UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No. 1:20-cv-24867-RNS

GRUPO UNIDOS POR EL CANAL, S.A., SACYR, S.A., WEBUILD S.p.A., JAN DE NUL N.V.,	:
Movants/Counter-Respondents,	:
v.	:
AUTORIDAD DEL CANAL DE PANAMÁ,	:
Respondent/Counter-Movant.	:

RESPONDENT AND COUNTER-MOVANT AUTORIDAD DEL CANAL DE PANAMÁ'S CONSOLIDATED CROSS-MOTION TO CONFIRM AND ENFORCE PARTIAL AND FINAL ARBITRATION AWARDS AND SUPPORTING MEMORANDUM OF LAW

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Respondent/Counter-Movant Autoridad del Canal de Panamá (the "ACP") moves pursuant to Section 207 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 207, and Section 9 of the FAA, 9 U.S.C. § 9, to confirm two (one partial and one final) arbitration awards entered in its favor against Movants/Counter-Respondents Grupo Unidos por el Canal, S.A. ("GUPCSA" or "Contractor"), Sacyr, S.A. ("Sacyr"), Webuild, S.p.A. ("Webuild"), and Jan De Nul N.V. ("Jan De Nul") (collectively, "Movants").

I. INTRODUCTION

This Motion seeks confirmation of two arbitral awards rendered by a three-member arbitral tribunal (the "Tribunal") following a nearly six year arbitration under the 2012 Arbitration Rules of the ICC International Court of Arbitration (the "Panama 1 Arbitration" or "Arbitration"). The first is the comprehensive, detailed, and exhaustively reasoned 565-page partial arbitration award (the "Partial Award"), which awarded a net amount of USD 238,460,621.80 in damages to the ACP. The second, final arbitration award (the "Final Award," and together with the Partial Award, the "Awards") follows from the Partial Award and confirms the full measure of damages awarded by the Tribunal to the ACP, allocates legal fees and costs between the Parties, and confirms the immense scale of the process leading to both the Partial and Final Awards—a process that was so extensive that Movants incurred almost $72 million in legal fees and costs and the ACP incurred more than $62 million in legal fees and costs during the course of the Arbitration.

Movants seek to vacate the Awards alleging that: (1) three experienced and well-renowned members of the Tribunal failed to disclose connections that could give rise to a perceived lack of independence and impartiality; and (2) because of that alleged lack of independence and impartiality, the Tribunal denied Movants due process and rendered incorrect awards. Movants' claims against the Tribunal members are the same for both the Partial and Final Awards, and their complaints about due process with respect to the Final Award flow from their complaints about the Partial Award.

As described in more detail in the ACP's Response in Opposition to Movants' Consolidated Motion to Vacate and the accompanying Consolidated Declaration of Nicholas

Henchie,[1] Movants' arguments are completely lacking in evidence, have no basis in law, and do not come close to overcoming the "heavy presumption in favor of confirming arbitration awards."[2] Movants allege no other grounds that, if proved, would permit them to avoid confirmation under Sections 9 and 207 of the FAA. Therefore, upon the Court's denial of Movants' Consolidated Motion to Vacate ("Motion"), there will be no remaining challenges to the confirmation of the Awards. With Movants failing to present any valid ground for refusing confirmation, the Court should enter an order confirming the Awards.

II. FACTUAL BACKGROUND

A. The Panama 1 Arbitration Arose from the $5.25 Billion Expansion of the Panama Canal.

The Design and Build of the Third Set of Locks Contract (the "Project" or "Works") was the largest contract of the $5.25-billion expansion program of the Panama Canal.[3] The ACP is an autonomous public law entity with the exclusive power to administer the Panama Canal pursuant to the Constitution of the Republic of Panama. Movants comprise the Contractor responsible for the design and construction of the Works, and three of the four members of the unincorporated consortium comprising the Contractor's shareholders (each of which is jointly and severally liable for the Contractor's performance).[4] The Panama 1 Arbitration concerned numerous disputes between the ACP and Movants regarding the Third Set of Locks Contract, including in relation to the basalt excavated at the Pacific Site for use as concrete aggregate and the delays associated with Contractor's submittal of a compliant concrete mix design.[5]

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[1] *See* the ACP's Response in Opposition to Movants' Consolidated Motion to Vacate (the "Response") **(DKT No. 57)**; Declaration of Nicolas Henchie ("Henchie Decl.") **(DKT No. 57-1)**. The ACP incorporates its Response as if fully set forth herein.

[2] *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama*, No. 17-23996, 2018 WL 3059649, at *1 (S.D. Fla. June 20, 2018).

[3] Henchie Decl. ¶ 8.

