heard, and the right to a reasoned award.[10] As detailed below, the Tribunal manifestly violated the requirements of the New York Convention and the FAA in a pervasive pattern of misconduct.

11. *First*, central to ICC arbitration is the assurance of independent, unbiased, and objective arbitrators. The requirement to disclose affirmatively anything that might reasonably give rise to doubt concerning an arbitrator's independence and impartiality is central to the choice of such a system. Movants, however, have experienced a grave injustice in that they were not accorded

[10] Article V of the New York Convention provides the sole grounds for vacatur of an award subject to the Convention. *See Inversiones y Procesadora Tropical, S.A. (INPROTSA) v. Del Monte Int'l GmbH*, 921 F.3d 1291, 1297 (11th Cir. 2019) (noting a motion to vacate could only be successful if it asserted a valid defense under the Convention). There is no essential difference, however, between these grounds and the grounds for vacatur of domestic awards under Section 10 of the FAA. *See Restatement (Third) of Int'l Commercial & Inv'r-State Arb.* § 4.9 cmt. a, Reporter's Note a. (Am. Law Inst., Proposed Final Draft 2019) (recognizing that "courts and commentators have tended to construe the grounds similarly" and that "the grounds . . . are in substance the same"). This Motion will accordingly rely on authorities under both New York Convention Article V and FAA Section 10.

a fair and impartial adjudication of their claims against ACP, which failed due to the evident partiality exhibited by the members of the Tribunal: Mr. Gunter, Dr. Gaitskell QC, and Mr. von Wobeser. As Movants recently learned, each member of the Tribunal failed to disclose relevant and material professional relationships outside the arbitration that can reasonably be viewed as creating conflicts of interest and the perception of bias, including most critically that—during the pendency of the Panama 1 arbitration—ACP's arbitrator appointed the Tribunal president in another ICC case, which likely will result in the Tribunal president earning hundreds of thousands of dollars in fees.

12. *Second*, the Tribunal's evident partiality manifested itself specifically through several issues that never were raised by the Parties, but were instead raised *sua sponte* by the Tribunal for the first time in the Award itself. This manifestation of partiality notably includes a central issue at stake in the Panama 1 Arbitration: the Tribunal's treatment of paragraph 1.07.D.1 of section 01 50 00 of the Employer's Requirements (a part of Parties' agreements), which led the Tribunal to find that ACP had disclaimed its liability for the unsuitability of existing basalt rock to produce "aggregates" for the millions of cubic meters of concrete needed to complete the Project, by reference to arguments never raised by ACP and therefore never addressed by Movants.[11] The Tribunal relied on its conclusion that ACP had disclaimed its liability in that regard to reject Movants' claims relating to concrete aggregate production. Further, given the high stakes of this multi-billion-dollar project, the Parties expressly agreed that any arbitral award must be justified with the reasoning of the Tribunal. Yet on several critical issues (including, again, the Tribunal's treatment of the above-mentioned paragraph 1.07.D.1), the Tribunal entirely failed to do so.

B. THE TRIBUNAL DISPLAYED EVIDENT PARTIALITY THROUGH THE NON-DISCLOSURE OF POTENTIAL MATERIAL CONFLICTS OF INTEREST AND MANIFESTED ITS BIAS IN A DEFICIENT AWARD

1. All Three Arbitrators Failed to Disclose Potential Conflicts of Interest

13. Article V(1)(b), (1)(d), and (2)(b) of the New York Convention and Section 10 of the FAA impose "'the simple requirement that arbitrators disclose to the parties any dealing that

[11] *See* **Exhibit 1:** Award, ¶ 919 (calling the interpretation of paragraph 1.07.D.1 "central to the Parties' dispute").

might create an impression of possible bias.'"[12] Accordingly, under both the Convention and the FAA, an award should be vacated where "(1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists."[13] One situation that is especially prone to potential bias is one in which an arbitrator fails to disclose a "pecuniary interest" related to the case.[14]

14. The disclosure rules of the New York Convention and the FAA are reinforced by ICC Rules. Under Article 11 of the ICC Rules, an arbitrator has a continuing duty to "disclose in writing . . . any facts or circumstances" arising either before or during the arbitrator's appointment "which *might* be of such a nature as to call into question the arbitrator's independence *in the eyes of the parties*, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality."[15]

15. The members of the Tribunal violated these fundamental norms by failing to disclose material professional connections that create an impression of bias, including most egregiously the undisclosed agreement of ACP's arbitrator with his co-arbitrator, to appoint the Tribunal president in the Panama 1 Arbitration to serve as tribunal president in separate ICC case—a lucrative post under which the Tribunal president will likely earn hundreds of thousands of dollars.[16] Before and during the Panama 1 Arbitration, the Tribunal made only limited and inconsequential disclosures.

