

IN THE MATTER OF AN ARBITRATION
UNDER THE ICC 2012 ARBITRATION RULES

Case No. 20910/ASM/JPA
(C-20911/ASM)

B E T W E E N :

- (1) GRUPO UNIDOS POR EL CANAL, S.A. (Panamá)
(2) SACYR, S.A. (Spain)
(3) WEBUILD S.P.A. (Italy)
(4) JAN DE NUL N.V. (Belgium)

Claimants

- and -

AUTORIDAD DEL CANAL DE PANAMÁ

Respondent

THE ACP'S
REPLY UPDATED COST SUBMISSIONS

18 December 2020

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1. INTRODUCTION

1.1 Further to the directions of the Tribunal dated 25 November 2020, the ACP submits its Reply Updated Cost Submissions.

2. THE CLAIMANTS IGNORE THE TRIBUNAL'S ORDER AS TO THE SCOPE OF THE UPDATED COST SUBMISSIONS

a. Overview

2.1 The ACP refers to the Tribunal's directions dated 25 November 2020. In those directions, the Tribunal stated:

“2. *The scope of such Updated Cost Submissions shall be **strictly limited to** (i) the costs incurred by the Parties on attempting to reach agreement on some outstanding quantum matters (specifically identified in the Partial Award) in the period between 28 September 2020 - date of the notification of the Partial Award - and the communication by the Parties to the Arbitral Tribunal on 12 November 2020 of their agreement reached on those issues as well as the (ii) costs of preparation of the Updated Cost Submissions” (Tribunal's emphasis)*

2.2 The Tribunal will recall the ACP's comments about the Claimants evading any agreement on the scope of the Updated Cost Submissions prior to the Tribunal's direction.¹ The ACP raised its concern that the Claimants intended to use this process to broaden the scope of the Updated Cost Submissions contrary to the Tribunal's ruling on the same, and even though permission to make new submissions on matters of costs incurred prior to the Partial Award had, on application by the Claimants, been expressly refused by the Tribunal.² It is regrettable, but entirely unsurprising, that the Claimants have done precisely what the ACP suspected they would attempt.

2.3 The bulk of the Claimants' Updated Cost Submission (dated 9 December 2020) (in particular paragraphs 3 to 9) seek to re-argue their previous submissions on the costs of the Arbitration. This demonstrates a flagrant disregard for the Tribunal's orders and is, of course, a violation of Article 22(5) of the ICC Rules which provides that the “*parties undertake to comply with any order made by the arbitral tribunal*”.

2.4 The Parties have already made their cost submissions on all matters prior to the Partial Award. The Claimants' prior request to make new submissions following the Partial Award has been previously determined and was rejected.³ Furthermore, the Tribunal's directions on the scope of matters to be addressed in the Updated Cost Submissions was abundantly clear. The Claimants simply ignore the Tribunal's orders to suit their own agenda, but in violation of Article 22(5) of the ICC Rules. Accordingly, the Tribunal is entitled to, and should, refuse to have any regard to those new arguments in relation to costs prior to the Partial Award. In any event, as explained in the next section, the Claimants' new argument is entirely misplaced.

b. The Claimants' legal arguments

2.5 The Claimants' previous submission, made at a time when they were no doubt hopeful of a favourable award on their substantial claims, was that the Tribunal had broad discretion to award costs with no fetter on that discretion being identified. The Claimants' conclusion was that it was within the Tribunal's discretion to make an order where costs followed the event. That is apparent from the following:

¹ See email from Vinson & Elkins to the Tribunal dated 23 November 2011.

² See email from the Tribunal to the Parties dated 17 October 2020.

³ See email from the Tribunal to the Parties dated 17 October 2020.

2.6 The principle is (in the Claimants' own words) "*undisputed*" as follows:⁴

II. UNDER THE ICC RULES AND THE APPLICABLE LAW, THE ARBITRAL TRIBUNAL HAS BROAD DISCRETION TO AWARD COSTS

3. It is undisputed between the Parties that, under the ICC Rules, the Tribunal has broad discretion in awarding costs.¹ In particular, pursuant to Article 37 of the ICC Rules, the Tribunal "shall fix [the costs] and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."²

2.7 The Claimants go on to say (correctly):⁵

4. It similarly is undisputed between the Parties that the Tribunal should, in principle, render its decision on costs pursuant to the "costs follow the event" principle.³ In considering the allocation of costs between parties, "[t]he general approach in ICC arbitration is to take into account the success of a party relative to the relief that party has sought."⁴ The Tribunal has the authority to apportion costs "on a claim-by-claim or issue-by-issue basis" and "if a party succeeded in all its claims (or sometimes most of its claims), the other party [should be] ordered to pay all of the successful party's reasonable costs."⁵ This principle also requires that the Tribunal take into account the complexity of the arbitration, the claims brought by each party against the other, and the scope of those claims.⁶ Thus, as elaborated below, the Tribunal should award costs to Claimants based on the success of their claims against ACP.⁷

