INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

International Arbitration Tribunal

CASE NUMBER 01-21-0000-4309

Telecom Business Solution, LLC et ano, Claimants and Counterclaim-Respondents v. Terra Towers Corp. et al., Respondents and Counterclaim-Claimants

Appendix to Fifth Final Partial Award

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International Arbitration Tribunal

CASE NUMBER 01-21-0000-4309

ARBITRATION PURSUANT TO
THE COMMERCIAL ARBITRATION RULES OF
THE AMERICAN ARBITRATION ASSOCIATION

BETWEEN:

TELECOM BUSINESS SOLUTION, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, and LATAM TOWERS, LLC, on its own behalf and derivatively on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Claimants,

vs.

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC., JORGE HERNANDEZ and ALBERTO ARZÚ,

Respondents,

and

CONTINENTAL TOWERS LATAM HOLDINGSLIMITED,

Nominal Respondent,

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC. derivatively and on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Counterclaimants,

vs.

TELECOM BUSINESS SOLUTION, LLC, LATAM TOWERS, LLC, F. HOWARD MANDEL, JOHN RANIERI, RYAN LEPENE, and AMLQ HOLDINGS (CAY) LTD.,

Counterclaim Respondents.

-and-

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Respondent.

AMLQ HOLDINGS (CAY) LTD.,

Counterclaimant,

vs.

TERRA TOWERS CORP. and TBS MANAGEMENT,S.A.

Counterclaim Respondents.

PARTIAL FINAL AWARD
CONCERNING SALE OF THE COMPANY

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with an arbitration provision contained in the Shareholders Agreement, dated October 22, 2015, between and among Claimants Telecom Business Solution, LLC and Latam Towers LLC ("Peppertree Claimants"), AMLQ Holdings (Cay) Ltd. ("AMLQ") a Counterclaim Respondent and Counterclaimant, aligned with the Peppertree Claimants (collectively hereinafter "Claimants"), Respondents Terra Towers Corp. and TBS Management S.A. ("Terra" or the "Shareholder Respondents"), and nominal party Continental Towers Latam Holdings Limited, and having been duly sworn, and having duly heard and considered the proofs and allegations of the parties, do hereby issue this Partial Final Award.

I. Introduction

1. This arbitration involves claims and counterclaims between the majority and minority owners of a company, Continental Towers LATAM Holdings, Ltd. ("Continental" or the "Company"), whose business is the development and operation of telecommunications towers in Central and South America. The Company was formed in 2015 when investors, the Claimants here, made a private equity investment in the Company's predecessor, until then wholly owned by or through affiliates of the Respondents Terra Towers Corp. and TBS Management S.A. (together, herein referred to as "Terra") each of which is controlled by Respondent Jorge Hernandez. Terra became the majority shareholders of the Company, holding about 55%, and Claimants become the minority shareholders, holding about 45%. Claimants Telecom Business Solution, LLC and Latam Towers LLC are affiliates of a Cleveland, Ohio private equity firm, Peppertree Capital. Claimant AMLQ Holdings is an affiliate of Goldman Sachs.

2. Greatly simplified, the business model of the Company is to build telecom towers at suitable locations and then rent "space" on the towers to mobile communications operators. The construction of towers is an expense not a revenue stream for the Company, but such construction is a revenue stream for an affiliate of the majority shareholders, DT Holdings ("DTH"), a Respondent in this case. DTH is paid by the Company for the construction. One key element of the disputes in this arbitration is the divergent views of the majority and minority shareholders about what towers should be built and where, and the minority shareholders defend their having opposed certain tower construction, that the majority shareholders advocated, on the basis that the towers would not be profitable to operate. The majority shareholders, for their part, contend that the minority's opposition to tower construction has had a different and allegedly improper motive: to depress the value of the Company so that an alleged affiliate of one of the minority shareholders could acquire the Company at an artificially low price.

3. The Company, Continental, is a "nominal" party to this arbitration, because the case mainly presents disputes between the majority and minority shareholder groups. However, certain of the shareholders' claims and counterclaims purport to be asserted derivatively on behalf

of Continental. When Claimants made their investments in 2015, this entailed the creation of Continental as a new corporate entity with a set of new agreements contemporaneously executed that include a Shareholder Agreement (the "SHA" or "Agreement"), Articles of Association and By-Laws, and a Development Agreement and other agreements to which DTH is a party, including a service agreement with DTH whereby the Company pays DTH to provide the operating and management functions of Continental in consideration of a stipulated monthly payment by the Company.

4. In a procedural order issued in August 2021, the Tribunal after hearing the Parties decided that a Phase 1 of the arbitration would be conducted to determine whether to grant Claimants' claims for specific performance in regard to two matters. The first matter involves the sale of the Company. The SHA provides that after five years from the date of Claimants' investment, a sale of the Company would occur if the sale process defined in the SHA were initiated by Claimants according to the stated procedure. Claimants did purport to initiate that procedure, but due to objections by Terra the initiative culminated in this arbitration, commenced in February 2021, rather than in the sale of the Company. The first question presented in this Phase 1 is whether the Tribunal should grant specific performance by an Award directing a sale of the Company in the manner provided in the SHA. The second matter in Phase 1 concerns the process for the Company to make decisions about construction of new towers. It is alleged by Claimants and not disputed by Respondents that certain tower construction has taken place at the Company's expense, with payments having been made to DTH for such construction, despite the fact that the Board of the Company did not approve the new towers, the Claimants' representatives on the Board having voted in opposition. The Parties dispute whether those tower rejections by Claimants' appointees to the Board were proper. But the question presented in Phase 1 is whether Claimants are entitled *prospectively* to specific performance of the Agreements' provisions for approval of new tower construction – that is to say, for Board approval as a condition of such construction -- or whether alternatively Claimants are limited to a damages remedy for any harm caused to their shareholder interests (or the Company, on whose behalf they also bring the case in a derivative capacity) as a result of the Company having proceeded with tower construction rejected by its Board of Directors, but

nevertheless directed by Terra. Respondents have made extensive factual and expert submissions purporting to show that there is no such injury but that instead the Company and the Claimants as minority shareholders have benefited and will continue to benefit from new tower construction of the type that Claimants' Board representatives have disapproved.

5. After full briefing and an oral hearing on both issues[1], the Parties elected to attempt negotiation of a potential solution concerning the second matter of Phase 1 - the towers approval branch of Phase 1.[2] The Parties have not reported further concerning the towers approval matter. Accordingly, this Partial Final Award concerns only specific performance with respect to the SHA process for sale of the Company. To be clear, the towers approval matter, and the Company sale matter, involve separate and distinct alleged breaches of the SHA; they are not factually dependent on one another. They were linked only by the common issue of interpretation and application of the SHA's provision, discussed below,

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[1] All Claimants as a group, and all Respondents as a group, agreed to make written submissions jointly. Claimants and Respondents each submitted two Phase 1 Memorials, consisting of Memoranda of Law, Witness Statements, Exhibits, and (in the case of Respondents) Expert Reports. Claimants and Respondents also made written submissions invited by the Tribunal in response to specific questions presented by the Tribunal. The Parties agreed that there was no need for cross-examination of witnesses in the Phase 1 Oral Hearing. That Oral Hearing proceeded on December 1, 2021, via Zoom, with the Tribunal assembled in person together at the hearing facilities of the American Arbitration Association in New York. Following that hearing, on December 9, 2021, Respondents submitted an application (not authorized by the Tribunal) to reconsider the original determination to treat the issue of specific performance in Phase 1, to re-consolidate the Phase 1 issues into Phase 2, and decide all issues at the conclusion of Phase 2. This submission also contained certain comments about how Respondents would wish to see a Company sale process proceed, if at all. Initially, on December 10, 2021, the Tribunal declined to receive Respondents' December 9 submission as it was not an authorized submission. Ultimately, by order dated December 20, 2021, the Tribunal determined that it would receive Respondents' December 9, 2021 submission and treat it as a post-hearing brief, permit a responsive post-hearing brief from Claimants on or before January 6, 2022, and a post-hearing reply brief from Respondents on or before January 13, 2022. The Tribunal also invited the Parties, in their submissions, to address what powers the Tribunal might or might not have to include in a specific performance award directing the sale of the Company any possible provisions concerning the sale process that are not specified in the SHA. Based on that December 20, 2021 Order, the record on which this Award is based includes Respondents' December 9, 2021 submission, Claimants' submission dated January 6, 2022, and Respondents' submission dated January 13, 2022.

[2] *See* Email from the Peppertree Claimants' counsel to the Tribunal dated December 8, 2021.

concerning specific performance as a remedy for non-performance of the terms of the SHA. The Parties' decision to negotiate on the towers approval matter does not affect the finality of this Partial Final Award. Similarly, this Partial Final Award does not affect our continuing jurisdiction to hear the towers approval dispute if the Parties are unable to resolve it amicably.

II. Relevant Provisions of the Agreements

A. Provisions Concerning Sale of the Company

6. Section 5.04 of the Shareholders Agreement entitled "Sale of the Company" provides in sub-section (b) entitled "Approved Sale" (as quoted here with omissions to exclude irrelevant phrases; emphases are original):

> Following the earlier of (i) the expiration of the Lock-Up Period, or [certain other events not relevant here] ... then within ninety (90) days of such event...the Initial B Shareholder[s][3] ... may request, upon written notice to the other Initial Shareholders and the Company (the "**Proposed Sale Notice**"), a sale of all or substantially all of the Company's assets or all or substantially all of the Shares in the Company (in one or more transactions) to an unaffiliated Third Party Purchaser (an "**Approved Sale**").
>
> (i) If the Proposing Shareholders have already procured or received an offer from an unaffiliated Third Party Purchaser to purchase the assets or Shares of the Company (a "Proposed Offer"), the Proposed Sale Notice shall disclose in reasonable detail the identity of the prospective purchaser and the proposed terms and conditions of the Proposed Offer. The Initial A Shareholders or the Initial B Shareholders, as applicable, (the "Objecting Shareholders") may reject such Proposed Offer within thirty (30) calendar days of delivery of the Proposed Sale Notice by providing the Company with an opinion from an independent and reputable investment bank with experience in the industry and a cross-border practice (an "Investment Bank"), retained at the sole expense of the Objecting Shareholders, stating that the value of the proposed transaction is materially less than comparable transactions in the industry and the Territory; *provided that*, if such opinion

[3] In the SHA, the Peppertree-affiliated Claimants are referred to as the Initial B Shareholders, AMLQ as the Initial C Shareholder, and Terra as the Initial A Shareholders. The Lock-Up Period is defined in the SHA as five years from the effective date of the SHA, which was October 22, 2015.

is provided, the provisions of Section 5.04(b)(ii) shall apply. In the event that no such opinion is provided by the expiration of such 30 day period, each Shareholder shall vote for, consent to and raise no objections against such Approved Sale and take all necessary and reasonable actions in connection with the consummation of the Approved Sale as requested by the Proposing Shareholders.

(ii) If the Proposing Shareholders have not already procured an offer from an unaffiliated Third Party Purchaser or if an opinion has been provided by an Objecting Shareholder pursuant to Section 5.04(b)(i), the Company shall, within thirty (30) calendar days of receipt of the Proposed Sale Notice, retain an Investment Bank to facilitate an Approved Sale and each Shareholder shall vote for, consent to and raise no objections against such Approved Sale and take all necessary and reasonable actions in connection with the consummation of the Approved Sale as requested by the Proposing Shareholders. In the event that the consideration to be received for the Shares or assets of the Company upon the consummation of the Approved Sale is less than the Proposed Offer provided by the Third Party Purchaser pursuant to Section 5.04(b)(i), the difference between the amount of the Proposed Offer and the purchase price of the Approved Sale shall be deducted from the proceeds otherwise due to the Objecting Shareholders.

There are additional subsections of Section 5.04(b) that pertain to allocation of proceeds and other elements of completion of the sale of the Company. We omit quotation of them here because the quoted subsections above are sufficient for an appreciation of the relevant history, recited below, concerning Claimants' presentation of a Proposed Sale in November 2020 and again in January 2021.

B. **Other Pertinent Provisions**

7. Section 8.06 of the Agreement states:

   Entire Agreement This Agreement constitutes the entire agreement of the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and undertakings, both written and oral, between the parties with respect to the subject matter hereof.

8. Section 8.10 of the Agreement states:

   Governing Law This Agreement will be governed by and construed in accordance with the Laws of the State of New York, United States, without giving effect to any choice or conflict of law provision or rule (whether of the State of New York or any other jurisdiction).

9. Section 8.12 of the Agreement states:

> **Specific Performance** The parties hereto agree that irreparable damage would occur in the event any provision of this Agreement was not performed in accordance with the terms hereof and the parties shall be entitled to specific performance of the terms hereof, in addition to any other remedy at law or in equity. Therefore, each party hereto consents to the issuance of an injunction or the enforcement of other equitable remedies against him at the suit of an aggrieved party without the posting of a bond or other security, to compel the specific performance of all of the terms hereof and to prevent any disposition of Shares in contravention of any terms of this Agreement.

III. Facts Relevant to the Proposed Sale of The Company -- November 2020 to January 2021

10. On November 4, 2020, two weeks after the expiration of the Lock-Up Period, the Peppertree-affiliated Claimants (B Shareholders in the SHA) sent a letter to the Company and the other Shareholders, giving notice pursuant to Section 5.04(b) of the Proposed Sale of the Company to Torrecom Partners LP ("Torrecom"). Torrecom's purchase offer, also dated November 4, 2020, was annexed. (PPT-AMLQ Ex. 5).

11. By letter dated November 24, 2020, Terra (A Shareholders in the SHA) rejected the sale contemplated by that Proposed Sale Notice enclosing an opinion by an investment bank, UBS, that Torrecom's bid was inadequate from a financial point of view. (PPT-AMLQ Ex. 6). Terra's letter stated in material part:

> Pursuant to Section 5.04(b)(i) of the SHA, the A Shareholders as "Objecting Shareholders" reject the Proposed Offer by tendering the enclosed opinion from an independent and reputable investment bank with experience in the industry and a cross-border practice (an "Investment Bank"), stating that the value of the proposed transaction is materially less than comparable transactions in the industry and the Territory. For additional reasons, which Terra has outlined in its Notice of Dispute dated October 23, 2020[4], and its response of even date herein, the Proposed Offer is not a bona fide offer and is thus rejected.
>
> According to Section 5.04(b)(ii) of the SHA, the Company shall within thirty (30) calendar days of receipt of a Proposed Sale Notice retain an Investment Bank to

[4] We omit discussion of the Parties' respective Notices of Dispute, which were required under the Shareholder Agreement prior to the commencement of any arbitration. The Notices of Dispute are not material to the question of whether there was a non-performance of the Agreement in regard to sale of the Company.

> facilitate an Approved Sale. Accordingly, the deadline for the Company to appoint an Investment Bank to facilitate an Approved Sale is December 4, 2020. Given that time is of the essence, Terra proposes convening a Board meeting in the next ten (10) days in order to discuss proposals for the retention of an Investment Bank by the Company and consider the conditions under which the Board could approve such retention.

12. Communications exchanged by the Parties and submitted into the record suggest that the Parties in early- to mid- December 2020 extended the 30 day period under 5.04 (b)(ii) for appointment of an Investment Bank to facilitate a sale of the Company to a new purchaser, to provide time for Claimants to consider a counterproposal by Terra to buy them out. (See PPT-AMLQ Exs. 7, 8, 16, 17). We make no findings of fact as to the accuracy of any Parties' rendition of those events.

13. On December 16, 2020, Claimants by email "demand[ed] that the process required by Section 5.04(b)(ii) of the SHA immediately proceed unabated." Terra's answer sent by its general counsel on December 22, 2020, asserted that "[t]he A Shareholders are not amenable to reviving an expired time period required by the SHA. At this point, it is a moot point to be discussing the appointment of an Investment Banker." After then asserting that "it is in the best interests of the Company to conduct a formal process to select an Investment Bank to lead any potential sale process," Terra stated that "the hasty and unstructured proposed process to select an advisor does not look after the best interests of the Company and is, therefore, not acceptable to the A Shareholders." (PPT-AMLQ Ex. 7).

14. Also on December 22, 2020, Claimants in an email communication asserted that Terra had breached the SHA by not pursuing the sale of the Company, and Terra's general counsel then replied in pertinent part that "the Board as the governing body of the Company is deadlocked and effectively defunct. These issues illustrate all the more why the Buy-out of the B and C

shareholders' shares is what we should all be working towards. The B and C shareholders would be better served by focusing their efforts on supporting the A Shareholders with respect to the Buy-out process and by allowing the management to run the operations of the Company in the best interests of all." (PPT-AMLQ Ex. 16).

15. On January 19, 2021, the Peppertree-affiliated Claimants sent a letter to the Company, Terra, and Goldman Sachs, requesting a sale of all of the assets or shares of the Company pursuant to Section 5.04(b)(ii) of the SHA to an unaffiliated Third Party Purchaser, attaching no purchase offer from Torrecom or any other potential buyer, and demanded that the Company, within thirty days, retain an Investment Bank to facilitate an Approved Sale. The letter stated that "[r]epresentatives of Peppertree are available this week to initiate the process of retaining an Investment Bank as required by the SHA. Please advise as to Terra's availability at you[r] earliest convenience." (PPT-AMLQ Ex. 8).

16. On January 27, 2021, Terra submitted to Claimants a "Redemption Resolution" for Board approval of a binding offer of the A Shareholders to redeem the B and C Shareholders shares using financing to be obtained by the Company. In the letter accompanying that Redemption Resolution, Terra contended that as of December 16, 2020 "the deadline for the Company to appoint an investment bank pursuant to Section 5.04(b)(i) of the Shareholders Agreement had expired." (PPT-AMLQ Ex. 17). After summarizing the proposed Redemption, Terra wrote in regard to Claimants' January 19, 2021 Notice of Proposed Sale:

> The Company, however, can only act through its Board. For the last five years, the Initial B Shareholders have intentionally and in bad faith deadlocked the Board to inhibit growth. It is therefore hard to fathom that a Board which you have intentionally deadlocked for years will be able to agree on the appointment of an Investment Bank. Terra does not trust the Initial B Shareholder to act in the best interests of the Company or to protect Terra's shareholder interests in the event of

> an Approved Sale. The directors appointed by Terra will not likely be inclined to approve an Investment Bank proposed by Peppertree and much less will they approve John Ranieri as a "Seller Representative." With a deadlocked Board, the Company will be unable to appoint an Investment Bank to facilitate an Approved Sale. The Proposed Redemption is consistent with the business divorce we have been proposing …

17. Claimants commenced this arbitration on February 2, 2021, alleged (inter alia) that Terra had breached the SHA by objecting to and interfering with the sale proposed in their Proposed Sale Notice, and sought damages and in the alternative specific performance as remedies for the alleged breach.

IV. The Tribunal's Analysis of Claimant's Entitlement to Specific Performance of the Sale of the Company Under Section 5.04(b) of the Agreement

A. The Relevance of Section 8.12 of the SHA

18. Respondents contend that Section 8.12 – quoted in full in paragraph 9 above - is not relevant to our ability to grant specific performance because the elements an applicant for specific performance must satisfy, as stated in court cases decided under New York law, are allegedly not satisfied. (Respondents' Second Phase 1 Memorial ("RSM") at 2-4, 7-11). Respondents contend that this is so whether we regard the New York law elements of specific performance as substantive law applicable by reason of the Agreement's governing law clause, or as controlling procedural law because this is a New York-seated arbitration. (Id.).

19. AAA Commercial Rule R-47(a), applicable because the SHA provides for arbitration under those Rules (SHA para. 8.15), states: "The arbitrator[s] may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract."

20. This Tribunal's remedial powers are derived from the Parties' contract. That means our power to grant specific performance is controlled by Section 8.12 of the Shareholder Agreement and AAA Commercial Rule R-47(a), both adopted by the Parties in the SHA. It is true that the Agreement also provides that the Agreement is governed by New York law, and that New York shall be the place of any arbitration. But the New York law applicable to the granting of specific performance of a contract, while relevant to our analysis, does not require that an arbitral tribunal, whose powers are derived entirely from the agreement of the Parties, should then disregard entirely the agreement of the Parties concerning remedies for breach. We discuss the case law in this regard in later sections of this Award. As explained in those sections, New York law on specific performance, at least based on the case law presented to us, does not provide a controlling principle of law that the Parties may not deviate by contract from judicially-crafted standards for specific performance. And no party has presented to us authorities under New York arbitration law that require an arbitrator to refrain from applying the standards for specific performance set forth in the Parties' contract in favor of judicial standards.

21. We will return to these considerations later on, in connection with the question of irreparable injury. But first we address other contentions made by Respondents.