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[12] *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1338 (11th Cir. 2002) (quoting *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968)).

[13] *Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998); *see also Mendel v. Morgan Keegan & Co.*, 654 F. App'x 1001, 1004 (11th Cir. 2016) (per curiam) (citing *Gianelli*, 146 F.3d at 1312) (same).

[14] *FDIC v. IIG Capital, LLC*, No. 11-CIV-21784-UNGARO, 2011 WL 13223912, at *4 (S.D. Fla. Sept. 27, 2011) (requiring "showing of pecuniary interest on the part of the arbitrator or some other fact to suggest bias" for vacatur).

[15] **Exhibit 6:** Rules of Arbitration of the International Chamber of Commerce (hereinafter ***ICC Rules of Arbitration***), art. 11(2), (3) (emphasis added); *cf.* **Exhibit 7:** IBA Guidelines on Conflicts of Interest in International Arbitration (2014) (hereinafter ***IBA Guidelines***), art. 3(a) (imposing on an arbitrator a continuing duty, "[i]f facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, [to] disclose such facts or circumstances to the parties").

[16] *See* **Exhibit 6:** ICC Rules of Arbitration, app. III, art. 3(4) (setting out the fee scale for ICC arbitrators).

But when Movants received the Award and saw that the Tribunal had in many instances ruled on grounds not put forth by *either* party and made factual findings inconsistent with the factual record, Movants promptly requested that each Tribunal member update his disclosures (***Disclosure Requests***) to ensure that there were no unknown circumstances that might have affected their impartiality and independence.[17]

16. The arbitrators' responses to the Disclosure Requests remain incomplete,[18] but they confirm that there were several important professional connections that should have been—but were not—disclosed and that would lead a reasonable person to believe that potential conflicts of interest exist. The failures to disclose here are particularly troubling, as most ICC arbitrations are confidential, and the parties are therefore entirely reliant on the integrity of the arbitrators to disclose potentially relevant information.[19] The following undisclosed connections raise serious questions about the integrity of the Panama 1 Arbitration and require vacatur of the Award:

17. *First*, ACP's arbitrator appointed the Tribunal president to a different confidential arbitral tribunal before the Tribunal began its deliberations in the Panama 1 arbitration.

(a) During the pendency of the Panama 1 Arbitration, and indeed before closing arguments and deliberation, ACP's arbitrator, Dr. Gaitskell, appointed the Tribunal president, Mr. Gunter, as president in a separate ICC arbitration (ICC Case No. 24400).[20] The president of an ICC tribunal can earn several hundreds of thousands of dollars per case, in accordance with the ICC Rules.[21] Yet neither Mr. Gunter nor Dr. Gaitskell disclosed this important and valuable appointment to

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17 *See* Bouchardie Decl., ¶ 29.

18 Given that the arbitrators' disclosures remain incomplete, Movants reserve the right to amend or supplement the facts described in this motion.

19 *See Univ. Commons-Urbana*, 304 F.3d at 1339 ("[A]n arbitrator is obligated to disclose those facts that create a reasonable impression of partiality, or put another way, information which would lead a reasonable person to believe that a potential conflict exists." (internal citations and quotation marks omitted)).

20 *See* Bouchardie Decl., ¶¶ 32, 51, 61.

21 *See* **Exhibit 6:** ICC Rules of Arbitration, app. III, art. 3(4) (setting out the fees for ICC arbitrators; depending on the amount in dispute, fees for arbitrators range from a minimum of USD$3,000 to over $500,000).

Movants when it occurred, and it is unclear whether Movants' arbitrator, Mr. von Wobeser, was aware of this separate connection between Mr. Gunter and Dr. Gaitskell during the Tribunal's deliberations. Only after Movants' Disclosure Requests (post-notification of the Award) did Mr. Gunter first acknowledge that he was sitting with Dr. Gaitskell, and even then he did not acknowledge that Dr. Gaitskell was responsible for his receiving the other appointment—a critical point that only came out after Movants pressed Mr. Gunter for further clarification.[22] Thus, Mr. Gunter and Dr. Gaitskell sit on another tribunal, without Mr. von Wobeser, including while deliberations for the Panama 1 Arbitration were ongoing.[23]

(b) This cross-appointment, which Mr. Gunter knew of but failed to disclose, "would lead a reasonable person to believe that a potential conflict exists."[24] Mr. Gunter cannot but be influenced, whether consciously or subconsciously, by the fact that Dr. Gaitskell was responsible for providing him this prestigious and lucrative appointment. Whether or not there was a *quid pro quo* between the two arbitrators, this appointment clearly gave ACP's arbitrator the ability to interact and build a bond with the Tribunal president on numerous occasions outside the presence of Movants' arbitrator. The fact that this appointment was not disclosed by either arbitrator furthers the impression of bias.