[4] *See* Conditions of Contract **(R-86)** [hereinafter "Contract"]. The Contract was awarded to the consortium "Grupo Unidos por el Canal," or "GUPC," which was comprised of a group of companies that included Sacyr Vallehermoso, S.A. (subsequently Sacyr), Impregilo S.p.A. (subsequently Salini-Impregilo S.p.A., and now Webuild S.p.A.), Jan de Nul N.V., and Constructora Urbana, S.A. Henchie Decl. ¶ 10. After the Contract was executed, GUPC assigned all of their rights and obligations under the Contract to a special purpose Panamanian entity, GUPCSA (the "Contractor"). *Id.* All the original consortium members became shareholders of GUPCSA. *Id.*

[5] Henchie Decl. ¶ 27.

B. The ACP Prevailed on the Merits Following a Nearly Ten-Year Dispute Adjudication Process that Culminated in a Four-Week Arbitration Hearing and a 565-Page Partial Arbitration Award.

To date, Movants have filed a total of seven arbitrations against the ACP in connection with the Third Set of Locks Contract, and the ACP has filed one against Movants.[6] The Panama "1" Arbitration is the third of those arbitrations to result in an award, following the "Cofferdam Final Award," which this Court confirmed in the ACP's favor in 2018, and the "Advance Payments Award," which also was issued in the ACP's favor in late 2018.[7] The disputes that resulted in the Partial and Final Awards from the Panama 1 Arbitration date back nearly a decade and have involved prior Dispute Adjudication Board ("DAB") proceedings and a mammoth undertaking by countless fact witnesses, expert witnesses, and attorneys from around the world.

The subject matter of one of the main claims in the Panama 1 Arbitration originated in February 2011, when the Contractor filed a notice of claim under the Parties' Contract that led to the initiation of a contractually-mandated dispute resolution process.[8] After initial proceedings involving representatives of the Parties, the Contractor's claim was submitted to the DAB.[9] The DAB proceedings then took place over approximately 15 months, between September 2013 and December 2014.[10] During the DAB proceedings, the Parties submitted two rounds of detailed written submissions and numerous expert witness reports.[11] Those written submissions were followed by a two-week, in-person hearing in Panama in September and October 2014 before the DAB, at which the Contractor was represented by its current counsel, White & Case.[12] At the conclusion of those proceedings, the DAB ordered the ACP to pay the Contractor approximately $265,299,500, which the ACP promptly paid in full despite its dissatisfaction with the DAB's decision.[13]

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[6] *Id.* ¶ 23.
[7] *Id.* ¶¶ 25–26, 40–42; *Grupo Unidos*, 2018 WL 3059649, at *7. The Advance Payments Award was not the subject of an American enforcement or confirmation proceeding.
[8] Henchie Decl. ¶ 52.
[9] *Id.* ¶ 48.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* ¶¶ 49, 53.

Following the DAB's (incorrect) decision, in March 2015, the ACP formally commenced the Panama 1 Arbitration by filing a request for arbitration with the ICC, seeking the repayment of the sums that the ACP had immediately paid but which it said were wrongly awarded by the DAB.[14] On the same day, Movants filed their own request for arbitration against the ACP seeking sums in excess of those awarded by the DAB and paid by the ACP, and the two proceedings were eventually consolidated by the ICC into the Panama 1 Arbitration.[15] Other claims were subsequently added by agreement.[16]

The process afforded to the Parties during the Arbitration was far more extensive than what they had received during the DAB proceeding. To begin, the Parties both nominated respective co-arbitrators to sit on the Tribunal, with the ACP nominating Dr. Robert Gaitskell QC and Movants nominating Mr. Claus von Wobeser.[17] Shortly thereafter, the Parties jointly selected Mr. Pierre-Yves Gunter as President of the Tribunal, and the ICC confirmed the Parties' selection.[18] All three arbitrators are well-known and highly respected in the international arbitration world.[19]

Following appointment of the Tribunal, the Parties engaged in a wide-ranging process of factual development, document production, legal briefing, expert discovery, and ultimately a hearing

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[14] *Id.* ¶ 49.
[15] *Id.* ¶ 27.
[16] The Foundation Conditions claims were added following the ACP's acceptance, in February 2017, of the Contractor's application to add these claims.
[17] Henchie Decl. ¶ 27.
[18] *Id.*
[19] Dr. Gaitskell has served as an arbitrator in more than 100 arbitrations throughout the world, is a professional engineer who has lectured across the globe on legal and engineering subjects, and has been named by the Legal 500 Asia Pacific 2019 as "[o]ne of the premier construction arbitrators in the world: very experienced, efficient, patient and fair." KEATING CHAMBERS, https://www.keatingchambers.com/people/dr-robert-gaitskell-qc/ (last visited July 28, 2021). Mr. von Wobeser has acted in more than 200 arbitration proceedings, either as arbitrator or counsel, is President of the Latin American Arbitration Association and of the Mexican Chapter of the ICC, has received the Lifetime Achievement Award from Chambers and Partners, and has been recognized by Chambers, Global Arbitration Review 100, the Legal 500, and many other publications. VON WOBESER, https://www.vonwobeser.com/index.php/lawyer?l=134 (last visited July 28, 2021). Mr. Gunter has acted as arbitrator and counsel in more than 220 cases and has been ranked Band 1 in Arbitration by Chambers Europe and Chambers Global, a "leading" arbitrator in Commercial Litigation by Leaders League, and "Recommended" by Who's Who Legal Switzerland. BAR & KARRER, https://www.baerkarrer.ch/en/lawyers/pierre-yves-gunter (last visited July 28, 2021).