B. Whether There Has Been a Breach by Terra

22. Terra contends that the Company's failure to engage an Investment Bank was not a breach of the Agreement by Terra, since the duty to engage an Investment Bank was an obligation of the Company. (RSM at 5). If we were simply asked to declare the rights of the parties under the SHA, this contention would be beside the point, as the Agreement provides for specific performance in case of *non-performance*, without stating that there must have been a breach of contract by one

party or the other. Here it cannot be disputed that the Company failed to retain an Investment Bank as called for by Section 5.04(b)(ii) and the contractual condition to the issuance of specific performance under Section 8.12 has therefore been satisfied. Whether that non-performance is attributable to a breach by Terra enters into our consideration because Claimants claim that there was a breach by Terra, ask us to resolve that issue, and seek specific performance as a remedy for breach of contract. (Claimants' Amended Statement of Claim at paras. 192 *et seq*). Further, our powers under AAA Commercial Rule R-47(a) to grant specific performance concern the granting of "any remedy or relief," and where as here the Claimants' claim seeks specific performance as a remedy for breach of contract, we apply the Rule R-47(a) "just and equitable" standard in the context of that claim. On this basis we proceed to consider whether Terra breached Section 5.04(b)(ii).

24. A contention was raised by Respondents that their prospective objection to the engagement of an Investment Bank proposed by Claimants, in their January 27, 2021 letter, was not a breach of Section 5.04(b)(ii). The contention, in essence, was that the language of 5.04(b)(ii) only prohibits Shareholders from raising objections against the Approved Sale to be facilitated by the Company-engaged Investment Bank, but does not prohibit raising objections to the Company's retention of an Investment Bank. We do not accept that contention, and here clarify our construction of Section 5.04(b)(ii) in this regard, anticipating that this issue could arise again.

25. Investment Bank is a defined term in the SHA, and the definition relates only to the qualifications, reputation, telecoms industry experience, and cross-border practice of the bank proposed. (Section 5.04(b)(i)). Section 5.04(b)(ii) commands that the Company "***shall... retain an Investment Bank***" and leaves no room for the Company to fail to hire an investment bank on any basis except that it is not an Investment Bank as defined in Section 5.04(b)(i). As the Company

must so act, it follows that no Shareholders' representatives on the Board may cast their votes, or threaten that Board votes will be cast, to prevent the hiring of a qualified investment bank to facilitate an Approved Sale.

26. Further, the ensuing command in Section 5.04(b)(ii) that the Shareholders shall take "all necessary and reasonable actions in connection with the consummation of the Approved Sale as requested by the Proposing Shareholders" is not expressly or by implication limited to the period after the retention by the Company of an Investment Bank, and is most reasonably read to include the voting of the Shareholders' Board representatives in favor of the retention of an Investment Bank when that action is manded by the Agreement.

27. In addition, and contrary to Terra's contention, an "Approved Sale" is not defined as the end-product of an approval process (thus by Terra's proposed implication permitting Shareholder objections prior to approval), but simply "as one or more transactions in which all or substantially all of the Company's assets or shares are sold" It is defined in the same sentence as, and therefore logically it arises in conjunction with, the Proposed Sale Notice. Moreover, the Shareholders' obligations to take "all necessary and reasonable actions in connection with the consummation of *such* Approved Sale" are obligations in the sale process, which begins upon the Company's receipt of a Proposed Sale Notice, and are not obligations triggered by the Sale or by an approval process that begins after the Proposed Sale Notice (of which none is provided). (Emphasis added.) Terra's contention is contrary to the plain meaning of 5.04(b)(i) and (ii). Notably, the provision concerning the retention of an Investment Bank expressly states that the bank's purpose is "to facilitate an Approved Sale." Since an Investment Bank is a necessary prerequisite to an Approved Sale, interpreting the SHA to authorize a party to object to the appointment of an Investment Bank would sanction paralysis of the sale process at its initial stages. That reading is not only contrary to the

text, but would be contrary to each Party's implicit obligation under New York law of good faith and fair dealing, under which one contracting party may not deprive its counter-party of the fruits of the contract.

28. It is clear from Respondents' January 27, 2021 letter that they asserted that they had the right to take into consideration, with respect to the Company's retention of an Investment Bank, the conduct of the Claimants in allegedly "deadlock[ing] the Board to inhibit growth." This is not within the definition of Investment Bank, and so it was a prohibited consideration. The same is true of Respondents' concerns that Claimants could not be "trust[ed] … to act in the best interests of the Company or to protect Terra's shareholder interests in the event of an Approved Sale" and of the mere fact that an Investment Bank might be one "proposed by Peppertree," as such considerations do not address the contractually-defined qualifications of an Investment Bank, particularly as one of the banks Peppertree proposed was the very bank Terra had hired just weeks earlier to consider the Torrecom proposal. All of these statements were made in violation of the express commitments of the Shareholders to raise no objections against the Approved Sale and to take all necessary and reasonable steps in connection with an Approved Sale, one of which obviously was the Company's retention of an Investment Bank.

29. In the specific circumstances here, Terra also breached its obligations under 5.04(b)(ii) through the January 27, 2021 letter, by presenting a Redemption Proposal. Section 5.04 (b)(ii) states that "*each Shareholder shall vote for, consent to and raise no objections against such Approved Sale and take all necessary and reasonable actions in connection with the consummation of the Approved Sale as requested by the Proposing Shareholders.*" Although Terra is free to propose a buy-out of Peppertree if it wishes, its presentation of a Redemption Proposal, which was in response to Terra's buy-out proposal in reply to the November 4, 2020 Notice of Proposed Sale

(see para. 12 above), amounted to an objection against an Approved Sale of the Company to a third party. Whether one views Terra's phrasing concerning Board action as expression of doubt or a flat refusal to have the Board support the engagement of an Investment Bank as Section 5.04(b)(ii) required, the "necessary and reasonable action" in response to the January 19, 2021 Notice of Proposed Sale letter was to make the Terra-appointed Board members available for a Board meeting at which the hiring of an Investment Bank would be approved and accomplished. This was not done, and it was a breach of Section 5.04(b)(ii) by Terra.

30. In reading Respondents' letter of January 27, 2021 as a whole and in the context of the Parties' communications recited above following Claimants' Proposed Sale Notice on November 4, 2020, we have little difficulty concluding that the letter clearly communicated that Respondents would exercise their power as majority shareholders to prevent the Company from retaining an Investment Bank, in contravention of their clear contractual obligation under Section 5.04(b)(ii). This is particularly the case because, as noted above, by the time of the Respondents' January 27, 2021 letter, Claimants in their letter of December 16, 2021 (PPT-AMLQ Ex. 7) had already identified UBS, the Investment Bank chosen by Respondents weeks earlier, and whose qualifications as an Investment Bank were admitted by Respondents (PPT-AMLQ Ex. 6) in the covering letter accompanying the UBS Letter rejecting the Torrecom offer, as one of a group of Investment Banks acceptable to Claimants. This fact negates any interpretation of the January 27 letter that reads Terra's comment about approval of an investment bank proposed by Claimants as equivocal. Moreover, if Terra was merely reporting that it was disinclined to approve a bank proposed by Claimants, Terra was obligated under the SHA to then propose a qualified investment bank acceptable to it for approval by Claimants, but it failed to do so.

C. Whether the Time for Claimants to Seek a Company Sale Has Expired (Respondents' Waiver Defense)

31. Terra ultimately contended that Claimants waived the right to require a sale of the Company because the 30-day period specified in Section 5.04(b) for appointment of an Investment Bank by the Company after the delivery of a Proposed Sale Notice, expired 30 days after Claimants' January 19, 2021 Proposed Sale Notice, allegedly without Claimants having taken the initiative that Respondents contend was required of them to request that the Board approved the hiring of an Investment Bank. (RSM at 12). [5] The relevant text is in Section 5.04(b)(ii) of the Agreement where it is stated that "*the Company shall, within thirty (30) calendar days of delivery of the Proposed Sale Notice, retain an Investment Bank to facilitate an Approved Sale and each Shareholder shall vote for, consent to and raise no objections against such Approved Sale and take all necessary and reasonable actions in connection with the consummation of the Approved Sale as requested by the Proposing Shareholders.*"

32. The language just quoted did not specify any further action to be taken by the Proposing Shareholder to bring the issue of engagement of an Investment Bank before the Board for a vote. The requirement to take "all necessary and reasonable actions in connection with the consummation of the approved sale **as requested by the Proposing Shareholders**" is, in our view, meant to place the burden of taking such actions on the other Shareholders, with the Proposing Shareholders being understood to have done their part by delivering the Proposed Sale Notice.

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[5] In the Memorials, Terra also argued that (1) Claimants could not now in 2022 deliver a new Approved Sale Notice beyond 30 days following the end of the Lock-Up Period, and (2) Claimants could no longer require appointment of an Investment Bank more than 30 days after Terra's rejection of the Torrecom proposal (Respondents' First Phase 1 Memorial ("RFM") at 18, 20-23). But once Claimants made clear that they rely on the January 19, 2021 Proposed Sale Notice, timing factors ensuing from that Notice became the focus of Terra's waiver argument.

33. Waiver is the intentional relinquishment of a known right. (Werking v. Amity Estates, Inc., 2 N.Y.2d 43, 52 (1956); County of Suffolk v. Ironshore Indem., Inc., 187 A.D.3d 1137, 1139 (2d Dep't 2020)). For Claimants to be chargeable with waiver, by not bringing before the Board a resolution for the engagement of an Investment Bank within 30 days after the January 19, 2021 Proposed Sale Notice, at minimum Claimants would have to have known that by not presenting such a resolution, they were forfeiting the right to the Approved Sale. Whereas the Agreement imposed no such requirement on the Proposing Shareholder specifically, such a requirement can only be inferred by a debatable construction of the various provisions of the Agreement concerning corporate governance generally intertwined with Section 5.04(b) which itself stated that the Peppertree-appointed Board members were available in the ensuing week. This alone negates intentional relinquishment, and defeats Terra's contention of waiver.

34. What is more, Claimants' course of action was obviously influenced by the written communication received from Terra on January 27, 2021 (PPT-AMLQ Ex. 17, see para. 16 above). In that communication Terra proposed a redemption of Claimants' shares as an alternative to the Approved Sale. In addition, Terra stated that it was "unlikely" that Terra's appointees on the Board would support engagement of an Investment Bank. And the ensuing sentence stated that "[w]ith the Board deadlocked" the Approved Sale could not go forward. Respondents contend that "unlikely" meant that support of the Terra-appointed Board members remained possible, notwithstanding the next sentence referring to Board deadlock, and that this letter therefore did not relieve Claimants of a burden to present the Investment Bank retention matter to the Board within 30 days after January 19, 2021. We are unpersuaded by this argument. As the Agreement did not clearly impose this duty on Claimants, they could not have known that they were forfeiting the right to consummate the Approved Sale by failing to call a Board meeting and present a Board

resolution more formally than they had already done by sending the January 19, 2021 Proposed Sale Notice. Whatever ultimately might be the proper application of the Agreement on a technical basis to the circumstances, Claimants could have reasonably believed that sending the Proposed Sale Notice put the ball squarely in Terra's court. This negates the intentionality of forfeiture necessary to Respondents' defense of waiver.

35. Moreover, Claimants conduct is best viewed not as a waiver but as a resort to arbitration in furtherance of their rights, in the context of (i)Terra's December 2020 rejection of the Torrecom proposal (see para. 11 above), (ii) Terra's service of a Notice of Dispute on the Peppertree and AMLQ Shareholders even before the Torrecom proposal (Notice of Dispute dated October 23, 2020 referenced in see PPT-AMLQ Ex. 6), (iii) Terra's attempts to sidetrack the sale process in December 2020 by negotiating a tolling of the deadline for retention of an Investment Bank while Terra sought to convince Claimant to accept a buy-out by Terra (see para. 12 above), and (iv) the overall anti-Approved Sale thrust of the January 27, 2021 communication (see para. 16 above),

36. Further, the January 27, 2021 letter breached Respondents' obligations under 5.04(b)(ii) to advance the Approved Sale process without objection and with the taking of all necessary and reasonable steps. We refer as we did at the December 1 hearing to the equity maxim "*Ex turpi causa non oritur actio*" roughly translated as "persons may not rely upon their own violations of law as a basis for a claim." (*See* Matter of Dorsey, 161 Misc. 2d 258, 260 (Surrogate's Court, Dutchess County 1994); Riggs v. Palmer, 70 Sickels 506, 516 (N.Y. Court of Appeals 1889) ("No one shall be permitted to profit from his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity....")). We would confer such an improvident benefit on Respondents if we found waiver by Claimants in these circumstances.

D. Whether Claimants Have an Adequate Remedy at Law

37. Respondents argue that damages are an adequate remedy for the alleged breach of the Agreement, if found to have been a breach, consisting of Respondents' interference with Claimants' rights to an Approved Sale of the Company under Section 5.04(b)(ii) of the SHA. We disagree, and find that while damages may be possible, they are not an adequate remedy. We reach that conclusion taking into consideration Section 8.12 of the SHA, but also even without regard to Section 8.12.

38. Damages would logically be measured by the difference between (1) what a sale of the Company in early 2021 would have yielded to Claimants as their *pro rata* share of the sale proceeds, and (2) the value now retained by Claimants because they still own their shares. While a valuation expert asked to assign a value to each of these two variables would do so, the reliability of such valuations, compared to specific performance (*i.e.* a third party sale facilitated by an Investment Bank), is far inferior.[6] The valuation would take place 15-18 months after the sale process would have occurred, but for Terra's breach of the SHA, in January-February 2021. A valuation expert would have to reconstruct the Company's financial position as it was in January 2021. Whereas the granular information pertinent to such valuation is in possession of Respondent DTH Holdings, a company under common control with Terra, and is dispersed in the various countries where, through DTH, the Company has operations, there is an issue of information access for any valuation expert engaged by Claimants. The impact on value and on marketability itself of the six-year history of stress between the shareholders, and taking into account the allegations of

[6] We note that Respondents did submit a valuation expert report in the Phase 1 Proceedings, but that report was addressed to the alleged enhancement of the value of the Company by the development of towers that the Peppertree Board members did not approve. That is a different valuation issue and does not bear on the analysis in the text.

wrongdoing in both directions, is not readily capable of capture in traditional valuation methodology. It is the kind of subjective dynamic that is better measured by looking for actual bidders. It stands to be more reliable for an actual bidder to value the Company on the basis of owning 100% of it, as compared to having valuation experts opine on what the Company's business, under control of a single owner and without the dynamics that the Peppertree-Terra relationship has produced, would be worth.

39. For valuation experts to offer reliance-worthy opinions on the value of the minority shares if they are retained by Claimants would be equally fraught. The opinions of experts retained by Claimants and Respondents on the willingness of any third parties to acquire the minority interest under the corporate governance arrangements of the current SHA are likely to vary widely. The experts' opinions on how a hypothetical minority interest purchaser would take into account the history of Claimants' and Respondents' relationship would probably vary as widely as do the Parties' perceptions of how that relationship has affected the business of the Company.

40. The Tribunal sees these matters as serious obstacles to making damages *adequate* as opposed to merely *possible*, and Respondents' position that this dispute is merely about money and therefore should result only in the award of damages obscures this critical difference. We could also foresee that an actual attempt by the Peppertree and AMLQ shareholders to sell their shares to a third party would follow the damages award. Unless such a sale were made at close to the value assigned in the damages award, that sale would produce even more arbitration, with one side claiming more damages from the other based on the difference between the actual sale price and the value used in the damages formula. That prospect also cuts against the alleged adequacy, as opposed to the mere possibility, of a damages remedy. It is clearly the controlling law of New York that ultimately the prospective reliability of measurement of damages is often the litmus test

of whether an applicant for specific performance has an adequate remedy at law. *See* Van Wagner Advertising Corp. v. S&M Enterprises, 67 N.Y.2d 186, 193 (1986) ("The point at which breach of a contract will be redressable by specific performance thus must lie not in any inherent physical uniqueness of the property but instead in the uncertainty of valuing it.... When the relevant information is thin and unreliable, there is a substantial risk that an award of money damages will either exceed or fall short of the promisee's actual loss"). *Accord*, Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 415 (2001), cited by Respondents (RSM at 8).

41. Further, to deny specific performance on the basis that there is an adequate remedy at law would have the Tribunal refuse to apply one clearly applicable principle of New York contract law, that is, to give full effect to the plain meaning of the Contract. (*E.g.*, Friends of Wicker Creek Archeological Site, Inc. v. Landing on the Water at Dobbs Ferry Homeowners Ass'n, 198 A.D.3d 728, 729 (2d Dep't 2021). Section 8.12 provides both Parties with the remedy of specific performance when the SHA is not performed according to its terms, and states that such non-performance causes irreparable harm. "Lock-Up Period" is a defined term in Article I of the SHA (at p.9 that means "the period of five (5) years starting on the Effective Date and ending on the fifth anniversary of the Effective Date." Claimants may exit via a Company sale at the end of the Lock-Up Period, as provided in Section 5.04(b). Subject to certain narrowly defined conditions, there was no option during the Lock-Up Period for Claimants to sell their minority stake to a third party or to insist that Respondents buy them out. See Section 5.01. The Claimants' entitlement to a Company sale at the end of the Lock-Up Period was the clear reciprocal right granted to Claimants for the Lock-Up Period restrictions on the transfer of the Claimants' shares, and the possibility for specific enforcement of those restrictions by Terra against Claimants, that the same

Section 8.12 conferred on Terra.[7] If specific performance of a Company sale under 5.04(b)(ii) is denied, the Lock-Up Period is five years plus an indeterminate additional period unless Claimants wish to sell a minority stake in the Company to a third party subject to Terra's right of first refusal, or to sell to Terra at whatever price Terra is prepared to offer. That would distort not only the plain meaning of the SHA, but the equilibrium and reciprocity of the rights and obligations during the Lock-Up Period, on the one hand, and after its expiration, on the other. Specific performance with a presumption of irreparable harm was included in Section 8.12 of the Agreement for the benefit of *all* Shareholders. New York contract law does not allow us to revise the SHA in the manner Respondents' arguments would require.

42. Terra cites Convergen Energy WI, LLC v. L'Anse Warden Electric Co., 2020 WL 5894079 (S.D.N.Y. Oct. 5, 2020), a case in which a U.S. District Court, asked to grant a preliminary injunction, declined to find a contractual recital of irreparable harm resulting from breach to be dispositive of the existence of irreparable harm, and stated that "[t]he parties to a contract cannot secure by agreement among themselves the equitable power of the court." Id. at *6 (RSM at 3). There are several reasons why this argument is not convincing.

43. First, the Second Circuit case cited in *Convergen*, in support of the proposition that the parties may not contractually usurp the equitable power of the Court, held that a contractual stipulation of irreparable injury from breach is *not controlling* on the irreparable harm issue, but that case did not find that the stipulation is *irrelevant*. Baker's Aid, a Div. of M. Raubvogel Co. v. Hussman

[7] *See* the restrictions on transfer of shares in the Company during the Lock-up Period (Section 5.01(a)), related transfer procedures (Section 5.01(b)), non-circumvention restrictions (Section 5.01(c)), and the obligation to give Terra a right of first refusal to buy all or some of the shares proposed to be sold to a non-affiliate of Peppertree after the expiration of the Lock-Up Period (Section 5.03(a))

Foodservice Co., 830 F.2d 13, 16 (2d Cir. 1987), cited in *Convergen*, *supra*, at *6. Our analysis is consistent with *Baker's Aid,* as we do not render the parties' stipulation of irreparable injury controlling to the exclusion of other considerations, but we do give that stipulation considerable weight, especially as we are arbitrators whose powers are derived from the agreement of the Parties and our essential mandate from the Parties is to enforce their agreement.

Second, as an arbitral tribunal we do not exercise "the equitable power of the court" but (as just observed) the powers conferred on us by the Parties in the Agreement. Our relevant sources of power on the question of specific performance are Section 8.12 of the Agreement and Rule R-47(a) of the AAA Commercial Rules. It is well recognized in case law applying the Federal Arbitration Act that equitable powers of arbitrators are those conferred by the parties, even if that results in relief that would not be available if sought from a court. *See* CE International Resources Holdings LLC v. S.A. Minerals Ltd., 2012 WL 6178236 at *3-5 (S.D.N.Y. Dec. 10, 2012) and Second Circuit cases cited therein.

Third, neither New York nor federal law *of arbitration* requires arbitrators, when asked to grant specific performance as a breach of contract remedy, to treat a contractual recital of irreparable harm in a particular way. Neither party here contends otherwise, Further, neither party has argued that New York or federal law *of arbitration* makes judicial equitable criteria for granting specific performance as a breach of contract remedy binding on a New York-seated arbitral tribunal. And no case cited by the parties holds that New York judicial equitable criteria for granting specific performance are part of the *substantive law of New York* that arbitrators must apply when there is a governing law clause of the type present here.

Finally, *Convergen* was decided in the context of a motion for interlocutory injunctive relief, not specific performance as a final remedy for breach of contract.