18. *Second*, the Tribunal president during the Panama 1 Arbitration, yet—without disclosure—sat on multiple arbitral tribunals with Professor Hanotiau, the tribunal president in an earlier arbitration between the Parties (the ***Cofferdam Arbitration***), and joined with Dr. Gaitskell (ACP's arbitrator) to render a majority award in the Cofferdam Arbitration that dealt with questions of principle also at stake in the Panama 1 Arbitration.[25]

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22 *See* Bouchardie Decl., ¶ 51.

23 **Exhibit 70:** Updated Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM), ¶ 24.

24 *Univ. Commons-Urbana*, 304 F.3d at 1339.

25 *See* Bouchardie Decl., ¶¶ 8–9.

(a) For the first time in response to Movants' post-Award Disclosure Requests, Mr. Gunter revealed that he has been sitting in another arbitration with Professor Hanotiau.[26] Mr. Gunter's relationship with Professor Hanotiau was highly material because the majority award in the Cofferdam Arbitration—which was issued by Professor Hanotiau and Dr. Gaitskell, over the forceful dissent of Movants' appointee, Mr. Cremades—made findings regarding issues of central importance to the Cofferdam Arbitration (such as the diligence to be expected from bidders and the application of disclaimers of liability), which Movants later realized were then imported in the Award.[27] After a further question from Movants, Mr. Gunter clarified that he was in fact appointed president in the undisclosed case by Professor Hanotiau and the other co-arbitrator on July 22, 2017, after the start of the Panama 1 Arbitration, and that these proceedings are still ongoing.[28]

(b) Movants' recent research further reveals that Mr. Gunter also acted as co-arbitrator on an arbitral panel where Professor Hanotiau served as president after being nominated by Mr. Gunter and the other co-arbitrator, which Mr. Gunter at first failed to disclose in response to the Disclosure Requests. At Movants' insistence, Mr. Gunter finally confirmed the existence of the other arbitration, and clarified that he and his co-arbitrator appointed Professor Hanotiau as president in November 2016, and that the award was issued on June 6, 2019.[29] Mr. Gunter also belatedly disclosed that he had also sat in an ad hoc arbitration in which he and his co-arbitrator had nominated Professor Hanotiau as president on October 3, 2013 and that the award was rendered on September 7, 2015.[30] This means that Mr. Gunter and Professor Hanotiau have been almost continuously sitting together, and thus spending substantial time together, since 2013.[31]

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[26] *See* Bouchardie Decl., ¶¶ 32–33.
[27] *See* Bouchardie Decl., ¶¶ 8, 54–55.
[28] *See* Bouchardie Decl., ¶ 53.
[29] *See* Bouchardie Decl., ¶ 53.
[30] *See* Bouchardie Decl., ¶ 53.
[31] **Exhibit 70:** Updated Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM), ¶ 23.

(c) Given that Mr. Gunter, together with ACP's arbitrator Dr. Gaitskell, in the Panama 1 Arbitration was being asked to opine on the binding or persuasive effect of Professor Hanotiau's majority award (with Dr. Gaitskell) in the Cofferdam Arbitration, a reasonable person learning of the undisclosed connections between Mr. Gunter and Professor Hanotiau would believe that a potential conflict or persuasive influence exists. Mr. Gunter's non-disclosure is especially glaring considering that the Tribunal, despite having correctly concluded that no issue preclusion was attached to the majority award in the Cofferdam Arbitration, went on reference that award nearly *100 times*, sometimes simply cutting and pasting significant portions of it directly into the Award. Indeed, the Tribunal imported the Cofferdam Majority's approach to central issues in dispute without offering any independent analysis or addressing the significant new evidence that Movants presented during the proceedings.[32]

19. *Third*, ACP's arbitrator, Dr. Gaitskell, has failed to disclose potential conflicts arising from his relationships with the Tribunal president and with the president of the Cofferdam Arbitration tribunal. He also has refused to conduct a conflict check extending to his own barristers' chambers.[33]

(a) As noted above, Dr. Gaitskell also failed to disclose that he appointed—together with his co-arbitrator—Mr. Gunter as president in another ICC arbitration. This undisclosed appointment reasonably creates the impression of partiality because the Tribunal president is likely to receive hundreds of thousands of dollars in fees thanks to ACP's arbitrator, who also enjoys a special relationship with the Tribunal president that is not shared by Movants' arbitrator, who is not part of that tribunal.

