

**INTERNATIONAL COURT OF ARBITRATION
OF THE INTERNATIONAL CHAMBER OF COMMERCE**

ICC CASE No. 20910/ASM/JPA (C-20911/ASM)

**(1) GRUPO UNIDOS POR EL CANAL, S.A., (2) SACYR, S.A.,
(3) WEBUILD S.P.A., (4) JAN DE NUL N.V.
("GUPC")**

Claimants

v.

**AUTORIDAD DEL CANAL DE PANAMÁ
("ACP")**

Respondent

CLAIMANTS' REPLY UPDATED COST SUBMISSION

18 December 2020

I. INTRODUCTION

1. In accordance with the Revised Procedural Calendar dated 1 December 2020 and the Tribunal's email to the Parties dated 25 November 2020,¹ Claimants set out their Reply Updated Cost Submission below. As the case with Claimants' Updated Cost Submission, this Reply Submission is supplemental to Claimants' First Cost Submission dated 20 November 2019 and Reply Cost Submission dated 20 December 2019, and Claimants maintain their request to recover their legal fees and costs, as detailed in those submissions.²
2. In its Updated Cost Submission, ACP alleges that it incurred costs in relation to post-Partial Award quantum matters, purportedly due to GUPC's "inadequate presentation of its claim and deficiencies (including errors and inaccuracies) in its supporting records"³ and that GUPC delayed providing the calculations to ACP, and this purported delay "caused wasted and unnecessary costs."⁴ As elaborated below, ACP's allegations are demonstrably wrong. Claimants acted diligently and efficiently in reaching agreement with ACP on the quantum matters. By contrast, as Claimants demonstrated, ACP engaged in abusive litigation tactics and procedural misconduct throughout this Arbitration, resulting in millions of dollars in unnecessary costs.⁵

II. CONTRARY TO ACP'S BASELESS ALLEGATIONS, CLAIMANTS ACTED DILIGENTLY AND EFFICIENTLY IN REACHING AGREEMENT ON QUANTUM MATTERS AS INSTRUCTED BY THE TRIBUNAL IN THE PARTIAL AWARD

3. ACP's allegation that it incurred costs due to GUPC's "inadequate presentation of its claim and deficiencies (including errors and inaccuracies) in its supporting records"⁶ is false. The need to calculate and reach agreement on the specific quantum issues arose from the Tribunal's specific determinations with respect to GUPC's Foundation Conditions claims and related financing costs. As Claimants explained, in the Partial Award the Tribunal decided in favor of Claimants with respect to a number of claims. With respect to Foundation Conditions (Claims 47(i), 50, and 57), the Tribunal awarded Claimant 1 direct costs, ITBMS, and both site office and head office overheads, plus finance costs.⁷ Separately, with respect to On-Site Laboratories Variation, the Tribunal awarded Claimant 1 direct costs, head office overheads, ITBMS, and profits, totaling USD 17,197,673.20, plus finance costs.⁸
4. The Tribunal, however, directed the Parties to reach agreement on a limited number of outstanding quantum matters with respect to certain elements of Claimant 1's successful Foundation Conditions claims, as well as its entitlement to finance costs.⁹ As elaborated below, contrary to ACP's baseless assertion that ACP incurred additional costs due to an alleged delay by Claimants, Claimants acted promptly and efficiently to make the calculations and reach agreement with ACP as directed by Tribunal. ACP did not engage in any calculation effort until it received Claimants' calculations, and subsequently delayed reaching agreement using trivial issues that had *de minimis* impact on the total quantum calculations. In any event, the

¹ [{Tribunal's email to the Parties}](#), dated 25 Nov 2020.

² Claimants hereby resubmit Annex F (Claimants' legal fees related to post-Partial Award quantum calculations and cost submissions) and Annex G (Claimants' expert and consultant fees related to post-Partial Award quantum calculations) to their Updated Cost Submission. While Annex G remains unchanged, Annex F is updated to show Claimants' legal fees incurred in preparation of this Reply Submission.

³ [{ACP's Updated Cost Submission}](#), p. 3, ¶¶ 2.2 – 2.16.

⁴ [{ACP's Updated Cost Submission}](#), p. 6, ¶¶ 2.17-2-18.

⁵ [{GUPC's Cost Submission}](#), p. 5, ¶¶ 10-24; [{GUPC's Reply Cost Submission}](#), p. 7, ¶¶ 18-37; [{GUPC's Updated Cost Submission}](#), p. 5, ¶¶ 10-12.