on the merits. From commencement of the Arbitration in March 2015 to the rendering of the Partial Award nearly six years later in September 2020, the Arbitration proceedings comprised, *inter alia*, the following, all of which were considered by the Tribunal:

(a) a detailed bifurcated phase to address jurisdiction and standing, that resulted in an 86-page partial award on jurisdiction;

(b) a detailed phase to address Movants' emergency application for interim measures;

(c) two rounds of pleadings totaling over 3,500 pages (excluding witness statements, expert reports, exhibits, and authorities);

(d) two lengthy and detailed document production phases in which close to 15,000 documents (including audio, video, and data files) were produced;

(e) 4 procedural orders;

(f) 78 statements of fact witnesses;

(g) 63 expert reports;

(h) over 3,500 exhibits;

(i) a 20-day merits hearing in Miami, Florida;

(j) two rounds of post-hearing briefs (totaling approximately 1,290 pages); and

(k) a further two-day hearing for closing arguments (with closing presentations containing some 1,460 slides in total).[20]

At the culmination of that lengthy, thorough process, the Tribunal rendered the 565-page Partial Award, with the Parties collectively having incurred more than $130 million in legal costs and fees to reach that result. A full 43 pages of the Partial Award, consisting of nearly 400 numbered paragraphs, set forth in specific detail the complex procedural history of the Arbitration.[21] Then, some 460 pages were dedicated to adjudicating the Parties' claims on the merits.[22] In resolving each of the

[20] Henchie Decl. ¶ 50(a)–(k). Throughout that half-decade process, the Parties were represented by counsel from around the world. The Partial Award lists 18 attorneys representing Movants and 21 attorneys representing the ACP, variously from the United Kingdom, Panama, the United States, France, Italy, Spain, and Switzerland. Partial Award ¶¶ 6–8. **(DKT No. 55-5)** There was an Addendum to the Partial Award, dated December 22, 2020, which corrected typographical errors. **(R-85)**

[21] Partial Award ¶¶ 9–405. **(DKT No. 55-5)**

[22] *Id.* ¶¶ 485–2196. **(DKT No. 55-5)**

Parties' claims, the Tribunal described in detail the ACP's position, the Movants' position, the controlling law, applicable contractual provisions, the relevant facts, and the Tribunal's resolution of each disputed issue.[23] The Partial Award rendered by the Tribunal was reasoned and comprehensive, and it more than complied with all requirements under the Parties' Contract, the governing law, and the applicable arbitration rules.

C. The Final Award Allocated Costs and Confirmed the Damages Issued in the Partial Award.

After the Partial Award was issued, the sole remaining issues were to allocate costs of the Arbitration and to confirm the Parties' agreement on the damages from certain claims where the Tribunal partially ruled for the Contractor. After four rounds of detailed submissions, responses to specific Tribunal questions, and scrutiny by the ICC Court, the Tribunal issued the Final Award.[24] The 56-page Final Award addressed all of the Parties' cost claims, ultimately determining that a net amount of more than $33.3 million in costs was owed to the ACP (on top of the $238 million owed by Movants to the ACP under the Partial Award). The ACP was awarded its full costs for all its successful claims; Movants were awarded their full costs for their successful claim and 70% of their costs for their partially successful Foundation Conditions claim.[25] All amounts due and owing under the Final Award have been paid.[26]

The ACP's Response to Movants' Consolidated Motion to Vacate attaches an opinion by Gary Born, a U.S. lawyer and registered foreign lawyer in England and Wales who is widely regarded as the world's preeminent authority on international arbitration.[27] Mr. Born was asked by the ACP to provide an independent expert opinion regarding the standards for arbitrator disclosure and removal in international arbitration, to apply those standards to the Movants' allegations as to each Panama 1

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[23] *Id.*

[24] *See generally* Final Award. **(DKT No. 55-4)**

[25] *See* Henchie Decl. ¶ 239.

[26] *Id.* ¶ 240.

[27] *See* Response at 2. Mr. Born has served as an arbitrator in over 250 international arbitrations and counsel in over 675 international arbitrations, including several of the largest ICC arbitrations in recent history. Since 2015, he has been President of the Singapore International Arbitration Centre ("SIAC") Court of Arbitration, and before that served as a member of the SIAC Court, which deals with matters of arbitrator disclosure and challenges under its rules. As an academic, he has authored a three-volume, 4,000-plus-page, treatise on international arbitration, which devotes hundreds of pages to the issues here. His CV is attached as an appendix to his opinion.

arbitrator, and to assess the relevance of those issues in the context of vacatur.[28] In this analysis, Mr. Born reviewed the Partial and Final Awards.[29] His opinion is that, "the Partial and Final Awards provide careful and detailed reasoning supporting the Tribunal's conclusions."[30]