44. To summarize, we give significant but not dispositive weight to the contractual stipulation in SHA Section 8.12 of irreparable harm resulting from a breach and giving rise to the right to specific performance. But even if we gave no weight to that Section of the SHA, we would find irreparable injury here for Terra's breach. Damages are too difficult to measure *reliably* in this circumstance. The relationship of shareholders in a closely-held enterprise is specific and unique, especially when there are in essence two shareholder groups with polarized interests and views. There is a human toll to corporate deadlock in a closely-held corporation that cannot be adequately measured in money damages. *See* Gimaex Holding, Inc. v. Spartan Motors USA, Inc., 2015 WL 6673687 at *6 (D. Del. Oct. 30, 2015) (forcing business partners to remain in business together was an irreparable injury weighing in favor of accelerated dissolution of joint venture), *report and recommendation adopted by* Gimaex Holding, Inc. v. Spartan Motors USA, Inc., 2015 WL 9437530 (D. Del. Dec. 22, 2015) (cited in Claimants' Phase 1 Memorial at p. 25). The shareholders also have fiduciary obligations to the Company and to one another. The cost of remaining a fiduciary when one no longer wishes to be in that role – expending effort that could otherwise be deployed toward other investments, making a record of those actions to manage the risk of claims of fiduciary breach by the opposing side -- cannot be measured adequately by money damages. Also, the Peppertree Claimants here are financial investors, a private equity firm, and prolonged illiquidity deprives a private equity firm of an essential element of such a business, control over the deployment of its capital.

E. Whether a Sale of the Company Imposes Undue Hardship on Respondents

45. Terra contends that "a forced sale will clearly prejudice Terra by taking away Terra's ownership rights in the Company against its will." (RSM at 11). But this is not the case. The sale process prescribed by Section 5.04(b)(ii) is "forced" only in the sense that intervention of an

arbitral tribunal is required to compel Terra to do what it agreed to do in 2015 as one of the conditions of the Claimants' making an investment and becoming minority shareholders. Terra's "will" in late 2021 when this argument was presented, insofar as it is different from the "will" expressed in the SHA, simply doesn't count. Our task as a Tribunal is to enforce Terra's and the other SHA parties' mutual "will" as expressed in the SHA at the time it was made. Sections 5.04, 8.12, and Rule 47(a) of the AAA Commercial Rules, together express clearly the will of the parties: the Company would be sold at the request of either the B Shareholders (Peppertree Claimants) or the A Shareholders (Terra) at the end of the Lock-up period in an Approved Sale facilitated by a Company-retained Investment Bank, and if there was a dispute about this an arbitral tribunal could order specific performance, upon finding specific performance to be "just and equitable"(Rule R-47(a)), without requiring an actual showing of irreparable harm.

46. As a result, there is no injustice or inequity involved here, at least on the part of Claimants. We deal only with the Claimants' lawful contract-based desire to liquidate their investment, having fulfilled their end of the bargain by respecting the lock-up of their minority shares for the duration of the Lock-Up Period, and Terra's desire to prevent that and extend the Lock-Up Period indefinitely. Terra takes this position, evidently, because they wish to keep control of the Company (as reflected in their December 2020 and January 2021 buy-back offers, and in the arguments made in their Memorials), and to do so either by making Claimants' investment illiquid (*i.e.* forcing them to remain invested) or by forcing Claimants to sell to Terra in a "redemption" that would not involve having an Investment Bank secure a third party offer for 100% of the Company.

46. Ultimately *this* part of the dispute is *only about money* in one sense: what it will cost Terra, if it wishes to acquire 100% control, to outbid a potential third-party purchaser to acquire the Peppertree and AMLQ shares. That this calculus would potentially present itself at the end of the

Lock-up Period had to have been obvious to Terra when it signed the Agreement. The Agreement provided for a Company sale process, not a majority-minority redemption process. There is no injustice or inequity in requiring Terra to live up to the contract. It is entitled to its *pro rata* share of the sale proceeds, subject to any setoffs that may be established, and nothing in the SHA stops Terra from asking Claimants, at any time, but more likely once the value achievable by a third-party sale is better understood, to sell their shares to Terra. [8]

48. Terra contends that Claimants may exit their investment by selling their shares to a third party. (e.g. RFM at p. 2). But the Parties in the Agreement specifically agreed on sale of the Company as the source of liquidity for a Shareholder at the end of the Lock-Up Period, and, without our considering whether such a transaction might be permitted by the Agreement, and without our inquiring about whether such a transaction might provide equivalent value to Claimants compared to a sale of the Company, our task is to enforce the Agreement as the Parties made it. To repeat, specific performance does not necessarily force Terra to sell its interest in the Company. It does however require a genuine sales process to go forward so that the price for Terra to have 100% control – if it elects to bid against a third-party purchaser and Claimants ultimately elect to sell their interest to Terra – is determined with market-based knowledge of what a sale outright of the Company would yield to Claimants. And the risk to Terra that Claimants for business reasons may prefer to sell to the third party purchaser rather than to Terra at the same price is a risk embedded in the SHA. Terra would at worst case have its share of the proceeds of the sale, and its

[8] Respondents contend that Goldman Sachs, owner of AMLQ, controls a competing telecoms company operating in Central and South America, and implies that the Company sale is desired to eliminate Terra as a competitor. (RFM at p. 9). That argument appears to assume that Peppertree, which owns many more shares in the Company than AMLQ, is willing to sacrifice the interests of its investors for the benefit of Goldman Sachs' investors. We make no findings of fact about this. But nothing in the SHA prevents Claimants or their affiliates -- or Respondents --from competing in this market after a Company sale.

counterclaims against Claimants for breach of contract damages intact. There is no hardship or inequity in that solution, in our judgment.[9]

F. Whether Claimants Must Show That They Have Substantially Performed By First Defeating Respondents' Counterclaims on the Merits

49. Both sides in this case cite New York case law stating that an applicant for specific performance must demonstrate that it has substantially performed the contract. (RSM at p. 3, Claimants Initial Phase 1 Memorial at p. 20). Claimants contend that they have fully performed, saying that the legal standard of New York law is "easily satisfied" here, (Id.) but in making that argument they contend that we should find that Respondents' counterclaims are without merit.. Respondents, on the other hand, contend that until their counterclaims are fully resolved, the issue of substantial performance by Claimants is an open one that prevents our awarding specific performance.[10] Whereas the parties have not presented to us New York controlling authorities on

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[9] We take note of the New York authorities cited by Terra for the proposition that "irreparable harm does not exist where alternatives are available to a movant, even if these alternatives are less convenient." (RSM at 9, internal quotations marks omitted). But we approach that principle in context. Section 5.04 was negotiated (as its highly specific phrasing indicates), between sophisticated parties with sophisticated counsel (as the notice provisions reflect), and no right of the majority Shareholder was included, as a basis to object to a proposed sale of the Company, that the minority Shareholder must demonstrate that it had exhausted the possibility of selling its minority interest to a third party. Were we to hold here that Peppertree must search for a purchaser of the minority interest, we would be re-writing the Agreement. Further, in this context, for Terra's argument to have any equitable resonance, Terra would have had to provide convincing evidence that a transfer of the minority interest was readily obtainable, other than to Terra, and to a new minority Shareholder acceptable to Terra, at a value reasonably equivalent to what a sale of the Company would yield. That is not, in this context, Peppertree's burden. And Terra offered no such evidence. The principle stated in some cases cited by Terra, that irreparable harm is not established because the applicant would otherwise bear minor inconveniences absent equitable relief – like having to buy a monthly commuter train ticket through the mail rather than from a ticket vending machine (Molloy v. MTA, 94 F.3d 808, 813 (2d Cir. 1996), cited by Terra in its Nov. 15 Answers Submission at para. 4) – does not fit here. It is not self-evident that selling the minority interest in Continental to a third party is even possible, much less a minor inconvenience as compared to the value achievable by an outright sale of the Company.

[10] This position is not set forth explicitly and completely in Respondents' two Phase 1 Memorials, but is to be understood from their contentions made in opposition to creation of the Phase 1 process,

how the general requirement of substantial performance is to be applied to a long-term multiple-obligation contract like the SHA, we address that issue as a matter of discretion and in a manner that will achieve a just and equitable result.

50. As a first step, we observe that no contention is made by Respondents that Claimants failed in any respect to observe the SHA's restrictions on transfer of their shares during the Lock-Up Period. It is thus not contended by Respondents that this aspect of Claimants' performance of the SHA, which we view as the reciprocal of the right to a Company sale after the Lock-Up Period, was not fully performed by Claimants. Stated simply, Claimants stayed the course from October 2015 to October 2020 as required by the Agreement.

51. In the cases cited to us by the Parties, we do not find a clearly controlling statement of New York law that the applicant for specific performance must show as prerequisite to granting the relief, no matter what the nature of the specific performance sought, and no matter the nature of the contract, that it has not committed *any* breaches of the contract at issue. The New York Court of Appeals has held, for example, that an applicant for specific performance of a simple bilateral exchange of contractually promised performances, like the purchase and sale of real estate, must show that the applicant is ready, willing and able to uphold its end of the bargain. *E.g.*, Huntington Mining Holdings, Inc. v. Cottontail Plaza, Inc., 60 N.Y.2d 997, 998 (1983); Alba v. Kaufmann, 27 A.D.3d 816, 818 (3d Dep't 2006). But we have not seen a case among those cited by the Parties in which the New York Court of Appeals held, in a complex multiple-obligation contract, to be performed on both sides over several years, like the SHA, that the applicant for specific

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and in their post-hearing submission concerning Phase 1 urging abandonment of the Phase 1 process and re-joinder of the Phase 1 issues with all other issues including Respondents' breach of contract counterclaims.

performance must first prevail on all counterclaims for breach of contract before any request for specific performance of any obligation may be granted. If that were controlling New York law, a specific performance applicant, like Claimants here, would too often be forced to litigate to judgment (or arbitrate to an award) a counterclaim for breach of contract raising some potentially complicated issues, entirely collateral to the right sought to be specifically enforced, that cannot be resolved without extended discovery and merits disposition. It would be an inequitable rule in many cases.

52. We do not believe New York's courts would so hold. And we decline to adopt such a rule in this case, as it would be unjust and inequitable under AAA Commercial Rule R-47(a), to condition Claimants' right to specific performance under 5.04(b)(ii) on first defeating any counterclaims Terra might raise. That would too easily make the raising of counterclaims -- that might well require information exchange and a merits hearing before they can be resolved -- into a weapon to defeat the clear terms of Section 5.04(b)(ii). Indeed, Section 5.04(b)(ii) in its plain terms enjoins Terra from raising *any objection* to the Proposed Sale, and this includes raising counterclaims and insisting that the counterclaims must be resolved first.

53. Moreover, the case law cited by Respondents does not show New York law to require a perfect record of contract performance by the applicant for specific performance. The cited cases refer to "*substantial performance*" by the applicant as one of the conditions that, when present, would make specific performance "*appropriate*" (*e.g.*, DiPilato v. 7-Eleven, Inc., 662 F.Supp.2d 333, 345 (S.D.N.Y. 2009), cited in RSM at 3; Travellers Int'l AG v. Trans World Airlines, Inc., 722 F. Supp.2d 1087, 1104 (S.D.N.Y. 1989) (cited and quoted in DiPilato)). But these cases do not hold that specific performance of one obligation in a complex contract is *never appropriate* where "substantial performance" is in dispute because the counterparty alleges a breach by the applicant

of an obligation in the agreement that is distinct from the one for which specific performance is sought. Further, in both DiPilato and Travellers, the applicants were seeking to enforce continuation of a business relationship -- in DiPilato, a 7-Eleven retail franchise; in Travellers, a tour operator contract with an international airline. Those cases are unlike this one.

54. Here, specific performance is sought to sever a shareholder relationship in a manner consistent with the Agreement, and granting that remedy does not impair Respondents' damages claims against Claimants for their alleged breaches in causing the Board to disapprove new tower construction. One federal court case cited by Respondents states that under New York law a decree of specific performance may be granted by a court "*only if*" the applicant has substantially performed under the contract (Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co., 470 F.Supp. 1308, 1324 (N.D.N.Y. 1979) (cited in Respondents' First Phase 1 Memorial ("RFM") at 19). But the court did not actually apply that requirement (which we note is not stated in the New York cases cited in Niagara Mohawk). Instead, it granted specific performance in that case while counterclaims for plaintiff's alleged breaches of the contract remained to be litigated. In doing so, the Court stated: "*The Court will not, at this time, definitively resolve the question of whether Niagara Mohawk has committed any breaches of contract prior to exercising its rights under the termination clause, but the Court does find that any prior breaches that may have occurred were, at most, partial rather than total breaches of contract. Therefore, Graver was not discharged from its own contractual obligations and would not have been justified in rescinding the contract for any such breaches.*" Id. at 1323. And the Court observed that defendant Graver had a damages remedy available for any such breaches. Id. at 1322. The same is true here, with respect to Respondents' counterclaims relating to Claimants' allegedly wrongful refusals to approve new tower development.

55. In summary, we find that the relevant substantial performance in relation to the Company sale under Section 5.04(b)(ii) is Claimants' observance of the restrictions on disposition of their shares during the Lock-Up Period, and no contention is made that Claimants committed a breach of that provision. We further find the approach of the federal district court in the Niagara Mohawk case to be appropriate with respect to Respondents' counterclaims.[11]

G. Whether Terra May Invoke Claimants' Alleged "Unclean Hands" To Bar Specific Performance

[11] For these reasons, it is appropriate to grant specific performance at this stage even though there has been no discovery of the type sought by Respondents into Claimants' intentions in refusing to support Terra proposals for new tower development. Our approach is consistent with the possibility that Respondents may ultimately prevail on their counterclaims.

56. Terra invokes "unclean hands" and "equitable estoppel"[12] [13] as defenses to the granting of specific performance. In essence, Terra contends, as it did in its January 27, 2021 letter, that Claimants' alleged bad faith actions -- to depress the value of the Company so that Torrecom could acquire the Company at a favorable price -- form a basis to deny specific performance, and, Terra argues, at the very least those allegations form a basis to deny specific performance at this time because the allegations of improper conduct by Claimants should be examined with the benefit of

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[12] At least formally, Respondents also referred to "repudiation" and "anticipatory repudiation" as affirmative defenses. (E.g. Nov. 15 Answers Submission at para. 12). New York law requires for anticipatory repudiation that there should be a "sufficiently clear and unequivocal" statement by the repudiating party that it will commit a total breach, or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a total breach. *See* Norcon Power Partners v. Niagara Mohawk Power Corp., 92 N.Y.2d 458, 463 (1998) (cited in Terra's Nov. 15 Answers Submission at para. 12). Respondents have not pointed to any such unequivocal declaration of total breach or voluntary affirmative act of Claimants that constitutes a total breach or that disables them from future performance without such total breach. The rejections of tower approval packages, ostensibly in the name of what is in the Company's best interests, is not such an unequivocal declaration or act. Neither is the submission of the Torrecom purchase offer, since Claimants stood down from that offer in favor of the solicitation of other third party bids in January 2021.

Further, Respondents still regard the Shareholder Agreement and Development Agreement as being in effect, the Claimants as being Shareholders, and the Claimants' Board of Directors appointees as being members of the Board and the Development Committee. (See Terra's November 15 Answers Submission at para.12, stating that "Terra [has] continued to operate under the Shareholders Agreement").

Terra also asserted a defense framed as "Failure to State a Claim" (RSM at 12). But under New York law specific performance is a remedy, not a cause of action, a principle inherent in the question of whether an applicant for specific performance of a contract should instead recover only money damages if there has been a breach. (*E.g.* Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409 (2001). Insofar as this embraces the contention of anticipatory repudiation of the Shareholder Agreement and Development Agreement, we reject it for the reasons just stated. And insofar as this is just another way of saying no breach of the SHA has been established, we reject that position based on the analysis in this Award.

[13] Respondents asserted equitable estoppel as an affirmative defense on the basis the "Claimants are trying … [to] implement a 'sale process' that is founded on the sham Torrecom offer Claimants procured and their efforts to take over the Company." (RFM at 33). But because Claimants have clarified that they do not seek enforcement of the Torrecom offer, and our Award does not decree performance based on the Proposed Sale Notice that presented the Torrecom offer, that basis for equitable estoppel is unavailable and no other has been raised by Respondents.

information exchange and not in an early-disposition framework. We think the SHA answers this contention. The Parties agreed in Section 5.04(b)(ii) that the Shareholders in receipt of a request for a proposed sale of the Company would "*vote for, consent to and raise no objections against such Approved Sale and take all necessary and reasonable actions in connection with the consummation of the Approved Sale as requested by the Proposing Shareholders.*" That language clearly envisioned that there might be disputes about the conduct of the requesting party unresolved at the time of the request for sale of the Company. If such disputes could be invoked as an objection, then liquidity of the investment would be illusory. Liquidity of the investment then could only come about at the end of a long dispute resolution process. Section 5.04(b)(ii) makes clear that the Parties intended that allegations of misconduct such as those made by Terra against the Peppertree Claimants would not and could not be invoked to prevent the 5.04(b)(ii) sale process from moving forward.

57. Respondents do not identify any controlling authority under New York contract law holding (specifically or by implication) that merely raising a defense of unclean hands prevents the granting of specific performance, in an arbitration where New York contract law governs, until the merits of that defense are determined. Petrello v. White, 2007 WL 2236700 (E.D.N.Y. Aug. 7, 2007) (RFM at 32) refers to a rule of equity concerning judicial equitable power, not a controlling principle of substantive New York contract law applicable in an arbitration where such law is the governing law. The same is true of PenneCom B.V. v. Merrill Lynch & Co., 372 F.3d 488, 493 (2d Cir. 2004) (Id.). Our powers as arbitrators to grant specific performance – arbitral as opposed to judicial equitable power – are derived here from the SHA, including AAA Commercial Rule R-47(a) adopted in the Agreement. (See *CE Int'l Holdings*, discussed *supra* at para. 43). This cited law concerning the judicial equitable power is a discretionary factor informing our determination

of whether specific performance would be "just and equitable." And Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814 (1945), also cited by Respondents (RFM at 32), confirms our view that the doctrine of unclean hands is a judicial procedural principle applicable when a court sits as a court of equity, rather than an aspect of the New York law of contracts: "*This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief....The doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.*"

58. In authority cited by Respondents, it is stated that "the doctrine of unclean hands bars equitable relief when the moving party has engaged in improper conduct similar to the alleged improper conduct from which he seeks relief." Scaminaci v. Jaffrey, 2021 WL 276705 at *5 (S.D.N.Y. Jan. 27, 2021) (RSM at 26). In the Second Circuit case cited for this proposition in *Scaminaci*, Motorola Credit Corp. v. Uzan, 561 F.3d 123, 128-29 (2d Cir. 2009), the Court cited Precision Instrument, *supra*, which we quote again in pertinent part with different emphasis: "[The unclean hands doctrine] is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith ***relative to the matter in which he seeks relief....***" (emphasis supplied). Here, however, Claimants' alleged bad faith conduct in advancing the Torrecom proposal to buy the Company is a collateral matter at this point, as Claimants do not seek enforcement of the Torrecom bid or any other sale to a specific third party that they have identified. No misconduct by Claimants is alleged by Respondents in regard to the Company sale process at issue here – the sale initiated by the January 19, 2021 Proposed Sale Notice. And Claimants' alleged bad faith conduct in refusing to approve Tower development proposals is also a collateral

matter. Sale of the Company will leave intact Respondents' counterclaims seeking damages for this alleged wrongdoing by Claimants.

59. Insofar as the judicial equitable doctrine of unclean hands informs our discretion here, we do not find these principles sufficient, on the facts alleged by Respondents, to make it unjust and inequitable to enforce the right to a Company sale granted in Section 5.04(b)(ii). Respondents do not assert a counterclaim based on fraud. Their assertions that the Torrecom bid violated the Agreement (because Torrecom was allegedly affiliated with Claimants and wanted a covenant not to compete from Respondents) are claims that there was breach of contract, not unconscionable behavior. Respondents' contention that Claimants sought to depress the value of the Company in service of a low bid by Torrecom, if proven, would perhaps amount to inequitable conduct. But Claimants do not here seek enforcement of the proposed sale to Torrecom. The factual foundations of Respondents' unclean hands defense do not concern anything integral to the concept that the Company would be sold at the end of the Lock-up Period, such as might be the case if Respondents contended that Claimants made promises to extend the Lock-Up Period or forego a Company sale entirely except on conditions different from those stated in 5.04(b)(ii). Thus, the elements of unclean hands alleged by Respondents, even if assumed to be true, do not warrant our exercising discretion to deny relief on the basis of them.

H. Whether Alleged Impairment of An Oppression Remedy Under BVI Law Provides An Affirmative Defense to Respondents

60. Terra contends that its potential right to relief against Claimants for a forced sale of Claimants' shares to Respondents as a remedy for alleged "oppression, discrimination, or prejudice" under Section 184I of the Companies Act of the British Virgin Islands (BVI) would be compromised if

specific performance under Section 5.04(b)(ii) brings about a sale of the Company's shares to a third party (RFM at 33-34, RSM at 14-16).

61. The SHA excludes the application of BVI law *to the interpretation and performance of the Shareholders Agreement.* The Parties to the Shareholders Agreement, including three Parties incorporated in the BVI (the Company, Terra, and AMLQ), agreed to Section 8.10, which states: *This Agreement will be governed by and construed in accordance with the Laws of the State of New York, United States without giving effect to any choice or conflict of law provision or rule (whether of the State of New York or any other jurisdiction).*" If the right of specific performance under Section 8.12 of the Agreement and under AAA Rule R-47(a), as applied to the Claimants' right to a Company sale under Section 5.04(b)(ii), were nullified, as Respondents contend, by the alleged requirement to preserve the availability of those shares for a potential forced sale to Respondents as an oppression remedy under the BVI Companies Act, then the SHA would effectively be *governed* to that extent by BVI law, contrary to Section 8.10.

