UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

Miami Division

Case No. 20-CV-24867-SCOLA

……

GRUPO UNIDOS POR EL CANAL, S.A.,
SACYR, S.A.,
WEBUILD S.p.A., and
JAN DE NUL N.V.

Movants/Counter-Respondents,

v.

AUTORIDAD DEL CANAL DE PANAMÁ,

Respondent/Counter-Movant.

…….

Second Expert Opinion of Mr. Gary B. Born

Submitted at the Request of Respondent Autoridad del Canal de Panamá

TABLE OF CONTENTS

I. INTRODUCTION

1. This is the second expert opinion I have been asked to submit by Vinson & Elkins L.L.P., counsel to Autoridad del Canal de Panamá ("Respondent" or "ACP"), regarding the arbitration between ACP and Grupo Unidos Por El Canal S.A. et al ("Movants" or "GUPC" and together with ACP the "Parties") in ICC Case No. 20910/ASM/JPA (C-20911/ASM), which the Parties refer to as the "Panama 1 Arbitration."

2. My professional qualifications and experience can be found at paragraphs 7-15 of my first expert opinion, dated August 4, 2021 (my "First Report"), and in my detailed CV that was attached to my First Report as Annex B.

3. In my First Report, I reviewed exhaustively the relevant standards for arbitrator disclosure and removal in international commercial arbitration proceedings and considered the conduct of the arbitrators in the Panama 1 Arbitration (the "Arbitrators") in light of these standards. I also discussed the relevance of these issues in the context of proceedings to vacate the final arbitral award ("Final Award") and the partial arbitral award ("Partial Award") in the Panama 1 Arbitration. In the course of my First Report, I responded to arguments put forth in the first expert opinions submitted by Professors Jack Coe and Chiara Giorgetti on behalf of Movants.[1]

4. In my First Report, I concluded that none of the Arbitrators had any obligation to disclose the contacts with other arbitrators or counsel that Movants allege should have been disclosed. Furthermore, I also concluded that none of the Arbitrators was subject to removal for non-disclosure of the contacts relied upon by Movants. That follows, *a fortiori*, from the fact that none of those contacts was even required to be disclosed, and, even if there had been some disclosure obligation, that none of these matters in any way compromised any of the Arbitrators' independence or impartiality. Finally, I concluded that, in my view, there was no conceivable

[1] *See* Expert Opinion of Professor Jack J. Coe, Jr., dated July 23, 2021 ("Prof. Coe First Report") (DKT No. 55-2) and Expert Report of Professor Chiara Giorgetti, dated July 23, 2021 ("Prof. Giorgetti First Report") (DKT No. 55-1).

basis for vacatur of either the Partial Award or Final Award on the non-disclosure grounds asserted by Movants.

5. In this second expert opinion, I have been asked to consider the additional arguments put forth in the second expert opinion of Professor Coe, the second expert opinion of Professor Giorgetti and the expert opinion of Judge Stephen Schwebel submitted on behalf of Movants.[2]

6. Nothing in those additional expert opinions alters the conclusions or analysis of my First Report. In this expert opinion, I highlight the most important applicable principles that Movants' experts ignore or misstate. Below I summarize my main conclusions in this second expert opinion:

a. The applicable standards of disclosure in this case are provided by the Federal Arbitration Act (the "FAA") and the ICC Rules of Arbitration (the "ICC Rules"). Other rules and laws previously cited by Movants' experts are irrelevant, and, as I point out below, now appears to be acknowledged by those experts. While not binding, the IBA Guidelines on the Conflicts of Interest in International Arbitration (the "IBA Guidelines") are relevant to the applicable standards for disclosure, because those Guidelines provide the most widely-used and recognized standards in international arbitration concerning arbitrator disclosure and disqualification. Contrary to suggestions of some of the Movants' experts, the IBA Guidelines would without question have been consulted by the Arbitrators, the parties (and their counsel) and the ICC Court in this case and are important indicia of the expectations of parties to international arbitrations such as this.

b. The Movants' experts almost entirely ignore the specific non-disclosures at issue in this case, providing no conclusions with respect to either obligations to have disclosed those matters or whether those non-disclosures warrant either removal of an arbitrator or vacatur of an award. Instead, the Movants' experts confine their opinions primarily to

[2] *See* Second Expert Opinion of Professor Chiara Giorgetti, dated September 13, 2021 ("Prof. Giorgetti Second Report") (DKT No. 64); Second Expert Opinion of Professor Jack J. Coe, Jr., dated September 13, 2021 ("Prof. Coe Second Report") (DKT No. 65); Expert Report of Judge Stephen M. Schwebel ("Judge Schwebel Report") (DKT No. 66).

general assertions and abstract theories. Putting aside errors in those assertions and theories, the question whether particular circumstances should be disclosed or could be grounds for removal or vacatur is a fact-specific inquiry that turns on the circumstances of individual cases; general assertions and theories provide little assistance in conducting that inquiry. In my view, the Movants' experts' failures to engage meaningfully as to this inquiry, or with my First Report's discussion of this inquiry, deprives those opinions of any real value in addressing the issues in this case.

c. The Movants' experts rely on the theory that the "cumulative" nature of the non-disclosures in this case supports an objective perception of bias.[3] This is mistaken. If a particular circumstance is irrelevant or immaterial, several such irrelevant or immaterial circumstances cannot acquire relevance when considered together (a sum of zeroes is still zero).

d. The Movants' experts fail to acknowledge the fundamental purpose of the standard of independence and impartiality: arbitrators should be independent and impartial *with respect to the parties and their counsel*. Instead, Movants' experts primarily focus on the Arbitrators' relationships with each other (or with other arbitrators) and fail to explain how these relationships among arbitrators could have led the Arbitrators to be partial to or dependent on one of the parties or its counsel. In my First Report, I explained in detail how the undisclosed circumstances in this case could not objectively be viewed as casting doubt on any of the Arbitrators' independence or impartiality except pursuant to implausible hypotheses and conspiracy theories. I note that none of the Movants' experts have sought to rebut my analysis of these issues.

e. The disclosure standard under the ICC Rules applicable to the Panama 1 Arbitration is deliberately phrased in a subjective and broad manner. In contrast, the standards for both the removal of an arbitrator and the vacatur of an award under the FAA are deliberately formulated in objective and much narrower terms. Thus, the

[3] *See* Judge Schwebel Report, at para. 22; Prof. Coe First Report, at para. 38; Prof. Coe Second Report. at para. 61; Prof. Giorgetti Second Report, at para. 58.

Movants' experts are simply wrong when they imply, and sometimes state, that a failure to disclose a potentially relevant circumstance will automatically lead to annulment. Remarkably, the Movants' experts rely on the fact that the Arbitrators supposedly violated the ICC's rules on disclosure but then dismiss as irrelevant the fact that, as the ICC Court expressly affirmed, a violation of these disclosure rules do not automatically, or ordinarily, lead to the disqualification of an arbitrator under the ICC Rules and did not result in disqualification of any of the Arbitrators in this case. In my view, the Movants' experts improperly cherry-pick provisions from the ICC Rules, ignoring the most significant aspects of the ICC Court's decision-making and the ICC Rules and misusing other aspects of the ICC Court's decision.

f. The Movants' experts dedicate substantial effort to explaining why, in their view, very expansive and continuous arbitrator disclosure is desirable public policy.[4] However, their individual (and controversial) views about public policy do not change the actual disclosure standard for the Arbitrators in this case, which is not nearly as expansive or disproportionate as they claim it is. Moreover, their public policy preferences cannot be applied retroactively to inform the standard applicable to the disclosures of the Arbitrators.

g. The Movants' experts posit that if arbitrators are not compelled to disclose potential conflicts broadly, there is a risk that they will not disclose potentially relevant circumstances because of their unconscious biases[5] or conscious desire to keep lucrative appointments.[6] The Movants' experts ignore the more evident moral hazard – namely, the risk of parties using farfetched theories of arbitrator conflict to delay arbitrations through arbitrator challenges, or worse, as in this case, to seek annulment or otherwise

---

[4] *See* Prof. Coe First Report, at paras. 38-39; Prof. Coe Second Report, at para. 89; Judge Schwebel Report, at paras. 20-21; Prof. Giorgetti Second Report, at paras. 78-80, 83; Prof. Giorgetti First Report, para. 36-39.
[5] *See* Judge Schwebel Report, at para. 20; Prof. Giorgetti Second Report, at paras. 79-80; Prof. Giorgetti First Report, at paras. 12, 27, 38.
[6] *See* Judge Schwebel Report, at para. 20; Prof. Giorgetti Second Report, at para. 77; Prof. Giorgetti First Report, at para. 22; Prof. Coe First Report, at para. 29.

avoid enforcement of valid arbitration awards. Relatedly, the Movants' experts regard disclosure obligations as cost-free, and therefore extremely broad, when both the ICC Rules, the FAA, the IBA Guidelines and all other relevant sources of rules provide for proportionate and balanced disclosure obligations, recognizing that disclosure imposes material costs on the parties, the arbitrators and the arbitral process.

h. The Movants' experts have asserted that my First Report primarily relies on the premise that only a limited pool of arbitrators would have been perceived by the Parties as having the sufficient skill and experience to decide the Panama 1 Arbitration. This is only a secondary point in my First Report. My conclusions were based on the FAA, the ICC Rules and accepted international arbitration principles. In any case, the Panama 1 Arbitration is in fact a case that, given the character and complexity of the underlying contracts and dispute, was very similar to maritime/reinsurances cases where the pool of potential arbitrators is correctly described as limited.

7. In providing this second opinion, I have reviewed the documents listed in Annex A (in addition to the documents I reviewed in preparing my First Report, listed in Annex A to that report).

8. My understanding of the relevant facts in this case is based on my review of the documents provided to me.[7] I reserve the right to amend, vary or supplement the views expressed in this opinion upon receipt of additional documents or information.

II. THE APPLICABLE STANDARDS OF DISCLOSURE IN THIS ACTION ARE PROVIDED BY THE FAA AND THE ICC RULES WHILE THE IBA GUIDELINES REFLECT INTERNATIONAL ARBITRATION PRACTICE

9. In the Panama 1 Arbitration, the underlying arbitration agreement expressly provided that "the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce," and that "the arbitration agreement and the arbitration shall be governed by the

[7] My firm has been compensated for the study and preparation of this second expert report by fees not to exceed $155,000; as of the date of this report, the accrued fees have reached that cap.

United States Federal Arbitration Act."[8] Moreover, as I explained in my First Report, the FAA would pre-empt application of U.S. state law even if the parties had not expressly selected a procedural law.[9] Thus, the applicable standards of disclosure in this action are clearly the New York Convention, the FAA's provisions regarding international arbitration and the ICC Rules.

10. Nevertheless, the primary focus of the Movants' experts' numerous reports has been on a selection of alternative sources that Movants' experts contend this Court should look to when determining the applicable duty to disclose. The Movants' experts have suggested a variety of sources as potentially relevant, implying that the arbitrator's duty to disclose should be informed by various provisions of U.S. state law,[10] the procedural rules of arbitral institutions different than the one selected by the parties in this dispute (i.e., the ICC),[11] an ethical code that has no force of law unless adopted by the parties (which was not the case here),[12] an irrelevant European Court of Human Rights decision,[13] and a controversial code intended exclusively for investment arbitrations which has not yet been adopted in any fashion, even in the investment context.[14]

11. In his first opinion, Professor Coe claimed that Florida state law on the disclosure of relationships with co-arbitrators applied here,[15] and that the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes (the "ABA-AAA Code") and various U.S. state laws demonstrate that an arbitrator "must generally consider revealing past and existing dealings with

---

[8] Final Award, at para. 78 (DKT No. 55-4).
[9] *See* Born First Report, at paras. 82-83.
[10] Prof. Coe First Report, at paras. 27-31 ("there are solid reasons why the ABA-AAA Ethics text, state law, and the ICC call attention to relationships among arbitrators, and why an arbitrator erring on the side of disclosure generally must consider revealing past and existing dealings with other prospective tribunal members").
[11] Prof. Giorgetti First Report, at para. 23-25 (describing the disclosure standard of several different arbitral institutions to conclude "in international arbitration, arbitrators have an obligation to provide full and continuous disclosure").
[12] Prof. Coe First Report, at paras. 27-31.
[13] Judge Schwebel Report, at para. 19.
[14] Prof. Giorgetti First Report, at para. 24.
[15] Prof. Coe First Report, at para. 29 ("Most fundamentally, when an arbitrator accepts an appointment to an international arbitral tribunal seated in Miami, an arbitrator must comply with the disclosure requirements mandated by Florida law, which requires disclosure of relationships with other arbitrators, counsel, and the parties throughout the proceedings.").

other prospective tribunal members."[16] In his second opinion, however, Professor Coe concedes that "the applicable disclosure standards for international arbitrators in this federal action are those of the ICC Rules and the FAA."[17] That concession is, for the reasons explained in my First Report, correct.