⁶ [{ACP's Updated Cost Submission}](#), p. 3, ¶¶ 2.2 – 2.16.

⁷ [{Partial Award}](#), p. 515, ¶¶ 2022-2071.

⁸ [{Partial Award}](#), p. 528, ¶¶ 2072-2087.

⁹ See [{Partial Award}](#), p. 525, ¶¶ 2060, 2065.

sequence of correspondence referenced by ACP as demonstrating delay by Claimants is partial and misleading, as shown below.

5. Following the Tribunal's instructions, on 30 September 2020, ACP noted that it was awaiting Claimants' "proposed calculations" before engaging in any discussions with Claimants.¹⁰ Claimants responded on 5 October confirming that they were "working on these calculations" and were "mindful of the time limit stated by the Tribunal."¹¹ Claimants noted that "there are some issues that require careful consideration," and proposed, "in the interest of efficiency," that ACP share its own calculations with GUPC.¹² ACP responded to Claimant's email two weeks later, on 21 October 2020, claiming that it was "yet to receive any indication from you as to when the Claimants will meaningfully engage with the ACP," while also again refusing to produce any of its own calculations, asserting "it is for the Claimants to advance an initial position and then for the ACP to consider and respond."¹³
6. The next day, on 22 October 2020, Claimants reconfirmed that they would provide the relevant calculations as soon as possible, leaving ample time to reach agreement on the calculations.¹⁴ Subsequently, on 30 October 2020, Claimants provided ACP with an Excel spreadsheet setting out Claimants' calculations. Claimants also provided a proposed methodology with respect to Claims 47 and 57, because as Claimants explained "there [were] certain inherent difficulties in performing the exercises directed by the Tribunal."¹⁵ Claimants sought ACP's collaboration, noting that "[i]n view of the relatively small amounts in dispute, we consider that the further accrual of legal and expert costs would be disproportionate."¹⁶
7. On 5 November 2020, ACP conveyed its agreement with respect to most of the calculations provided by Claimants, including Claims 47 and 50. However, with respect to Claim 57, ACP queried the calculations and requested that Claimants "provide further particulars of how this volume is derived from those records."¹⁷ ACP used the small variance in concrete volumes, which only had a trivial impact on the overall quantum, as pretext to force Claimants to locate the original contemporaneous records from the batching plant to perform a further reconciliation.¹⁸ Claimants provided ACP updates on 6, 8, and 11 November with reconciliation of lean concrete volumes for Claim 57 and explanation as to why the small variance occurred.¹⁹ ACP refused to reach agreement until 11 November, and continued to write lengthy and disproportionate letters, due to the small variation in concrete volumes, despite the fact that the reliability of the batching plant records was expressly approved by the Tribunal in paragraph 2029 of the Partial Award.²⁰ The accuracy of the batching plant records was again confirmed through the exchange of correspondence (and the efforts of GUPC to find the original handwritten records for the concrete pours in question). This was ultimately accepted by ACP, but time and costs were wasted as a result of ACP's behavior.
8. Claimants could not have foreseen the scope of the quantum calculations requested by the Tribunal in its Partial Award. It is telling that the basis of ACP's allegations is merely "[t]he possibility that the Contractor may not succeed on some parts of its Foundation Conditions

¹⁰ [{Letter from Respondent to Claimants}, dated 30 Sep 2020.](#)

¹¹ [{Email from Claimants to Respondent}, dated 5 Oct 2020.](#)

¹² [{Email from Claimants to Respondent}, dated 5 Oct 2020.](#)

¹³ [{Email from Respondent to Claimants}, dated 21 Oct 2020.](#)

¹⁴ [{Email from Claimants to Respondent}, dated 22 Oct 2020.](#)

¹⁵ [{Email from Claimants to Respondent}, dated 30 Oct 2020.](#)

¹⁶ [{Email from Claimants to Respondent}, dated 30 Oct 2020.](#)

¹⁷ [{Letter from Respondent to Claimants}, dated 5 Nov 2020.](#)

¹⁸ [{Letter from Respondent to Claimants}, dated 6 Nov 2020;](#) [{Letter from Respondent to Claimants}, dated 10 Nov 2020;](#) [{Letter from Respondent to Claimants}, dated 12 Nov 2020.](#)

¹⁹ [{Email from Claimants to Respondent}, dated 6 Nov 2020;](#) [{Email from Claimants to Respondent}, dated 8 Nov 2020;](#) [{Letter from Claimants to Respondent}, dated 11 Nov 2020.](#)

²⁰ [{Letter from Respondent to Claimants}, dated 12 Nov 2020.](#)

claims” which according to ACP “should have been obvious to the Contractor.”²¹ However, as ACP itself acknowledges, the Tribunal requested a breakdown between the claims for lean concrete for the first time in the course of the Closing Hearing, and Claimants did in fact present the requested breakdown with their closing submission.²² The Partial Award required a different calculation, which – as explained above – Claimants presented to ACP without any delay, resulting in a timely agreement by 12 November 2020, despite the unnecessary additional clarifications that were required as a result of ACP’s behavior.