62. This would also effectively add a term to the SHA, which is prohibited for the additional reasons that the Parties expressly made the SHA the exclusive source of their rights with respect to one another concerning the subject matter of the SHA. The seventh "Whereas" clause of the Shareholders Agreement recites that "*the parties are entering into this Agreement to set forth their respective rights and obligations with respect to the Company and the Shares ....*" We read that, in its plain meaning, to mean **all of** their respective rights and obligations. And Section 8.06 states: "*This Agreement constitutes the entire agreement of the parties hereto with respect to the subject matter hereof....*" We would ignore that standard integration clause if we decided that the SHA sets forth the parties' entire agreement with respect to the sale of Shares except that we cannot grant specific performance of the Company sale provided for in Section 5.04(b)(ii) – or at least

cannot grant it at the time it is requested and on a timetable consistent with Section 5.04(b)(ii) -- because this would prevent us from eventually ordering a forced sale of Claimants' shares to Respondents as an oppression remedy under the BVI Companies Act. Further, this BVI Company Act objection to a Company sale falls within the requirement of Section 5.04(b)(ii) that Terra should **raise no objection**.

63. The case cited by Terra, in support of its argument for application here of the BVI Companies Act Section 184I(2)(a) as an obstacle to specific performance, Mindspirit, LLC v. Evalueserve Ltd., 346 F.Supp.2d 552, 580 (S.D.N.Y. 2018), states: "[t]he internal affairs doctrine ***is a 'generally-recognized choice-of-law rule,'*** which is followed in New York, and which provides that questions relating to the internal affairs of corporations are decided in accordance with the law of the place of incorporation'" (emphasis supplied).[14] But the question here is not whether Terra may assert an "oppression" claim under the BVI Companies Act in this arbitration. We assume here without deciding that such a claim may be asserted. But among the various potential remedies for such oppression listed in the BVI Companies Act S. 184I(2)(A), forced sale of Claimants' shares to Respondents is foreclosed by the SHA.[15]

64. To find otherwise we would have to ignore the express exclusion of New York choice-of-law rules from the New York law we are empowered to apply to the SHA, and instead hold that in order to protect our *discretion potentially to grant* the forced sale of shares remedy under 184I(2)(a) of the BVI Company Law, we should invoke the "internal affairs doctrine" to prohibit

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[14] *See* Terra's Nov. 15 Answers Submission at para. 2.

[15] Subsection 2(a) of S. 184I of the BVI Act vests discretion in the High Court to provide, as an oppression remedy, "*in the case of a shareholder, requiring the company or any other person to acquire the shareholder's shares.*"

or at least delay specific performance of Section 5.04(b)(ii) of the Shareholders Agreement. Doing so here in our view would contradict the plain terms of the Agreement. Whether Respondents state a cause of action for oppression under the BVI Companies Act, and which of the other remedies under that Act might be appropriate if there is a cause of action and a violation by Claimants is established, are questions that may arise another day.

65. Terra also cites a number of cases for the proposition that a New York choice-of-law clause in a contract that says the contract shall be governed by New York law is not determinative of what law applies to tort claims. [16] It is not necessary for us to analyze these cases. Even as we assume without now deciding that Respondents have a legally sufficient BVI Companies Act oppression claim that the Tribunal may hear and decide under that Act, Terra's argument for Section 184I(2)(a) of that Act as an impediment to specific performance of Section 5.04(b)(ii) of the Shareholders Agreement fails for the reasons stated above.

V. The Tribunal's Analysis and Decision as to Cost Allocation

66. Rule R-47(b) of the AAA Commercial Arbitration Rules states: "In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate." Rule R-47(d)(ii) states: "The award of the arbitrator(s)...may include:...an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement."

67. Section 8.11 of the SHA states in pertinent part: "The award may include an award of costs, including reasonable attorney's fees and disbursements." In view of the Parties' adoption of the AAA Commercial Arbitration Rules in the same Section 8.11, we construe the reference to "[t]he

[16] Terra's Nov. 15 Answers Submission at para. 2.

award" to apply to a partial final award such as this one, and to include the types of costs identified in Rule R-47 quoted above.

68. We construe the cost allocation provision in Section 8.11 to be one that permits the prevailing party to recover its reasonable attorney's fees and expenses and other costs associated with the proceeding in which it was successful, solely on the basis of having been successful, and without subjective evaluation by the Tribunal of the factual and legal positions advanced by the unsuccessful parties, or of the conduct of the parties and party representatives during the proceedings or in the business interactions that led to the arbitration. (That is not to say that this is the limit of our discretion in allocating costs under the clause, but it is the relevant scope for purposes of this Award). Our award of costs herein therefore entails no such subjective assessments, and is reflective only of the fact that Claimants are the prevailing parties in this Partial Final Award.

69. As directed by the Tribunal, Claimants made a submission concerning the amounts of their legal fees and disbursements, and comments on the reasonableness of the sums claimed. Also as directed by the Tribunal, Respondents submitted written comments on the reasonableness of the sums claimed by Claimants. The Tribunal has carefully considered Respondents' arguments supporting a substantial reduction in the legal fees to be awarded. We note that an Arbitral Tribunal is not bound by New York law or federal law concerning awards of attorneys' fees in judicial proceedings. This is a procedural matter in the arbitration. While some of the factors affecting the amount of the award are similar, we are not bound to give the same level of scrutiny as would a court. We are influenced mainly by the degree to which Claimants were the prevailing party, the complexity and difficulty of the proceedings, and the reasonableness of the hourly billing rates (which Respondents do not question). We do not find any abusive billing practices or significant

redundancies or misallocations of time indicated by the examples in timesheets cited by Respondents. We have also considered Respondents' position that we should defer the award of attorneys' fees to a different stage of the arbitration. The Tribunal proposed that the Parties stipulate to such a solution but they did not. Owing to the uncertainty that could arise in terms of finality for enforcement in one or more jurisdictions where enforcement of this Award might be sought, the Tribunal finds its prudent to make a complete disposition on awardable costs for Phase 1 Company Sale at this time.

70. Accordingly the Tribunal finds that the Peppertree Claimants are entitled to recover $139,189.50 of attorney's fees and $59,847.40 of disbursements, and Claimant AMLQ is entitled to recover $392,345.50 of attorney's fees and $ 26,777.90 disbursements.

71. The Claimants are also entitled to recover the percentages of the Arbitral Tribunal's fees and expenses associated with this Phase 1 Award that are equal to the percentages of the deposits for the Tribunal's fees and expenses that the Peppertree Claimants and AMLQ have, respectively, paid to the ICDR. The relevant percentage for the Peppertree Claimants is 70% and for AMLQ is 30%. The Tribunal's fees and expenses associated with this Phase 1 Award have been $200,000 (a rounded figure reflecting the necessity of reasonable approximation) and therefore the Peppertree Claimants are entitled to be awarded $140,000 and AMLQ is entitled to be awarded $60,000 as recovery of their respective payments of shares of the Tribunal's fees and expenses associated with this Phase 1 Partial Final Award.

VII. PARTIAL FINAL AWARD CONCERNING SALE OF THE COMPANY

72. For the reasons stated above, we award as follows:

(i) Claimants' claim that Respondents Terra Towers Corp. and TBS Management S.A. breached the SHA by failing to cause the Company to proceed with sale of the Company pursuant to Claimants' January 19, 2021 Proposed Sale Notice is sustained, and Claimants' request that specific performance be granted as a remedy for such breach is sustained.

(ii) Respondents Terra Towers Corp. and TBS Management S.A. shall cause their appointed members of the Board of Directors of the Company to vote in favor of the engagement of an Investment Bank as defined in the SHA at a Board meeting to be held within 15 days after those Respondents are notified in writing by Claimants of the Investment Bank that Claimant propose that the Company engage, provided that such written notice is received within 30 days from the date of this Award.

(iii) The Approved Sale of the Company shall proceed on the basis of Claimants' Proposed Sale Notice of January 19, 2021 and pursuant to the engagement of the Investment Bank as required in (i) above, and pursuant to Section 5.04(b) of the SHA as construed in this Partial Final Award.

(iv) The Claimants' share of the compensation and expenses of the arbitrators totaling US$200,000 (the "Awarded Tribunal Fees") shall be borne by Respondents, jointly and severally. Therefore, Respondents, being jointly and severally liable, shall pay the Peppertree Claimants, within thirty (30) days from the date of this Partial Final Award, the sum of United States Dollars 140,000 (US$140,000), representing that portion of the Awarded Tribunal Fees that have been paid to the arbitrators for proceedings culminating in this Partial Final Award from deposits made to the ICDR by the Peppertree Claimants. The Respondents, being jointly and severally liable, shall reimburse AMLQ, within thirty (30) days from the date of this Partial Final Award, the sum of United States Dollars 60,000 ($60,000), representing that portion of the Awarded Tribunal Fees

that have been paid to the arbitrators for proceeding culminating in this Partial Final Award from deposits made to the ICDR by AMLQ. The amounts payable to the Claimants under this sub-paragraph shall bear simple interest from the date of this Partial Final Award until the date of payment at the rate of three and one quarter percent (3.25%) per annum.

(v) Respondents, being jointly and severally liable, shall pay the Peppertree Claimants, within thirty (30) days from the date of this Partial Final Award, the sum of United States Dollars 199,036.90 (US$199,036.90) to reimburse them for attorney fees and costs incurred in connection with proceedings culminating in this Partial Final Award. The amount payable shall bear simple interest from the date of this Final Award until the date of payment at the rate of three and one quarter percent (3.25%) per annum.[17]

(vi) Respondents, being jointly and severally liable, shall pay AMLQ, within thirty (30) days from the date of this Final Award, the sum of United States Dollars 419,123,40 (US$419,123.40) to reimburse them for attorney fees and costs incurred in connection with proceedings culminating in this Partial Final Award. The amount payable shall bear simple interest from the date of this Final Award until the date of payment at the rate of three and one quarter percent (3.25%) per annum.

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[17] This is the current Wall Street Journal Prime Rate (www.bankrate.com/rates/interest-rates/wall-street-prime-rate) (last visited February 20, 2022). The Tribunal declines to award the 9% rate provided in the New York Civil Practice Law & Rules, Article 50, as the Tribunal considers that it is not bound to apply this rate by reason of the New York choice-of-law clause, or the fact that New York is the place of arbitration. That rate is an aspect of procedure in the courts of the State of New York, is not agreed by the Parties, and is not aligned with what is necessary to compensate Claimants for the potential loss associated with delay in payment. *See Report of the International Commercial Disputes Committee of the New York City Bar Association, Awards of Interest in International Commercial Arbitration: New York Law and Practice* (June 21, 2017) (www.nycbar.org) (last visited Feb. 20, 2022).

(vii) The ICDR's administrative fees attributable to the proceedings culminating in this Partial Final Award shall be borne by the Respondents, jointly and severally. However, in view of the difficulty of attributing the correct portion of such fees to these proceedings in the context of all proceedings held and to be held, quantification is reserved to the Final Award.

(viii) This Partial Final Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

We hereby certify that, for the purposes of Article I of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, and for the purposes of Article 4 of the Inter-American Convention on International Commercial Arbitration ("Panama Convention"), this Partial Final Award was made in New York, New York, United States of America.

Date: February 23, 2022

Mélida N. Hodgson, Co-Arbitrator

Date: February __, 2022

Richard F. Ziegler, Co-Arbitrator

Date: February __, 2022

Marc J. Goldstein, Tribunal Chair

Date: February __, 2022

Mélida N. Hodgson, Co-Arbitrator

Date: February 23, 2022

Richard F. Ziegler, Co-Arbitrator

Date: February __, 2022

Marc J. Goldstein, Tribunal Chair

Date: February __, 2022 _____

Mélida N. Hodgson, Co-Arbitrator

Date: February __, 2022 _____

Richard F. Ziegler, Co-Arbitrator

Date: February 24, 2022 MG

Marc J. Goldstein, Tribunal Chair

I, Mélida N. Hodgson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Partial Final Award Concerning Sale of the Company.

Date: February 23, 2022

Mélida N. Hodgson

I, Richard J. Ziegler, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Partial Final Award Concerning Sale of the Company.

Date: February 23, 2022

Richard F. Ziegler

I, Marc J. Goldstein, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Partial Final Award Concerning Sale of the Company.

Date: February 24, 2022 MG

Marc J. Goldstein

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal

CASE NUMBER 01-21-0000-4309

SECOND PARTIAL FINAL AWARD (CONCERNING SANCTIONS UPON RESPONDENTS FOR VIOLATIONS OF TRIBUNAL ORDERS)

ARBITRATION PURSUANT TO
THE COMMERCIAL ARBITRATION RULES OF
THE AMERICAN ARBITRATION ASSOCIATION

BETWEEN:

TELECOM BUSINESS SOLUTION, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, and LATAM TOWERS, LLC, on its own behalf and derivatively on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Claimants,

vs.

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC., JORGE HERNÁNDEZ and ALBERTO ARZÚ,

Respondents,

and

CONTINENTAL TOWERS LATAM HOLDINGSLIMITED,

Nominal Respondent,

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC. derivatively and on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Counterclaimants,

vs.

TELECOM BUSINESS SOLUTION, LLC, LATAM TOWERS, LLC, F. HOWARD MANDEL, JOHN RANIERI, RYAN LEPENE, and AMLQ HOLDINGS (CAY) LTD.,

Counterclaim Respondents.

-and-

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Respondent.

AMLQ HOLDINGS (CAY) LTD.,

Counterclaimant,

vs.

TERRA TOWERS CORP. and TBS MANAGEMENT,S.A.

Counterclaim Respondents.

The Context of this Award

1. This Partial Final Award, our second in this case, represents the culmination of more than nine months of contentious disputation between the Parties over the status of the Executive Management of Continental Towers LATAM Holdings, Ltd. (the "Company"). In one sense, this has been a sideshow to the merits of the arbitration, as it does not involve directly the determination of the merits claims the Parties have asserted against one another. But in another sense, the unrelenting efforts of the Respondents to secure the removal, and if not the removal then the marginalization, discrediting, and intimidation of the CEO and COO of the Company, are intrinsic to the merits.
2. In Phase 1 of this arbitration, we made a Partial Final Award (herein "PFA-1") directing specific performance of the provisions of the Shareholders' Agreement that require the Company to be sold to a third party. The Respondents have applied to the U.S. District Court for the Southern District of New York to have PFA-1 vacated. That application was made as a cross-motion to Claimants' petition for recognition and enforcement of PFA-1. A judgment on the Claimants'

award recognition-enforcement petition and Respondents' cross-petition for *vacatur* is awaited. If PFA-1 is recognized and enforced, the independence and integrity of Executive Management could materially affect whether the Company is in fact sold, and also could bear on the timing, price and other terms of the sale and the potential damages claims by Claimants and/or Respondents relating to the impact of Company Management actions or inactions on the sale process.

3. Further, there are merits claims to be heard in Phase 2 that Respondents violated Claimants' rights by misappropriating funds from the Company, for example by obtaining tower development payments for towers whose development was not approved by the pertinent committee of the Company's Board of Directors (the "Board"). Also reserved for Phase 2 are counterclaims by Respondents that Claimants have harmed the Company by refusing to approve towers development.

4. We have determined to issue this ruling on Claimants' application for sanctions in the form of a partial final award for several reasons. First, the closeness of the relationship of these Executive Management issues to the merits suggests that finality with regard to the status of Executive Management is desirable for the process of sale of the Company to proceed in an efficient way. A second reason is that Respondents have contested our jurisdiction to make this ruling and to conduct the proceedings that led up to it, including the orders we entered providing for an evidentiary hearing and the required production of evidence, which orders the Respondents elected to treat as ineffective for the stated reason that we were *functus officio*. Only a competent court can finally decide that *functus officio* question, and it is best for this arbitration that the question be decided while the arbitration is in progress if possible. A third reason also involves a question of arbitral jurisdiction that was raised by Respondents: Respondents have challenged as beyond this Tribunal's authority one of the orders with which Respondents have chosen not to comply on the ground that such order allegedly required conduct by non-parties, *i.e.* affiliates of Respondent DT Holdings, Inc. ("DTH"). Respondents' non-compliance led the Claimants to make the instant application for sanctions. As will be discussed below, in prior Orders we have rejected Respondents' position on these jurisdictional issues. The opportunity for interlocutory judicial consideration, if desired by any of the Parties, of our powers to make the decisions we make here, appears important to the effectiveness of the ongoing arbitration in multiple ways.

5. A fourth reason is that Respondents have objected to the proceedings leading to this Award on the ground that the Tribunal is (in the phrasing of the Federal Arbitration Act ("FAA")) "evident[ly] partial[]." We view that contention as unwarranted but it is not an issue we can decide. It is not known by the Tribunal whether Respondents have presented that issue to the competent administrative authority, the AAA's International Centre for Dispute Resolution ("ICDR"), or whether they have presented the issue and failed to obtain an order from the ICDR disqualifying any member of the Tribunal. In a case with so much remaining to be decided, and important stakes for all Parties, a question of evident partiality already raised repeatedly by Respondents over a period of several months should be judicially determined at the earliest opportunity if Respondents wish to pursue it.
6. Finally, there is little question that the instant motion for sanctions presents a "separate and independent" claim – in essence the Respondents' claim that senior management of the Company are unqualified for their roles by reason of partisanship for Claimants and improper conduct worthy of criminal prosecution (which may also be viewed as the Claimants' claim that this Tribunal should impose sanctions because Respondents' views of senior management of the Company has not justified their non-compliance with the Tribunal's Orders). And none of the measures we award as sanctions requires any additional action by the Tribunal.

7. We conclude that Claimants' motion for sanctions should be granted . We will award, as sanctions under AAA Commercial Rule R-58, a stay of proceedings on Respondents' counterclaims until such time as Respondents fully comply with our prior orders (the "Stay Sanction"), a prohibition of Respondents' further asserting claims or defenses based on the conduct of senior management of the Company up to the date of this Award, a requirement for lead counsel to be designated by Respondents and for such lead counsel to make all submissions on Respondents' behalf with undertakings equivalent to those imposed by Federal Rule of Civil Procedure 11, and a monetary award for fees of the Tribunal with interest.

8. The Stay Sanction is accompanied by a Procedural Order putting the stay into effect. The Stay Sanction is an enforceable award insofar as it excludes, with finality, conditions for the lifting of the stay other than those stated in this Award. The Stay Sanction is implemented in in the form of a Procedural Order, so that it is clear that the Tribunal retains power to Order the lifting of the stay and to determine if the conditions for lifting the stay are met.

Essential Procedural History

8. This controversy had its starting point, for the Tribunal's involvement, when the Tribunal was notified by Company counsel of facts involving the alleged mistreatment of the Company's CEO, Jorge Gaitán, and the COO, Carol Echeverría, during a sequence of interactions between them, on the one hand, and Respondent Jorge Hernández, on the other hand, that occurred in Guatemala at the offices of the Guatemala affiliate of DTH in September 2021. The Claimants subsequently contended that there had been a wrongful removal of Mr. Gaitán and Ms. Echeverría from their positions at the Company[1], and Claimants applied for interim relief to restore the *status quo ante*. After receiving extensive written evidence from the Parties and hearing oral testimony on October 22, 2021, the Tribunal entered an order granting Claimants' interim relief application on November 12, 2021 (the "November 12 Order"). In material part, the November 12 Order required that Mr. Gaitán and Ms. Echeverría be restored to all working conditions and terms and conditions of employment with DTH that were associated with the performance of their Company management roles as of March 19, 2021 (on which date, after this arbitration was underway but before this Tribunal was constituted, all Parties had signed a written agreement that Mr. Gaitán would continue as Company CEO).

9. What occurred thereafter in this proceeding has turned out to have been a multi-faceted effort by Respondents to present to this Tribunal and to the Company's Board a false narrative of misconduct and criminality by Mr. Gaitán and Ms. Echeverría. This effort included, as its most central feature, filing multiple criminal complaints in a court in Guatemala in December 2021 and January 2022. Those criminal filings relied on a false account of submissions made in this arbitration and a false description of the events in September 2021 at DTH's offices that culminated in the termination of employment of Mr. Gaitán and Ms. Echeverría. Respondents then presented those Guatemala criminal court matters to this Tribunal as a reason that Respondents could not comply with (and should not be required to comply with or sanctioned for not complying with) our orders to restore Mr. Gaitán's role to what it was at March 19,

[1] DTH is controlled by Jorge Hernández, who is the controlling person of Respondents Terra Towers Corp. and TBS Management S.A. (herein collectively "Terra"), the majority shareholders of the Company. DTH is bound contractually to perform services for the Company, including tower construction, through agreements that were signed concurrently with the Shareholders' Agreement in 2015. Per the contracts executed in 2015 in conjunction with the Shareholders' Agreement, the Company makes a monthly payment to DTH to cover the services DTH provides, and DTH performs services for the Company by having Mr. Gaitán and Ms. Echeverría serve as officers of the Company and through employees of DTH and its country-specific affiliates in the countries in which DTH operates.