(b) Dr. Gaitskell also has refused to investigate any potential conflicts of interest arising from the activities of Keating Chambers (the English barristers' chambers to which he belongs) or its members, claiming to have "no knowledge of what other members of Keating Chambers do professionally" and "no way of knowing."[34] That is simply

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32 *See* Bouchardie Decl., ¶ 26.
33 Bouchardie Decl., ¶¶ 33, 64–65.
34 Bouchardie Decl., ¶ 64.

not accurate: clerks in barristers' chambers are able to gather the information needed for a conflict search, which can be run without violating the confidences of the chamber's clients.[35] Dr. Gaitskell's refusal even to investigate potential conflicts of interest at Keating Chambers is rather arresting considering that such conflict checks are now common practice in international arbitration, even with English barristers' chambers.[36] The refusal is significant because Keating Chambers' barristers specialize in construction and international arbitration cases and are likely to appoint, appear before, or serve on tribunals with the arbitrators in this case. Importantly, Dr. Gaitskell's recent refusal to carry out a conflict check extending to members of his chambers shows that he did not carry out any such a conflict check at the time of his nomination in the Panama 1 Arbitration, either.

20. *Fourth*, the third arbitrator, Mr. von Wobeser, failed to disclose his ongoing relationship with APC's counsel.[37]

(a) The undisclosed potential conflicts of Mr. Gunter and Dr. Gaitskell also taint the work of Mr. von Wobeser, who was indirectly, but necessarily, affected by the undisclosed potential conflicts described above. In addition, Mr. von Wobeser failed to disclose that, since July 2019, he has been sitting in an arbitration with Mr. Andrés Jana, counsel for ACP, as a fellow member of the tribunal.[38] This tribunal was constituted before the oral closing of the Parties in the Panama 1 Arbitration, and continued during the Tribunal's deliberations. Such a connection creates the impression of bias in that it gave counsel for ACP, Mr. Jana, the opportunity to liaise directly with Mr. von Wobeser in an *ex parte* manner, outside of the presence of Movants, in circumstances where Mr. von Wobeser necessarily will be seeking Mr. Jana's agreement on an award. Indeed, such a connection is exactly what the United

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[35] *See* **Exhibit 70:** Updated Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM), ¶ 33.

[36] *See* **Exhibit 70:** Updated Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM), ¶ 33.

[37] *See* Bouchardie Decl., ¶¶ 70.

[38] Bouchardie Decl., ¶ 70.

States Court of Appeals for the Eleventh Circuit already has found to constitute a potential bias requiring vacatur, that is "if an arbitrator, *concurrently with the arbitration*, partakes in a proceeding in which counsel for one of the parties to the arbitration is also participating."[39] Whether or not there is any *quid pro quo* between the two men, there is at least the possibility and therefore the impression of a conflict of interest. The fact that Mr. von Wobeser did not disclose his relationship with Mr. Jana exacerbates the "impression of bias" arising from these unusual circumstances.

21. Both individually and collectively, the above-described non-disclosures constitute a serious breach of each arbitrator's impartiality and independence, and create an impression of bias for a reasonable person. Movants never would have accepted the appointment of the arbitrators, "had they been informed at the relevant time of these disclosures, as should have been the case."[40] As a result, Movants have been forced to assert challenges based on these undisclosed conflicts in the ICC arbitrations themselves.[41]

22. As noted in the Bouchardie Declaration and shown in the chart below—which provides a visual representation of the various appointments described above in relation to the Panama 1 Arbitration—the undisclosed conflicts overlapped for effectively the entirety of the Panama 1 Arbitration, further bolstering the obligation to disclose given the ample opportunity for