12. While Professor Coe now admits that the ABA-AAA Code "is not binding in this case,"[18] he still suggests that it might be "relevant here in that it serves to inform the FAA's evident partiality standard in regard to violation of disclosure obligations."[19] In support of that suggestion, Professor Coe misconstrues my treatise as supposedly indicating that the "significance of the ABA-AAA Code of Ethics is confirmed by the extent to which US courts have relied on it."[20]

13. Professor Coe fails to appreciate that the ABA-ABA Code's significance, whatever it may be, is confined to cases administered by the AAA, as I explained in my First Report: "In particular, the ABA-AAA Code of Ethics is not applicable or applied in ICC arbitrations or by

---

[16] Prof. Coe First Report, at para. 31.
[17] Prof. Coe Second Report, at para. 12.
[18] Prof. Coe Second Report, at para 17.
[19] Prof. Coe Second Report, at para. 17.
[20] Prof. Coe Second Report, para. 19 fn. 28. Professor Coe refers to my treatise wherein I cite cases in support of the proposition that the "Code has been relied upon in a number of decisions by U.S. courts in considering issues relating to arbitrators' independence and impartiality in the context of actions to vacate or confirm arbitral awards." Prof. Coe Second Report, at para. 19 (quoting International Commercial Arbitration 1967 (3d ed. 2021)). However, I was referring to the fact that U.S. courts have considered the ABA-AAA Code in determining whether an arbitrator *in an AAA-administered arbitration* was impartial. The underlying cases I cite to in support of this proposition were AAA-administered. *See e.g., Lifecare Int'l, Inc. v. CD Med., Inc*., 68 F.3d 429, 432 (11th Cir. 1995) ("The American Arbitration Association denied the motion to disqualify and the proceedings continued"); *Dadeland Square, Ltd. v. Gould*, 763 So. 2d 524, 525 (Fla. Dist. Ct. App. 2000) (Plaintiff "then filed a demand for expedited arbitration with the American Arbitration Association…"). Professor Coe cites to a case where the Second Circuit ignored the lower court's references to the ABA-AAA Code in affirming the decision, citing to caselaw instead. Prof. Coe Second Report, at para. 49. As this was an ad-hoc arbitration, rather than one administered by the AAA, the lower court's reference to the ABA-AAA Code was unusual, and it is not surprising that the Second Circuit affirmed on other grounds.

other institutions administering international arbitrations."[21] Instead, the ABA-AAA Code of Ethics was intended to provide guidance for arbitrators sitting in arbitrations under the AAA Rules and is relied upon by the AAA in making challenge decisions in arbitrations under the AAA Rules."[22] That is particularly true given the fact – not mentioned by Professor Coe – that the express language of the ABA-AAA Code itself limits its relevance to cases wherein the parties have agreed to give it force of law.[23] The ABA-AAA Code is irrelevant in this case where the Panama 1 Arbitration was administered by the ICC, and the Parties did not agree to give the ABA-AAA Code either force of law or contractual relevance.

14. Notably, the Parties to the Panama I Arbitration could have agreed to arbitrate under the AAA or ICDR Rules, or could have incorporated the ABA-AAA Code by reference, but chose not to. Rather, the Parties agreed to arbitrate under a different set of institutional arbitration rules – the ICC Rules – with a different set of disclosure and removal obligations. Disregarding that choice, and imposing a different set of arbitration rules and disclosure obligations would violate fundamental principles of party autonomy,[24] which the Movants' experts acknowledge are of

---

[21] Born First Report, at para. 90. Professor Coe argues that my statement was misleading because the Arbitration Rules of the ICDR, the division of the AAA that administers international arbitrations, provides that the Code applies in cases administered by the ICDR and therefore the Code "was in fact intended for international use, not only for AAA arbitrations." Prof. Coe Second Report, at para. 17. However, that the AAA apples the ABA-AAA Code in both its domestic and international arbitrations does not change that the AAA-ABA Code only applied in AAA-administered arbitrations. Indeed, the ICDR only expressly adopted the AAA-ABA Code into the ICDR Rules very recently, with its new ICDR Rules, effective March 1, 2021. *See* 2021 ICDR International Dispute Resolution Procedures, art. 14(1).

[22] *See* Born First Report, at para. 90.

[23] ABA-AAA Code of Ethics, Note on Construction, at p. 2. ("This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.").

[24] G. Born, INTERNATIONAL COMMERCIAL ARBITRATION, Ch. 15, § 15.02, at p. 2295 (3d. ed. 2021) ("One of the most fundamental characteristics of international commercial arbitration is the parties' freedom to agree upon the arbitral procedure. This principle is acknowledged in and guaranteed by the New York Convention and other major international arbitration conventions; it is guaranteed by national arbitration statutes in virtually all jurisdictions; and it is contained in and facilitated by the rules of most arbitral institutions.") (Exhibit 5).

central importance here.[25] As the Supreme Court held in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, when "construing an arbitration clause, courts and arbitrators must 'give effect to the [parties'] contractual rights and expectations…as with any other contract, the parties' intentions control.'"[26] In particular, this means that the parties' choice of procedure must be respected. As U.S. courts have held, "the FAA requires 'arbitration proceed *in the manner provided for in [the parties'] agreement*.'"[27]

15. Unlike Professor Coe, Professor Giorgetti has not reconsidered her initial position regarding the source of the applicable standards of arbitrator disclosure and removal in this case. In particular, she continues to assert that the rules of arbitral institutions other than those of the ICC are relevant because they "demonstrate that a common contemporaneous consensus exists towards more disclosure in international arbitration."[28] This is mistaken because it purports to replace the parties' agreement to arbitrate with Professor Giorgetti's personal academic preferences.

16. As I explained in my first expert report, there is no consensus for "more" disclosure or "expansive" disclosure, without regard to other considerations; rather, the consensus, apart from Professor Giorgetti's views, is that disclosure should be "proportionate."[29] More fundamentally, the rules of other arbitral institutions are not applicable to the Court's analysis in this case because the Parties have not agreed to be bound by those rules and have instead agreed to be bound by the ICC Rules. It is elementary that the Parties' selection of the ICC Rules, and those Rules' standards regarding arbitrator independence and disclosure, is valid and effective under the FAA. Substituting other institutional rules – or one academic's views about a "consensus" of

---

[25] *See* Prof. Coe Second Report, at para. 81 ("Arbitration is an attractive alternative to courts for international disputes in part because of the broad autonomy accorded the parties. Disclosure is an important facet of party autonomy[.]").
[26] 559 U.S. 662, 664 (2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989)).
[27] Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 325 (2d Cir. 2004) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989)) (emphasis in original).
[28] Prof. Giorgetti Second Report, at para. 62.
[29] Born First Report, at para. 76.

other institutions' standards – for the Parties' agreement violates basic principles under the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

17. Professor Giorgetti also continues to argue for the purported relevance of the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (the "Draft Investor-State Code"), suggesting that it "reinforces the view that arbitrators should err on the side of disclosure."[30] While I recognize Professor Giorgetti's extensive personal contributions in the drafting and efforts to publicize the Draft Investor-State Code,[31] I see no basis for her position that the Draft Investor-State Code has any effect on the disclosure standards under the ICC Rules or the FAA, much less this Court's vacatur analysis.

18. As I explained in my First Report, the Draft Investor-State Code remains a strictly aspirational, incipient effort to harmonize disclosure standards for international *investment* arbitration (and not for international *commercial* arbitration), has not been adopted in any fashion in any place, and may never be adopted given the significant criticism it has already received.[32] Professor Giorgetti's suggestion that the current version of the Draft Investor-State Code for *investment* arbitration should affect existing *commercial* arbitrations is, in my view, indefensible.

19. In sum, none of the alternative sources proffered by the Movants and their experts to either supplant or supplement the FAA and the ICC Rules have any bearing in this action. The only secondary source that this Court could appropriately take into consideration is the IBA Guidelines. This is because, in my experience, the IBA Guidelines are consulted at some point in the arbitrator selection process in almost every international commercial arbitration. As I stated in my First Report, the IBA Guidelines do not have the status of national law, with

[30] Prof. Giorgetti Second Report, at para. 59.
[31] Prof. Giorgetti First Report, at para. 4.
[32] Born First Report, at para. 93.

mandatory legal effect, but they are nonetheless widely used in international commercial arbitrations and generally reflect the expectations of the parties, counsel and arbitrators.[33]

20. Professor Coe spends significant effort in his second opinion attempting to diminish the relevance of the IBA Guidelines.[34] Professor Coe argues that the IBA Guidelines are inapposite because "the parties have not designated them as applying to their arbitration" and because of "the highly limited role the IBA Guidelines have played in US case law."[35] With respect, Professor Coe misses the point.

21. Unlike the ABA-AAA Code, or any of the other alternative source cited by Movants' experts, parties to international arbitration expect that arbitrators will consider the IBA Guidelines in making disclosure decisions, and parties will cite to them in challenging arbitrators. The IBA Guidelines are, unlike the AAA-ABA Code or the Draft Investor-State Code, not institutional rules, applicable only to one institutional arbitration process, but instead a general set of best practices, relevant generally to all institutional and ad hoc international arbitrations.[36] Parties will also expect that the IBA Guidelines will inform challenge decisions taken by arbitral institutions.[37] Indeed, there are numerous publicly available instances where the

---

[33] Born First Report, at para. 39. *See e.g., Halliburton Company (Appellant) v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48, ¶ 67. ("The IBA Guidelines 2014 set out good arbitral practice which is recognised internationally").
[34] *See* Prof. Coe Second Report, at paras. 46-61.
[35] Prof. Coe Second Report, at para. 46.
[36] *See* Born First Report, at paras. 53-56 (explaining that the IBA Guidelines have gained general acceptance as a set of best practices which are applied in the majority of international arbitrations).
[37] *See* Born First Report, at paras. 55-56; *see, e.g.,* N. Blackaby, C. Partasides, et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, at pp. 256-258 (6th ed. 2015) (Exhibit 4) ("the Guidelines have gained general acceptance as a non-binding set of principles with which most international arbitrators seek to comply…the Guidelines are relied upon heavily by parties challenging arbitrators and those defending such challenges. And whilst the Guidelines may not always be directly cited, they are nonetheless also present in the minds of the authorities when reaching decisions on concepts of independence and impartiality.")

ICC Court has resolved a dispute over an arbitrator's duty to disclose by reference to the IBA Guidelines.[38]

22. In my experience, of more than 675 international commercial arbitrations, and in my tenure as president of a leading international arbitral institution that routinely considers disclosure and challenge issues, the IBA Guidelines are, with virtually no exceptions, always considered or cited by parties, arbitrators and institutions. I cannot recall an international arbitration in which I have been involved, in the past decade, in which disclosure or challenge issues were raised and the IBA Guidelines were not considered. (In contrast, I have virtually never seen parties, arbitrators or institutions cite to or rely upon the ABA-AAA Code, much less the Draft Investor-State Code.) While the IBA Guidelines are not binding on this Court, the fact that they inevitably would have been considered by the parties and the arbitrators is relevant to whether a reasonable person would believe the nondisclosures in the Panama 1 Arbitration indicate a potential conflict.