2.8 As the ACP has already stated:⁶

- 2.6 The tribunals in the Cofferdam and Advance Payments arbitrations both found that they had the requisite power under the ICC Rules to make costs determinations, and did in fact make corresponding cost orders in favour of the ACP. In the Cofferdam Arbitration the tribunal noted, *inter alia*, that, "*Article 37 of the Rules gives the arbitrators broad discretion to allocate costs, which the Parties recognize*",¹⁹ and in the Advance Payments arbitration the tribunal similarly stated that, "*The Tribunal's decision on the costs of the arbitration is governed by Article 37 of the ICC Rules which reads in relevant part as follows...*"²⁰

2.9 The position is clear (and agreed) – the Tribunal has the requisite power under the ICC Rules to make cost determinations.

2.10 The Claimants now seek to advance an entirely new legal argument in relation to those costs in respect of which the Tribunal has refused permission to make any further submission. Specifically, the Claimants now say that the Tribunal's broad discretion is in fact subject to a very substantial fetter, namely that: "*under U.S. law, the general rule is that each party in a legal proceeding pays for its own legal fees, and awarding of those fees is only appropriate where a specific statute or rule permits it, or if there is evidence of serious, bad faith conduct of a party*" (emphasis added).⁷ In normal circumstances this would be seen as an astonishing volte-face; with these claimants it is par for the course. It is also wrong.

2.11 The correct position is that where, as here, the parties expressly agreed by contract to arbitrate and finally settle disputes under the ICC Rules, and those rules allow for costs to be recovered, U.S. courts would permit such recovery.⁸ As explained previously, Sub-Clause 20.6(a) of the Contract incorporates the ICC Rules'

⁴ See paragraph 3 of the Claimants' Reply Cost Submissions dated 20 November 2019.

⁵ See paragraph 4 of the Claimants' Reply Cost Submissions dated 20 November 2019.

⁶ See paragraph 2.6 of the ACP's Cost Submissions dated 20 November 2019. See also Section 2 of the ACP's Cost Submissions dated 20 November 2019.

⁷ See paragraphs 3 and 4 of the Claimants' Updated Cost Submissions (9 December 2020). See also paragraph 12 which says that the "*the default rule in the United States is that legal fees are not awarded*". In support of this proposition the Claimants cite *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975), at C-LA-0521, which is a U.S. Supreme Court case from the 1970s. That case has absolutely nothing to do with arbitration. Further, it is a case about awards of fees in cases brought pursuant to federal statutory schemes in which enforcement of federal law (there, environmental law) by private lawsuit may entitle a successful claimant to fees. In that very narrow, heavily-statutory corner of U.S. federal law, fees are only available by statute – there being no contractual relationship at issue and no reliance on state law on awards of fees in disputes.

⁸ See *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328, 332 (7th Cir. 1995) at Appendix 17 to the ACP's Cost Submissions dated 20 November 2019. See also 6 Bruner & O'Connor Construction Law § 19:121 (2016) at Appendix 18 to the ACP's Cost

cost recovery mechanism, pursuant to which the Tribunal has broad discretion to award costs.⁹ And, the ACP firmly rejects any accusation of bad faith on its part.¹⁰ On the contrary, as the ACP previously explained, it is the Claimants' bad faith conduct which ought to weigh heavily in the Tribunal's assessment of costs.¹¹

c. The allegations about the ACP's conduct prior to the Partial Award

- 2.12 In paragraphs 4 to 9 and paragraph 12, the Claimants seek to advance arguments concerning the ACP's alleged "*misconduct over the course of the Arbitration*",¹² and subsequently set out their position on various matters outside the scope of the Tribunal's order, as above.¹³ The Claimants refer specifically to their prior cost submissions in support of their arguments.¹⁴ The Claimants' pleading is little more than a rehearsal of those previous submissions on conduct, but in the context of this newly advanced "principle" of US law.
- 2.13 All of the Claimants' misplaced allegations over the ACP's conduct have already been addressed in the prior submissions. The ACP does not repeat its submissions in that regard, but directs the Tribunal to the appropriate sections of the ACP's Reply Cost Submissions:
- (a) Jurisdictional Objection:¹⁵ Section 4(a) of the ACP's Reply Cost Submissions
 - (b) Emergency application:¹⁶ Section 4(b) of the ACP's Reply Cost Submissions
 - (c) Confidentiality:¹⁷ Section 4(c) of the ACP's Reply Cost Submissions
 - (d) Duty to plan:¹⁸ Section 5(a)(i) of the ACP's Reply Cost Submissions
 - (e) Contamination:¹⁹ Section 5(a)(vi) of the ACP's Reply Cost Submissions
 - (f) On Site Laboratories:²⁰ Section 5(d)(i) of the ACP's Reply Cost Submissions
 - (g) Document production:²¹ Section 6 of the ACP's Reply Cost Submissions
 - (h) Scheduling issues:²² Section 6 of the ACP's Reply Cost Submissions
- 2.14 What is notable for the present submissions is that the Claimants do not make a single allegation about the ACP's conduct since the Partial Award.