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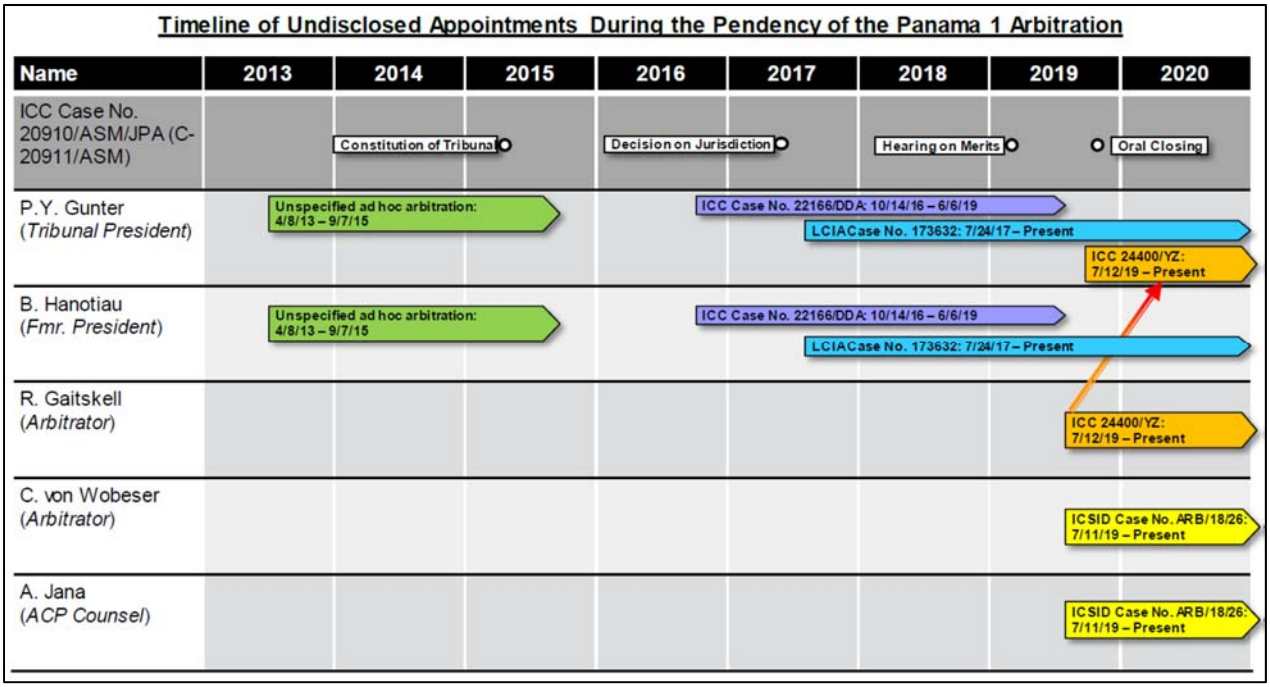
[39] *Univ. Commons-Urbana*, 304 F.3d at 1340 (emphasis in original); *see also id.* at 1341 ("[S]erving as the decision-maker in one action in which a colleague in another action represents a party clearly poses the possibility of bias, and thus represents a potential conflict that a reasonable person would easily recognize.").

[40] **Exhibit 70:** Updated Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM), ¶ 30; **Exhibit 69:** Letter from Sacyr, Webuild, and Jan De Nul to the ICC.

[41] **Exhibit 53:** ICC Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM); **Exhibit 54:** ICC Challenge Application in ICC Case No. 22466/ASM/JPA (C-22967/ASM); **Exhibit 70:** Updated Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM); **Exhibit 70:** Updated Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM); **Exhibit 72:** ICC Challenge Application in ICC Case No. 22465/ASM/JPA (C-22966/JPA).

the arbitrators' lack of independence and partiality to embed itself in the proceeding and, ultimately, infect the Award.[42]



2. The Tribunal's Evident Partiality Manifested Itself in Key Issues in the Award

23. The evident partiality and perception of bias revealed by the foregoing non-disclosures manifested in many ways throughout the Tribunal's Award. In particular, the Tribunal reached unsupported conclusions for which it failed to state reasons and based its findings on arguments that neither ACP nor ACP's experts had made—in hundreds of pages of pleadings and some four weeks of hearings—without notice to Movants. The Tribunal thus deprived Movants of the opportunity to respond to these arguments and present witness evidence, expert rebuttal opinions, or cross-examination on these matters. These failures are independent grounds for vacatur under the New York Convention and the FAA:

(a) Under Article V(1)(b) of the New York Convention, when a party has *inter alia* been denied an opportunity to be heard, the award must be vacated.[43] The award also must

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[42] **Exhibit 76:** Timeline of Undisclosed Appointments During the Pendency of the Panama 1 Arbitration.

[43] *See* New York Convention art. V(1)(b) (providing for vacatur if a party "was otherwise unable

be vacated where a party is not given notice or an opportunity to respond to an argument.[44]

(b) When parties specially contract to receive a reasoned arbitral award, the New York Convention requires the tribunal to abide by that agreement which, in the present case, requires the Tribunal to state its reasoning.[45] Here, the Parties expressly provided in their contracts that the Tribunal must decide their dispute "under the Rules of Arbitration of the [ICC]."[46] Article 32(2) of the ICC Rules requires that an ICC "award shall state the reasons upon which it is based."[47] For an award to satisfy this requirement the Tribunal's "reasoning must be both thorough and self-sufficient" and must show that each party had "the opportunity to answer the case against it and also any pertinent point raised by the arbitral tribunal on its own initiative, as well as to deal with any fact or allegation brought to the attention of the tribunal."[48]

24. Thus, as demonstrated herein, not only does the Tribunal's evident partiality and perception of bias serve as a basis for vacatur of the Award, but the Tribunal's actions also denied

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to present his case"); *see also Consorcio Rive S.A. v. Briggs of Cancun, Inc.*, 82 F. App'x 359, 364 (5th Cir. 2003) (noting Art. V(1)(b) states an award "need not be enforced" where party was unable to present its case); *Teamsters, Chauffers, Warehousemen & Helpers, Local Union No. 506 v. E.D. Clapp Corp.*, 551 F. Supp. 570, 577–78 (N.D.N.Y. 1982) (granting motion to vacate where petitioner had not had "a full opportunity" to present its case to arbitrator).