III. MOVANTS' EXPERTS FAIL TO DISCUSS MEANINGFULLY THE NON-DISCLOSURES IN THIS CASE

23. In my First Report, I detailed why the specific circumstances not disclosed by the Arbitrators did not need to be disclosed under the applicable disclosure standard, did not warrant disqualification of the arbitrators under the applicable removal standard, and did not warrant vacatur of the Partial Award or Final Award under the vacatur standard of the Eleventh Circuit.[39] The reason I analyzed the specific circumstances of this case in such detail is that, in the words

[38] Born First Report, at para. 55-56; *see e.g.,* S. Greenberg and J. Ricardo Feris, References to the IBA Guidelines on Conflicts of Interest in International Arbitration when Deciding on Arbitrator Independence in ICC Cases, ICC Bulletin Vol. 20 No. 2 (2009) (Exhibit 13), at p. 3 (PDF) ("… the Secretariat of the Court briefs the [ICC] Court on the circumstances… In so doing, it usually refers to any article in the IBA Guidelines that in some way contemplates the situation in question.").

[39] *See* Born First Report, at paras. 95-124, 132-137, 152-165, 171-212.

of the Eleventh Circuit, "the 'evident partiality' question necessarily entails a fact intensive inquiry."[40]

24. In my view, it is both highly significant and telling that the Movants' experts devote the majority of their effort not to the specific circumstances of this case but instead to discussions of generalities, public policy, social science, and, as discussed above, inapplicable sources of asserted norms. Professor Coe spends a significant amount of space debating the comparative merits of the AAA-ABA Code of Ethics and the IBA Guidelines.[41] Judge Schwebel and Professor Coe also spend a substantial amount of space discussing a relatively minor point in my First Report (that the pool of arbitrators perceived to be qualified to decide the Panama 1 Arbitration would have been limited).[42] For her part, Professor Giorgetti extensively explains her theory of why expansive disclosure in international arbitration is inevitably beneficial and explains her views on the vacatur standard, but spends almost no time examining how these views apply to the specific circumstances of this case.

25. In my view, this lack of focus on the specific facts of the case renders the Movants' experts' reports of limited use and highlights the weakness of the Movants' arguments. Generalities about "extensive" disclosure obligations, limited pools of arbitrators and the possibilities of unconscious bias have very little bearing on the specific issues before this Court. I assume that the Movants' experts would have critiqued my First Report's analysis of the specific non-disclosures at issue in this case if they had disagreed with its reasoning or specific conclusions. Absent such critique, I will not repeat the reasoning or conclusions contained at paragraphs 95 to 137 of my First Report, but, for the avoidance of doubt, I entirely reaffirm that analysis and those conclusions.

---

[40] *Lifecare Int'l, Inc. v. CD Med., Inc*., 68 F.3d 429, 435 (11th Cir. 1995). *See also* Prof. Coe Second Report, at para. 27 ("[a] fact-intensive approach [is] required in examining evident partiality cases").
[41] *See supra* at paras. 10-14.
[42] *See infra* at paras. 95-100.

IV. MOVANTS' CUMULATIVE THEORY OF DISCLOSURE

26. In what I believe should be characterized as an implicit acknowledgement that individually none of the circumstances that were undisclosed by the Arbitrators could independently be the basis for either removal or vacatur, the Movants' experts emphasize in their latest opinions that the *cumulative* effect of the Arbitrators' alleged non-disclosure supports vacatur, and assert that I incorrectly analyzed each alleged non-disclosure individually. Specifically, they state, *inter alia*, the following:

a. "The appearance of bias is reinforced by the cumulative nature of the undisclosed conflicts."[43]

b. "Mr. Born (as the ICC Court had also done) analyzes each episode and each arbitrator individually. He thus ignores the cumulative effect of the numerous failures to disclose[.]"[44]

c. "While Mr. Born examines each instance of conflict alleged by Movants separately, as I pointed out in my First Opinion, the cumulative effect of repeated failures to disclose by all three arbitrators, combined with the weakness of each of the disclosures, should be considered in totality."[45]

27. At the outset, my analysis of each alleged failure to disclose individually was based on the approach of the Eleventh Circuit. In *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, for example, the court reviewed each of the three undisclosed circumstances individually.[46] Similarly, in *Torres v. Morgan Stanley Smith Barney, LLC*, the court reviewed the alleged

---

[43] Judge Schwebel Report, at para. 25.
[44] Prof. Giorgetti Second Report, at para. 81.
[45] Prof. Coe Second Report, at para. 61.
[46] *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002) (the appellants "contend that [the arbitrator] failed this obligation by providing insufficient disclosures on three separate areas: (1) his previous legal interactions with the Bradley Arant law firm in various mediations, arbitrations, and litigations; (2) his interview with Capstone Building; and (3) his acquaintanceship with Jeff Schattinger. We consider each in turn…").

undisclosed circumstances by each arbitrator individually.[47] In my view, the Eleventh Circuit's analysis makes sense and correctly applies the FAA. If none of the allegedly relevant circumstances merits disclosure on its own, it makes little sense that these circumstances should nevertheless be disclosed because there was more than one. Irrelevant circumstances do not gain relevance in the aggregate. To put it bluntly, zero plus zero still equals zero.

28. Professor Coe argues that "if a party discovers that an arbitrator has failed to make a series of disclosures, that party will likely lose confidence in the arbitrator's impartiality and independence—that is, that party may conclude that the arbitrator has an impermissible bias. Indeed, the perception of bias may grow stronger with each non-disclosure of a potential conflict."[48] Professor Coe is correct that if an arbitrator repeatedly fails to disclose potential conflicts, a party's "perception of bias may grow stronger." But that is only true if each nondisclosure was in fact relevant because it genuinely involved a potential conflict. A sum of such nondisclosures could increase the perception of bias just like a sum of positive numbers results in a larger number. But the math does not hold if none of the individual circumstances merited disclosure. Again, this is like adding a series of zeroes—the result is still zero.

29. The theory that irrelevant circumstances should be disclosed just because there are many of them not only makes little sense but would lead to pernicious effects. First, such disclosure would imply that there is bias where there is none, leading to frivolous challenges and increasing the cost and length of time of arbitrations. As this case illustrates, litigious parties would make multiplicitous complaints about alleged nondisclosures or conflicts, none of which had merit, and then claim that the cumulative effect of these multiple complaints rose to the level required for removal or vacatur. That would have deleterious effects on the arbitral process and misapplies the standards of the FAA.

30. Second, the Movants' theory could also lead to the circumvention of established waiver rules. Under the ICC Rules, the parties have thirty days to challenge an arbitrator from the time

---

[47] *Torres v. Morgan Stanley Smith Barney, LLC*, 839 F. App'x 328, 331 (11th Cir. 2020).
[48] Prof. Coe First Report, at para. 38.

they learn of the facts that are the basis of the challenge.[49] This rule aims to prevent parties from keeping a challenge in reserve in case the arbitration does not go their way. Like the ICC Rules, U.S. courts have routinely prohibited this type of sandbagging.[50] The "cumulative effect" theory espoused by Movants' experts could lead to the circumvention of these waiver rules where the losing party alleges that circumstances learned after issuance of the award (which by themselves are irrelevant), combined with circumstances it had knowledge of before the award (which are likewise irrelevant), result in a viable action for vacatur even though the action relies on circumstances the losing party had long before waived.

31. I discuss other deleterious effects of over-disclosure in sections VII and VIII below.

V. THE REQUIREMENT FOR INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS IN INTERNATIONAL ARBITRATION

32. It is elementary under the FAA and the New York Convention that arbitral awards are presumptively valid and binding and can only be annulled in exceptional circumstances and for specific and exhaustively listed grounds, that must be narrowly construed.[51] As I described in detail in my First Report, in the Eleventh Circuit the party seeking vacatur has the burden of

---

[49] 2012 ICC Rules, art. 14(2) ("For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.").

[50] *See Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993) (parties "cannot stand by during arbitration, withholding certain arguments, then, upon losing the arbitration, raise such arguments in federal court. We will not tolerate such sandbagging."); *Clark Realty Builders, LLC v. Falls at Marina Bay, L.P.*, 2007 WL 9751799, at *2 (S.D. Fla. July 16, 2007) (quoting *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters* for the proposition that a party cannot withhold an argument and then assert it after losing the arbitration).

[51] G. Born, INTERNATIONAL COMMERCIAL ARBITRATION, Ch. 25, § 25.03, at p. 3432 (3d. ed. 2021) ("reviews of annulment proceedings in Switzerland, the United States, France and England have concluded that annulment of international awards is an exceptional occurrence, with the overwhelming majority of all awards being upheld in the face of annulment challenges") (Exhibit 5).

overcoming the presumptive enforceability and finality of an award.[52] This is a heightened standard in the Eleventh Circuit.[53] (I note, parenthetically, that the Movants' experts appear to accord little or no importance to either the Eleventh Circuit's emphasis on the finality of awards or the critical importance of finality to the arbitral process.)

33. The presumption of finality and exceptional nature of vacatur applies whatever the purported grounds for vacatur may be, including that an arbitrator lacks impartiality or independence.[54] The ethical obligation of arbitrators in international arbitration to be independent and impartial are expressly required by many national legislations, institutional rules, and arbitration guidelines.[55] The ICC Rules are no exception. They provide that "[e]very arbitrator must be and remain impartial and independent of the parties involved in the arbitration."[56]

34. While the distinction between independence and impartiality can be formulated in different ways, independence generally means that there are no unacceptable external relationships or connections between an arbitrator and a party or its counsel (such as financial, professional, employment, or personal relationships), while impartiality means that an arbitrator

---

[52] Born First Report, at para. 159; *see, e.g., Original Appalachian Artworks, Inc. v. JAKKS Pac., Inc.*, 718 F. App'x 776, 780 (11th Cir. 2017) ("a party seeking to vacate an arbitrator's award has the burden of establishing the existence of a specific statutory ground for vacatur").
[53] *See Gianelli Money Purchase Plan & Tr. v. ADM Inv. Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998) ("the FAA presumes that arbitration awards will be confirmed. Therefore, the 'evident partiality' exception is to be strictly construed, as it must be if the federal policy favoring arbitration is to be given full effect."); *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) ("the FAA presumes that arbitration awards will be confirmed…consequently, federal courts should defer to the arbitrator's resolution of the dispute whenever possible"); *see also* Johnson v. Directory Assistants Inc., 797 F.3d 1294, 1300 (11th Cir. 2015); *Gherardi v. Citigroup Glob. Markets, Inc.*, 2018 WL 4864851, at *8 (S.D. Fla. July 26, 2018) ("The burden of proof for vacating an arbitration award based upon alleged bias is a heavy one.").
[54] *Torres v. Morgan Stanley Smith Barney, LLC*, 839 F. App'x 328, 331 (11th Cir. 2020) (faced with a motion to vacate for evident partiality, the court explained that "[f]ederal courts may vacate an award only in the four very unusual circumstances set forth in 9 U.S.C. § 10(a)").
[55] *See* 2006 UNCITRAL Model Law, art 12; 2014 AAA-ICDR International Dispute Resolution Procedures art. 13(1); 2014 LCIA Arbitration Rules, art. 5(3); IBA Guidelines, General Principle 1 (Exhibit 19))
[56] 2012 ICC Arbitration Rules, art. 11(1).

is subjectively unbiased and not predisposed towards one party.[57] According to one commentary, "[i]n general, impartiality means that an arbitrator will not favor one party more than the other, while independence requires that the arbitrator remain free from the control of either party."[58]

35. Arbitrator disclosure plays a supporting role to the requirement that arbitrators be independent and impartial of the parties. Simply stated, the purpose of disclosure is to permit the parties to ascertain whether, in their judgment, the arbitrators adjudicating or potentially adjudicating their case are impartial and independent.[59] However, while the subjective view of a party may lead it to challenge an arbitrator, a party's subjective view does not determine whether the arbitrator will or should be disqualified. Factual circumstances, whether disclosed or not, cannot lead to the disqualification of an arbitrator or the annulment of an award unless these circumstances could *reasonably* lead to the conclusion that the arbitrator might not be independent or impartial of the parties.[60]

36. I discuss the standards of disclosure, removal and annulment in further detail below, but I have started with the requirement of independence and impartiality because, despite its fundamental importance, it is largely ignored by the Movants' experts. In my First Report, I explained in detail (over some twelve pages) why the contacts between the Arbitrators in the Panama 1 Arbitration and other arbitrators or counsel could not reasonably raise doubts that they were either partial to or dependent on ACP.[61] The Movants' experts have failed to show otherwise. In their most recent opinions, they make no attempt to rebut my analysis, and they only half-heartedly argue that the specific undisclosed contacts in this case were of a nature that could reasonably lead to reasonable doubts about the Arbitrators' independence or impartiality. I

---

[57] *See* G. Born, INTERNATIONAL COMMERCIAL ARBITRATION, Ch. 12, § 12.05 [A][2], at p. 1908-09 (3d. ed. 2021) (Exhibit 5); Decision in LCIA Ref. No. 5660 of 5 August 2005, 27 Arb. Int'l 371, ¶4.3 ("while the concept of independence was concerned with the financial, professional or personal relationship between an arbitrator and a party, 'the concept of partiality may be concerned with the bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute'") (Exhibit 43).