3. COSTS OF REACHING AGREEMENT ON THE QUANTUM OF THE FOUNDATION CONDITIONS AND ON-SITE LABORATORIES CLAIMS

- 3.1 The Claimants do not meaningfully engage with the proper scope of the Updated Cost Submissions, being

Submissions dated 20 November 2019, acknowledging that "*Contract provisions providing for recovery of attorney's fees and costs incurred to pursue contract rights are routinely enforced*".

⁹ See paragraph 2.4 of the ACP's Cost Submissions dated 20 November 2019.

¹⁰ The Claimants' allegations in this regards are addressed at paragraph 3.22 and Sections 4 and 6 of the ACP's Reply Cost Submission dated 20 December 2019.

¹¹ See, for example, paragraphs 3.36, 3.39-3.42, 3.45-3.46 of the ACP's Cost Submissions of 20 November 2019.

¹² See paragraph 4 of the Claimants' Updated Cost Submissions (9 December 2020).

¹³ See paragraphs 5 to 9 and 12 of the Claimants' Updated Cost Submissions (9 December 2020).

¹⁴ See paragraph 5 of the Claimants' Updated Cost Submissions (9 December 2020).

¹⁵ See paragraph 5 of the Claimants' Updated Cost Submissions (9 December 2020).

¹⁶ See paragraph 6 of the Claimants' Updated Cost Submissions (9 December 2020).

¹⁷ See paragraph 6 of the Claimants' Updated Cost Submissions (9 December 2020).

¹⁸ See paragraph 7 of the Claimants' Updated Cost Submissions (9 December 2020).

¹⁹ See paragraph 7 of the Claimants' Updated Cost Submissions (9 December 2020).

²⁰ See paragraph 7 of the Claimants' Updated Cost Submissions (9 December 2020).

²¹ See paragraph 8 of the Claimants' Updated Cost Submissions (9 December 2020).

²² See paragraph 8 of the Claimants' Updated Cost Submissions (9 December 2020).

the costs incurred by the Parties on attempting to reach agreement on the outstanding quantum matters. The extent of their submission is as follows:

- (a) the starting position, they say, is that there should be no award of legal fees absent serious, bad faith conduct of a party (paragraph 3);
- (b) the ACP purportedly engaged in such conduct throughout the Arbitration (paragraphs 5 to 9 which simply rehearse the submissions in the Claimants' previous costs submissions, all of which have already been addressed by the ACP);
- (c) the Tribunal should therefore award Claimants their costs incurred in calculating the outstanding quantum and reaching agreement with the ACP (paragraph 11 final sentence). However, the relief sought (paragraph 13) is inconsistent with that, the Tribunal being asked to order that "*each party mainly bear their own legal fees and costs*" but to "*take into account the improper procedural conduct ACP exhibited throughout the arbitration and allocate the costs related to that conduct to Claimants*".

3.2 Notwithstanding the fallacious basis of the Claimants' submission that the Tribunal's discretion is fettered in a manner not previously identified by the Claimant in its more than 60 pages of submissions on the costs of the Arbitration (as explained above), even if that was correct, what is singularly absent from the Claimants' submission is any attempt to relate the alleged improper conduct on the part of the ACP (which allegation has been and continues to be vigorously contested by the ACP as summarised above) and the costs of reaching agreement on the amount of the quantum award. There obviously is no relevant conduct of the ACP that has impacted those costs, and as set out in the ACP's first round submission and summarised below, those particular costs were wholly caused by the Claimants' inadequate presentation of its claim.

3.3 Even on its own case, the Claimants' submission, properly understood, is that the Tribunal has no basis for an award in the Claimants' favour of the costs of this quantum agreement phase. The ACP agrees that there is no basis for such an award to the Claimant. However, the ACP maintains its submission that the Tribunal has an unfettered discretion to award costs and that, for the reasons given in its first submission, the Tribunal should make an award in favour of the ACP, requiring the Claimants to pay the ACP's costs of this phase together with the costs of these submissions.