D. The Tribunal's Compensation Was Per the Agreed Rules, Reasonable, and Customary.

Under the ICC Rules, arbitrator compensation depends mostly on the amount in controversy. In fact, any party can calculate fees on the ICC's costs calculator. During the roughly six years of proceedings of the Arbitration, the ICC Court assessed fees based on the ICC Rules.[31] The amounts were fixed by the ICC International Court of Arbitration, not the arbitrators themselves. The Parties paid advances on that amount for years, based on those scales, and were fully aware of the amounts paid.[32] In any event, the amounts charged by the arbitrators for their work are reasonable and customary. Collectively over years, the Tribunal undertook almost 9,000 hours of work in this complex, nine-figure dispute.[33] And in light of the more than $100 million the Parties claim in legal fees, the fees paid to the arbitrators cannot in any way be deemed to be disproportionate or inappropriate. It is also important to note that for two of the arbitrators (Mr. von Wobeser and Mr. Gunter), per the normal arrangement in law firms, the fees received for their work would have been paid to their respective law firms (not to them individually).[34]

III. JUDICIAL REVIEW OF ARBITRATION AWARDS IS EXTREMELY LIMITED

It is "well settled that judicial review of an arbitration award is narrowly limited."[35] Such review is "among the narrowest known to the law."[36] "As long as an arbitrator is even arguably construing the issues before him based on the parties' agreement, and acting within the scope of his

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[28] Expert Opinion of Gary Born ¶ 1 [hereinafter Born] **(DKT No. 57-92)**.
[29] *Id.* ¶ 25–26.
[30] *Id.* ¶ 26.
[31] Final Award ¶¶ 143–169. **(DKT No. 55-4)**
[32] *Id.* ¶¶ 143–172. The fees received by the Tribunal members (or their firms) are based on thousands of hours of work over the course of nearly six years.
[33] *Id.* ¶ 171. Mr. Gunter spent 4,317 hours, Mr. von Wobeser spent 2,351 hours, and Dr. Gaitskell spent 2,241 hours on the Arbitration.
[34] *See* Born ¶ 181.
[35] *Grupo Unidos*, 2018 WL 3059649, at *1 (quoting *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1190 (11th Cir. 1995)).
[36] *Id.* (quoting *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1001 (11th Cir. 2007)).

authority, 'that a court is convinced he committed serious error does not suffice to overturn his position.'"[37] "The FAA imposes a heavy presumption in favor of confirming arbitration awards and federal courts should defer to an arbitrator's decision whenever possible."[38] "Ultimately, 'a court's confirmation of an arbitration award is usually routine or summary.'"[39]

IV. THE COURT SHOULD CONFIRM THE PARTIAL AND FINAL AWARDS

The FAA contains two chapters pertinent to this Cross-Motion: Chapters 1 and 2. Chapter 2 incorporates and implements the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the United States is a Contracting State (the "New York Convention" or the "Convention").[40] Under Chapter 2, any party to an arbitration may seek confirmation of an award "falling under the Convention."[41] The Awards from the Panama 1 Arbitration "fall under the Convention" because of their connections to foreign states and foreign parties, as detailed below (and as this Court found in the Cofferdam Award confirmation proceeding).[42] Therefore, confirmation of the Awards may be sought under FAA Chapter 2, Section 207 (9 U.S.C. § 207).

Chapter 1 also applies. In contrast to vacatur, which can succeed only if a movant asserts a valid ***Convention*** defense (and provides the strict proof demanded),[43] confirmation also can be given under Chapter 1 of the FAA because "Chapter 1 of the FAA applies to New York Convention proceedings through the residual clause to the extent that the two do not conflict."[44] Therefore, confirmation of the Awards also may be sought under FAA Chapter 1, Section 9 (9 U.S.C. § 9).

A. The Court Should Confirm the Awards Under 9 U.S.C. § 207.

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[37] *Id.* (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).
[38] *Id.*
[39] *Id.*
[40] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. IV, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 2520, T.I.A.S. No. 6997, 330 U.N.T.S. 3.
[41] 9 U.S.C. § 202.
[42] *Grupo Unidos*, 2018 WL 3059649, at *5 (finding that "the New York Convention" applies in the Cofferdam Award confirmation proceeding).
[43] *E.g.*, *Inversiones y Procesadora Tropical, S.A. (INPROTSA) v. Del Monte Int'l GmbH*, 921 F.3d 1291, 1297 (11th Cir. 2019).
[44] *Grupo Unidos*, 2018 WL 3059649, at *6; 9 U.S.C. § 208 (providing that Chapter 1 of the FAA applies to actions and proceedings not in conflict with Chapter 2 or the Convention).