[58] D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary 213* (2d ed. 2013) (Exhibit 42).

[59] *See* Born First Report, at para. 35; Prof. Giorgetti First Report, at para. 13.

[60] *See infra* VI.

[61] *See* Born First Report, at paras. 171-212.

discuss below the only (and very limited) arguments Judge Schwebel and Professor Giorgetti make in this regard in their recent opinions. (I also note that Professor Coe failed to address this point at all in his second opinion.)

37. Judge Schwebel argues as follows:

> "What was undisclosed here—most notably that Dr. Gaitskell agree to join in appointing Mr. Gunter to the well compensated position of tribunal president in another arbitration—creates the appearance of a lack of impartiality and independence. A reasonable observer could conclude that this valuable appointment, likely resulting in hundreds of thousands of dollars (if not more) in income for Mr. Gunter, could, consciously or subconsciously, affect Mr. Gunter's relationship with Dr. Gaitskell and his neutrality in this arbitration."[62]

38. I disagree fundamentally with Judge Schwebel that a reasonable observer could conclude that Dr. Gaitskell's joint appointment of Mr. Gunter to the position of tribunal president could make Mr. Gunter partial to or dependent on ACP. I discussed this scenario at length in my First Report,[63] but to summarize, for Judge Schwebel's assertion to be plausible a reasonable observer would have to conclude three things: (1) Mr. Gunter could be partial to or dependent on Dr. Gaitskell in the Panama 1 Arbitration because Dr. Gaitskell joined in appointing him president of a tribunal in an unrelated arbitration; (2) Mr. Gunter could believe that Dr. Gaitskell was partial to or dependent on ACP, the party that appointed Dr. Gaitskell as co-arbitrator in the Panama 1 Arbitration; and (3) Mr. Gunter could, as a result of the preceding two conclusions, be biased toward ACP in the Panama 1 Arbitration. Equally, Judge Schwebel's logic would require believing that Mr. Gunter was somehow also beholden to the other co-arbitrator who, together with Dr. Gaitskell, participated in nominating him as president in the unrelated arbitration.

---

[62] Judge Schwebel Report, at para. 20. In his opinion, Judge Schwebel relies heavily on *BEG v Italy*. *See* Judge Schwebel Report, at paras. 18-19. At issue in *BEG* was the lack of impartiality and independence of a party-appointed arbitrator who had previously served as a lawyer, Vice Chairman, and a member of the Board of Directors for the parent company of the party who appointed them. *See BEG S.p.a. v. Italy*, App. No. 5312/11, Eur. Ct. H.R. ¶¶ 132, 149, 153 (May 20, 2021). Clearly these sets of facts, in which the challenged arbitrator had direct ties with one of the parties, are vastly different than the ones at issues in this case, and *BEG* is of little relevance to this case.

[63] *See* Born First Report, at paras. 175-186.

39. This hypothetical chain of causation is highly speculative, and its implausibility is clear upon closer inspection. Indeed, each step in this causal chain is in my view untenable.

40. The first step in the foregoing chain is that the reasonable observer would believe that Mr. Gunter would feel beholden to Dr. Gaitskell by virtue of the fact of Mr. Gunter's appointment in another arbitration. For this to be true, the reasonable observer would need to assume that this appointment would be of sufficient importance to Mr. Gunter that he would risk his reputation (and thus his career) by becoming partial to or dependent on another arbitrator, rather than complying with his duties of independence and impartiality.[64] That is implausible.

41. Mr. Gunter's appointment as president in the unrelated arbitration did not entail only whatever fees might result from the mandate (which could readily be none, if the matter settled or otherwise terminated), but also the work that was required on the part of Mr. Gunter to earn those fees; that work is particularly onerous and demanding in the case of a presiding arbitrator, who would bear principal responsibility for drafting an award and conducting the arbitral proceedings.[65] There is no reason to assume, as Judge Schwebel does, that Mr. Gunter's appointment was either rewarding or profitable for Mr. Gunter; it may well have been neither. Moreover, an arbitrator of Mr. Gunter's status likely receives a steady flow of arbitral appointments and instructions as counsel, which are often declined for a host of reasons. The suggestion that Mr. Gunter, or other arbitrators, would regard any single appointment to the time-consuming role of presiding arbitrator in another arbitration as some sort of special or unusual favor is in my view wholly unrealistic; the notion that such an appointment would taint Mr. Gunter's judgment is even less tenable; and the notion that Dr. Gaitskell's indirect role in that appointment would have such a result is completely implausible.

---

[64] As one federal court aptly put it, an arbitrator's "reputation for neutrality is a badge of honor, and an essential credential in getting business." *Amerisure Mut. Ins. Co. v. Everest Reinsurance Co.*, 109 F. Supp. 3d 969, 989 (E.D. Mich. 2015).

[65] Moreover, courts have rejected the notion that a party appointing an arbitrator could make an arbitrator dependent or partial to that party as would the payment for services. *See, e.g., Ario v. Cologne Reinsurance (Barbados), Ltd.*, 2009 WL 3818626, at *10 (M.D. Pa. Nov. 13, 2009) (rejecting a party's argument that "acceptance of an arbitral position is the same as accepting business from the party itself"). This logic applies with even more force to a *joint* appointment as tribunal president *by co-arbitrators*.

42. The second step in Judge Schwebel's analysis requires the reasonable observer to believe that Mr. Gunter could believe that Dr. Gaitskell was partial to or dependent on ACP, and therefore desired to advance ACP's interests in the Panama 1 Arbitration by selecting Mr. Gunter in an unrelated arbitration. That step is again wholly implausible.

43. This second step ignores Dr. Gaitskell's extensive experience, unchallenged reputation,[66] and declaration of impartiality and independence in the Panama 1 Arbitration, as well as his obligations of independence and impartiality in the related arbitration in which Dr. Gaitskell participated in selecting Mr. Gunter as presiding arbitrator. Only if Dr. Gaitskell were regarded as biased towards ACP, as opposed to independent and impartial in both the Panama 1 Arbitration and the unrelated arbitration, would his role in nominating Mr. Gunter be of any possible relevance to Mr. Gunter's own independence and impartiality. Here, however, not only is there no reason to question Dr. Gaitskell's independence and impartiality, but the ICC Court rejected any such claim in the Panama 1 Arbitration; similarly, there is no suggestion whatsoever that either Dr. Gaitskell or Mr. Gunter lacked independence or impartiality in the other, unrelated arbitration. Given that, the notion that Dr. Gaitskell's indirect role in helping select Mr. Gunter in another arbitration could have somehow involved him acting in a partisan manner in the Panama 1 arbitration is in my view wholly spurious.

44. Finally, the third step in Judge Schwebel's analysis requires the reasonable observer to believe that Mr. Gunter (as a result of feeling beholden to Dr. Gaitskill and also believing Dr. Gaitskell was dependent or partial to ACP) would act to ACP's benefit, rather than act independently and with impartiality, in the Panama 1 Arbitration. This would mean believing that Mr. Gunter would be motivated to act for the benefit of ACP, rather than to fulfill his obligations of independence and impartiality, despite not having any direct ties with, nor having

---

[66] Judge Schwebel asserts that "Mr. Born's indulgent interpretation…that the arbitrators' 'positive reputations' should lead objective observers to discount indications of their possible partiality smacks of [] 'hubris.'" Judge Schwebel Report, at para. 21. However, the UK Supreme Court in a recent high-profile case held: "The professional reputation and experience of an individual arbitrator is a relevant consideration for the objective observer when assessing whether there is apparent bias as an established reputation for integrity and wide experience in arbitration may make any doubts harder to justify." *Halliburton Company (Appellant) v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48, ¶ 67 (Exhibit 16).

received any benefit from, ACP. In my opinion, a reasonable observer would not imagine that Mr. Gunter could be corrupted in favor of ACP by virtue of Dr. Gaitstell's participation in his nomination in an unrelated arbitration. On the contrary, in my experience, Dr. Gaitskell's role in Mr. Gunter's nomination would be wholly irrelevant to Mr. Gunter's decision-making, independence and impartiality in the Panama 1 Arbitration.

45. As noted in my First Report,[67] the appointment of presiding arbitrators by co-arbitrators, including co-arbitrators who sit (or have sat) together on other tribunals, is extremely common in international commercial arbitration.[68] In many of the cases that I have been involved in, as counsel, arbitrator and institutional leader, co-arbitrators have appointed presiding arbitrators where one or both of the co-arbitrators sat or had sat with the nominee. I do not recall there ever being any controversy regarding such nominations nor any suggestion that they needed to be disclosed, much less that they would be grounds for a challenge or removal of an arbitrator. In my view, introducing such a requirement for disclosure of co-arbitrators' involvement in selecting other members of the tribunal for roles in other arbitrations would seriously detract from the efficiency, expertise and other advantages of the arbitral process.

46. Notably, while the Movants suggest that the non-disclosure of a party-nominated co-arbitrator having participated in the nomination of the president of a different tribunal in an

---

[67] *See* Born First Report, at para. 207 ("In my experience, it is common for arbitrators not to disclose serving in unrelated arbitrations in which counsel for one of the parties appeared. That is particularly true where, as here, an arbitrator was nominated as presiding arbitrator by both co-arbitrators in another arbitration (and then appointed), rather than as co-arbitrator by one party.").