2021. They also presented these false accounts to lawyers in jurisdictions where DTH operates, and to one law firm in the Untied States, to obtain legal memoranda that were presented to this Tribunal in support of Respondents' position. In effect, Respondents decided to collaterally attack the November 12 Order and refuse to comply with it on the basis of the pendency of those criminal complaints, while concealing from the Tribunal that the alleged factual basis for the criminal complaints consisted of allegations that the Tribunal had already rejected in the November 12 Order.

10. We recite now in detail the procedural history that ensued after the November 12 Order. We do so in part because a key complaint of alleged Tribunal bias as stated by Respondents' counsel during the evidentiary hearing on June 3, 2022 is that the Tribunal unfairly refused to hear their evidence of Mr. Gaitán's and Ms. Echeverría's alleged misconduct and criminality *in the procedural setting preferred by Respondents*, *i.e.* a motion addressed to the Tribunal to remove them from their Company management posts. [2]

11. Ten days after the November 12 Order, the Respondents submitted to the Tribunal in letter form a mo[tion] for an order removing Jorge Gaitán from Management of Continental Towers LATAM Holdings Limited (the "Company"), "due to criminal acts of malfeasance which have damaged the Company and DTH." That letter also stated: "Respondents are contemporaneously bringing the underlying facts to the attention of the Company's Board seeking as well the Board's approval for Gaitán's removal from management."

12. The Tribunal issued a Procedural Order the next day, November 23, 2021, that stated:

> The Tribunal has received Respondents' November 22, 2021 application (the "Application") for reconsideration and clarification of the Tribunal's November 12, 2021 Order Granting Interim Relief (the "Order") and for a stay of the effectiveness of the Order.
>
> The Application insofar as it seeks a stay is denied and decision is otherwise reserved. The November 24 deadline for compliance and reporting concerning compliance set forth in the Order remains in effect and we look forward to receiving the parties' submissions.

[2] It is not our role to evaluate our own impartiality, save as we are required by the AAA Commercial Rules and applicable ethical standards (e.g., AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes) to resign if we conclude we can no longer act impartially, and to make disclosures of facts that a reasonable observer might consider to affect our impartiality, which each of us has done.

> Compliance with the Order is not excused or postponed by this order or the Application.
>
> Any further submissions concerning the Application, insofar as decision has been reserved, shall be made only as directed by the Tribunal.

13. On November 30, 2021, Respondents sent to the Tribunal what they termed "the applicable DT review documents pertaining to Gaitán and Continental." This was an evidentiary submission to us of ostensibly new or newly-discovered purported facts said by Respondents to bear on Mr. Gaitán's fitness to maintain his position as Company CEO. No report was made of any Board action and no request for relief from the Tribunal was made.

14. In a separate letter on November 30, 2021, Respondents through counsel took issue with factual assertions made by Mr. Gaitán in a letter from the Company's counsel to the Tribunal dated November 23, 2021 that Mr. Gaitán had certified as truthful. Again, no relief to remove Mr. Gaitán was sought from the Tribunal. The letter reported that "[t]he A Shareholders [Terra Respondents] have requested a Board meeting with the B Shareholders [Peppertree Claimants[3]] to discuss these and several other related issues."

15. On December 3, 2021, Respondents' counsel notified the Tribunal "that Terra has called a board meeting for next Thursday, December 9, in order to address the issues that have been raised concerning Mr. Gaitán …."

16. On December 6, 2021, the Tribunal made a procedural order that covered a number of matters. Most pertinent here: (1) the Tribunal denied Respondents' motion to reconsider the November 12 Order (having before then reserved decision), and (2) directed that "[i]f Respondents wish to seek the removal of Mr. Gaitán from Management of the Company they shall submit a resolution to the Board for Board approval by December 13, 2021. If no such resolution is submitted by that date, the Respondents' application to the Tribunal for the removal of Mr. Gaitán will be deemed withdrawn." The latter direction was given having regard for the fact that, as noted in paragraphs 10 and 11 above, Respondents had informed the Tribunal of their plans to present the proposed removal of Mr. Gaitán as Company CEO to the Board, but had not applied to the Tribunal for the removal of Mr. Gaitán. Given the positions of the

[3] Claimants Telecom Business Solution LLC and Latam Towers LLC are controlled by a Cleveland,Ohio-based private equity firm, Peppertree Capital Management, Inc.

Parties, the Tribunal understood Respondents' reporting to us concerning the timing of their intended Board presentations as a notification that we could expect an application from Respondents for the removal of Mr. Gaitán as Company CEO in a short time.

17. On December 9, 2021 the Tribunal sent an email to the Parties that stated:

> In regard to compliance with the Tribunal's November 12, 2021 Interim Relief Order, the Tribunal does not propose to issue any additional ruling or relief without first hearing witness testimony concerning the facts set forth in the written submissions that have been made on the compliance issue. Should the Parties wish to have such a hearing, the Tribunal's only available business day before the Holiday Period, with reasonable notice, is Friday December 17. If there is to be such a hearing, we would expect to hear testimony from Mr. Gaitán and Mr. Hernández, and we would entertain in advance the Parties' submissions as to what other witnesses might testify.

18. On December 10, 2021, Respondents' counsel submitted a letter reporting that Terra had proposed the removal of Mr. Gaitán at a Board meeting the preceding day, that the Peppertree-appointed Directors did not support this, and that "[b]ased on the foregoing, Terra respectfully requests that the Tribunal consider and issue an order on Terra's motion to remove Mr. Gaitán."

19. Before the Tribunal responded to that request, however, Respondents' counsel sent another letter to the Tribunal dated December 13, 2021 "to provide the Tribunal with additional evidence from DTH's ongoing investigation of Mr. Gaitán…." (This letter was received by the Tribunal on December 14, 2021 at 1:07 a.m., a time-record referenced in the procedural order quoted in para. 20 below).

20. In a procedural order issued on December 15, 2021, the Tribunal stated in relevant part:

> If the portion of the 1:07 a.m. December 14 submission that relates to the proposed removal of Mr. Gaitán has not yet been presented to the Board, and Terra wishes to renew its effort to have the Board remove Mr. Gaitán on the basis of the facts set forth in this submission, Terra should do so. **When the Board has voted on this renewed proposal, the Tribunal should be notified, in a joint communication, only whether Terra's proposal was adopted or rejected. At that time, or upon request of Terra if Terra does not wish to renew its proposal to the Board, the Tribunal will inform the Parties what further written submissions, if any, will be permitted concerning the motion for removal of Mr. Gaitán.** In case Terra makes such a request to the Tribunal, it should be stated simply as a notification of the request for consideration of the motion, and should not contain argument or evidence.

(emphasis supplied).

21. Thus the record is clear that at the end of 2021, the Tribunal was not neglecting a request from Respondents for action on their request for removal of Mr. Gaitán on the basis of any preconceived notion that the proposed motion was not supported by facts. The Tribunal had clearly directed Respondents to return to the Board to have the Board reconsider the question in view of the new facts Respondents claimed to have uncovered (and for the Parties to report jointly on the outcome for Tribunal consideration of next steps).

22. On January 4, 2022, Respondents used the platform of an invited submission on a different issue to expand upon their contentions of malfeasance by Mr. Gaitán. But the letter did not contain any report that the question of removal of Mr. Gaitán had been re-submitted to the Board.

23. In the ensuing months we held proceedings on a motion by Claimants to compel compliance with the November 12 Order and to have sanctions issued for non-compliance. In the course of those proceedings, which culminated in our Order dated March 15, 2022, Respondents made further attacks on Mr. Gaitán and Ms. Echeverría. We were presented by Respondents with evidence, nearly all of it hearsay, that (1) Mr. Gaitán and Ms. Echeverría were defendants in a criminal proceeding in Guatemala resulting from their alleged misdeeds that allegedly victimized Respondent DTH, including theft of company proprietary data, (2) a Guatemala criminal court judge had allegedly made an interim measures order in the 2022 criminal complaint proceedings lodged by DTH against Mr. Gaitán and Ms. Echeverría on February 4, 2022, to freeze their bank accounts and restrict them from leaving Guatemala ("*ne exeat* order"), (3) a DTH internal investigation allegedly revealed that Mr. Gaitán had by malfeasance and misrepresentation created substantial financial liabilities for the Company toward a client; and (4) a DTH internal audit revealed a scheme of embezzlement led by Mr. Gaitán and his father (who had recently been discharged as a DTH employee after more than ten years of service). But Respondents did not report to the Tribunal that their motion to remove Mr. Gaitán was ripe for consideration by the Tribunal based on the satisfaction of the condition precedent to the possibility of Tribunal action on their motion to remove Mr. Gaitán – *i.e.* that there had been Board consideration of a resolution to remove him and that the Board had rejected the resolution.[4] (To be clear, the Tribunal did not state at any point that a Board deadlock on a resolution

[4] On January 28, 2022, Respondents submitted as evidence in opposition to Claimants' Motion to Compel Compliance with the November 12 Order, among other things, a witness statement of Jorge Hernández and a transcript of the Company Board meeting held December 9, 2021 (Ex. R-96). Mr. Hernández in his witness statement did not assert that the Peppertree Directors had voted against a resolution to remove Mr. Gaitán and that therefore removal of Mr. Gaitán was ripe for consideration by the Tribunal. Rather, he stated that the position of the Peppertree Board members concerning removal of Mr. Gaitán was that the Tribunal's November 12 Order deprived

presented by Respondents to remove or suspend Mr. Gaitán and/or Ms. Echeverría would be a **sufficient** condition for the Tribunal to entertain a motion by Respondents).

24. Respondents did make one more effort to have the Tribunal act on Respondents' requests with regard to Mr. Gaitán and Ms. Echeverría, that is to say, to have the Tribunal entertain their motion to remove him. That was on February 25, 2022, while the non-compliance/sanctions issue that we had spent the preceding two months addressing, culminating in the oral hearing on February 12, 2022, was *sub judice*. But this was not the joint report we had asked for as to whether the Board had acted on a previously presented resolution to remove Mr. Gaitán. (*See* Order quoted in para. 17 above). Rather, Respondents presented a proposed application for "emergent relief" to suspend Mr. Gaitán and Ms. Echeverría, for the duration of the pending purported criminal proceedings that DTH had lodged against them in Guatemala, on the alleged basis that their continued service to the Company while such "proceedings"[5] were pending posed compliance risks the Company should not accept.

25. Claimants replied on February 28, 2022, informing the Tribunal that the Board had not yet acted upon Respondents' proposal for such a suspension. Respondents presented an unsolicited Reply on March 2, 2022, purporting to contest factually the Claimants' assertions about Board action or inaction. On March 15, 2022 in Procedural Order No. 2022-02 the Tribunal acted on Respondents' application for leave to remove Mr. Gaitán and Ms. Echeverría, denying the application. The Tribunal stated: "[W]hereas the decision whether to terminate Company management from their positions resides with the Board of Directors under the Shareholders' Agreement, the proposed motion lacks merit and therefore the request for leave is not granted."

26. In that March 15, 2022 Order (PO 2022-02), the Tribunal -- without deciding the disputed factual issue of whether the Board had or had not rejected a Terra resolution to suspend (not remove) Mr. Gaitán and

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them of their power to vote to remove Mr.Gaitán. (Hernández Witness Statement 1/28/22 at para. 18). He also stated, and the transcript supported, the position that Respondents' proposal at the December 9, 2021 Board meeting had been in the alternative: to remove Mr. Gaitán or to arrange the basis for his compensation in his Company role. The thrust of Mr. Hernández's witness statement is that Respondents had tried and not succeeded to negotiate with Claimants an agreement on Company-role compensation for Mr. Gaitan and Ms. Echeverria.(Id. at paras. 19-23).

[5] We use the phrase "purported criminal proceedings" because the DTH criminal complaints filed in Guatemala can be considered equivalent to a notification made to a prosecutor's office in the United States by an alleged victim asking for the prosecutor to open an investigation.

Ms. Echeverría based on alleged corrupt-practices laws compliance risks, and without deciding whether indefinite suspension of Mr. Gaitán and Ms. Echeverría was a materially different issue from their removal -- determined that we lacked power to substitute our judgment for that of the Board and to impose the Terra-appointed Directors' version of the correct outcome. The essential basis of that ruling was that the Shareholders' Agreement grants the Board the power to hire and fire the Executive Team of the Company and requires a majority vote of the directors to make any such decisions. That position was also an essential premise of our November 12 Order. It had nothing to do with any premature rejection of Respondents' evidence. That ruling left Respondents free to seek leave to make claims against Claimants on a theory of breach of fiduciary duty on the basis of the alleged actions of the Peppertree-appointed Directors of the Company in rejecting removal or suspension of Mr. Gaitán and Ms. Echeverría. They have not sought to do that.

27. So that the procedural trajectory that led us to this Award will be clearly understood, we address here a separate March 15, 2022 Order (Procedural Order 2022-01) not yet discussed. When Claimants began the process of seeking sanctions for non-compliance with the November 12 Order in January 2022, they submitted as evidence of non-compliance certain publications that had been made by DTH affiliates in news media in Costa Rica, Panama and Guatemala declaring, and addressed expressly to DTH's clients and the public, their complete disassociation from Mr. Gaitán and Ms. Echeverría. These publications had been made on or about January 10, 2022. (As will be seen later on in this Award, it turns out that the timing of those publications coincided with the filing by DTH of a criminal complaint in Guatemala on January 13, 2022, that, in its amended form dated January 20, 2022, named as defendants Mr. Gaitán, Ms. Echeverría, and two other DTH employees who allegedly criminally conspired with them). The sanction that we imposed for non-compliance with the November 12, 2021 Order, in this March 15, 2022 Order (PO 2022-01), was to require DTH to cause its affiliates to publish corrective and curative notices in the same media in which the January 10 DTH publications relating to Mr. Gaitán's and Ms. Echeverría had appeared. We stated in pertinent part:

> Respondent DTH shall cause its subsidiaries in Guatemala, Costa Rica, and Panama, as identified above … to publish forthwith, in the same media in which the notices were published, on the same corporate letterhead, and in the same language(s), font sizes and styles as the notices, the following:
>
> **IMPORTANT NOTICE TO OUR CLIENTS, CONTRACTORS AND SUPPLIERS IN THE TELECOMMUNICATIONS INDUSTRY**
>
> **[Corporate identifying information identical to that of the January 10 notice] hereby withdraws its notice dated January 10, 2022 concerning Mr. Jorge Alberto Gaitán Castro**

> **and Ms. Carol Odette Echeverría Carbrera [sic][6] de Reyes consistent with orders of an international arbitral tribunal dated November 12, 2021 and March 15, 2022 that are binding upon DTH Holdings, Inc., the parent company of [the corporate entity]. We reaffirm the ongoing roles of Mr. Gaitán Castro and Ms. Echeverría Cabrera de Reyes in our company as fully authorized executive management of our affiliate Continental Latam Holdings Limited.**

In PO 2022-01 we ordered Respondents to submit proof of compliance within ten business days.

28. On the deadline for compliance/compliance-reporting by Respondents, March 30, 2022, the Tribunal received a letter from counsel to DTH and Jorge Hernández, Allan Joseph, in which he stated that "**there was no such 'proof of compliance to submit**" because there had been no compliance. As justifications for non-compliance, Mr. Joseph's letter asserted that the Tribunal lacked jurisdiction to order the publication of the corrective notice, and, further, that "**DTH cannot comply with the Tribunal's directives in the Order because it requires the respective local subsidiaries of DTH to act contrary to local laws and local corporate governance standards.**" Mr. Joseph's letter continued: "**The local DTH entities cannot publish a notice indicating that Jorge A. Gaitán and Carol Echeverría have 'ongoing roles' in our company when these individuals … are under indictment for criminal acts which potentially place each local subsidiary in violation of local laws.**" (emphases supplied). In support of the latter position, Respondents submitted three written statements from lawyers in various countries where DTH had affiliates, and five management letters from the management of those DTH affiliates purporting to take positions in reliance on the lawyers' statements, each purporting to opine that the continued engagement by the Company of Mr. Gaitán and Ms. Echeverría presented an unacceptable compliance risk in view of the criminal allegations (by DTH) against them and the other evidence of misconduct allegedly uncovered by Respondents. They also presented a Memorandum dated February 16, 2022 issued by the American law firm Morrison & Foerster (hereinafter, the "Morrison Memorandum"), which purported to advise the Company that it was inappropriate to keep Mr. Gaitán in the role of Chief Compliance Officer for the Company while the criminal proceedings against him were ongoing. We discuss the Morrison Memorandum later in this Award.

29. As we explain in this Award, the position advanced by Mr. Joseph as counsel to DTH and Mr. Hernández (and which was joined by the other Respondents) turns out to have been insupportable due

[6] "[Sic]" connotes that there was a spelling error in the Tribunal's March 15, 2022 Order. Carbrera should be Cabrera.

to the falsity of the alleged facts on which the various legal/compliance opinions and management letter were based and on which the legal position asserted by Mr. Joseph in that March 30, 2022 letter was grounded.

30. When the deadline for compliance with the March 15 order PO-2022-01 arrived, and Respondents had not published the corrective notices, but instead had offered the reasons for non-compliance just described, Claimants again moved for sanctions. At that point, and before scheduling Respondents' submissions concerning the new sanctions motion, the Tribunal decided to consider whether there should be a full evidentiary hearing to determine the facts concerning alleged misconduct and criminality of Mr. Gaitán and Ms. Echeverría.

31. Before setting a schedule for Respondents to reply in writing to that sanctions motion, the Tribunal called for a status conference, which was held on April 12, 2022. The Tribunal discussed the prospect of such an evidentiary hearing with the Parties at the conference, after having solicited their views by a written questionnaire.

32. Following that conference the Tribunal issued Procedural Order No. 2022-06 on April 26, 2022 that made the following key points as relevant here:

1) "The Tribunal has determined, with respect to non-compliance with our March 15 Order, to defer the consideration of any possible sanction, or identifying potential sanctions for comment under Rule R-58[7], until an evidentiary hearing has been held on an accelerated basis to consider and evaluate Respondents' evidence of misconduct on the part of Mr. Gaitán and Ms. Echeverría and certain persons

[7] Notwithstanding this reference to Rule R-58 in Procedural Order No. 2022-06, after careful consideration, we have determined that Rule 58(b) of the AAA Commercial Rules does not require a separate "opportunity to respond" prior to an Award on sanctions, wherein Respondents would comment specifically on the sanctions that the Tribunal intends to impose. The sensible construction of Rule 58(b) is that the Respondents should have the opportunity to make submissions on whether the imposition of sanctions is justified. This interpretation follows from Rule 58(a) which authorizes the Tribunal to impose "appropriate sanctions". If Rule 58(b) mandated a separate comment phase on the question of whether a particular contemplated sanction is an "appropriate sanction," the Rule would so state. Moreover, Rule 58(a) deals specifically with how a Tribunal must proceed in the case of a particular type of sanction, i.e. one that "limits a party's participation in the arbitration or results in an adverse determination of an issue." In that event, the Rule does not direct a comment opportunity concerning the specific sanction, but does require that the arbitrator "shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award." We have complied with Rule 58(a) with regard to each of the sanctions imposed in this award.

who are claimed to have acted in concert with them, including Mr. Gaitán's father. Such allegations of misconduct appear to be the primary basis for Respondents' refusal to comply with the corrective disclosure mandated in the March 15 Order."

2) the Tribunal reserved hearing dates in May and early June and invited comments from the Parties concerning what witnesses should give oral testimony and what if any additional documentary evidence should be provided before the hearing.

3) Respondents were invited to submit comments in writing concerning the legal basis for their non-compliance with the March 15 Order and to respond in other respects to Claimants' motion for sanctions.

33. On April 29, 2022, Company counsel notified the Tribunal that Mr. Gaitán and Ms. Echeverría would be available to testify. Also on that date, Claimants provided dates of availability, and in a written submission provided comments on proposed witnesses and proposed additional documentary evidence to be provided by Respondents.

34. Respondents also submitted written comments on April 29, 2022, making the following assertions:

1) "The Tribunal lacks jurisdiction to order any action be taken by non-parties to this arbitration especially where those non-parties are parties to agreements with Company subsidiaries which provide for separate arbitration provisions."

2) "[T]he March 15 Order is a partial award and is part of the vacatur motion currently pending before the Southern District of New York, leaving this Tribunal functus officio."

3) "Respondents refusal to comply with the March 15 Order has nothing to do with Mr. Gaitán's and Ms. Echeverría's misconduct and there is no need to take evidence in that regard." This directly contradicted the position taken by Mr. Joseph in his letter to the Tribunal on March 30, 2022 (quoted above in Paragraph 28) In a footnote, the Respondents contended that the Tribunal's unwillingness to entertain Respondents' motion to remove Mr. Gaitán and Ms. Echeverría from their Company positions was product of "*the Tribunal's evident partiality and bias*[8]."