44 *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) ("The essential requirements of due process . . . are notice and an opportunity to respond."); *Parsons & Whittemore Overseas Co., Inc. v. Société générale de l'industrie du papier (RAKTA)*, 508 F.2d 969, 975 (2d Cir. 1974) ("This provision essentially sanctions the application of the forum state's standards of due process.").

45 *See*, *e.g.*, *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 841–42 (11th Cir. 2011) (district court vacated award where parties' agreement required a reasoned award); *W. Emp'rs Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 262 (9th Cir. 1992) (vacating award where panel failed to provide reasoned award as required by arbitration agreement).

46 **Exhibit 1:** Award, ¶¶ 406, 408–09.

47 **Exhibit 6:** ICC Rules of Arbitration, art. 32(2).

48 Humphrey Lloyd et al., *Drafting Awards in ICC Arbitrations*, 16 ICC Int'l Ct. Arb. Bull. 19 (2005), ¶ 5; *see also id.* ¶ 5.2.3 ("The arbitral tribunal must be sure that it bases its decisions on only the facts and law presented to it by the parties or which it has ascertained (where it is permissible for it to do so) and which the parties have been given a proper opportunity to challenge.").

Movants the opportunity to be heard by adopting arguments that had not been made by either party and violated the Parties' contractual provision for a reasoned award.

25. *First*, the Tribunal's partiality manifested itself in its denial of Movant's opportunity to be heard and its failure to state reasons relating to a central issue at stake in the arbitration:[49] whether paragraph 1.07.D.1 of section 01 50 00 of the Employer's Requirements excluded ACP's liability for the unsuitability of the basalt rock to be excavated for purposes of the Project near the Pacific Ocean (***PLE Basalt***) to produce "concrete aggregates" (in particular, sand). Paragraph 1.07.D.1 concerned the source of concrete aggregates to be used and which Movants—based upon ACP's representations—planned to use to produce the millions of cubic meters of concrete required for the Project. When the PLE Basalt proved unsuitable, Movants were forced to excavate rock elsewhere in order to produce aggregates, leading not only to significant additional costs but causing massive difficulties and delays.

26. Both Parties expressly agreed that paragraph 1.07.D.1 should be interpreted "according to its literal terms."[50] In interpreting paragraph 1.07.D.1, the Tribunal initially conducted such "literal reading"[51] of the provision as Panamanian law required and concluded that the exclusion of liability referred only to aggregate, and not to the PLE Basalt.[52] However, the Tribunal then disregarded its own analysis and Panamanian law, and interpreted this provision based on arguments not raised by the Parties, including by reference to prior negotiations.[53] The Tribunal did so despite the plain meaning of the Contract governed by Panamanian law, as the Tribunal already had found in other parts of the Award.[54] In particular:

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49 *See* **Exhibit 1:** Award, ¶ 919 (calling the interpretation of paragraph 1.07.D.1 "central to the Parties' dispute").

50 **Exhibit 33:** Transcript of Closing Hearing in ICC Case No. 20910/ASM/JPA (C-20911/ASM) (Day 22) (excerpts), at 174:1; **Exhibit 1:** Award, ¶ 906 ("both Parties consider[ed] that these provisions of the Contract [were] clear and require[d] no interpretation"). The Parties disagreed only about what precisely a literal interpretation of the provision entailed.

51 **Exhibit 1:** Award, ¶ 927.

52 Under Panamanian law, the plain meaning of a contract is controlling. **Exhibit 1:** Award, ¶ 628.

53 Bouchardie Decl., ¶¶ 80–91.

54 **Exhibit 1:** Award, ¶ 628 ("The first sentence [of article 1132 of the Panamanian Civil Code] reflects the principle of *in claris interpretatio non fit*, and thus imposes the general rule that *if the words of the contract are clear and unambiguous, no interpretation is necessary and the*

(a) The Tribunal relied on a three-part analysis of the applicability of basalt rock to the disclaimer language of paragraph 1.07.D.1—argumentation that ACP had not put forward. The Tribunal analyzed paragraph 1.07.D.1 separately as against "*adequacy*," "*meet*[ing] *the requirements for the Contractor's proposed design*," and "*suitab*[ility] *for the Works*," deciding that adequacy and suitability for the Works applied to the basalt and therefore concluding that the paragraph 1.07.D.1 disclaimer applied to the basalt.[55] ACP, however, never put forward this three-part contextual argument. If Movants had had an opportunity to address this position, they would have shown (including though expert evidence) that it was unfounded.