[68] *See* ICC Dispute Resolution 2020 Statistics, at p. 15 ("single and repeat confirmations/appointments within the year represented 66% and 34% of all confirmations/appointments respectively.") (Exhibit 45); *see also* G. Born, INTERNATIONAL COMMERCIAL ARBITRATION, Ch. 12, § 12.05 [K], at p. 2019 (3d. ed. 2021) ("Most courts and appointing authorities reason that repeat appointments are usually the result of an arbitrator's (independent) qualities and experience in the field, which makes him or her desirable as an arbitrator, without giving rise to any relationship of dependence or partiality with the involved party, law firm or lawyers.") (Exhibit 5); W. Koh, *Think Quality Not Quantity: Repeat Appointments and Arbitrator Challenges*, 34 J. Int'l Arb. 711 (2017) ("Repeat appointments of an arbitrator by the same counsel or party are not uncommon in arbitration…") (Exhibit 47).

entirely unrelated arbitration was "most egregious,"[69] at no point in any of the Movants' experts' five reports do they cite any authority that supports the claim that a party-appointed arbitrator sitting in one arbitration who participates in the nomination of a co-arbitrator to be the president of a different panel in an entirely unrelated arbitration has somehow gained influence, whether subconscious or conscious, over their fellow arbitrator. The complete absence of any precedential support for Movants' experts' theory is made even more glaring by their own admission that cross-appointments are not uncommon in international arbitration[70] and the fact that there is an abundance of commentary on other types of circumstances that should be disclosed.[71]

47. Indeed, the only case I am aware of where the Movants' theory was relied upon rejects it on multiple grounds. In *Ario v. Cologne Reinsurance (Barbados), Ltd*, the court was asked to consider an argument that a neutral arbitrator's "agreement to be the [neutral arbitrator] for another arbitration after being selected for that arbitration (in part) by [a] party arbitrator here…was ground for recusal."[72] The court concluded:

> "[T]here is no evident partiality from an arbitrator's accepting a position as [a neutral arbitrator] in another, unrelated arbitration while the current arbitration is still ongoing, *even if that position was partially obtained by the action of a party-appointed arbitrator*."[73]

---

[69] Movants 'Consolidated Motion to Vacate Partial and Final Arbitral Awards and Incorporated Memorandum of Law ("Movants' Consolidated Motion to Vacate"), at p.10 (DKT No. 55). *See also* Judge Schwebel Report, at para. 20; Prof. Giorgetti First Report, at para. 27.

[70] *See* Prof. Coe Second Report, at paras. 62-68 (acknowledging that "overlapping appointments" occur in international arbitration).

[71] *See* Prof. Giorgetti First Report at Section IV(C) (claiming that the "practice of reciprocal or repeat appointments and of 'double hatting' is an increasingly criticized practice in international arbitration," but failing to identify any existing criticism for reciprocal appointments and instead explaining the existing criticisms of repeat appointments and double hatting).

[72] *Ario v. Cologne Reinsurance (Barbados), Ltd*., 2009 WL 3818626, at *7 (M.D. Pa. Nov. 13, 2009). This case arose in a context which the court acknowledged was a specialized field resulting in a small pool of arbitrators. I explain in detail the reasons why the Panama 1 Arbitration would have had a relatively small pool of qualified arbitrators in Section IX below.

[73] *Id.* at 10 (emphasis added).

Notably, in support of this conclusion, the *Ario* court cited an Eleventh Circuit case which held that the fact "that arbitrators appoint each other to panels does not *per se* manifest 'evident partiality.'"[74]

48. For her part, Professor Giorgetti makes two (different) arguments. First, she states that "[a]t a minimum counsel – Mr. Loftis – sitting with Dr. Gaitskell would be aware of how he decides issues, what persuades him and how best to make an argument. The other party, however, could not possibly know this inside information."[75] Second, she states that "the arbitrators knew each other, had the chance to talk to each other, may have revealed their approaches and views on issues that inform the others in order to persuade during deliberations, and could have developed some common take/vision and approaches to issues crucial to the arbitration. This would lead a reasonable person to believe that a conflict might exist."[76]

49. In my view, neither argument is at all persuasive that the undisclosed circumstances in this case could lead a *reasonable* person to believe the Arbitrators lacked independence or impartiality.

50. With respect to the first argument, it is highly speculative that ACP's counsel could have gained insight into how Dr. Gaitskell might be persuaded from having sat as arbitrator with Dr. Gaitskell in a separate arbitration several years earlier. Arbitrations, like litigations, are highly fact specific and I think it is highly unlikely that sitting together in a single matter would provide another tribunal member with material information not available to others. I note in particular that substantial amounts of information about arbitrators are publicly available, and that law firms like Movants' counsel (White & Case) have very extensive experience with leading arbitrators like Dr. Gaitskell, by virtue of having appeared before them (as the record here

---

[74] *Lozano v. Maryland Cas. Co*., 850 F.2d 1470, 1473 (11th Cir. 1988). The court in *Lozano*, applying Florida state law, presumed party-appointed arbitrators to be partisans, so it is even more notable that *Lozano* found that partisan arbitrators appointing a neutral arbitrator did not manifest evident partiality.

[75] Prof. Giorgetti Second Report, at para. 76.

[76] Prof. Giorgetti Second Report, at para. 81. Professor Giorgetti also asserts that "[a]nother concern that arises when arbitrators repeatedly sit together is an unequal access to information and the development of a social relationship between only some of the arbitration participants." Prof. Giorgetti First Report, at para. 39.

confirms[77]), sat with them or otherwise worked with them professionally. Professor Giorgetti's suggestion that improper inside information, not available to the Movants' counsel, could have been obtained from sitting together in an unrelated arbitration is, in my view, entirely unrealistic.

51. I also note that, even if one assumed that ACP's counsel did gain some information about Dr. Gaitskell's decision-making, this does not say anything at all about Dr. Gaitskell's state of mind or independence and impartiality. Even if accepted, it would bear only on ACP's counsel's experience (from several years before), and not on Dr. Gaitskell's integrity, independence or impartiality.

52. Professor Giorgetti's second argument fails for much the same reason. While she asserts that arbitrators that sit together might develop certain affinities,[78] she also asserts that "it is indeed impossible for a party to be certain what dynamics arbitrators sitting together may create."[79] That amounts, in my view, to a recognition that the existence and importance of Professor Giorgetti's affinities is entirely speculative. Sitting together can just as easily produce apathy or antagonism as well as affinities – or, in my experience, much more likely just another professional encounter. There is, however, absolutely no reason to think that sitting together on a tribunal produces more (or less) affinities than dozens of other professional encounters, including work on bar committees, academic projects and the like – none of which even arguably need to be disclosed.

53. Even supposing that two arbitrators developed affinities with each other, Professor Giorgetti fails to explain how that hypothetical could lead either of them to be partial to or dependent on a particular party to an arbitration. Moreover, as the Eleventh Circuit has noted, arbitrators' "familiarity [with each other] due to confluent areas of expertise does not indicate bias."[80] Indeed, "so long as the previous interactions do not represent part of an ongoing

---

[77] As Dr. Gaitskell disclosed, White & Case itself appointed him arbitrator in a number of cases. Letter of Dr. Gaitskell to Carolyn Lamm, (DKT No. 55-36). Dr. Gaitskell had also sat on an arbitration panel with Richard Preston of Seyfarth Shaw (counsel for Movants). *Id*.
[78] *See* Prof. Giorgetti Second Report, at para. 75-76.
[79] Prof. Giorgetti Second Report, at para. 75.
[80] *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1340 (11th Cir. 2002).

business relationship, it may be an asset."[81] It is because such relationships are not concerning that, as Professor Giorgetti very clearly concedes, "the IBA guidelines do not require disclosure of the fact that an arbitrator concurrently serves or has served on the same arbitral tribunal with another member of the tribunal."[82]

54. While I address other flaws in the opinions of the Movants' experts in the sections below, the vacatur analysis need not go further. If the undisclosed contacts could not lead a reasonable observer to believe the Arbitrators potentially lacked independence or impartiality, and Movants' experts make no credible argument in this regard, then there is no basis for annulling the Partial Award or Final Award.

VI. THE STANDARD FOR ARBITRATOR DISCLOSURE IN INTERNATIONAL ARBITRATION IS DIFFERENT THAN THAT FOR REMOVAL OR VACATUR

A. Movants' Experts Conflate the Standard for Disclosure and the Standards for Removal and Vacatur

55. The Movants' experts' failure to address in any meaningful way whether a reasonable observer could believe that the Arbitrators in this case were not independent or impartial is the logical result of their focus on the standard for *disclosure* in international arbitration rather than the standards for *disqualification* or *vacatur*. Of course, it is the latter standards that are decisive here.

56. The ICC Rules provide that a "prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances 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."[83] The Movants' experts and I agree

---

[81] *Id*.
[82] Prof. Giorgetti Second Report, at para. 55 (citing IBA Guidelines, Part II ¶ 6).
[83] 2012 ICC Rules art. 11(2). The standard under the IBA Guidelines is similar. IBA Guidelines, art. 3(a) ("If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances").

that this disclosure is subjective insofar that an arbitrator must consider what to disclose based on what might constitute a conflict "in the eyes of the parties."[84]

57. Critically, however, the standard for *removing* an arbitrator or *vacating* an award is objective, not subjective. Professor Giorgetti admits that the standard for removal is whether "there are *reasonable* doubts as to the arbitrators' independence and partiality."[85] Additionally, it is not disputed that the standard for vacatur in the Eleventh Circuit requires that the information the arbitrator failed to disclose "lead a *reasonable* person to believe that a potential conflict exists."[86] I emphasize the word "reasonable" in both these standards because it makes clear that the test under these standards is not whether one of the parties in the arbitration *subjectively* believes there is a potential conflict but whether *objectively* it would be reasonable for a party to believe there is a potential conflict.

58. Despite the clear distinctions between the disclosure standard and the removal and vacatur standards, in both her first and second expert report Professor Giorgetti attempts to conflate the subjective "eyes of the parties" standard for disclosure and the objective standard for the vacatur of an award by concluding that "[a] neutral observer would reasonably doubt the independence and impartiality of arbitrators who fail to disclose circumstances which, in the eyes of the parties, must be disclosed."[87] In other words, according to Professor Giorgetti, the fact that an arbitrator failed to disclose circumstances that subjectively could cast doubt on the arbitrator's impartiality or independence would lead to objective doubts about his or her independence or impartiality. Similarly, Judge Schwebel claims that "[*a*] *fortiori*, this appointment should have been disclosed, and the failure to do so creates the objective appearance of a lack of impartiality and independence."[88]

---

[84] Prof. Giorgetti First Report, at para. 28 (referring to "the subjective perspective from which disclosure obligations are to be examined"); Prof. Coe First Report, at para. 22 ("The arbitrator is instructed to consider who the parties are and, presumably, their surrounding circumstances and the context of the dispute.").
[85] Prof. Giorgetti First Report, at para. 28.
[86] *Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs*., 146 F.3d 1309, 1312 (11th Cir. 1998).
[87] Prof. Giorgetti First Report, at paras. 36, 40; Prof. Giorgetti Second Report, at para. 72.
[88] Judge Schwebel Report, at para. 22.

59. In practice, under the Movants' experts' formulations, the standard for disclosure and that for removal or annulment would be one and the same: the arbitrator would have to disclose everything that in the eyes of the party could cast doubt on his or her impartiality or independence or face disqualification and permit vacatur of the award. This fundamentally misstates the law under the FAA and New York Convention and, if accepted, would seriously undermine the international arbitral process.