[8] In the April 29, 2022 submission, Respondents' accusation of Tribunal bias was linked by Respondents to the Tribunal's invitation to the Parties, made in Procedural Order No. 2022-06 on April 26, 2022, for comment on whether the Tribunal might direct the replacement of the Company CFO Mr. Quisquinay as a sanction for Respondents' violation of the Tribunal's December 8, 2021 Order. That December 8 Order had directed Respondents

35. The Tribunal considered Respondents' assertion that their "*refusal to comply with the March 15 Order had nothing to do with Mr. Gaitán's and Ms. Echeverría's misconduct.*" In electing to proceed with the announced evidentiary hearing, we also concluded that (1) only if the Respondents' factual contentions about Mr. Gaitán and Ms. Echeverría were truthful could there be any excuse -- that would result in denial of sanctions or mitigate the severity of sanctions -- for Respondents' total disregard of the Tribunal's orders of November 12, 2021, December 8, 2021, and March 15, 2022, (2) therefore hearing the evidence and giving both sides a procedurally fair chance to present evidence was a necessary foundation for our judgment about imposing any further sanction and if so the severity of the sanction to be imposed, and (3) in all events, the Claimants in their April 29, 2022 comments submission approved of the Tribunal's proposal to hold a hearing. Indeed Claimants sought the opportunity to show in a full evidentiary hearing that the Respondents' allegations of misconduct against Mr Gaitán and Ms Echeverría were baseless. They

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to take all steps necessary to ensure that the Company paid the legal bills of Company counsel. It suffices to state that the Tribunal (1) has not removed Mr. Quisquinay from his position, and (2) another solution was ordered to address the dispute over Mr. Quisquinay's refusal to pay the fees of Company counsel in PO 2022-04.

A few days later, we learned from Claimants that Respondents had presented to Claimants an allegation (allegedly not their own, but that of an anonymous "whistleblower" in mid-March 2022) that Goldman Sachs, the indirect parent entity of Claimant AMLQ, had paid a $250,000 bribe to the Chair of the Tribunal on the eve of his appointment confirmation in June 2021. This allegation appeared on an internet site and turns out to have been the second of two articles on obscure websites relating to this case and purporting to be based on a "whistleblower" report. The other, first published February 25, 2022, and said to be based on information from a whistleblower who was a former employee of Peppertree, was entitled "Peppertree Caught Up in Corruption Scandal, Whistleblower Alleges," and concerned the same ostensible FCPA compliance concerns raised by Mr. Gaitán's continued service as FCPA compliance officer that were covered in the Morrison Memorandum (see paragraphs 90 et seq. of this Award). (PPT-AMLQ Ex. 83).

As to the Goldman Sachs "whistleblower" bribery report concerning the Tribunal Chair, correspondence provided by AMLQ's counsel showed that Goldman Sachs upon investigation had determined that the allegation was baseless. The Tribunal thereafter provided to the Parties a separate refutation based on information provided by the Chair. Then Respondents asked the Tribunal to investigate, *inter alia* by issuing arbitral subpoenas to Goldman Sachs. They supported the application with executed affidavits made by forensic investigators hired by Respondents, captioned in the Southern District of New York case concerning PFA-1 but evidently not filed. The Tribunal declined to embark on the proposed investigation. Respondents have not asked the Chair to withdraw. We do not know if Respondents asked ICDR to disqualify the Chair, but if any such request was made it has not been granted. The Chair and the Tribunal considered but rejected the possibility of resignation. If the unease naturally felt in response to such allegations or the post-refutation request to investigate them could justify unseating one or all members of a sitting tribunal, some parties in arbitrations would be inclined to commit provocative acts to bring this about, and the institution of arbitration would be compromised. See William W. Park, *Arbitrator Bias*, TRANSNATIONAL DISPUTE MANAGEMENT (TDM), January 2015, www.transnational-dispute-management.com (last visited Aug. 5, 2022): "To promote the litigants' trust in the arbitral process, an arbitrator might sometimes step down just to alleviate one side's discomfort. Not always, however. In some instances it would be wrong to permit proceedings to be disrupted by unreasonable fears, whether real or feigned."

presented a list of proposed witnesses consisting of persons associated with written evidence the Respondents had presented. And they submitted proposed requests for production of documents including categories of documents that Claimants had sought for review by the Peppertree-appointed members of the Company's Board in connection with the Terra-appointed Directors' proposals for removal or indefinite suspension of Mr Gaitán and Ms Echeverría from Company management.

36. Accordingly, on May 4, 2022, the Tribunal entered Procedural Order No. 2022-07. (This Order was re-issued in a slightly amended form on May 5). We ordered Respondents to produce 11 categories of documents on or before May 12, 2022. We also ordered Respondents to cause seven witnesses to appear to give testimony. We ordered the Company to cause two witnesses to appear to give testimony: Mr. Gaitán and Ms. Echeverría. We directed the Parties to coordinate with one another on a schedule for the appearances of the witnesses. We also declared the Tribunal's intention to issue an arbitral subpoena to the Morrison & Foerster law firm ("Morrison"), whose Memorandum dated February 16, 2022 had been entered as evidence by the Respondents. We annexed to our Order a draft of the subpoena, which had been carefully drawn to minimize privilege implications, and invited comments from the Parties by May 5. Respondents did not offer any comments. Thereafter the subpoena was issued and service was accepted by Morrison.

37. On May 11, 2022, Claimants submitted to the Tribunal an email message their counsel had received from Terra's counsel on that date, which stated: "*Respondents will not be producing any witnesses for the upcoming evidentiary hearings. We have made our position abundantly clear that this Tribunal is functus officio. We also deny that 'all these witnesses are under our control.' They are not. We will file a specific response by tomorrow's deadline with specific objections but for purposes of scheduling we are not producing any witnesses. Counsel for DT Holdings, Inc. joins in taking this position.*" (emphasis supplied). On May 16, 2022, Respondents in an email to the Tribunal from Mr. Joseph confirmed that "[c]onsistent with Respondent's objections, counsel for Respondents will appear remotely *as observers*." (emphasis supplied).

38. On May 12, 2022, the Tribunal received an email from DTH/Mr. Hernández counsel Mr. Joseph stating various objections to the Morrison subpoena and indicating that a formal objection was being prepared (notwithstanding Respondents' failure to submit any response to the draft of the subpoena the Tribunal provided to the Parties for comments before it was served). Later that day DTH's objection to the Morrison subpoena and motion to quash in letter form were received from DTH's counsel. After receiving

comments from Claimants' counsel, the Tribunal denied the objection/motion to quash in Procedural Order No. 2022-09 dated May 15, 2022. That Order rejected Respondents' contention that the Tribunal was *functus officio* and incorporated the reasoning of the Tribunal on the Respondents' *functus officio* objection that had been presented in Procedural Order No. 2022-08 on May 9, 2022. [9]

39. Also on May 12, 2022, Respondents submitted comments on PO 2022-07 asserting *inter alia* that the Tribunal lacked power to conduct the hearing, that the Tribunal was *functus officio*, that the Tribunal was biased against Respondents, that the Tribunal lacked power to direct Respondents to produce evidence, and that compliance with certain of the Tribunal's requests for evidence would be illegal under laws of Guatemala and El Salvador.

40. That May 12 submission was not in the form of a motion for relief: Respondents did not ask the Tribunal to vacate PO 2022-06 or PO 2022-07. And to our knowledge Respondents did not make an application in any judicial forum to enjoin this aspect of the arbitration. We address the contentions in that submission here:

1) The Respondents' assertion that the Tribunal was biased against Respondents served no purpose, because this arbitral tribunal has no power to adjudicate issues about its own impartiality or independence. Respondents could challenge one or more Tribunal members for alleged improper bias before the ICDR, or challenge an award of the Tribunal in court on the basis of "evident partiality." Raising this accusation could not serve as a basis for the Tribunal to excuse compliance with its own order to produce evidence at and prior to a hearing.

2) The Tribunal's reasoned rejection of Respondents' *functus officio* position was set forth in PO 2022-08 and PO 2022-09. In PO 2022-08, on May 9, 2022, we addressed Respondents' contention that our December 8, 2021 Order concerning the Company's payment of fees of the Company's counsel, although identified by this Tribunal as an "order," was actually an "award" and that we were therefore powerless to address allegations in 2022 that Respondents were directing the Company CFO (also employed by DTH) to fail to make those payments. We found that, apart from our own characterization, under the most persuasive federal case law[10], our December 8 Order concerned a matter of procedure in

[9] PO 2022-08 concerned Respondents' non-compliance with our December 8, 2021 Order that directed them to facilitate, and not obstruct, the Company's payment of counsel fees of Company counsel in the arbitration.

[10] PO 2022-08 cited and discussed, most prominently, *Publicis Communication v. True North Communications Inc.*, 206 F.3d 725 (7th Cir. 2000). We also discussed Second Circuit cases that had been cited by Respondents that permit treating an interlocutory decision of an arbitral tribunal as an Award when it resolves a separate and independent

the arbitration – the right of the Company to the continued service of its counsel – and did not constitute any part, much less a substantial part, of the merits or any separate and independent claim. We also examined Respondents' *functus officio* position in PO 2022-09 on May 15, 2022, after Respondents objected to our issuance of an arbitral subpoena in connection with the issues decided in this Award, on the basis that our November 12 interim relief order, also identified by us as an "order," was also actually an "award," leaving us without power to address any further the question of whether there had been compliance with the November 12 Order. There we stated in pertinent part: "No party has asserted a merits claim concerning the status of Mr. Gaitán and Ms. Echeverría. These issues are collateral to the still unresolved merits claims, including claims by Claimants for damages allegedly caused by misappropriation of Company funds by DTH."

3) Respondents evidently did not obtain a judicial order to enjoin the proceedings on the basis that we are *functus officio*, and so, in proceedings before this Tribunal, they remain bound to comply with the Tribunal's orders concerning these proceedings or risk the consequences of non-compliance under the AAA Commercial Rules. Respondents made the decision to limit their participation in the June 3 and July 22 evidentiary hearings to the self-described status of "observers." While we did not accept the legitimacy of their reasons for imposing that limitation on their participation, we accommodated their attendance in the proceedings because as Parties they had every right to attend. And we permitted Respondents at every step to change their position and participate fully, which they elected not to do.

4) Respondents' assertion that the Tribunal lacked power under the AAA Commercial Rules to direct production of documents or the appearance of witnesses at a hearing was also without merit. See AAA Commercial Rules R-34(a) ("The parties … shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute"). That Rule applies to all issues, procedural or substantive, final or interlocutory, that a Tribunal is called upon to determine.

5) Respondents' contentions that the Tribunal directed them to provide for the appearance of witnesses that they did not control were contrary to the record. Those witnesses were either in the employ of Respondents or were professionals engaged by Respondents to produce evidence for use in the arbitration.

6) One instance of such control pertains to an opinion of a Guatemala lawyer delivered by hand to Terra internal counsel Danielle Kirby on May 12, 2022 and delivered onward to the Tribunal by Respondents' counsel on that date. (Ex. R-131). The author of the opinion, like Ms. Kirby, is among the

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claim. *See, e.g.,* Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.3d 280, 283 (2d Cir. 1986); Sperry Int'l Trade, Inc. v. Gov't of Israel, 532 F. Supp. 901, 906 (S.D.N.Y.), *aff'd*, 689 F.2d 301 (2d Cir. 1982).

witnesses whose testimonial appearance the Tribunal directed and who Respondents contend is not in their control. This Guatemala lawyer, Mario Roberto Méndez Álvarez, was listed as a witness in PO 2022-07 because Respondents submitted as evidence a purported record of a criminal proceedings hearing in Guatemala on February 4, 2022 in which Mr. Méndez appeared as counsel for the DTH affiliate that was the criminal complainant. He is a witness within the control of Respondents by the legal standards we apply.[11] His failure to appear to testify not only violates our Order but results in our giving no weight as evidence to his May 12 Opinion.[12]

7) In any event, this May 12 Opinion authored by Mr. Méndez Álvarez would furnish no excuse for Respondents' non-compliance with our Order for their production of evidence of criminal conduct by Mr. Gaitán that was presented to the Guatemala court. The "jurisdiction" objection that the Tribunal cannot require production of evidence in possession of DTH affiliates is not only akin to the jurisdictional objections with respect to those affiliates that we have rejected multiple times, but is contradicted by an undisputed evidentiary record in this case that a single individual, Jorge Hernández, controls DTH and each of its individual-country DTH affiliates and therefore an order to DTH to produce evidence is not invalid because a DTH affiliate has possession of the evidence. (We observe that our treatment of the jurisdictional issue included specific analysis of portions of the relevant agreements of the Parties in which it was evident that DTH had entered into the agreement as agent for its affiliates and not merely as a principal, such that the affiliates, contrary to Respondents' arguments, are in fact Parties to those agreements. It was also an element of our analysis that our orders directed compliance by DTH, not its

[11] Under New York law (which does not *govern* on this issue but is a suitable point of reference), "'[c]ontrol' is used in a very broad sense and includes a witness under the party's influence or one whom it may be naturally inferred is of good will to the party." Kupfer v. Dalton, 169 A.D.2d 819, 820 (2d Dep't 1991).

[12] The AAA Commercial Rules provide the Tribunal with guidance in this context. Rule R-23 provides in relevant part that "[t]he arbitrator shall have the authority to achieve a fair, efficient and economical resolution of the case, including without limitation…(d) in the case of willful non-compliance with any order issued by the arbitrator(s), drawing adverse inferences [and] excluding evidence and other submissions." Further, paragraph 53 of Procedural Order No. 2 states in relevant part that "[t]he unexcused failure of a witness to appear for cross-examination shall be a proper basis for exclusion of the Witness Statement."

Also, paragraph 11 of Procedural Order No. 2 expressed the intent of the Tribunal to be guided (but not bound) by the ICDR Guidelines for Arbitrators Concerning Exchanges of Information ("ICDR Guidelines") and the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"). Guideline 8b. of the IBA Guidelines states: "In the event any party fails to comply with an order for information exchange, the Tribunal may draw adverse inferences and may take such failure into account in allocating costs." Article 9(6) of the IBA Rules states in relevant part: "[i]f a party fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party." Article 9(7) of the IBA Rules states in relevant part that "[i]f a Party fails without satisfactory explanation … to make available any evidence, including testimony, ordered by the Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party."

affiliates, and that DTH has not at any time shown that it lacks the ability to direct the conduct of its affiliates).

8) We reject on its merits Mr. Méndez Álvarez's completely conclusory opinion that "*it would also be totally illegal to give [the Tribunal] evidence that is part of a criminal proceeding and in the possession of the attorney general's office, for criminal acts committed within the national territory that are unrelated to the specified arbitration.*" (emphasis supplied). For one thing, it is simply false that the alleged criminal acts are "unrelated to the specified arbitration." Now that we have the Guatemala amended criminal complaint filed for DTH on January 20, 2022 by Mr. Méndez Álvarez as DTH's counsel, we know that the allegations of Mr. Gaitán's and Ms. Echeverría's criminality advanced by Mr. Méndez Álvarez is mostly a re-hash of Mr. Hernández's version of the meetings in DTH's Guatemala offices on September 27-28, 2021 -- facts that formed the core factual matrix of our interim relief proceedings in October 2021, and that led to the November 12 Order.

9) Moreover, to show a genuine issue of illegality under Guatemala law that should cause our Tribunal as a matter of discretion to modify its order for production, we would need to know specifically how the witness would be exposed to adverse legal consequences in Guatemala if he or she complied with our Order. Further, Terra and DTH, the Respondent entities to which our production orders were directed, are Panama and British Virgin Islands entities, and Jorge Hernández is a resident of California. How compliance with our production orders would expose them to adverse legal consequences in Guatemala is not shown. To be clear, this opinion from Mr. Méndez Álvarez purports to opine not on the purported effect of Guatemala law on himself as a Guatemala citizen, but on the alleged illegality under Guatemala law for "Terra and/or DTH to submit information" about the Guatemala criminal complaints made by DTH affiliates against Mr. Gaitán, Ms Echeverría and certain of their former DTH colleagues. His two-sentence "opinion," citing no legal authority, fails to raise any genuine issue about illegality of compliance with our production order.

10) Respondents also submitted on May 12, 2022, a written statement by a person who identifies as Luis Edgar Morales Joya, a criminal attorney in El Salvador. The statement is partly that of a fact witness and partly purports to be an opinion on El Salvador law. (Ex. R-132). Mr. Morales states: "*I am filing criminal and civil action [against] Jorge Leonel Gaitán Paredes* [Mr. Gaitán's father] *and another, for the crimes of Management Fraud and Falsification or Alteration of Documents.*" (emphasis supplied). He did not provide a copy of either a criminal complaint or a civil complaint or any other record of the accomplished filing of such a case. Therefore we understand Mr. Morales' statement to be that as of May 12 he was preparing to file but had not filed such actions against Mr. Gaitán's father. Mr. Morales then

asserts, in regard to our order for production of evidence of misconduct by Mr. Gaitán's father, that "*decisions rendered by a foreign authority are not subject to compulsory compliance in the Republic of El Salvador until they have first fulfilled the Procedure of Formalities for Authorization of Enforcement of Judgments Rendered by Foreign Courts.*" (emphasis supplied). We read Mr. Morales's assertion of El Salvador law to refer only to steps that must be taken to have the courts in El Salvador enforce a foreign authority's document production order, but this has no bearing on Respondents' lawful obligation to comply voluntarily with this Tribunal's requests for production of evidence. Moreover, the law of El Salvador appears to be quite beside the point because our Order directs Panama and BVI entities and a California resident, all of whom agreed to arbitrate disputes before an AAA Arbitral Tribunal in New York, to produce such evidence in New York. Mr. Morales's opinion — apart from not identifying, much less supplying, the El Salvador laws he relies on — does not address the question of why El Salvador law furnishes an obstacle to their compliance with our order or exposes them to any adverse consequence in El Salvador if they complied.

11) These vulnerabilities of the May 12 legal opinions of Mr. Méndez Álvarez and Mr. Morales that Respondents' counsel tendered as evidence would or should have been apparent to Respondents' counsel, and yet in their May 12 submission to which these opinions were appended, they made no effort to explain why, in the framework of this arbitration and the AAA Rules and US/New York arbitration law, the contentions of these non-independent El Salvador and Guatemala lawyers (who were already engaged by DTH to bring criminal complaints against Mr. Gaitán and his father) should be afforded any meaningful weight. They simply stated in a conclusory way, citing those opinions, that our orders for production violated evidentiary privileges under foreign law. (Respondents' May 12, 2022 submission at p. 7).

12) The submission of these legal opinions as justification for refusal to comply with our PO 2022-07 requiring the Respondents to provide evidence illustrates the lack of any support for Respondents' position. 41. In stating their "objection" to the June 3 hearing, and to explain their refusal to provide any of the documents or witnesses they were directed to provide and to limit their participation to being "observers," Respondents' counsel told the Tribunal they would be "***happy to***" provide evidence if we were considering their motion to remove Mr. Gaitán (Tr. 06/03 at 27:8), but that our decision instead to order the same evidence to be considered in the context of a motion by Claimants seeking sanctions against Respondents for having disobeyed Tribunal orders was somehow prejudicial/unacceptable. This position has no merit.[13]

[13] Respondents during the June 3 hearing again based their refusal to present evidence in the hearing on the fact that the Tribunal had declined to hear and decide their motion to remove Ms. Gaitán and Ms. Echeverría from

SUMMARY OF THE TESTIMONY GIVEN AT THE JUNE 3 HEARING

Mr. Jorge Gaitán

42. Now summarized is the oral testimony of Mr. Gaitán at the June 3 hearing. The Respondents, on the stated basis of their objections to the proceedings, and based on their self-imposed "observer" status, declined to cross-examine. Respondents' counsel were present (on Zoom, having elected, as was their right, not to attend in person) throughout Mr. Gaitán's testimony.

Non-Compliance of Respondents with November 12 Order

43. Mr. Gaitán's undisputed testimony was that his working conditions at DTH associated with his role as CEO of the Company as of March 19, 2021 were never restored and that in fact his ability to function as CEO of the Company has deteriorated not improved since the issuance of our November 12, 2021 Interim Relief Order. He testified:

> [T]hey never restored the same conditions of March 19, 2021, which was the day that the tribunal ordered to restore, or even the people who used to work at that moment are not the same in the same roles.[14] For example, Ms. [Pineda] never ha[d] any relations with

Company Management. In that context, it is useful to quote what we said about that matter in PO 2022-09: "Respondents in several submissions have complained that the Tribunal has refused to entertain their proposed motion …That proposal has not been presented as a merits claim, nor as an application for an interim measure under AAA Commercial Rule R-37. The Shareholders' Agreement confers power to select Company Management on the Board of Directors. A Board deadlock on a proposal to change Company Management is, under the Shareholders' Agreement, a rejection of the proposed change."

We also note that before unveiling their so-called "functus officio" objection, and even thereafter (as shown in Paragraph 41 above), Respondents repeatedly importuned the Tribunal to reverse course about Mr. Gaitán - to reconsider the factual basis of the November 12 Order, to reconsider that Order based on new evidence of alleged malfeasance, and separately to act on a "motion to remove" Mr. Gaitán based on such alleged malfeasance.