The Awards arise out of legal relationships that are commercial in nature, which involve written agreements to arbitrate and parties from several foreign countries (Panama, Spain, Italy, and Belgium), contemplate performance in a foreign country (Panama), and provide for arbitration in the United States, a signatory of the New York Convention.[45] By meeting those criteria, both Awards fall under Chapter 2 of the FAA for purposes of confirmation, recognition, and enforcement.[46]

Under Section 207 of Chapter 2, the "general rule" is that "courts ***must*** confirm international arbitral awards."[47] To that end, the ACP's only burden in obtaining confirmation under Section 207 is to provide the Court with three documents: (1) a certified copy of the Partial Award; (2) a certified copy of the Final Award; and (3) the arbitration agreements between the Parties.[48] A certified copy of the Partial Award is in the record at **DKT Nos. 55-5 and 55-6**, and the

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[45] Henchie Decl. ¶¶ 8–21 (describing the commercial relationship between Movants and the ACP and the performance of the applicable agreements in Panama), 9–10 (describing the Parties' Contract), 157 (identifying Miami, Florida as the seat of the Arbitration); Final Award at 1 (cover page listing GUPCSA as Panamanian, Sacyr as Spanish, Webuild as Italian, Jan De Nul as Belgian, and the ACP as Panamanian) **(DKT No. 55-4)**; Partial Award ¶ 304 (identifying Miami, Florida as the site of the merits hearing), 406–09 (summarizing the Parties' agreements to arbitrate) **(DKT No. 55-5)**; Contract §§ 20.6, 20.10 **(R-86)** (setting forth the Parties' written agreement to arbitrate); Joint and Several Guarantee, dated May 31, 2010 § 9.2 **(DKT No. 55-9)** (same) [hereinafter the JSG]; Guarantor Arbitration Agreement, dated August 1, 2014 §§ 6.2, 6.3 **(R-87)** (same) [hereinafter the GAA].

[46] 9 U.S.C. § 202; *see also Alberts v. Royal Caribbean Cruises, Ltd.*, 834 F.3d 1202, 1204 (11th Cir. 2016) (stating that Chapter 2 applies when (1) a written agreement; (2) provides for arbitration in the territory of a signatory of the Convention; (3) the "agreement arises out of a legal relationship . . . which is considered commercial"; and (4) "a party to the agreement is not an American" or the "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."); *see also Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1284 (11th Cir. 2015) ("[A]ny arbitration agreement 'arising out of a legal relationship' that 'is considered as commercial . . . falls under the [New York] Convention.'" (quoting 9 U.S.C. § 202) (first alteration in original)).

[47] *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1166 (11th Cir. 2004) (emphasis added).

[48] *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 n.3 (11th Cir. 2004) ("Once the proponent of the award meets his article IV jurisdictional burden of providing a certified copy of the award and the arbitration agreement, he establishes a prima facie case for confirmation of the award. . . . That is, the award is presumed to be confirmable."); *CTA Lind & Co. Scandinavia AB v. Lind*, No. 8:08-CV-1380-T-30TGW, 2009 WL 961156, at *3 (M.D. Fla. Apr. 7, 2009) ("The burden then 'shifts to the defendant to establish the invalidity of the award on

Final Award is at **DKT No. 55-4**. The arbitration agreements between the Parties are located at **R-86** (the Contract), **DKT No. 55-9** (the Joint and Several Guarantee), and **DKT No. R-87** (the Guarantor Arbitration Agreement). Therefore, the ACP has "establishe[d] a prima facie case for confirmation of the award[s] . . . [and] the award[s are] presumed to be confirmable."[49]

When a party to an arbitration applies for an order confirming an award and meets its prima facie burden (as the ACP has), the "court ***shall*** confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."[50] Movants agree that the Convention provides the "exclusive grounds" for vacatur.[51] The grounds for refusal or deferral of recognition are exceedingly narrow. They are set forth in Article V of the Convention and are limited to seven explicit potential grounds.[52] Movants raise three Convention grounds against the Partial and Final Awards[53] none of which support their claims for vacatur, as detailed below and in the Response.

1. Movants' Article V(2)(b) (Public Policy) Ground for Vacatur Fails on the Law and Facts.

Movants conflate Article V(2)(b), improperly, with the concept of evident partiality under Section 10(a)(2) of the FAA.[54] As discussed further in the Response, Article V(2)(b) of the Convention is not a backdoor to the FAA where the Convention is the "exclusive grounds" for vacatur. The Convention's pro-award policy requires that Article V(2)(b) be "construed narrowly."[55] As such, it applies only to violations of a "well-defined and dominant" "explicit public policy,"

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one of the grounds specified in Article V . . . [t]hat is, the award is presumed to be confirmable.'" (alterations in original)).

[49] *Czarina, L.L.C.*, 358 F.3d at 1292 n.3.

[50] 9 U.S.C. § 207 (emphasis added); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998) ("Section 207 of Chapter 2 of the FAA explicitly requires that a federal court 'shall confirm [an international arbitral] award unless it finds one of the grounds for refusal or deferral of . . . enforcement of the award specified in the [New York] Convention.'" (alterations in original)).

[51] Consolidated Motion to Vacate at 7 (the "Motion"). **(DKT No. 55)**

[52] *Four Seasons Hotels & Resorts, B.V.*, 377 F.3d at 1167.