60. The sources that Movants' experts rely on highlight the implausibility of this approach. In discussing the standard for arbitrator disqualification, Professor Giorgetti states that "this legal standard was clearly explained in the publicly-available case *Blue Bank v. Venezuela*…in which the [decision-maker] held that a *reasonable* third party 'would find an evident or obvious appearance of lack of impartiality.'"[89] Directly contrary to Professor Giorgetti's characterization, however, the *Blue Bank* decision makes clear that the test for disqualification is objective. Moreover, the *Blue Bank* decision emphasizes that the standard for arbitrator disqualification is more demanding than the standard for disclosure, explaining that the arbitrator's lack of partiality or independence must be "'manifest'… mean[ing] 'evident' or 'obvious'."[90] (And, of course, the Eleventh Circuit has made it clear, as discussed elsewhere, that the standard for vacatur is even more demanding yet.[91])

61. As I explain in detail in my First Report, the rules of all of the leading institutions, as well as the IBA Guidelines, are in accord that the standard for disqualification is more demanding than the standard for disclosure.[92] That is why I explained in my First Report and reiterate here that an arbitrator should only be removed if there is a real, serious possibility that he or she lacks

---

[89] Prof. Giorgetti First Report, at para. 29 (emphasis added).
[90] *Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No.ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, (Nov. 12, 2013), at para. 61.
[91] *See supra* at para. 32.
[92] *See* Born First Report, at para. 126, fn. 115 (citing G. Born, INTERNATIONAL COMMERCIAL ARBITRATION, Ch. 12, § 12.05 [N], at p. 2048 (3d ed. 2021) (Exhibit 5).

independence or impartiality, and that an unjustifiable doubt or unreasonable suspicion does not satisfy the objective standard.[93]

62. The Movants and their experts also conflate the disclosure, removal and vacatur standards when explaining the standard for vacating an award under the FAA in the Eleventh Circuit. In discussing this standard, the Movant's experts avoid explaining that the impression of bias must be supported by stronger evidence than required for arbitrator disclosure, foregoing any mention of the Eleventh Circuit's repeated clarifications that the impression of bias justifying vacatur must be "definite and capable of demonstration rather than remote, uncertain and speculative."[94]

63. Instead, the Movants' experts repeatedly assert that whether in the context of arbitrator disclosure,[95] arbitrator disqualification,[96] or a vacatur proceeding[97] an "impression of bias" is sufficient to meet the standard. The Movants' experts ignore the well-settled rule, however, that an "impression of bias" must be greater to vacate an award than to justify disclosure.

64. For example, Professor Giorgetti asserts that "the fact that the arbitrators failed to disclose multiple different circumstances over the critical years of underlying arbitration adds to the reasonableness of the conclusion that there is an impression of bias that would satisfy the *Gianelli* analysis [for vacatur] in the Eleventh Circuit."[98] In support of this claim, Professor Giorgetti then cites to the IBA Guidelines' explanation that "disclosure or disqualification … should not depend on the particular stage of the arbitration."[99] However, the IBA Guidelines commentary does not mean that the same facts or circumstances which should be *disclosed*

---

[93] *See* Born First Report, at para 129.
[94] *Aviles v. Charles Schwab & Co.*, 435 F. App'x 824, 828 (11th Cir. 2011) (citing *Middesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1202 (11th Cir. 1982)).
[95] Prof. Giorgetti First Report, at paras. 26-27; Prof. Coe First Report, at paras. 18-26; Prof. Coe Second Report, at para. 8; Prof. Giorgetti Second Report, at para. 21.
[96] *See* Prof. Giorgetti First Report, at paras. 28-35.
[97] Prof. Giorgetti Second Report, at para. 88 ("the applicable standard for vacatur is the impression of bias, not proof of actual bias, which is met in the present case"); Prof. Coe First Report, at para. 38.
[98] Prof. Giorgetti Second Report, at para. 69.
[99] Prof. Giorgetti Second Report, at para. 69 (citing IBA Guidelines, Explanation to General Standard 3(e)).

because they might contribute to a subjective impression of bias would also be sufficient to justify *vacatur*, as Professor Giorgetti seeks to imply. On the contrary, as the Guidelines themselves emphasize,[100] there is a "misconception that disclosure itself implies doubts sufficient to disqualify the arbitrator, or even creates a presumption in favour of disqualification. Instead, any challenge should only be successful if an objective test…is met."[101] Therefore, the standard for vacatur is substantially more demanding than that for disclosure.[102]

65. For his part, Professor Coe correctly states the Eleventh Circuit vacatur standard as "whether the information omitted would 'lead a reasonable person to believe that a potential conflict exists.'"[103] But he then immediately distorts the applicable vacatur standard by "slightly reformulat[ing] the question" to be based on "the relative ease with which the relationships in question could have been disclosed."[104] The relative ease of disclosing certain relationships is not even relevant to the disclosure obligation—it is certainly not relevant to the standard for vacatur.

66. As explained in my First Report, applying the proper standard for vacatur – rather than the standards fashioned by Professors Coe and Giorgetti – leaves no serious doubt that neither the Partial Award or Final Award is subject to vacatur. In my view, none of the non-disclosures

---

[100] 2014 IBA Guidelines, General Standard 3, Explanation 3(c) ("It is hoped that the promulgation of this General Standard will eliminate the misconception that disclosure itself implies doubts sufficient to disqualify the arbitrator, or even creates a presumption in favour of disqualification. Instead, any challenge should only be successful if an objective test, as set forth in General Standard 2 above, is met.")

[101] 2014 IBA Guidelines, General Standard 3, Explanation 3(c) ("It is hoped that the promulgation of this General Standard will eliminate the misconception that disclosure itself implies doubts sufficient to disqualify the arbitrator, or even creates a presumption in favour of disqualification. Instead, any challenge should only be successful if an objective test, as set forth in General Standard 2 above, is met.").

[102] *See* G. Born, INTERNATIONAL COMMERCIAL ARBITRATION, Ch. 26, § 26.05 [C][6], at p. 3947-48 (3d. ed. 2021) ("the standard required for annulment of an award on grounds of arbitrator bias is materially more demanding than that for removal of an arbitrator.") (Exhibit 41); S. Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for A "Real Danger" Test 181*, (2009) (higher standard for annulment than disqualification makes "eminent sense: by protecting the arbitral product, they are safeguarding the process") (Exhibit 46).

[103] Prof. Coe First Report, at para. 36 (citing *Gianelli*, 146 F.3d at 1312).

[104] Prof. Coe First Report, at para. 37.

cited by the Movants even arguably provide grounds for a reasonable person to believe that a potential conflict of interest existed with respect to any of the Arbitrators.

B. Movants' Experts Improperly Rely on the ICC Standard for Disclosure While Disavowing the ICC Standard for Disqualification

67. Throughout their opinions, the Movants' experts heavily rely on the subjective ICC standard for disclosure, as articulated in the ICC Rules and ICC Note, to claim that the arbitrators in this case did not comply with their disclosure obligations.[105] In this regard, the Movants' experts have found it "notable" that the "ICC Court found twice that the arbitrators failed to disclose relevant professional relations with counsel of one of the parties,"[106] and have stated that "[e]ven the ICC Court of Arbitration in this proceeding found that the arbitrators should have disclosed certain relationships."[107] Having made those arguments, the Movants' experts then argue that the ICC Court's decision that there were no grounds for the removal of the Arbitrators should be disregarded, ignoring that the ICC Court faithfully applied the ICC Note's express directive that "failure to disclose is not in itself a ground for disqualification,"[108] a directive that is consistent with U.S. court cases and commentary as well as international authority and institutional rules.[109]

68. The ICC Court correctly held: "A failure to disclose circumstances that an arbitrator should have disclosed does not *per se* lead to the conclusion the challenge should be granted. An objective test is applied in the context of Article 14 of the ICC Rules."[110] Accordingly, while the ICC Court found that certain circumstances should have been disclosed under the ICC's expansive subjective disclosure standard, the Court also found that the non-disclosure of these

---

[105] *See* Prof. Giorgetti Second Report, at para. 72 (referring to a failure to disclose from the perspective of "the eyes of the parties" to suggest that "the arbitrators violated their duty here"); Prof. Coe Second Report, para. 24-26; Prof. Giorgetti First Report, at paras. 26-27; Prof. Coe First Report, at paras. 18-26.
[106] Prof. Giorgetti First Report, at para. 32; *see* Prof. Giorgetti Second Report, at para. 70.
[107] Prof. Coe Second Report, at para. 80.
[108] ICC Note of 2021, at para. 26 (Exhibit 22); ICC Note of 2019, at para. 22 (Exhibit 21); ICC Note of 2016, at para. 19 (Exhibit 20).
[109] *See* Born First Report, at paras. 161-163.
[110] ICC Court Statement of Reasons, Exhibit 58 to Movants' Consolidated Motion to Vacate, at internal p. 5 (DKT 55-62).

facts did not warrant disqualification of the Arbitrators under the objective standards for removal.

69. In my view, it is fundamentally wrong for the Movants' experts to argue that only some ICC Standards, and the ICC Court's decision applying them, are relevant to this Court's vacatur decision while other ICC Standards, and the ICC Court's decision applying them, are not relevant. The Parties agreed to be bound by all of the ICC Rules and to have the ICC Court decide challenges to the Arbitrators. Either the Parties' agreement, and therefore the ICC Rules and the ICC Court's decision, is relevant or it is not. The Movants and their experts cannot choose only those ICC Rules or portions of the ICC Court's decision that serve their arguments and ignore the others.

70. That is particularly true here. As discussed in my First Report, the ICC's standard for disclosure is deliberately broad, based on a subjective "eyes of the parties" test; that standard necessarily, and intentionally, calls for disclosure of numerous matters which are not grounds for either removal or objective doubts about an arbitrator's independence and impartiality. As a consequence, an arbitrator's non-disclosure of a matter (or disclosure of that matter) does not in any way imply that there are objective doubts as to his or her independence and impartiality. The Movants' experts' failure to appreciate this basic distinction undermines their entire analysis.

71. Professor Giorgetti argues that "the ICC Court's decision is of limited usefulness, as it applies a different standard than is applicable to U.S. vacatur proceedings,"[111] and that this supposedly "different standard" is "overly strict."[112] The Movants' experts also complain about the "objective" nature of the standard the ICC Court applied.[113] The Movants' experts' arguments are misconceived. The standard for disqualification, as I explained above, is deliberately, and for very good reason, formulated as objective under the ICC Rules.

---

[111] Prof. Giorgetti First Report, at para. 33.
[112] Prof. Giorgetti First Report, at para. 34.
[113] Prof. Giorgetti Second Report, at para. 71; *see also* Prof. Coe Second Report, at para. 29-30 (suggesting it would be improper for the court to give any weight to the ICC Court's decision because it applies a different standard than the FAA).

72. I note that the Movants' experts' suggestion that disqualification standards should be subjective is utterly unprecedented and undesirable. To my knowledge, no arbitral institution anywhere applies a subjective standard ("in the eyes of the parties") to disqualification of arbitrators, and no professional guidelines or serious academic commentary have ever proposed such a subjective standard. Moreover, the objective standard of disqualification that the ICC Court applied is similar to that of the objective standard for vacatur in the Eleventh Circuit.[114]

73. The Movants appear to imply that the ICC Court, in using an objective standard, required that the Arbitrators actually be biased before they would be removed.[115] This is manifestly false, as the ICC Court's decision makes crystal clear. As is evident from the following statements from that decision, the ICC Court correctly applied the standard that doubts about (not certainty of) the Arbitrators' independence and impartiality must be objectively reasonable to warrant disqualification:

> a. The alleged appearance of possible bias resulting from Mr. Gunter and Dr. Gaitskell sitting together in a separate arbitration "cannot qualify as a reasonable *doubt* as to Mr. Gunter's independence or impartiality."[116]

---

[114] Both the ICC removal standard and the Eleventh Circuit vacatur standard are objective. The ICC standard for removal is somewhat more easily satisfied (resulting in removal of an arbitrator) than the Eleventh Circuit's vacatur standard (resulting in vacatur of an award). *See* Born First Report, at para. 156 (explaining that "under almost all national laws, annulment of an arbitral award requires satisfying a significantly more demanding standard than those applicable to either disclosure of information by an arbitrator or removal of an arbitrator"); *see also* G. Born, INTERNATIONAL COMMERCIAL ARBITRATION, Ch. 12, § 12.05 [F], at pp. 1956-57 (3d. ed. 2021) (Exhibit 5).

[115] Prof. Giorgetti Second Report, at para. 71 ("[T]he ICC Court in this case, however, applied a different standard, as it effectively required proof of an actual conflict in rejecting the arbitrator challenges on the merits for lack of proof of the communications between the arbitrators. In so doing, the ICC Court failed to apply the 'reasonable person' standard"); Movants' Reply in Support of Their Consolidated Motion To Vacate Partial and Final Arbitral Awards, (DKT 61), at p. 2 (asserting that the ICC Court "unreasonably, required proof of actual bias").