[14] The Tribunal's November 12, 2021 Interim Relief Order stated in pertinent part:

> We therefore grant interim relief in the form of an injunction requiring that DTH immediately restore Jorge Gaitán and Carol Echeverría to the Company positions they occupied as of March 19, 2021, and that Respondents Terra and TBS take all necessary steps to cause DTH to comply with this Order. Further, we find that it is necessary – in order to avoid dilution of this relief through DTH potentially imposing working conditions that could amount to a constructive discharge, and in view of the practical inability of the Tribunal or the Claimants to monitor the day to day

> our operations in Central America. And all the level of harassment against us to forbid us to go back to the office has been increasing since then. It never stops. So there is no real capacity at this moment to run the company in the way that we just used to do it one year ago.

(Tr. 06/03 at 202:13-24).

OFG Project in Panama

44. With respect to the OFG project in Panama, Mr. Gaitán testified that the accusations against him by Respondents that he had violated duties as CEO of the Company by creating unauthorized liabilities of the Company toward a third party (OFG) and fraudulently representing himself to be "attorney-in-fact" for the Company[15], were without any merit. Mr. Gaitán testified to the following key points: (1) Respondents' accusation in submissions to the Tribunal that the OFG project in Panama was not disclosed to the Company's shareholders or the Board of Directors or the Development committee is false; (b) Respondents caused an English translation of a document concerning the Project to be made for the Tribunal that fundamentally changed its meaning to be inculpatory of Mr. Gaitán whereas the Spanish language document clearly showed that Mr. Gaitán had not engaged in any misconduct, (c) Mr. Hernández had full contemporaneous knowledge of the OFG project, (d) the legal representative of OFG, Mr. Jonny Reboso, confirmed to the Company in writing at Mr. Gaitán's request that no liability of the Company toward OFG existed and that "all the obligations for the developing of those 14 sites ha[d] been made by

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> operations of the Company as conducted within the framework of DTH – to (i) order the restoration forthwith of all working conditions and terms and conditions of employment by DTH that were associated with Mr. Gaitán and Ms. Echeverría holding the Company positions they held on March 19, 2021….

[15] On November 22, 2021, the deadline set by the Tribunal for Respondents to report their compliance with the November 12 Order, Respondents instead introduced exhibits related to their assertion that Mr. Gaitán had allegedly engaged in such misconduct. One such exhibit was an undated letter to Mr. Gaitán from the human resources manager of a DTH affiliate (Ex. R-76) – but clearly in the Fall of 2021 based on its text -- which stated in part: ""[Y]ou have claimed positions and roles that have not been assigned to you, as in the case of Proyecto OFG Panama, where you signed a Letter of Understanding as "Legal Representative" of Continental – a position or role you do not have – and as CEO of "DT" – also a position you do not hold. Furthermore you have made certain negotiations (Proyecto Tikal and Proyecto OFG Panama) without having authorization to do so, and which are undergoing analysis to determine if that involved losses for the Company's clients." But as discussed below in subparagraph (d), this accusation is far-fetched.

On November 30, 2021, Continental's counsel submitted to the Tribunal a letter from Mr. Gaitán to Continental's Board of Directors on that date, accompanied by a series of exhibits, responding to the accusations against him in regard to the OFG Panama Project. Respondents made further submissions in reply.

The Tribunal's conclusion that Respondents' accusations are without merit is supported not only by Mr. Gaitán's unchallenged testimony on June 3, 2022, but also by the weight of the credible evidence submitted to the Tribunal in 2021 and 2022, and by the adverse consequences resulting from the Respondents' refusal to comply with our order to provide oral witness testimony by Jorge Hernández about this matter (*i.e.* assignment of no weight to Mr. Hernández's witness statement assertions about the matter, and adverse inferences).

DTH and the local [DTH] entity in Panama. So there is no liability, not even for one dollar, for Continental Towers." (Tr. 06/03 at 205:24-206:2, 206:8-209:18), and (e) Respondents' accusation that Mr. Gaitán committed a fraud when the signed a letter to OFG in the capacity of attorney-in-fact for Continental Towers is without merit, as he had no intent to commit any fraud as evidenced by the fact that this letter was contemporaneously shared with the shareholders of Continental Towers (Tr. 06/03 at 210:15-213:24). (*See also* letter of Nov. 30, 2021 to the Board, which was forwarded to the Tribunal)

Authority to Engage the Company's Arbitration Counsel

45. With regard to Respondents' allegations that Mr. Gaitán lacked authority to engage Mr. Schachter's law firm (and another firm having international arbitration expertise) as Company counsel for the arbitration because Mr. Gaitán was not the CEO of the Company and Mr. Quisquinay was the only true member of the executive team of the Company, Mr. Gaitán refuted these allegations by his testimony that they were totally false. (Tr. 06/03 at 221:3-17). [16]

Role of Jorge Hernández

46. Mr. Gaitán testified that Jorge Hernández is orchestrating all the accusations against Mr. Gaitán. "It's not the A shareholder. We can put a name on this. Mr. Jorge Alberto Francisco Hernández is this, because he's behind every single action that any lawyer, employee, or entity on behalf of the A shareholder made." (Tr. 06/03 at 224:24-225:3).

Initial Criminal Complaint of December 2021

47. Mr. Gaitán made reference to the letter of Company arbitration counsel to the Tribunal of January 27, 2022 and confirmed that this was verified as to the facts' accuracy under penalty of perjury by Mr. Gaitán. (Tr. 06/03 at 230:2-18).

48. Per Mr. Gaitán's testimony, the signatory for DTH of the first Guatemala criminal complaint in December 2021 was an engineer who had worked under Gaitán's father in El Salvador and then was

[16] The issue of whether Mr. Gaitán was in fact the CEO of Continental Towers was already resolved by the Tribunal in the November 12 Order against Respondents and in favor of Claimants' position that on March 19, 2021, after the arbitration was underway, all Parties had re-affirmed Mr. Gaitán's status as Company CEO in writing. That letter agreement is in the record of this arbitration. That followed extensive written submissions of evidence and argument, and oral testimony subject to full cross-examination of Mr. Gaitán and Mr. Hernández. But Respondents continued to fill the record with assertions to the contrary.

moved to "run the operations in Guatemala under my direction." (Tr. 06/03 at 233:8-9). At the date and time referenced in the original criminal complaint (October 20, 2021) Gaitán "was in the hearings for the interim relief measure that Peppertree filed to the Tribunal." (Tr. 06/03 at 235:24-236:1). [17]

49. Mr. Gaitán did not receive notification of the filing of the December 2021 first criminal complaint from Respondents, or Mr. Guzman, or the prosecutor's office or the court. He learned of it in January 2022 as the result of follow-up by Mr. Gaitán's Guatemala employment counsel of information supplied in a conversation Mr. Gaitán had with Respondents' co-counsel Rafael Briz of the Mayora y Mayora law firm (identified by Mr. Gaitán in his testimony as Mr. Hernández's personal attorney) in December 2021. Mr. Gaitán initiated that conversation to propose an agreement that would enable him to "go back to the work in Continental Towers" (which the Tribunal understood to mean go back to work under the terms and working conditions that had prevailed at March 19, 2021). (Tr. 06/03 at 236:12-13). Mr. Gaitán's testimony was that Mr. Briz replied:

> [H]is [i.e. Mr. Briz's] answer was that Mr. Hernández sent me three messages. The first one, that I created great damage to the company. The second one, that there's not going to be any negotiation until I accept to resign from Continental Towers. But the third one is that until we didn't reach an agreement [understood by the Tribunal to mean for so long as they didn't reach an agreement], he [Mr. Hernández] is going to be entitled to put all – to take all the legal actions against me.[18]

(Tr. 06/03 at 236:14-24).

50. At that point Mr. Gaitán, understanding this last remark by Mr. Briz as a signal that one or more legal claims against Mr. Gaitán had been or would be filed, asked his employment lawyer to begin "monitoring with the judges and with general attorney's office if I have a complaint" and in mid-January the

[17] October 20, 2021 was in fact the date of a witness statement provided by Mr. Gaitán with exhibits. The oral hearing on interim relief that preceded the November 12 Order was held on October 22, 2021.

[18] The record shows that by this time Mr. Gaitán and Ms. Echeverría had also commenced employment litigation related to their separation from DTH in the competent court to hear employment claims in Guatemala. (In fact, Mr. Hernández asserted in a Witness Statement that their commencement of employment litigation was a reason they could not longer work for DTH. (Jorge Hernández Witness Statement, Feb. 7, 2022 at para. 13)Among the allegations made against Mr. Gaitán and Ms. Echeverría by Respondents in this arbitration was that the attorney they engaged for the employment case had been arrested on charges of money laundering. Respondents submitted to Morrison & Foerster as evidence of this occurrence a news media report of that arrest, and the Tribunal learned of this when the Morrison Memorandum was submitted by Respondents. Respondents failed to submit – either to Morrison or the Tribunal -- the available news media reports that the charges against this attorney had subsequently been dismissed. (PPT-AMLQ Ex. 73). The Tribunal learned this from a submission made by Claimants, and it was confirmed in Ms. Echeverría's June 3 testimony (Tr. 06/03 at 128:14-17: "No charges were put on him and he was released because of lack of merit. And that's something that's – was all over the news in Guatemala", confirmed Tr. 106/03 at 29 with reference to the newspaper article in *Prensa Libre*, "the largest printed media in Guatemala").

employment lawyer notified Mr. Gaitán of this December 2021 criminal complaint. (Tr. 06/03 at 236:25-237:7). That criminal complaint is currently "under dismissal process" because, according to the information provided to Mr. Gaitán by his counsel in Guatemala, the prosecutor's office "required two times to Mr. Carlos Rolando Guzman Lopez to confirm the claim, and he didn't show to the general attorney's [understood by Tribunal as the "prosecutor's" or "attorney general's"] office." (Tr. 06/03 at 240:6-12, confirmed Tr. 06/03 at 241:12-23 and Tr. 06/03 at 248:4-9).

Second Criminal Complaint in January 2022

51. Mr. Gaitán testified that the second criminal complaint in Guatemala (that is to say, the criminal complaint filed by DTH January 13, 2022 against another individual, and amended January 20, 2022 to assert complaints of criminal conduct against Mr. Gaitán and others, see below at para. 85) is in the same status as the first, that is to say, it is a complaint lodged with the prosecutor's office and the prosecutor has not made any decision to charge Mr. Gaitán with any crimes. (Tr. 06/03 at 245-249, confirmed Tr. 06/03 at 257). Concerning the alleged judicial proceeding for the issuance of provisional measures (*ne exeat* order and bank account attachment) dated February 4, 2022 reflected in Respondents' Ex. R-126, Mr. Gaitán testified that neither he nor Ms. Echeverría nor any attorney for either of them was present, because they had no advance notice of the proceedings. (Tr. 06/03 at 246, 251). They only learned of the alleged proceeding when they read Mr. Hernández's written testimony in this arbitration on February 8, 2022 and Respondents' submission on that date of Ex. R-126 (Tr. 06/03 at 253-254). Mr. Gaitán does not know if the two interim orders described in Ex. R-126 (*ne exeat* and bank account attachment) were officially entered, but did know that the orders had not taken effect and his bank accounts are "still working." (Tr. 06/03 at 261-262). Mr. Gaitán attended the June 3 evidentiary hearing in New York without violating any order, is lawfully outside Guatemala, is not a fugitive and has not been charged in Guatemala with any crime. (Tr. 06/03 at 223:14-16).

52. According to Mr. Gaitán, testifying based on what was reported to him by his Guatemala counsel in the criminal case, the February 4, 2022 hearing occurred because this criminal complaint did not first go to the prosecutor's office as is customary but was initially "put directly to a judge. The judge grant[s] these measures against us, and then they send the file to the general attorney's office… and they start an investigation…." (Tr. 06/03 at 255:11-17). As far as he knew from his counsel, who obtained and listened to the audio recording of the February 4 hearing, no evidence was presented at the February 4 proceeding represented by Ex. R-126. (Tr. 06/03 at 262).

53. Mr. Gaitán subsequently made a submission to the prosecutor's office through his counsel (Tr. 06/03 at 256:12-14) – and the Company's arbitration counsel provided an English translation to the Tribunal on June 30, 2022 pursuant to the Tribunal's request made during the hearing.

54. The provisional measures reflected in the February 4, 2022 proceedings record Ex. R-126 are the subject of a dismissal motion before the criminal court that was scheduled to be heard on May 24, 2022 but that hearing was postponed because "[a]t the last minute, Mr. William Rene Méndez (DTH's co-counsel in the criminal complaint filing, and father of Respondents' in-house attorney William Méndez Araújo) asked to postpone the hearing because he has like a back pain or some kind of sickness." (Tr. 06/03 at 256:16-22). Mr. Gaitán's testimony as understood by the Tribunal is that after May 24 but before the June 3 hearing, DTH's counsel in the criminal complaint matter made another submission of evidence to the prosecutor, consisting of Mr. Schachter's communications to the Tribunal (as certified by Mr. Gaitán) with their exhibits, which had been furnished to DTH criminal complaint counsel by the Mayora y Mayora law firm, co-counsel to Respondents. (Tr. 06/03 at 256-57).

Termination of Employment of Mr. Gaitán's Father

55. Mr. Gaitán, asked about his knowledge of the employment termination of his father at a DTH affiliate, testified that (i) Jorge Hernández asked Mr. Gaitán's father ("Gaitán Sr.") to issue "letters" commenting negatively on Peppertree's Board member John Rainieri, which Gaitán Sr. declined to do because he did not know Mr. Rainieri, (ii) he learned from his brother that, in October or November 2021, Jorge Hernández had asked his father to issue an affidavit stating that Mr. Gaitán suffered from mental illness (presumably for use in this arbitration, following the pattern of the roughly two dozen declarations filed by Respondents and purporting to be given by Respondents' employees in support positions of the Respondents in this case, including derogatory assertions about Mr. Gaitán's character and behavior toward fellow employees) , that his father refused to do so, and thereafter his father received a direct call from Mr. Hernández saying that under the current circumstances it was imperative that he be suspended from his position and he was instructed to remove all his belongings from his office in El Salvador within 24 hours. (Tr. 06/03 at 269-270). Mr. Gaitán testified that DTH continued to pay Mr. Gaitán's father through December 2021, perhaps January 2022, and then his father received a letter from Carlos Guzman (the same Carlos Guzman who acted as complainant in the December 2021 criminal complaint filing) saying that Mr. Gaitán's father had been terminated from his post with DTH in El Salvador because of misappropriation of funds. (Tr. 06/03 at 270-271).

56. The Tribunal observes that Mr. Guzman was among the witnesses that Respondents were ordered to bring to evidentiary hearings to testify before the Tribunal, and whose failure to appear was an unexcused violation of our Procedural Order 2022-07.

Claims of Embezzlement and Tax Fraud Against Mr. Gaitán and His Father in El Salvador DTH Affiliate Audit Report

57. Mr. Gaitán testified that it was some time later in January 2022 that he learned, from reading submissions in the arbitration filed by Respondents, of an alleged audit investigation that uncovered alleged embezzlement of funds by Mr. Gaitán and his father. (Tr. 06/03 at 276). Mr. Gaitán testified that there was no truth to the Respondents' allegations of embezzlement, and similarly no truth to Respondents' allegations to criminal tax fraud (Tr. 06/03 at 277).

58. Mr. Gaitán testified that the embezzlement allegations were part of a pattern of behavior typical of Mr. Hernández as Terra's controlling person: to terminate the employment of persons who refused to sign documents to support his positions in the arbitration, and then to provide an "excuse" (understood by the Tribunal to mean a false explanation that, if true, would have justified the employment termination). (Tr. 06/03 at 271-273).

59. Mr. Gaitán testified that the DTH affiliate in El Salvador was one of the longest-operating ("most aged") of the companies controlled by Mr. Hernández, and that it was managed with the participation of ("in conjunction with") Mr. Hernández, Mr. Quisquinay and Mr. Gaitán's father (Tr. 06/03 at 272). The Tribunal understood this testimony to mean that any actual embezzlement of funds by Mr. Gaitán's father could not have occurred without participation of or contemporaneous detection by Mr. Hernández and/or Mr. Quisquinay.

60. Mr. Gaitán also testified that transactions identified in the audit report as improper payments to him, to Ms. Echeverría and to others "actually are sales commissions which are referenced in the report linked directly to a site development, which are – it is normal." (Tr. 06/03 at 272). The Tribunal understood this to be corroborative of Ms. Echeverría's testimony (described below) that the audit report improperly portrayed as misappropriated funds amounts that were legitimately earned and paid as sales commissions to employees related to site development.

61. The Tribunal observes that our Procedural Order 2022-07 directed Respondents to produce, and they have failed without valid excuse to produce: (i) "[e]very document provided by Respondents or any of

their affiliates to the auditor that has conducted the forensic audit on behalf of the El Salvador DT entities", and (ii) "[t]he entire forensic audit file and workpapers of the auditor that has conducted the forensic audit on behalf of the El Salvador DT entities."

Oral Testimony of Ms. Carol Echeverría on June 3, 2021

62. Ms. Echeverría was shown her witness statement dated October 20, 2021 and she confirmed that it was truthful and accurate. (Tr. 06/03 at 66:19-67:6, 67:13-18). Respondents elected not to cross-examine Ms. Echeverría, and they have only controverted the contents of her witness statement in witness statements and oral testimony from October 2021 that the Tribunal, in making its November 12 Order, determined was not reliable and accurate. Accordingly, the contents of Ms. Echeverría's October 20, 2021 witness statement are treated in this Award as truthful and accurate. The summary of Ms. Echeverría's testimony below is supplemented as to certain details taken from that witness statement.

Meetings with Jorge Hernández in September 2021

63. In a private meeting initiated by Jorge Hernández and held at a Guatemala City restaurant, Mr. Hernández told Ms. Echeverría that Mr. Gaitán had not been invited by him to join in this meeting because Mr. Gaitán had damaged the Company by enabling Company counsel, Mr. Schachter, to send a letter to the Shareholders in March 2021 stating that the Company would only disburse funds to build new towers if the new towers were approved by all the Shareholders. (Tr. 06/03 at 74-75).

64. A meeting on September 28, 2021 initiated by Mr. Hernández, was held in Mr. Hernández's office within the Guatemala City office of DTH, was attended by Ms. Echeverría and her "team" including Marisabel Umana, Virginia Morales and Suly Ochoa. Mr. Gaitán was present, as were Mr. Hernández and two lawyers, William Méndez Jr. who works for certain of Mr. Hernández's companies, and Rafael Briz of Mayora y Mayora, one of the Respondents' counsel of record in this arbitration. (Tr. 06/03 at 77-87).

65. At the instruction of Mr. Hernández, each member of the "team" was directed to hand over their computer to a representative of the DTH information technology department, according to Mr. Hernández so that a "backup" of the data on their computers could be made. The IT department representative arrived with "some external memory devices" to accomplish this "backup." (Tr. 06/03 at 85).

66. This "backup" regimen was disconcerting for Mr. Gaitán "because he couldn't give complete backup of his personal computer, because it was personal and because he has there, later on I understood, a lot of information about the case, about the arbitration process, so he could not deliver those documents to one of the part[ie]s of the arbitration." (Tr. 06/03 at 85).

67. This was clarified in testimony in response to a question from the Chair of the Tribunal:

> Q. If I understand correctly, you're saying that Mr. Gaitán's concern, as you understood it to be expressed at the meeting, was that part of the information on his personal computer related to the arbitration and his role as an officer of the company, correct?
>
> A. Correct. I think it's correct.
>
> Q. And Mr. Gaitán's concern as expressed was that access to that information should not be given exclusively to one shareholder rather than to both shareholders at the same time, is that correct?
>
> A. That's correct. That's my understanding of that.

(Tr. 06/03 at 86).

68. The previous day Mr. Gaitán had asked Ms. Echeverría and her team, by text message sent from a meeting he was having with Mr. Hernández that Ms. Echeverría did not attend, to remove his personal effects from his office and put his belongings in his car. Ms. Echeverría had complied. (Tr. 06/03 at 90-91).

69. The lawyers, Mr. Rafael Briz and Mr. William Méndez Araújo (son of the attorney William Méndez who represented DTH with another attorney in the 2022 criminal proceedings), went outside to inspect Mr. Gaitán's car "to see if he has stolen property from the company because he asked us to empty his office." (Tr. 06/03 at 90). Mr. Briz and Mr. Méndez Araujo confirmed that there were only personal items belonging to Mr. Gaitán in his vehicle, and an ensuing inspection of Mr. Gaitán's office by them also showed that only personal items had been removed. (Tr. 06/03 at 90-91).

Respondents' Allegations of Criminal Conduct by Ms. Echeverría and Mr. Gaitán

70. Claimants' counsel questioned Ms. Echeverría about Mr. Hernández's accusations of misconduct made in his witness statement dated January 28, 2022 (to which no weight is given in favor of Respondents' by the Tribunal for the reasons we have stated).