[53] Movants, in the Motion at 8, state elusively "the grounds for vacatur under FAA Section 10(a)(2) 'correspond[] with some applications of Articles V(1)(b), V(1)(d), and . . .V(2)(b).'" Movants have not asserted a claim under Article V(1)(d).

[54] Motion at 7–9.

[55] *Cvoro v. Carnival Corp.*, 941 F.3d 487, 496 (11th Cir. 2019) (collecting cases).

ascertained "by reference to the laws and legal precedents, and not from general considerations of supposed public interests."[56] It succeeds only when enforcement "violate[s] the forum state's most basic notions of morality and justice."[57] "[F]requently raised," the defense "has rarely been successful."[58] As addressed in Section III.B of the Response, Movants' vague and misplaced attempt to equate Article V(2)(b) with Section 10 fails, as Movants fail to show that Section 10(a)(2) is a "well defined" rule of public policy, that there has been a violation of such public policy, and that enforcing the Awards would "violate the . . . most basic notions of morality and justice."

Movants bear the burden to plead and prove that vacatur is required under the Convention.[59] Movants have not met that burden. Their attempt to meet this heavy burden to justify vacatur rests on the argument that the Tribunal (including their own nominee, Mr. von Wobeser, and Mr. Gunter, who they jointly agreed) lacked impartiality and independence. As set forth in detail in the Response, those arguments are factually incorrect and legally insufficient.

First, Movants' arguments are not supported by any evidence. For example, Movants' attack on Mr. Gunter largely is that (1) Mr. Gunter served as an arbitrator with Professor Bernard Hanotiau in arbitrations unrelated to the Panama Canal; (2) Professor Hanotiau also served as chairman of the Cofferdam Arbitration; (3) the award from the Cofferdam Arbitration was referenced and relied upon by the Tribunal in the Panama 1 Award; and (4) one "may reasonably wonder" whether Professor Hanotiau shared his views with Mr. Gunter during the other, unrelated arbitrations that might have impacted how the Panama 1 Partial Award addressed the effect of the Cofferdam Award, and then, by extension affected the Final Award. That disjointed argument relies on nothing more than speculation and conjecture, which, on its face, fails the requirement that alleged bias must be "direct, definite, and capable of demonstration, rather than remote, uncertain, and speculative" to give rise to vacatur.[60] Indeed it was directly rejected by Mr. Gunter.[61]

Second, there is no legal support for Movants' arguments. For example, Movants argue in part that Dr. Gaitskell QC's disclosures were inadequate because, when Movants requested (only

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[56] *Id.* at 496.
[57] *Id.*
[58] *Id.* (collecting cases).
[59] *Indus. Risk*, 141 F.3d at 1442.
[60] *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs.*, 146 F.3d 1309, 1312 (11th Cir. 1998).
[61] Henchie Decl. ¶ 87.

after receiving the unfavorable Partial Award) that he run a conflict search that included all members of his barristers' chambers, he "refused to investigate" any such potential conflicts. But, unlike American law firms where one firm lawyer's conflicts may be attributed to other firm lawyers, British barristers are independent professionals and are ethically barred by the governing Bar Council's Rules from making such a "chambers-wide" conflicts check, as recognized by American courts.[62] As such, there cannot be any legal basis to impugn Dr. Gaitskell QC's integrity and independence due to his compliance with the ethical rules governing the British legal system, as recognized by American courts.

Those are just two of the many examples as to why Movants did not come close to meeting their burden to establish any of the vacatur grounds they pleaded. The ACP's Response sets forth in detail each of the reasons why Movants failed to carry their burden. That Response is incorporated by reference as if set forth fully in this Cross-Motion.

2. Movants' Other Grounds under Article V of the Convention, to the Extent Raised, Also Fail

Movants raise two other provisions of the New York Convention: Articles V(1)(b) (unable to present case) and V(1)(c) (the tribunal exceeded its authority) with respect to the Tribunal's interpretation of paragraph 1.07 D.1 of the Employer's Requirements (i.e., the Contract). These claims likewise fail on the facts and law, as addressed in full in Section V of the ACP's Response.

Article V(1)(b) requires *only* "the minimal requirements of fairness,"[63] *i.e.* "an opportunity to be heard at a meaningful time and in a meaningful manner."[64] Movants were not denied the opportunity to be heard. To the contrary, the Parties exhaustively presented their cases during the nearly six-year arbitration, via thousands of pages of submissions and weeks of oral evidence. Both

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[62] *Id.* ¶¶ 96–103 (citing Bar Core Duties); *Belize Bank Ltd. v. Gov't of Belize*, 852 F.3d 1107, 1112 (D.C. Cir. 2017) ("[A]n English chambers is composed of independent solo practitioners housed together and operating under a common name, a structure vastly different from an American law firm . . . . Thus, we find the case law relied on by Belize, which details ethical concerns underlying firm-wide imputation of conflicts of interest, inapposite . . . .").

[63] *Productos Roche S.A. v. Iutum Servs. Corp.*, No. 20-20059-CIV, 2020 WL 1821385, at *3 (S.D. Fla. Apr. 10, 2020).