[116] ICC Court Statement of Reasons, Exhibit 58 to Movants' Consolidated Motion to Vacate, at internal p. 8 (DKT 55-62) (emphasis added).

b. "There is no compelling argument why a reasonable *doubt* as to Mr. Gunter's independence in this arbitration would have arisen because of his professional relationships with Professor Hanotiau."[117]

c. "The mere theoretical opportunity to discuss the matter without the third arbitrator, which may rise in any context, cannot qualify as a reasonable *doubt* as to Mr. Gunter's independence or impartiality."[118]

d. "However, the mere fact that counsel for Respondent appeared in one other arbitration before Mr. Gaitskell is not such as to *cast reasonable doubts* as to Mr. Gaitskell's continued independence or impartiality. This is not changed by Mr. Gaitskell's failure to timely disclose this circumstance."[119]

74. The "reasonable *doubt* as to the [arbitrator's] independence and impartiality" standard applied by the ICC Court for removal is similar to the standard for vacatur applied by the Eleventh Circuit (the existence of undisclosed "information which would lead a reasonable person to *believe* that a potential conflict exists"). Notably, both standards are objective, based on the views of a reasonable person, while the ICC Court looked to mere "doubts" while the Eleventh Circuit requires a "belief" on the part of the reasonable person.

75. The ICC Court's decision that the undisclosed circumstances in this case do not lead to reasonable doubt about the Arbitrators' independence and impartiality is, of course, not binding on this Court. However, the Parties agreed to be bound by the ICC Rules, both as to disclosure and disqualification. To the extent that this Court is persuaded by or gives some deference to the ICC Court's finding that there were circumstances the arbitrators should have disclosed, this Court should also be persuaded by or give deference to the ICC Court's decision that these circumstances do not meet the ICC's standard for disqualification and therefore do not meet the similar or more stringent standard for vacatur.

---

[117] *Id. at* p. 7 (emphasis added).
[118] *Id.* at p. 8 (emphasis added).
[119] *Id.* at p. 9 (emphasis added).

VII. MOVANTS' EXPERTS MISCHARACTERIZE THE STANDARD FOR ARBITRATOR DISCLOSURE IN INTERNATIONAL ARBITRATION

76. In addition to conflating the standards of disclosure and vacatur, the Movants' experts assert that the standard for disclosure is broader than in fact it is. Professor Giorgetti claims that "international arbitrators have a continuous, expansive and affirmative duty to disclose all potential conflicts to the parties."[120] Similarly, Professor Coe interprets the ICC Rules as imposing on the arbitrator the duty to consider disclosing "any potential viewpoint that a party might take."[121] These formulations of the disclosure standard are wrong in several respects.

77. First, the Movants' experts fail to acknowledge that arbitrators inevitably exercise a degree of judgment in choosing what to disclose, particularly given the broad disclosure standard. Professor Giorgetti criticizes my First Report's explanation of the disclosure standard by asserting that "it is incorrect to claim that it is in the judgment of the arbitrators whether to disclose a relationship."[122] However, an arbitrator can only determine what might be relevant "in the eyes of the parties" (and thus comply with the ICC Rules of disclosure) by using his or her own judgment. If an arbitrator did not draw the line somewhere as to what should be disclosed, which requires judgment, he or she would have to disclose any conceivable circumstance related to the case or the parties no matter how trivial (which not even the Movants' experts suggest is the case[123]).

78. As one commentary explained, an arbitrator's duty to disclose under the ICC Rules does not extend to any potential viewpoint a party could take, but is cabined by reasonableness:

> "ICC arbitrators are required to 'stretch their minds' so as to consider how particular facts and circumstances may be perceived by the parties. [...] It should nevertheless be

[120] Prof. Giorgetti Second Report, at para. 85.
[121] Prof. Coe First Report, at para. 22.
[122] Prof. Giorgetti Second Report, at para. 40.
[123] Professor Giorgetti concedes that "[d]isclosure requirements concern relevant facts or circumstances" and "disclosure guidelines aim to strike somewhat of a balance and trivial matters need not be disclosed." Prof. Giorgetti Second Report, at paras. 31-32.

> understood as requiring only the disclosure of such matters as may *reasonably* call into question the arbitrator's independence 'in the eyes of the parties.'"[124]

79. It is in any case incontrovertible that arbitrator judgment is permitted (and required) by the ICC disclosure standard, which is why Alexis Mourre, the then-ICC President, observed that the ICC disclosure standard has the effect of "allowing the arbitrator to assess what circumstances *are in his or her view relevant*" and that "he or she *will almost inevitably apply his or her own standard of judgment* to the selection of the facts to be disclosed."[125]

80. Second, the Movants' experts' formulation of the disclosure standard for arbitrators is unprecedented and lacks any support in international commercial arbitration. Professor Giorgetti cites the Draft Investor-State Code in support of her position that there is "a common contemporaneous consensus for more disclosure."[126] However, the Draft Investor-State Code was drafted for *ICSID investor-state arbitration* and, more importantly, has not been finalized and certainly not adopted in any fashion. Indeed, just this past month a third draft of the Draft Investor-State Code was published, showing that it continues to be in flux.[127] It is possible that one day the Draft Investor-State Code might become the standard for ICSID arbitration. But it is emphatically not the standard for international commercial arbitration today.

81. Third, the retroactive application of Movants' unprecedented standard in this case would be extremely unfair. There was little reason for the Arbitrators to disclose a relationship when that type of relationship has never before been identified as bearing on an arbitrator's

---

[124] Y. Derains, E. A. Schwartz, *A Guide to the ICC Rules of Arbitration*, Kluwer Law International (2005) at p. 135 (Exhibit 44).

[125] A. Mourre, Conflicts Disclosures: The IBA Guidelines and Beyond, in 37 THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION, ch. 23, at para. 23.19 (S.L. Brekoulakis, J.D.M. Lew et al. eds., 2016) (Exhibit 34) (emphasis added). Professor Giorgetti argues that Mr. Mourre disapproved of this reality. *See* Prof. Giorgetti Second Report, at para. 44. However, whether he did or not is frankly irrelevant. The ICC standard clearly permits, as Mr. Mourre acknowledges, a measure of arbitrator discretion.

[126] Prof. Giorgetti Second Report, at para. 62.

[127] Draft Investor-State Code of Conduct for Adjudicators in International Investment Disputes, Version Three ("Draft Investor-State Code for ISDS Adjudicators"), ICSID Resources (2021), https://icsid.worldbank.org/sites/default/files/documents/Code_of_Conduct_V3.pdf

independence or impartiality.[128] The implicit suggestion by the Movants' experts that non-disclosures of such circumstances suggest a lack of impartiality or independence, sufficient to warrant vacatur of an award, ignore entirely the fact that such disclosures simply were not customary or necessary under the IBA Guidelines or prevailing international arbitration practice.

82. The Movants' experts say that it is "neither fanciful nor unrealistic" to suggest that the Parties would have expected such disclosures to be made.[129] In my experience, that is incorrect. Instead, in my experience, counsel and parties would not expect arbitrators to disclose overlapping appointments with other arbitrators or counsel, and they would not think that such appointments were of particular importance. As explained in my First Report, I do not think that either arbitrators, parties, counsel or arbitral institutions in international commercial arbitrations would expect or desire that disclosure of such overlapping appointments be made.

83. Finally, the Movants' disclosure standard would have pernicious effects on international arbitration. While Professor Giorgetti claims that "[t]here is no drawback to complete and continuous disclosure,"[130] as I explain in my First Report, an arbitrator's duty to disclose is intended to be proportionate, aimed at fostering the parties' trust on the one hand, and on avoiding the costs and delay caused by excessive disclosure and unnecessary challenges on the other hand.[131]

84. The pernicious effects of a policy of over-disclosure can be seen in the disclosures of Mr. Gunter throughout 2021. In light of Movants' insistent requests, and mindful of their prior challenge, Mr. Gunter disclosed trivial matters related to other appointments.[132] The Movants have now seized on these minor disclosures to argue perversely that if Mr. Gunter believed it

---

[128] As I noted above at paras. 46-47, the Movants' experts cite no authority for the theory that an arbitrator jointly appointing a co-arbitrator as president in an unrelated arbitration could lead to bias.
[129] *See* Prof. Coe Second Report, at para 16 ("disclosure of relationships among arbitrators are neither fanciful nor unrealistic to expect"); Judge Schwebel Report, at para. 12.
[130] Prof. Giorgetti Second Report, at para. 25.
[131] *See* Born First Report, at para. 76.
[132] Movants' Consolidated Motion to Vacate Partial and Final Arbitral Awards and Incorporated Memorandum of Law ("Movants' Consolidated Motion to Vacate"), at p. 25 (DKT No. 55)

necessary to make these disclosures, it is clear he should have previously disclosed his contacts with other arbitrators and counsel.[133]

85. In an abundance of caution, Dr. Gaitskell disclosed in September 2021 that in an unrelated arbitration his co-arbitrator (who is not connected in any way to the Panama disputes) had proposed appointing Mr. Hanotiau (who is *not* an arbitrator in the Panama 1 Arbitration) as tribunal president.[134] Movants strongly opposed the appointment, and therefore Mr. Hanotiau was not appointed in this separate arbitration.[135] In other words, as a result of over-disclosure, the Movants have now asserted for themselves a veto power over arbitrator appointments in an unrelated arbitration, infringing on the rights of the parties in that other, unrelated arbitration.

VIII. FRIVOLOUS ARBITRATOR CHALLENGES AND VACATUR ACTIONS UNDERMINE INTERNATIONAL ARBITRATION

86. Based on my experience as counsel, arbitrator and leader of a leading arbitral institution, I can affirm that parties overwhelmingly would not expect disclosure of circumstances such as those in this case, and the vast majority of arbitrators would not have disclosed them.

87. Professor Giorgetti does not contest that the vast majority of arbitrators would have not found that disclosure was required here but states that this is evidence of the "key problem…[that] arbitrators constantly overvalue their ability to be independent."[136] In my view, that criticism reflects both the lack of support for Professor Giorgetti's position in contemporary international commercial arbitration law and practice and the extent to which her views diverge from those of reasonable participants in the contemporary arbitral process.

88. In my experience, international arbitrators do not "constantly overvalue" their independence. On the contrary, international arbitrators are challenged only rarely under all

[133] Movants' Consolidated Motion to Vacate, at p. 25 (DKT No. 55) ("It speaks volumes that, after he had been challenged, Mr. Gunter recognized that these entirely unrelated appointments were worthy of disclosure. Yet, prior to being challenged, he chose not to disclose…").
[134] Exhibit 4 to Second Bouchardie Declaration (DKT No. 63-4).
[135] Exhibit 4 to Second Bouchardie Declaration (DKT No. 63-4).
[136] Prof. Giorgetti Second Report, at para. 46.

leading institutional arbitration rules – precisely because the parties assess the arbitrators' independence and impartiality in the same way that the arbitrators do. The notion that arbitrators "constantly overvalue" their independence presumes that parties always or frequently are faced with arbitrators who lack independence and impartiality – which is manifestly not the case. On the contrary, parties consistently select international arbitration to resolve their commercial disputes precisely because of the expertise and independence of arbitral tribunals.[137]

89. The lone support Professor Giorgetti offers in support of her assertion about arbitrator partiality is a poll taken at an arbitration conference wherein 85% of arbitrators who responded to the poll indicated that they considered their ability to make accurate and impartial decisions to be above the median compared to other respondents.[138] Professor Giorgetti also asserts that a "growing body of literature shows that arbitrators are, like many of us, subject to unconscious bias" and therefore "expansive and continuous disclosure is an even more important tool."[139] For his part, Professor Coe claims that arbitrators may be prone to ignore their duty to disclose because of their desire to keep lucrative appointments.[140]

90. In my view, these generalized criticisms are both wrong and irrelevant. They are wrong because arbitrators take seriously their disclosure obligations and arbitral institutions administer those obligations rigorously; the Movants' experts cite no serious support for their notion that arbitrators systematically refuse to take their disclosure obligations seriously. Those criticisms are also irrelevant, because they are abstract hypotheses about human behavior that say nothing about the specific circumstances of this case or the application of applicable vacatur standards to this case.