9. In addition, the Tribunal must reject ACP’s position that it should be awarded costs for finalizing quantum for On-Site Laboratories because it was the “winner” of that claim.²³ On the contrary, the Tribunal rejected ACP’s claim to overturn the DAB decision,²⁴ indeed concluded in favor of Claimant 1, and awarded direct costs, head office overheads, ITBMS, and profits, totaling USD 17,197,673.20, plus finance costs.²⁵ The Partial Award therefore set out the quantum due to Claimant 1, but directed the Parties to agree on financing costs. As explained above, Claimants acted promptly and diligently in finalizing the quantum matters, including with respect to the financing costs, and thus, there is no reason to award ACP any costs in relation to On-Site Laboratories, or any of the quantum matters.

III. CLAIMANTS SHOULD RECOVER COSTS RELATED TO ACP’S IMPROPER CONDUCT, WHILE THE REMAINDER OF THE LEGAL FEES AND COSTS SHOULD BE BORNE BY EACH PARTY

10. As elaborated in Claimants’ Updated Cost Submission, the default rule in the United States is that legal (counsel) fees are not awarded such that each party bears its own legal fees.²⁶ When considering the costs of the proceeding, however, in accordance both with ICC Rules and U.S. law, the Tribunal should take into account ACP’s procedural misconduct over the course of the Arbitration.²⁷ Indeed, it is undisputed between the Parties that “it is entirely within the discretion of the tribunal to find that a party’s improper conduct or bad faith is the *sole* determinative factor in its decision on costs.”²⁸ This is consistent with U.S. Supreme Court precedent which expressly recognizes that “bad faith may be found, not only in the actions that led to the lawsuit, but *in the conduct of the litigation.*”²⁹

²¹ [{ACP’s Updated Cost Submission}](#), p. 3, ¶ 2.2.

²² [{Tribunal’s Questions}](#), [Tribunal’s Questions, dated 27 Sep 2019](#), p. 5, ¶ 38; [{C-P-0031}](#), [Claimants’ Closing Statement, dated 12 Oct 2019](#), p. 146; [{C-P-0032}](#), [Claimants’ Closing Statement – Answer to Tribunal’s Questions, dated 12 Oct 2019](#), p. 120; [{C-P-0033}](#), [Claimants’ Rebuttal, dated 13 Oct 2019](#), p. 106 [pp. 45-47]; *see also* [{ACP’s Updated Cost Submission}](#), p. 3, ¶ 2.2.

²³ [{ACP’s Updated Cost Submission}](#), p. 7, ¶ 2.19.

²⁴ As Claimants demonstrated, because ACP is unsuccessful in its attempts to overturn the DAB award in full, ACP cannot claim any costs in relation to On-Site Laboratories. [{GUPC’s Reply Cost Submission}](#), p. 5, ¶¶ 12-13.

²⁵ [{Partial Award}](#), p. 528, ¶¶ 2072-2087. As Claimants demonstrated in their prior Cost Submissions, the DAB’s findings, or the amount of compensation it awarded to GUPC S.A., has no bearing on this Tribunal’s discretion to award costs incurred by Claimants. [{GUPC’s Reply Cost Submission}](#), p. 4, ¶¶ 11-15.

²⁶ [{C-LA-0023}](#), J. Fry, S. Greenberg & F. Mazza, *The Secretariat’s Guide to ICC Arbitration* (2012), p. 28, ¶ 3-1488.

²⁷ [{C-LA-0514}](#), [ICC Commission Report: Decisions on Costs in International Arbitration, ICC Dispute Resolution Bulletin, Issue 2 \(2015\)](#), p. 13 [pp. 11, 14-16], ¶¶ 62, 78-85; *see* [{C-LA-0515}](#), [Final Award in ICC Case No. 8486, YBCA Vol. XXIVa \(1999\)](#), p. 5 [p. 172] (holding that “[a]ccording to the general principles of international arbitration law,” a tribunal “must take into account for its decision on costs *not only* the result of the proceedings *but also* the behaviour of the parties during the proceedings.”). (Emphasis added).