[64] *Id.*; *see also Hispasat, S.A. v. Bantel Telecom LLC*, No. 17-20534-CV, 2017 WL 8896241, at *4 (S.D. Fla. Aug. 2, 2017) (noting that review is limited to whether the procedure was "fundamentally unfair").

Parties also expressly confirmed, at the closing arguments hearing in October 2019, that they had no objections as to how the Tribunal conducted the procedural aspects of the arbitration. The Tribunal also expressly stated it considered all arguments.

Movants also contend that the Tribunal exceeded its authority under Article V(1)(c) in its interpretation of Section 1.07 D.1 of the Contract in the Partial Award.[65] Movants agreed to give the Tribunal the broadest possible mandate: to decide "issues . . . resulting from the Parties' submissions, statements, and pleadings and which are relevant to the adjudication of the Parties' respective claims and defences."[66] The law is also clear: Article V(1)(c) should be construed narrowly and requires Movants to overcome the powerful presumption that the arbitral body acted within its powers.[67] Movants' complaints about the Tribunal's interpretation of Section 1.07 D.1 are gripes about the content of the Awards and the way in which the Tribunal interpreted the Contract. Neither is reviewable on vacatur.[68] Arbitrators who even "arguably" interpret the parties' contract do not exceed their authority.[69]

The Arbitration lasted just short of six years, involved numerous, complex technical and factual issues, included dozens of fact witnesses and expert witnesses, yielded thousands of pages of legal briefing, culminated in a month-long merits hearing, and resulted in a fully-reasoned, detailed, 565-page Partial Award and a fair and thorough Final Award. Movants have not even begun to satisfy their demanding burden to negate that entire process—and send the Parties back to square one—

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[65] Motion at 27 n.135.

[66] Terms of Reference ¶ 81 **(R-83)**; *see also* Henchie Decl. ¶ 27.

[67] *De Rendon v. Ventura*, No. 1:17-CV-24380, 2018 WL 4501059, at *4 (S.D. Fla. Aug. 8, 2018) (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 976 (2d Cir. 1974)).

[68] *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572–73 (2013) (if an arbitrator even "arguably" interprets the parties' contract "[t]he arbitrator's construction holds, however good, bad, or ugly"—losers "do[] not get to rerun the matter in a court").

[69] *Wiregrass Metal Trades Council AFL–CIO v. Shaw Env'l & Infrastructure*, 837 F.3d 1083, 1088 (11th Cir. 2016); *see also Capital Inc. v. Rafael Urquidi*, 786 F. App'x 970, 973 (11th Cir. 2019) ("[A]n arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties' intent. Where an arbitrator fails to articulate the rationale for his decision, we will overturn the award **only when** it is 'apparent' that the arbitrator exceeded his authority. A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award".) (emphasis added, internal citations and quotations omitted).

through these vacatur proceedings. As this Court held in rejecting GUPCSA and Sacyr's prior attempt to vacate the Cofferdam Arbitration Award, the merits of an arbitral award are not subject to court interference.[70] Thus, the ACP respectfully asks this Court to enter an order confirming the Partial and Final Awards under 9 U.S.C. § 207.

B. The Court Should Confirm the Awards Under 9 U.S.C. § 9.

The ACP also moves to confirm the Partial and Final Awards under 9 U.S.C. § 9. Like Chapter 2, Chapter 1 of the FAA mandates the confirmation of awards except on specific and limited grounds. "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'"[71] Therefore, "[j]udicial review of commercial arbitration awards is narrowly limited under the FAA."[72] The "FAA imposes a heavy presumption in favor of confirming arbitration awards; therefore, a court's confirmation of an arbitration award is usually routine or summary."[73] Similar to Section 207, the burden is on the party opposing confirmation under Section 9—here, Movants—to show that one of the limited grounds set forth under Sections 10 or 11 of the FAA applies.[74]

As with Section 207, the ACP has met its prima facie burden under Section 9 of the FAA by presenting the Awards and Contract. Because Movants have not met their burden of establishing a ground not to confirm, the ACP need not do anything further in this filing to be entitled to

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[70] *Grupo Unidos*, 2018 WL 3059649, at *6.
[71] *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008).
[72] *B.L. Harbert Int'l v. Hercules Steel Co.*, 441 F.3d 905, 909 (11th Cir. 2006).
[73] *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 842 (11th Cir. 2011) (internal citation omitted); *see also Careminders Home Care, Inc. v. Concura, Inc.*, 660 F. App'x 795, 796 (11th Cir. 2016) ("A proceeding to confirm an arbitration award under Section 9 of the FAA is intended to be summary."); *Dorward v. Macy's Inc.*, 588 F. App'x 951, 953 (11th Cir. 2014) ("[C]ourt's confirmation of an arbitration award is usually routine or summary."), *cert. denied,* 136 S. Ct. 33 (2015).
[74] *World Bus. Paradise, Inc. v. Suntrust Bank*, 403 F. App'x 468, 469 (11th Cir. 2010); *Careminders*, 660 F. App'x at 796; *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1289 (11th Cir. 2002) ("The burden is on the party requesting vacatur of the award to prove one of these four bases.").