91. Moreover, in my view, the Movants' concerns (based on speculation and uncertain social science) regarding arbitrators' unconscious bias and supposed incentive to under-disclose also

---

[137] *See Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285 (5th Cir. 2007) (referring to "expertise" as "one of [arbitration's] most attractive features").
[138] Prof. Giorgetti Second Report, at para. 46.
[139] Prof. Giorgetti Second Report, at para. 80.
[140] *See* Prof. Coe First Report, at para. 17 ("Another circumstance that may cause an arbitrator to limit disclosure is that arbitrators generally want to serve… Persons unfamiliar with international arbitration are often surprised by the fees earned by arbitrators.").

ignore the significantly more real moral hazard of parties using alleged conflict concerns to derail the arbitration process or impede the enforcement of valid arbitration awards, thus imperiling the finality of awards, a key attraction of arbitration.[141]

92. As I noted in my First Report, although parties sometimes genuinely discover new, previously unknown grounds for a challenge to an arbitrator who has ruled against them, in many cases challenges made after an award is rendered are motivated by substantive dissatisfaction over an adverse decision, rather than by a genuine doubt regarding the arbitrators' independence and impartiality.[142]

93. U.S. courts and courts of other common law jurisdictions, as well as the IBA Guidelines and other commentary, recognize the problems that can arise from over-disclosure and tactical challenges of arbitrators and awards:

a. Permitting challenges based on speculative and imprecise allegations "would open a new and…interminable chapter in the efforts of people who have chosen arbitration and been disappointed in their choice to get the courts…to undo the results of their preferred method of dispute resolution."[143]

b. "Awarding vacatur [upon speculative assertions of bias] would seriously jeopardize the finality of arbitration…losing parties would have an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships…"[144]

c. "[R]equiring vacatur on these attenuated facts would rob arbitration of one of its most attractive features apart from speed and finality-expertise. Arbitration would lose

---

[141] *World Bus. Paradise, Inc. v. Suntrust Bank*, 403 F.App'x 468, 470 (11th Cir. 2010) ("Arbitration's allure is dependent upon the arbitrator being the last decision maker in all but the most unusual cases").; *Johnson Controls, Inc. v. Edman Controls, Inc*., 712 F.3d 1021, 1028 (7th Cir. 2013) ("Attempts to obtain judicial review of an arbitrator's decision undermine the integrity of the arbitral process.").

[142] G. Born, INTERNATIONAL COMMERCIAL ARBITRATION, Ch. 12, § 12.05 [M], at p. 2034 (3d ed. 2021) (Exhibit 5); J. Levine, *Late-in-the-Day Arbitrator Challenges and Resignations: Anecdotes and Antidotes*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS, at p. 260 (C. Giorgetti ed., 2015) (Exhibit 30) ("A common scenario for challenges at an advanced stage in proceedings is when a party is dissatisfied with a tribunal's ruling on procedure or substance.").

[143] *Gherardi v. Citigroup Glob. Markets, Inc.*, 2018 WL 4864851, at *8 (S.D. Fla. July 26, 2018) (quoting *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir. 1983)).

[144] *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285 (5th Cir. 2007).

the benefit of specialized knowledge, because the best lawyers and professionals, who normally have the longest lists of potential connections to disclose, have no need to risk blemishes on their reputations from post-arbitration lawsuits attacking them as biased."[145]

d. "[T]o require disclosure of some matter which was trivial and could not materially support a conclusion that there was real possibility of bias, would risk causing the parties unnecessary concerns about an arbitrator's impartiality and also encourage vexations challenges by a party to the arbitrator's position."[146]

e. The IBA Guidelines emphasize "the need to avoid unnecessary challenges against arbitrators in order to protect the parties' ability to select arbitrators of their choosing."[147]

f. "[S]ome commentators have concluded that the practice [of challenging arbitrators] has increased to the extent that it is at risk of affecting the efficiency and legitimacy of the process."[148]

94. These admonitions apply with particular force in this case. Here, the Movants challenged all three members of the tribunal, after an adverse award, on different sets of grounds. This is highly indicative of a tactical challenge.[149]

---

[145] *Id.*
[146] *Halliburton Co. v. Chubb Bermuda Insurance Ltd.* [2020] UKSC 48, ¶ 108 (Exhibit 16).
[147] IBA Guidelines, Introduction, at para. 2.
[148] N. Blackaby, C. Partasides, et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, at p. 258 (6th ed. 2015) (Exhibit 4).
[149] S. Greenberg, *Tackling Guerilla Challenges Against Arbitrators: Institutional Perspective*, *in* 7(2) TRANSNAT'L DISP. MGMT., at para. 29 (2010) (Exhibit 14) (According to former ICC Deputy Secretary General Simon Greenberg, "a combination of … three factors, *i.e.* frequent challenges at inconvenient times and based on spurious grounds, might, when taken together, lead to an even stronger inference that the challenge is a guerrilla tactic."), *see also* paras. 12, 16-22 (discussing tactical challenges that were rejected by the ICC Court: "Sometimes the moment in the procedure at which a party challenges an arbitrator can give rise to a suspicion that the party is using the challenge as a dilatory tactic. … [A] time when suspicion might arise as a result of the timing of a challenge is after the arbitral tribunal has drafted its award but before it is notified to the parties. It might even be that the challenging party either fears (or has somehow learnt) that it will lose.… As a variation of the above, it happens (albeit very rarely) that a party files a challenge after the notification of the final award. In one recent case, the respondent filed an application for correction of the final award pursuant to Article 29(2) of the Rules and at the same time introduced a challenge against all members of the arbitral tribunal. The challenge was mainly based on the arbitral tribunal's assessment of the evidence in favour of the claimant.").

IX. THE MOVANTS' EXPERTS' ARGUMENTS REGARDING THE LIMITED POOL OF ARBITRATORS IS MISGUIDED AND MISINTERPRETS MY OPINION

95. As I noted in Section I above, my conclusion in my First Report that the Arbitrators did not need to disclose the circumstances that the Movants allege should have been disclosed was based on the ICC Rules and the FAA (and subsidiarily on the IBA Guidelines). My conclusion that there are no grounds for vacatur in this case was based on the FAA.

96. Nevertheless, both Judge Schwebel and Professor Coe suggest that a primary basis for my First Report was my statement that there were a limited number of arbitrators with the perceived expertise to handle a complicated construction arbitration like the Panama 1 Arbitration.[150] Judge Schwebel builds his entire opinion on this inaccurate proposition,[151] and Professor Coe dedicates a substantial portion of his opinion to it.[152] In fact, although correct, this argument was in no way essential to my First Report. I would reach precisely the same conclusions even if there was a very large pool of potential arbitrators suitable for the Panama 1 Arbitration. In any case, however, I explain below both my argument and why Judge Schwebel's and Professor Coe's criticisms are unavailing.

97. In my First Report, I explained that parties typically desire, and ordinarily insist upon, arbitrators who have substantial expertise in the subject matter of the parties' underlying dispute, as well as experience under the applicable institutional arbitration rules.[153] Because of this demand for the combination of a specific subject matter expertise and relevant arbitral experience, the "pool of potential arbitrators that sophisticated commercial parties and international arbitration counsel …would consider for appointment in such a complex, high value dispute is relatively limited."[154] I note also that parties and counsel in international

---

[150] Judge Schwebel Report, at para. 14; Prof. Coe Second Report, at para. 62-63.
[151] Judge Schwebel Report, at paras. 17-18.
[152] Prof. Coe Second Report, at paras. 62-77.
[153] *See* Born First Report, at para. 21.
[154] *Id.*

arbitrations frequently insist or strongly prefer personal experience with potential arbitrator nominees – which inevitably limits the pool of available arbitrators.

98. One of the ramifications of these aspects of the arbitral process is that it is "very common, and equally inevitable, that there are extensive professional contacts both among experienced arbitrators and between such international arbitrators and international arbitration counsel."[155] I further explained in my First Report that U.S. courts, when faced with a motion to vacate, have considered that overlapping appointments are inevitable among arbitrators in "specialized fields" and are not indicative of bias because such appointments are "not unusual."[156]

99. As the Movants themselves explain, at issue here is a "multi-billion-dollar project, spanning a decade" which they describe as a "historic public works project."[157] There are a limited number of a "historic" projects of this magnitude and complexity, especially in Latin America. It necessarily follows that there is also a limited number of arbitrations that have arisen out of projects of this magnitude, and therefore a limited number of arbitrators with experience deciding a dispute of this magnitude. This justifies my conclusion that the Arbitrators' non-disclosure of their overlapping appointments was explicitly not indicative of bias in this case.[158]

100. The Movants' experts have entirely misconstrued my explanation. Judge Schwebel suggests that I have "creat[ed] a questionable choice by seemingly presenting experience and impartiality as an either-or proposition."[159] Similarly, Professor Giorgetti states that "[n]othing in the record or otherwise suggests that the parties waived their right to independent and objective arbitrators in favor of experience."[160] However, I have not claimed that a party forfeits their right to an impartial tribunal because there is a small pool of arbitrators for them to choose from. Instead, I explain that overlapping appointments do not indicate bias when there is a small pool

---

[155] *Id.* at 22.
[156] Born First Report, at para. 212 fn. 228.
[157] Movants' Consolidated Motion to Vacate, at p.6 (DKT No. 55).
[158] *See* Born First Report, at para. 212.
[159] Judge Schwebel Report, at para. 17.
[160] Prof. Giorgetti Second Report, at para. 83.

of arbitrators. Unsurprisingly, and contrary to the views of Professor Giorgetti and Judge Schwebel, U.S. courts have come to the same conclusion.[161]

X. CONCLUSION

101. For the reasons detailed above, I confirm my conclusion in my First Report that there is no credible basis for contending that the Partial Award or Final Award are subject to vacatur on any of the grounds raised by Movants.

102. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 20th day of October 2021, in London, United Kingdom.

Gary B. Born
Wilmer Cutler Pickering Hale and Dorr LLP
49 Park Lane
London W1K 1PS
United Kingdom
Tel: +44 (0) 20 7872 1000
Fax: +44 (0) 20 7839 3537
E-mail: gary.born@wilmerhale.com

[161] *See* Born First Report, at para. 212 (citing the numerous cases where U.S. courts have concluded that repeat appointments are expected and not indicative of bias when the pool of potential arbitrators is small).

ANNEX A: DOCUMENTS REVIEWED AND/OR CONSIDERED

To prepare my second opinion, I reviewed the additional following documents Vinson & Elkins provided me pertaining to the pending vacatur proceedings 1:20CV24687 ("Partial Award Case") and 1:21CV21509 ("Final Award Case") before the United States District Court in the Southern District of Florida:

a. Certain documents attached to the First Declaration of Nicholas Bouchardie, dated July 23, 2021 (DKT No. 55-3), to which I refer herein but had previously not referred in my first opinion;

b. Movants' Response to ACP's Consolidated Cross-Motion To Confirm and Enforce the Partial and Final Awards;

c. Movants' Reply in Support of Their Consolidated Motion To Vacate Partial and Final Arbitration Awards, dated 13 September 2021, together with

    i. Declaration of Nicholas Bouchardie dated 13 September 2021 ("Second Bouchardie Declaration"), DKT No. 63, and certain of its attached exhibits;

    ii. Expert Opinion of Professor Jack J. Coe, Jr. dated 13 September 2021 ("Second Prof. Coe Opinion") DKT No. 65;

    iii. Expert Report of Professor Chiara Giorgetti, dated 13 September 2021 ("Second Prof. Giorgetti Opinion") DKT No. 64;

    iv. Expert Report of Judge Stephen Schwebel, dated 13 September 2021 ("Judge Schwebel Opinion") DKT No. 66.