²⁸ [{C-LA-0514}](#), [ICC Commission Report: Decisions on Costs in International Arbitration, ICC Dispute Resolution Bulletin, Issue 2 \(2015\)](#), p. 16 [p. 14], ¶ 78. (Emphasis added).

²⁹ [{C-LA-0524}](#), [Hall v. Cole, 412 U.S. 1 \(1973\)](#), p. 7 [p. 15] (Emphasis added).

11. As Claimants detailed in their prior Cost Submissions, a significant portion of Claimants' costs are attributable to ACP's improper and abusive procedural and substantive conduct throughout the course of this Arbitration.³⁰ As detailed in Claimants' prior submissions,³¹ and summarized below, ACP's conduct in this Arbitration obstructed the expeditious and efficient resolution of the dispute, and caused Claimants to incur significant additional and unnecessary costs.
- ACP raised baseless jurisdiction objections with respect to Claimants 2-4's claims under the JSG. ACP maintained these objections throughout the entire jurisdictional phase, only to withdraw them after all witnesses, experts, Tribunal, and counsel had assembled in Miami, and on the second day of the Hearing on Jurisdiction.³²
 - During Claimants' Emergency Application, ACP intentionally disseminated sensitive and confidential financial information that was disclosed by Claimants in support of their submissions on the issue, despite the Tribunal's strict and clear Confidentiality Order.³³ The Tribunal found, on two occasions, that ACP breached the Confidentiality Order.³⁴
 - ACP engaged in an abusive litigation strategy that protracted the resolution of the disputes and unnecessarily increased Claimants' costs. ACP wrongfully denied certain factual and legal issues leading to substantial briefing on these issues, only to concede at the very end of the Arbitration.³⁵ ACP vigorously pursued fabricated "contamination" and blasting defenses, which previously were dismissed by the DAB, and now also by the Tribunal.³⁶
 - ACP protracted the document production phase by refusing to produce documents despite the Tribunal's orders, and by insisting on production of documents that were irrelevant to the case.³⁷ During the course of the Merits Hearing, ACP created artificial scheduling issues, including for example, changing the witness schedule due to its witnesses' and lead counsel's unavailability.³⁸
12. Thus, ACP's intransigence and obstructionism caused Claimants to incur significant additional costs in relation to, *inter alia*, ACP's baseless jurisdictional objections, its intentional breaches of the Tribunal's Confidentiality Order, and its unreasonable litigation strategy and persistent procedural misconduct. ACP's improper conduct must be considered by the Tribunal in allocating the remainder of the costs,³⁹ in accordance with the ICC Rules and U.S. law.⁴⁰

³⁰ See [{GUPC's Cost Submission}](#), p. 6 [pp. 4-20], ¶¶ 12-16, 17-19, 20-24.

³¹ See [{GUPC's Cost Submission}](#), p. 6 [pp. 4-20], ¶¶ 12-16, 17-19, 20-24.

³² [{Jurisdiction Hearing Transcript}](#), p. 134 [170:21-171:21] (Day 2) (indicating that due to ACP's concessions the Tribunal effectively has nothing "to decide for the moment with respect to respondent's objection"); see also [{Tribunal's email to the Parties, dated 24 Feb 2017}](#).

³³ See [{Procedural Order No. 1, dated 30 Dec 2016}](#), p. 83 [p. 82], ¶¶ 446-463.

³⁴ [{Procedural Order No. 2, dated 12 Feb 2017}](#), p. 13 [p. 12], ¶ 51 ("In light of the above, the Arbitral Tribunal finds that the public statements made by the Respondent in its press release dated 11 January 2017, in particular, those concerning the First Claimant's failure to present new letters of credit and failure to repay certain advance payments on 31 December 2016 and 1 January 2017, and the Respondent's demands upon the Shareholders under their guarantee agreements (Exhibit C-336), were made in breach of the clear terms of the Tribunal's confidentiality order"). [Emphasis added]; [{Procedural Order No. 3, dated 17 Mar 2017}](#), p. 39 [pp. 38-39], ¶ 192.

³⁵ See [{ACP's PHB-1}](#), p. 66 [pp. 59-60], ¶¶ 2.251-2.252; [{Day2}](#), p. 264 [264:7-20] (Del Moral Cross); [{SOR}](#), p. 940 [Ch. 7, pp. 18-19], ¶ 51.

³⁶ See [{GUPC's PHB-1}](#), p. 131 [Ch. 3, p. 70], ¶ 243; see also [{Partial Award}](#), p. 214, ¶ 895.