(b) The Tribunal also took account of "the [P]arties' conduct . . . to assess their mutual intention."[56] However, ACP argued that the literal meaning of the terms of the Contract (not the Parties' conduct) should be used to establish the mutual intent of the Parties. Further, in assessing the Parties' mutual intention, the Tribunal considered the Q&As exchanged at the tender stage, noting that, in the Tribunal's view, the tenderers' questions referred to the sources of the aggregate (i.e., the rock or the PLE Basalt) as "aggregates."[57] Here again, the Tribunal went beyond the arguments made by ACP, which had never argued that the Q&A session held with tenderers for the Project should inform the interpretation of the Contract.[58] On this point too, Movants were denied an opportunity to respond with appropriate evidence and counter-arguments. Had Movants been given such opportunity, they would have explained that none of the tenderers' questions relied upon by the Tribunal came from Movants (rather they came from other tenderers) and cannot therefore evidence Movants' understanding at the time, especially considering that Movants' questions

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clear terms shall prevail." (emphasis added)).

55 **Exhibit 1:** Award, ¶ 931.

56 **Exhibit 1:** Award, ¶ 934–38.

57 **Exhibit 1:** Award, ¶¶ 934–35.

58 Bouchardie Decl., ¶¶ 88–89.

clearly distinguished between the basalt (the rock as a source) and the aggregates (the manufactured product).[59]

27. Further, the Tribunal offered no reasons whatsoever for its departure from what it elsewhere had concluded was the plain meaning of paragraph 1.07.D.1—or from the governing principle, which it had itself espoused, that the plain reading of a contract prevails under Panamanian law. This is all the more remarkable because the Tribunal's total about-face took place within merely a few paragraphs. At paragraph 927 of the Award, the Tribunal established the clear terms and "literal reading of the wording of [paragraph 1.07.D.1]"—but by paragraph 934, the Tribunal contradictorily asserted that paragraph 1.07.D.1 is "objectively ambiguous" and then sought, without taking into consideration any argument raised by the Parties, to rely on the Parties' conduct leading up to the conclusion of the Contract. The Tribunal's reading of paragraph 1.07.D.1, a direct result of its bias, led the Tribunal to exclude ACP's liability for the unsuitability of the PLE Basalt, despite what it had earlier recognized was the plain, literal meaning of the relevant provision.[60]

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[59] Bouchardie Decl., ¶¶ 88–90.

[60] In arriving at the above conclusions, which contradicted what the Tribunal itself had said was the "clear distinction" made in paragraph 1.07.D.1 between aggregate and rock and the "literal reading of the wording of this provision," the Tribunal fundamentally exceeded its authority. *See* New York Convention art. V(1)(c) (providing for vacatur of an award that "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"). An arbitral tribunal exceeds its authority when it "ignore[s] the plain language of the [parties'] contract" by "contradict[ing] the express language of the agreement" or by "modify[ing] clear and unambiguous terms." *Wiregrass Metal Trades Council v. Shaw Envtl. & Infrastructure, Inc.*, 837 F.3d 1083, 1088 (11th Cir. 2016) (internal citations and quotation marks omitted). An arbitral award should also be vacated where a tribunal fails to apply the governing law or simply ignores its provisions. *See Edstrom Indus., Inc. v. Companion Life Ins. Co.*, 516 F.3d 546, 552–53 (2008) (finding arbitrator failed to apply state law as required by the arbitral agreement), *abrogated on other grounds by Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011) (abrogating *Edstrom* insofar as it could be read as resting on the ground of manifest disregard of law). The Tribunal ignored this basic aspect of its mandate and, instead, impermissibly relied on its own vague "notions of . . . justice" rather than applying norms that could even plausibly be characterized as Panamanian law. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013) (internal citations and quotation marks omitted).

28. The consequences of the Tribunal's findings on this issue were far-reaching. In particular, the Tribunal explicitly relied on its interpretation of paragraph 1.07.D.1 to reject Movants' claims for breach of the duties to inform and to act in good faith,[61] both of which had been put forward by Movants as independent bases for their concrete aggregate production claim.[62] Further, although the Tribunal did not explicitly acknowledge it, its interpretation of paragraph 1.07.D.1 vitiated Movants' alternative theories for their concrete aggregate production claims (such as the breach of the Employer's Requirements).[63]

29. *Second*, the Tribunal found that, by failing to conduct additional tests on the PLE Basalt at the tender stage to determine its suitability for crushing into aggregates, Movants had not complied with Prudent Industry Practices.[64] As a result, the Tribunal held that, because Movants failed to do additional testing,[65] Movants "did not undertake sufficient efforts to self-inform" and in turn breached their duty to self-inform.[66] As detailed by Mr. Bouchardie, in doing so the Tribunal effectively imposed its own views of Prudent Industry Practices based on a biased and incomplete analysis of the evidence, and ignoring important arguments raised by Movants.[67] Further, while the Tribunal erroneously claimed it was relying on positions asserted by ACP's experts for its finding that Movants did not conduct sufficient validation tests, no such position was presented.[68] By ignoring the Parties' agreement and evidence, and creating their own view of Prudent Industry

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61 *See* **Exhibit 1:** Award, ¶¶ 1097–98 & n.979 (duty to inform); *id.* ¶ 1121 (duty to act in good faith). The contractual exclusion also was relied upon by the minority to reject Movants' claim for breach of the Panamanian law duty to plan. **Exhibit 1:** Award, ¶¶ 1062–95.