3.4 The costs incurred in agreeing concrete quantities were entirely caused by the Contractor's inadequate presentation of its claim and deficiencies (including errors and inaccuracies) in its supporting records. The Claimants accept as much in their most recent submission, highlighting that the Tribunal ordered the exercise to seek to agree quantum because "*it does not have all of the necessary underlying elements to make the calculation*"²³. The ACP simply summarises its position as follows:

- (a) regarding **Claim 47**, the Claimants had to propose an alternative calculation based on assumptions because the Contractor had failed to keep and to put on the evidential record the records necessary to demonstrate the Contractor's entitlement for its claim;²⁴
- (b) regarding **Claim 50**, the need to engage in the process directed by the Tribunal was entirely the result of the inadequate and opaque way in which the claims had been presented by the Contractor;²⁵
- (c) regarding **Claim 57**, the position was particularly troubling;²⁶

²³ See the final sentence of paragraph 10 of the Claimants' Updated Cost Submissions (9 December 2020).

²⁴ See paragraphs 2.3 to 2.5 of the ACP's Updated Cost Submissions dated 9 December 2020.

²⁵ See paragraph 2.6 of the ACP's Updated Cost Submissions dated 9 December 2020.

²⁶ See paragraphs 2.7 to 2.16 of the ACP's Updated Cost Submissions dated 9 December 2020.

- (i) the Claimants again had to propose an alternative calculation based on assumptions because the Contractor had failed to keep and to put on the evidential record the records necessary to demonstrate the Contractor's entitlement for its claim;
 - (ii) where the ACP had identified discrepancies in the calculations, the Claimants admitted that the Contractor's pour records, which the Tribunal found to be accurate based on the Contractor's submissions and their supposedly having been verified by Mr. Hunter, were inaccurate in the instances identified by the ACP (despite also apparently having been verified by the Contractor);
 - (iii) the Claimants purported to rely on underlying source records which: (1) were not on the record; (2) appeared not to have been provided to the ACP before; (3) also appeared not to have been provided to Mr. Hunter; nor (4) to the member of the Contractor's 'claims team' who prepared the spreadsheet at Exhibit Hunter I-42, which stated in clear terms that it had been "*checked*";
 - (iv) for all of the various (and unfortunately egregious) assertions about the ACP's alleged 'improper conduct', and even though the ACP was well within its rights to not agree, the ACP, taking the documents on their face, acting with the utmost fairness in allowing the Contractor to rely on material not on the record, was prepared to agree the calculations.
- (d) the Claimants unreasonably delayed in providing their calculations to the ACP. In the face of the Claimants' dilatory conduct and failure to even identify when its calculations could be expected, the ACP had no choice in the meantime but to take steps to prepare its own calculation; the Claimants' delay also required the parties to seek a short extension from the Tribunal. Had the Claimants provided their calculations promptly, the ACP would likely have either not incurred those costs, or the full extent of those costs;²⁷
 - (e) in relation to the on-site Laboratories claim, the Contractor did not receive an award from the Tribunal that exceeded the sums awarded in DAB Referrals 10 and 14B;²⁸ and
 - (f) the award of the costs of preparing these costs submissions should reflect the award made in respect of those costs (i.e. costs awarded to the party that can broadly be regarded as being successful in relation to the underlying costs).²⁹

3.5 The ACP has updated Schedule 2 to reflect costs incurred between 10 to 18 December 2020.

The ACP is willing and available to assist the Tribunal in respect of any queries which the Tribunal may have in relation to these costs submissions.

Respectfully submitted on behalf of the ACP this 18th day of December 2020.

Vinson & Elkins RLLP

Mayer Brown International LLP

Bofill Mir & Álvarez Jana

²⁷ See paragraphs 2.17 to 2.18 of the ACP's Updated Cost Submissions dated 9 December 2020.

²⁸ See paragraph 2.19 of the ACP's Updated Cost Submissions dated 9 December 2020.

²⁹ See paragraph 3.1 of the ACP's Updated Cost Submissions dated 9 December 2020.

Schedules

Schedule 1

Period	Vinson & Elkins	Counsel	Gannett Fleming	Delta Consulting	TOTAL
2020					
28 – 30 September	\$6,975.00	\$1,782.50	\$0.00	\$4,990.00	\$13,747.50
1 – 31 October	\$33,168.75	\$7,751.50	\$12,050.00	\$42,383.75	\$95,354.00
1 – 12 November	\$27,206.25	\$6,703.50	\$8,775.00	\$12,230.00	\$54,914.75
TOTAL	\$67,350.00	\$16,237.50	\$20,825.00	\$59,603.75	\$164,016.25

Schedule 2

Period	Vinson & Elkins	Counsel	TOTAL
2020			
13 – 30 November	\$7,456.50	\$1,356.00	\$8,812.50
1 – 9 December	\$2,062.50	-	\$2,062.50
10 – 18 December	\$15,187.50	\$3,162.50	\$18,350.00
TOTAL	\$24,706.50	\$4,518.50	\$29,225.00