³⁷ See [{GUPC's Cost Submission}](#), p. 19 [pp. 17-19], ¶ 21.

³⁸ See [{Parties' Exchange on Post-Hearing Calendar, dated 19 Feb 2019}](#).

³⁹ See [{GUPC's Reply Cost Submission}](#), p. 30 [pp. 30-32], Annex C: Claimants' Claim-By-Claim Breakdown Of Costs and Annex D: Claimants' Costs For The Jurisdictional Phase (Including Interim Measures And Confidentiality Issues).

⁴⁰ See, e.g., [{C-LA-0514}](#), [ICC Commission Report: Decisions on Costs in International Arbitration, ICC Dispute Resolution Bulletin, Issue 2 \(2015\)](#), p. 13 [pp. 11, 14-16], ¶¶ 62, 78-85; see [{C-LA-0515}](#), [Final](#)

IV. CLAIMANTS' LEGAL FEES AND COSTS UPDATED TO INCLUDE COSTS INCURRED IN RELATION TO THE POST-PARTIAL AWARD QUANTUM MATTERS (INCLUDING UPDATED COST SUBMISSIONS)

| | EUR | CHF | USD |
|--|------------------|------------------|-------------------|
| White & Case LLP | | | |
| Fees | | | 40,728,384 |
| Expenses | | | 1,783,166 |
| Schellenberg Wittmer | | | |
| Fees | | 1,100,874 | |
| Expenses | | 103,547 | |
| Bonelli Erede Studio Legale | | | |
| Fees | 1,331,235 | | |
| Expenses | 23,993 | | |
| Seyfarth Shaw LLP | | | |
| Fees | | | 4,586,682 |
| Expenses | | | 158,103 |
| Aleman, Cordero, Galindo & Lee | | | |
| Fees | | | 1,211,829 |
| Expenses | | | 404,220 |
| Total Legal Fees & Expenses | 1,355,228 | 1,204,420 | 48,872,383 |
| Claim management costs | | | |
| <i>GUPC</i> | 1,551,757 | | 850,518 |
| <i>Sacyr</i> | 1,255,039 | | |
| <i>Salini-Impregilo</i> | 880,973 | | |
| <i>Jan de Nul</i> | 1,187,108 | | |
| Expert and Consultant Fees & Expenses | | | 10,723,388 |
| Database Support Fees & Expenses | | | 760,771 |
| Translation Costs | | | 66,584 |
| Printing Costs | | | 67,473 |
| ICC Advances | | | 2,000,000 |
| Total Incurred Costs | 6,230,105 | 1,204,420 | 63,341,119 |

V. REQUEST FOR RELIEF AND RESERVATION OF RIGHTS

13. The Tribunal should direct that each Party mainly bear their own legal fees and costs, but should take into account the improper procedural conduct ACP exhibited throughout the Arbitration and allocate the costs related to that conduct to Claimants.
14. Claimants reserve all their rights, including, without limitation, the right generally to rectify, amend and/or supplement this statement of costs, and to request other relief as Claimants may consider necessary or appropriate to defend their rights.⁴¹

* * *

Respectfully submitted this 18th day of December 2020:

White & Case LLP
Bonelli Erede
Schellenberg Wittmer
Seyfarth Shaw LLP
Alemán, Cordero, Galindo & Lee
For Claimants

[Award in ICC Case No. 8486, YBCA Vol. XXIVa \(1999\)](#), p. 5 [p. 172]; [{C-LA-0521}](#), *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), p. 9 [pp. 258-259].

⁴¹ Claimants specifically reserve their right to request stay of this Arbitration pending the decision of the vacatur of the Partial Award before the Southern District of Florida.

**ANNEX F: CLAIMANTS' LEGAL FEES
IN RELATION TO POST-PARTIAL AWARD QUANTUM MATTERS & UPDATED COST SUBMISSION
(INCLUDES CLAIMANTS' REPLY UPDATED COST SUBMISSION)**

| <i>Counsel</i> | <i>Value</i> |
|-----------------------|------------------------|
| White & Case LLP | USD 97,974.95 |
| GUPC Management Costs | USD 5,168 + EUR 28,469 |

**ANNEX G: EXPERT/CONSULTANT FEES
IN RELATION TO POST-PARTIAL AWARD QUANTUM MATTERS**

| Expert/Consultant Name/Firm | Fee |
|---|---------------|
| Atkins International David Shilston | USD 23,784.94 |
| Yendall Hunter Limited Martin Hunter | USD 17,730.68 |
| <i>Total</i> | USD 41,515.62 |