confirmation of the Awards. In light of this, the Partial and Final Awards should be summarily confirmed.[75]

C. Movants Are Not Entitled to Conduct Discovery in This Case.

Movants request discovery under Federal Rule of Civil Procedure 26(d)(1) and a hearing.[76] Entertaining this unnecessary discovery and hearing request would allow Movants to convert a summary arbitration proceeding into a re-trial on the merits.[77] Discovery is not warranted because Movants have failed to state a *prima facie* case for vacatur[78] for the reasons articulated above and in the ACP's Response. The request is another delay tactic designed to drive up litigation costs, undermining the FAA's public policy of "reliev[ing] congestion in the courts and [providing] parties with an alternative method for dispute resolution that would be speedier and less costly than litigation."[79] This should be a summary proceeding, and not give Movants a second bite at the apple.[80]

In support of their request, Movants raise the Order Requiring Discovery and Scheduling Conference and Order referring Discovery Matters to the Magistrate Judge and Magistrate Judge Goodman's Discovery Procedures Order in case No. 1:21-cv-21059-RNS. That case has now been consolidated. As such, these Orders do not apply in this consolidated proceeding and do not justify Movants' request for discovery and a hearing where neither are warranted in these summary proceedings.[81]

D. Calculation of the Amount of the Final Judgment.

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[75] *World Bus. Paradise, Inc.*, 403 F. App'x at 469 ("[T]he court **must confirm** the arbitrator's award unless [it] is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the statute].") (emphasis added).

[76] Motion at 29–30.

[77] *See O.R. Secs., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 747–48 (11th Cir. 1988) ("Arbitration proceedings are summary in nature to effectuate the national policy of favoring arbitration, and they require expeditious and summary hearing, with only restricted inquiry into factual issues.") (internal citations omitted).

[78] *See Gianelli*, 146 F.3d at 1312.

[79] *See O.R. Secs., Inc.*, 857 F.2d at 745–46 ("The policy of expedited judicial action expressed in section 6 of the [FAA], would not be served by permitting parties who have lost in the arbitration process to file a new suit in federal court.").

[80] *See id.* at 747–48.

[81] In any event, the Orders did not mandate discovery as Movants claim.

The Final Award confirms the Partial Award and orders that Movants pay the following to the ACP:[82]

- USD $238,460,621.80 in damages plus 6% interest per annum from the date of notification of the Award (as awarded in the Partial Award);
- USD $23,048,094.37 for the ACP's costs related to the Concrete Aggregate Claim;
- USD $20,437,241.68 for the ACP's costs for the Concrete Mix Design Claim;
- USD $2,488,817.40 for the ACP's costs for the Shareholders' ROI Claim;
- USD $117,738.50 for the ACP's costs for the Movants' Application to Add Tranche 2 to the Arbitration;
- USD $129,824.50 for the ACP's costs for the Movants' Application to Consolidate; and,
- USD $57,972.38 or 30% of the ACP's costs incurred in additional post-Partial Award work.

In total, the Tribunal ordered Movants to pay the ACP USD $284,740,310.63, which includes the full amount of damages previously awarded in the Partial Award in addition to costs.[83] To date, all amounts due and owing under the Final Award have been paid.[84]

V. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, for the reasons set forth above and in its Response in Opposition to Movants' Consolidated Motion to Vacate, and all exhibits and declarations accompanying both this Motion and the Response, the ACP respectfully requests that the Court enter a Final Judgment, with execution to issue:

- Confirming and enforcing the Partial Award rendered against Movants in accordance with its terms pursuant to the New York Convention, 9 U.S.C. § 207, and the FAA, 9 U.S.C. § 9;

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[82] Final Award at 54–55. **(DKT No. 55-4)**

[83] *Id.* The Final Award also ordered that the ACP pay Movants $10,079,575.62, €1,094,264.58, and CHF 220,890.71 in costs for the Foundation Conditions Claim, plus 6% interest per annum, and $1,182,290.86, €59,665.46, and CHF 12,044.20 in costs for the On-Site Laboratories Claim, plus 6% interest per annum. Each party was also ordered to pay $105,000 for 50% of the post-Partial Award arbitration costs. *Id.*

[84] Henchie Decl. ¶ 240.

- Confirming and enforcing the Final Award rendered against Movants in accordance with its terms pursuant to the New York Convention, 9 U.S.C. § 207, and the FAA, 9 U.S.C. § 9; and
- Awarding the ACP costs and such other relief as this Court deems just and proper.

[Signature Block Appears on Next Page]

Date: August 6, 2021

Respectfully submitted,

By: */s/ Sujey S. Herrera*

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**Admitted Pro-Hac Vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 6, 2021 a true and correct copy of the foregoing will be emailed and conventionally served to all counsel or parties of record.

By: *__/s/ Sujey S. Herrera_____*
Sujey S. Herrera