62 *See* **Exhibit 1:** Award, ¶¶ 744, 780–83, 1096, 1103, 1118.

63 Bouchardie Decl., ¶ 92 *et seq.* With respect to Movants' claim under the Employer's Requirements, the Tribunal's finding that ACP did not bear the risk for the unsuitability of the PLE Basalt necessarily affected the Tribunal's interpretation of the statements included by ACP in the Employer's Requirements regarding the suitability of the PLE Basalt. Similarly, if Movants did not bear the risk for the unsuitability of the PLE Basalt for use as concrete aggregates, that would reduce the level of investigation that Movants would have been expected to carry out prior to submitting their tender.

64 *See* **Exhibit 1:** Award, ¶ 1081.

65 *See* Bouchardie Decl., ¶¶ 92–97.

66 Bouchardie Decl., ¶¶ 92–93.

67 *See* Bouchardie Decl., ¶¶ 92–97.

68 *See* Bouchardie Decl., ¶¶ 92–97.

Practices, without inviting the Parties' views, the Tribunal reached unsupported conclusions for which it failed to state reasons and denied Movants an opportunity to be heard. Such conduct only heightens the concerns of Tribunal bias.

30. *Third*, in support of its conclusion that Movants had failed to appreciate the risk that the PLE Basalt would not be suitable for aggregate production, the Tribunal also noted that one of the tenderers (***C.A.N.A.L.***) had bid a price much higher than that of Movants and even ACP's own estimate, which the Tribunal inferred was the result of C.A.N.A.L. better appreciating the risks associated with the Project (including the risk of unsuitability of the PLE Basalt for aggregate production).[69] ACP, however, never argued that C.A.N.A.L.'s bid was more reasonable because C.A.N.A.L. had better assessed the unsuitability of PLE Basalt for aggregate.[70] Rather, the bids were significantly different, and even "ACP itself recognized that the bid prices would be very dependent on the quantities of concrete that the Tenderers would plan to use."[71] Thus, Movants were denied the opportunity to introduce evidence and arguments in rebuttal to the Tribunal's own speculation about C.A.N.A.L.'s bid.[72]

31. *Fourth*, the Tribunal relied on large block quotes from the Cofferdam Arbitration majority award and imported the Cofferdam majority's approach for many of its conclusions, offering no additional analysis of its own.[73] As the Tribunal itself acknowledged,[74] the Cofferdam Arbitration majority award was *not* binding. Simply copying and pasting from a non-binding source cannot be deemed "providing reasons," especially here, where Movants provided—but the Tribunal ignored—additional evidence and argumentation as to why the Cofferdam Arbitration majority award was wrong.

32. Thus, the Tribunal's bias resulted in an Award built upon contradictory reasoning—or no reasoning at all—at key junctures, factual determinations unsupported by the record,[75] and

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69 *See* **Exhibit 1:** Award, ¶ 1060.
70 *See* Bouchardie Decl., ¶¶ 98–103.
71 Bouchardie Decl., ¶ 102.
72 *See* Bouchardie Decl., ¶¶ 98–103.
73 *See* Bouchardie Decl., ¶ 26.
74 **Exhibit 1:** Award, ¶ 1129.
75 *See Detroit Coil Co. v. Int'l Ass'n of Machinists & Aerospace Workers, Lodge No. 82*, 594 F.2d

unknown or irrelevant grounds, thus demonstrating reasoning "so erroneous . . . or unclear" that the Award must be set aside.[76]

III. REQUEST FOR HEARING AND DISCOVERY

33. Movants request a hearing for the Parties to argue this Motion before the Court. A brief hearing will give the Parties an opportunity to clarify the complex factual background supporting vacatur, above all the multiple relationships that give rise to a reasonable impression of partiality. Movants also request expedited discovery under rule 26(d)(1) of the Federal Rules of Civil Procedure. Given that the requested discovery or otherwise could result in further facts supporting the evident partiality from requests to the arbitrators and/or Parties—and acknowledging the difficulty in obtaining such facts—Movants reserve the right to amend and/or supplement the facts and arguments in the Motion.

IV. PRAYER FOR RELIEF

34. For the foregoing reasons, Movants move this Court to enter an order vacating the Award in full and granting such other relief as the Court should deem proper.

575, 580–81 (6th Cir.) (holding that an award cannot stand when arbitrator's factual determinations are unsupported by record).

[76] *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 68 (D.D.C. 2010).

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Respectfully submitted,

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