> Q. In paragraph 26 Mr. Hernández says about you, "Second, Echeverría's reckless disregard for the confidentiality of DT's sensitive information, including attorney-client privileged information, shows exactly why she and Gaitán cannot be allowed to access the offices of DT Guatemala. They are abusing confidential information they stole from DT when they left and have refused to return, and they are doing it to support their baseless employment law claims in Guatemala." Do you see paragraph 26?
>
> A. Yes.
>
> Q. What's your response to that allegation?
>
> A. We did not steal anything and we did not disregard the confidentiality.
>
> Q. Do you have a view as to why it is at this point in time that Mr. Hernández would accuse you of such things?
>
> A. In my opinion, it has a lot to do with the first witness statement we submitted in this arbitration process.
>
> Q. Being the fact that you wouldn't take Mr. Hernández's side?
>
> A. Yes. I mean, we – when we started being neutral, Mr. Hernández was not happy with us because we were trying to be neutral. And in my witness statements before you can see that he asked – he mentioned that I was not writing letters to support his case, and then with the – with annexed we included in the first and second witness statements, that's what he thinks it's like violating confidentiality.

(Tr. 06/03 at 100-01).

71. On February 4, 2022, Ms. Echeverría had no knowledge of a hearing in a criminal proceeding against her that was held in a Guatemala criminal court. She learned about it for the first time in the from the witness statement of Mr. Hernández submitted in this arbitration on February 7, 2022. (Tr. 06/03 at 102-103).

72. Ms. Echeverría through her lawyers in Guatemala was able to obtain information from the prosecutor's office about the criminal complaint against her and Mr. Gaitán. In that way she has learned that "we are not charged with any crime." Of significant importance, she learned that the evidence filed by DTH in support of the criminal complaint consisted of the exhibits to Mr. Gaitán's and/or Ms. Echeverría's October 20, 2021 witness statements in this arbitration. "So that's the proof that we disclosed confidential information." (Tr. 06/03 at 107, confirmed at Tr. 06/03 at 119-123). That evidence

also included photos taken by the security cameras in the DTH office parking lot in Guatemala City on September 27, 2021 showing Ms. Echeverría putting Mr. Gaitán's personal belongings and an empty package of a USB memory stick in his vehicle. (Id.)

73. The criminal complaint against Ms. Echeverría and others (filed January 2022, as it was later learned) involved some irregular aspects according to the report to Ms. Echeverría from her lawyer. One was that the proceeding was initiated against another individual, and then amended to include Mr. Gaitán, Ms. Umana, Mr. Berger and Ms. Echeverría. Another was that it is not customary that precautionary measures such a *ne exeat* and attachment would be entered by the court before there had been any investigation by the prosecutor's office or a request from the prosecutor's office for such measures based on their investigation. (Tr. 06/03 at 110--112).

> In this case that didn't happen. They went directly to the judge. They had a claim against someone else, someone don't know for these allegations, for aggravated theft, fraud, material misrepresentation, use of information and criminal conspiracy. So they did it for this third person that, according to our personal lawyers, does not exist. That number, that identification number does not exist, and the name doesn't match with the identification number. (Tr. 06/03 at 110-111).

74. The court order granting precautionary measures has not yet been withdrawn, due to the postponement of a scheduled May 24 hearing that did not occur "because at the last moment Mr. William Méndez Sr. who is the one that's doing the case against us at the last moment said he could not attend because he has a back pain or something. So we were not able to have the hearing about it." (Tr. 06/03 at 111-112).

75. These precautionary measures did not come into existence as a court order on February 4, 2022, but "around March." (Tr. 06/03 at 115). The *ne exeat* order, to the extent it is in force, has not been violated by Ms. Echeverría because she has been outside Guatemala the entire time since the order was issued. (Tr. 06/03 at 115). (The Tribunal understands Ms. Echeverría's testimony to be that she did not violate the *ne exeat* order, because in her own personal situation, being outside of Guatemala, there was no occasion to test whether it was being enforced or not). The bank account attachment to her knowledge has never been delivered to any of her banks. (Tr. 06/03 at 116).

76. Ms. Echeverría submitted a written witness statement to the prosecutor's office. (Tr. 06/03 at 122). This was later provided to the Tribunal by the Company's counsel based on the Tribunal's request.

Claims of Embezzlement in El Salvador DTH Affiliate Audit Report

77. With reference to the El Salvador DTH affiliate's forensic audit indicating improper payments, Ms. Echeverría testified that the payments were entirely proper sales commissions on co-locations in the Continental Towers portfolio that were paid to incentivize the sales force. (Tr. 06/03 at 144-149). The possibility of stealing funds did not exist, as all payments had to be approved by the financial department led by CFO Quisquinay. (Tr. 06/03 at 148). She received instructions to use sales commissions to incentivize the sales force and assumed those instructions originated with Mr. Hernández. (Tr. 06/03 at 150-151).

CONCLUSIONS

78. Based on the entire record before the Tribunal including the oral testimony of Mr. Gaitán and Ms. Echeverría and Ms. Ruti Smithline, partner in the Morrison & Foerster law firm (as discussed separately below in the context of the Morrison Memorandum at paras. 90 *et seq.*), the documents from the Guatemala criminal complaint case docket furnished by Company counsel on June 30, 2022 in response to the Tribunal's request on June 3, and the adverse inferences resulting from Respondents' unexcused failure to produce evidence that the Tribunal ordered them to produce, the Tribunal makes the following conclusions pertaining to the question of whether sanctions should be imposed and if so what sanctions:

1) Jorge Hernández acting for the Respondents forced Jorge Gaitán and Carol Echeverría out of their DTH positions in September 2021 because he considered them to be insufficiently supportive of the Respondents' position in this arbitration. The notion that they were replaced in their DTH positions because they abandoned those positions was correctly rejected by the Tribunal in our November 12 Order, and the record as it has been developed confirms that. Respondents' insistence, in post-November 12 submissions to this Tribunal, in courts of law, and in soliciting the Morrison Memorandum from Morrison, that they abandoned their DTH posts, has been a stubborn and costly adherence to fabricated facts.

2) In this regard, we are particularly influenced by our deeper appreciation for the mistreatment of Mr. Gaitán at meetings called by Mr. Hernández in the Guatemala City offices of DTH on September 27-28, 2021.

a) The interactions among Mr. Gaitán, Ms. Echeverría and Mr. Hernández on and around September 27-28, 2021 were the result of a confrontation demanded by Jorge Hernández to register his displeasure with the Company's positions in the arbitration which he found to be

insufficiently supportive of Respondents. This was part of an effort by Mr. Hernández to overcome the Shareholders' letter agreement signed March 19, 2021 concerning the neutrality of the Company in the arbitration by forcing the Company's Executive Management team to act, in fact, in a fashion that favored Respondents' position.

b) Mr. Gaitán, having a well-founded fear that he was about to be terminated and would be unable to return to the DTH office premises to retrieve personal items, asked his co-workers Carol Echeverría, Juan Berger and Marisabel Umana to assist him in loading his personal items in his vehicle. They did so. This occurred on September 27, 2021 while Mr. Gaitán was in a meeting with Mr. Hernández.

c) The photos submitted to the Guatemala criminal prosecutor by DTH as exhibits to the amended January 2022 criminal complaint – photographs taken by the security cameras in the parking area of the DTH affiliate offices in Guatemala City on September 27, 2021, showing Mr. Gaitán's colleagues loading items in his vehicle -- do not show DTH property being stolen by Mr. Gaitán, but reflect the placement in Mr. Gaitán's vehicle of personal items of Mr. Gaitán.

d) At the insistence of Mr. Hernández, another meeting was held at the DTH Guatemala City office on September 28, 2021, on one hour's notice, attended by: Messrs. Gaitán, Berger and Hernández, Ms. Echeverría and Ms. Umana, and also, as relevant here, Respondents' outside counsel and arbitration co-counsel Rafael Briz and DTH in-house lawyer William Méndez Araújo (as noted, the son of the 2022 criminal complaint co-counsel William Rene Méndez).

e) The office facility in which the meeting was held was secured by armed bodyguards under the control and direction of Mr. Hernández. This fact caused Mr. Gaitán to be under justifiable fear of physical coercion.

f) At this meeting, Mr. Hernández accused Mr. Gaitán of having removed company assets (meaning, in this context, property of Continental Towers or DTH) from Mr. Gaitán's office. Mr. Gaitán denied this, explaining that he had only removed personal items and that they were still in his vehicle. Mr. Hernández ordered Mr. Briz and Mr. Méndez Araújo to search Mr. Gaitán's personal vehicle, which they did, and the search revealed that there was no Company property in the vehicle but only, as Mr. Gaitán has asserted, the personal items he had caused his colleagues to place in the vehicle during the preceding day.

g) Mr. Hernández also ordered a search of Mr. Gaitán's office and work space, done shortly after the completion of the vehicle search, by Mr. Briz and Mr. Méndez Araújo, and it was confirmed that no Continental or DTH property had been taken.

h) In the same meeting, Mr. Hernández demanded that Mr. Gaitán, Ms. Echeverría, Ms. Umana and Mr. Berger turn over their computers to the head if the IT department ostensibly to be "backed up," and they complied. This resulted in "backing up" (that is to say, copying) of all the files on their respective computers including the Company's operating files. The copied data was saved to external hard drives brought in by the IT department. Mr. Hernández and Mr. Briz told Mr. Gaitán that he could not leave until the computer "backups" were completed - which as to Mr. Gaitán's personal laptop computer did not occur until 10:30 pm, by which time Mr. Gaitán had been detained under fear of physical restraint by armed guards for more than seven hours.

i) Therefore the only evidence in the record concerning the allegations of the amended criminal complaint of January 20, 2022 that "*the defendants did not hand over the information in their computers, as they emptied more than ninety-five percent of all the information they contained before returning them*" and that this "*destruction with no authorization shall be considered a criminal offense*" shows that these allegations were baseless. So too are the other related factual allegations in that amended criminal complaint, for example that Mr. Gaitán and the other defendants "*planned in advance to destroy and erase all the records that were available in the computers and cell phones that they used … for their own personal benefit and harming [DTH].*" (emphases supplied).

j) Concerning the participation of Mr. Briz in the meetings and events of September 28, 2021, we observe that Mr. Briz has been co-counsel to Respondents in this arbitration from the start. The Company, of which Mr. Gaitán was CEO, had separate legal representation in the arbitration, approved on March 19, 2021 in writing by all the Shareholders of the Company, and so in any meeting concerning the arbitration in which Respondents' counsel were present, Mr. Gaitán as Company CEO should have been afforded the opportunity to have the Company's counsel participate. Mr. Briz as Respondents' co-counsel in a New York seated international arbitration ought to have been sensitive to the observance of international standards of conduct for lawyers in international arbitration. *See, e.g.*, Guideline 19 in the IBA Guidelines on Party Representation in International Arbitration (2013) ("A Party Representative should make any potential Witness aware that he or she has the right to inform or instruct his or her own counsel about the contact and to discontinue the communication with the Party Representative.") Instead he contributed to the coercive environment of the meeting orchestrated by Mr. Hernández. Mr. Hernández's insistence during that meeting to hold Mr. Gaitán hostage by express or implied threats of (1) DTH employment-related retaliation, and (2) physical intervention of armed guards

reporting to Mr. Hernández[19], until a "backup" of his personal laptop computer was made, enabled Mr. Hernández to copy electronic communications between Mr. Gaitán and Company counsel, between Mr. Gaitán and Claimants or their counsel, and Mr. Gaitán's own personal notes about his Company work, that may have been stored on his devices, whether stored on the DTH email server or otherwise. Mr. Briz, as co-counsel in the arbitration should have advised his client that the rules of arbitration governed information exchange among the Parties and that the potential involuntary procurement of arbitration-related information stored on Mr. Gaitán's computer and belonging to the Company or to Mr. Gaitán personally raised questions of propriety that should have been addressed before information was unilaterally seized. Moreover, by September 28, 2021, this Tribunal had already set boundaries for information exchange that limited disclosure in Phase 1 of the arbitration. Those boundaries were applicable to all Parties and the unilateral seizure, potentially, of communications between Mr. Gaitán and Claimants held on Mr. Gaitán's personal computer was in disregard of our rulings.[20]

k) Mr. Gaitán, deprived of the ability to consult Company counsel during the meeting let alone to have Company counsel present, could not have been expected to know what his obligations were as company CEO to protect arbitration-related communications from such forced seizure.

79. There was no wrongdoing by Mr. Gaitán in connection with the so-called "Panama [OFG] Project" much less any wrong-doing that first came to light after our November 12 Order, as Respondents falsely asserted when they first raised this matter in November 2021 in the context of seeking reconsideration of the November 12 Order and removal of Mr. Gaitán from Company Management. The undisputed

[19] The presence of armed guards under the control of Mr. Hernández is a fact mentioned in the witness statement of Mr. Gaitán given to the Guatemala prosecutor's office, furnished by Company counsel to the Tribunal on June 30, 2022. Mr. Schachter's letter to the Tribunal dated October 11, 2021, verified by Mr. Gaitán, referred to the presence of Mr. Hernández's "personal security staff."

[20] The Tribunal on August 12, 2021 entered Procedural Order No. 3 that adopted a Phase 1 process concerning sale of the Company and stated that "[d]isclosure relevant and material to Phase 1 may be sought in the manner specified in Procedural Order No. 2." Paragraphs 42 *et seq.* of Procedural Order No. 2 set forth a Tribunal-supervised method for Parties to seek documents from other Parties via Document Production Requests at such times as the Tribunal would allow. Whether, in the context of the arbitration and the Company's arbitration status as a "Nominal Party,"a Shareholder like Terra or its affiliate DTH could make a demand outside the arbitration to obtain the Company's communications with the other Shareholders was not a question Respondents and their counsel should have answered by unilateral seizure of Mr. Gaitán's personal computer and copying of all data on that computer under the pretext of making a backup of data sent or received on the DTH email server.

evidence in the record (which includes Mr. Hernández's January 28, 2022 and February 8, 2022 witness statements, although these are given no weight by the Tribunal based on his refusal to appear for cross-examination as ordered) is that Mr. Hernández was fully informed of the transaction between DTH and OFG and approved of it, and that no liability of the Company arose from the transaction, whether by virtue of Mr. Gaitán stating that he was "attorney in fact" for the Company or otherwise. (*see* above at para. 41). There was no impropriety by Mr. Gaitán in making reference to himself as attorney-in-fact for the Company, as he was its CEO.[21]

80. There was no merit to the allegations of embezzlement or tax evasion made in the El Salvador DTH affiliate's audit report after the termination of Mr. Gaitán's father as El Salvador country manager for DTH and his replacement with Carlos Guzman. The alleged funds misappropriations described in that report were properly-earned sales commissions of employees and proper expense reimbursements. We find that the preparation of this audit report was motivated in part by Respondents' desire to present an apparent justification for the employment termination of Mr. Gaitán's father, a long-time DTH employee, when in fact that termination was a retaliation directed by Mr. Hernández for the refusal of Mr. Gaitán's father to participate at the request of Mr. Hernández in his efforts to tarnish Mr. Gaitán in this arbitration. These conclusions are based on the testimony of Mr. Gaitán and Ms. Echeverría, which the Tribunal found to be credible; the additional enhancement of credibility resulting from Respondents' election not to cross-examine them; the suspicious timing of the audit report itself; the inferences of collaboration in the manufacture of false evidence that we draw from the fact that Mr. Guzman was both the successor to Mr. Gaitán's father as country manager in El Salvador and the nominal complainant in the December 2021 criminal complaint in Guatemala, and the adverse inferences resulting from Respondents' unexcused disregard of our order (PO 2022-07) to produce documents concerning this audit report.

81. The December 2021 criminal complaint against Mr. Gaitán filed in a Guatemala criminal court by a DTH employee, Mr. Guzman, a proxy for DTH, was based on alleged "Theft" of information that consisted of Mr. Gaitán having submitted DTH documents, that were allegedly DTH confidential information, as exhibits to a certified statement he made in this arbitration on October 20, 2021. We find there was no

[21] Respondents have made no submission that British Virgin Islands law, applicable to the Company, or Panama law, applicable to DTH, prohibits a CEO from claiming to be its attorney-in-fact. We also observe that Respondents' effort to have Mr. Gaitán removed from his role as Company chief compliance officer with responsibilities for compliance with the US Foreign Corrupt Practices Act, and equivalent applicable laws of other nations, is seemingly at odds with the position that he was not an attorney-in-fact for the Company.

good faith factual basis for - Mr. Gaitán's conduct to have been the subject of a criminal complaint and that the treating of that conduct as criminal was retaliatory for Mr. Gaitán's neutral role in the arbitration as Company CEO:

1) Mr. Guzman was among the witnesses whom we ordered Respondents to cause to appear to testify in the evidentiary hearing, and without valid excuse Respondents determined that Mr. Guzman would not appear. The alleged DTH confidentiality agreement that allegedly limited Mr. Gaitán's ability as Company CEO to use in the arbitration DTH records to which he had access in his DTH role, was not produced to the Tribunal. In the proceedings leading to the November 12 Order, no motion was made by Respondents to strike from the record any of the exhibits to Mr. Gaitán's certified statement of October 20, 2021. These exhibits, like all exhibits in the arbitration, are Confidential Information under the Confidentiality Order in this case, and it is not alleged by Respondents in this arbitration, or in DTH's Guatemala criminal complaints, that these exhibits were deployed in the arbitration as a means to channel them to a wider audience.

2) Of the five exhibits presented with Mr. Gaitán's witness statement of October 20, 2021, only Exhibits JG-1 and JG-6 were internal to DTH or Respondents. [JG-5, initially presented in error, was removed]. JG-1 was an internal memo to employees dated October 23, 2020 announcing the commencement of arbitration among the Shareholders of the Company and saying that communications about the arbitration from the Company or any Shareholder should be directed to Kristha Pineda (an aide to Mr. Hernández). Nothing about that memo could conceivably warrant the filing of a criminal complaint alleging theft or misappropriation of DTH secrets that consisted of displaying that memo in this arbitration. As to Ex. JG-6, the excerpts of that document that were translated into English for the Tribunal were generic expressions of praise and commendation by Mr. Hernández for the work of Mr. Gaitán and Ms. Echeverría prior to the commencement of this arbitration.

3) We cannot fathom how, in good faith, these items could be made the subjects of a criminal complaint for theft of DTH confidential information. It is therefore not surprising to learn, as we did in the June 3 hearing and from the additional information provided by the Company in response to the Tribunal's request — that the present status is that no criminal charges bearing the imprimatur of a prosecutor have ensued from the December criminal complaint filed for DTH in the name of Mr. Guzman.

82. Every activity in this arbitration founded on the premise that Mr. Gaitán stood justly accused of serious crime in the December 2021 Guatemala criminal complaint (and also the January 2022 criminal complaints, treated in the ensuing paragraphs) was a waste of time, energy and expense because that

criminal complaint was a contrivance by Respondents. This could not have been unknown to Respondents' arbitration counsel unless they willfully blinded themselves to the truth by asking no questions about the basis for the December 2021 Guatemala criminal complaint.

83. It follows that the publication on January 10, 2022, by DTH affiliates in Guatemala, Panama and Costa Rica, in widely distributed online news media and a press release, of broad categorical statements of disassociation from Mr. Gaitán and Ms. Echeverría, cannot reasonably have been motivated by a genuine business motive of DTH or Terra to protect the goodwill and reputations of the local DTH affiliates in those countries. The filing of a new criminal complaint by DTH via Mr. Méndez Álvarez and Mr. William Rene Méndez as co-counsel on January 13, 2022, against an alleged individual who was misdescribed therein as an employee of DTH, and that morphed into an "extended" and "expanded" complaint against Mr. Gaitán and Ms. Echeverría and their alleged co-conspirators on January 20, 2022, and Respondents' approach to Morrison for an Opinion in the days between the January 13 and January 20 versions of the criminal complaint, lend strong support to this view.

84. It similarly follows that the Respondents' refusal to comply with our March 15, 2022 Order, calling for the publication of corrective notices, cannot be justified, nor can the severity of sanction for non-compliance be mitigated, on the basis that DTH and its affiliates had a genuine business motive to be publicly disassociated from Mr. Gaitán and Ms. Echeverría as a result of the December 2021 Guatemala criminal complaint[22] or the January 2022 Guatemala criminal complaints. The factual allegations underlying these criminal complaints, as Respondents clearly knew, were innocuous facts intrinsic to the arbitration evidence, and Respondents distorted those facts in service of a plan to oust Mr. Gaitán and Ms. Echeverría from Company management, an ouster that in turn was in service of the broader objectives of a more favorable position against Claimants in the arbitration.

85. We also find based on the entire record before us that the second criminal complaint action pursued in Guatemala by DTH, begun January 13, 2022, was – like the initial criminal complaint action separately filed in December 2021 with the DTH employee Mr. Guzman as the nominal complainant -- an entirely

[22] Mr. Guzman personally may not have had knowledge of the falsity of the alleged facts he relied on in filing the December 2021 criminal complaint on behalf of DTH, at the time of the filing. But in this arbitration DTH adopted that criminal complaint and asserted the veracity of the underlying facts and their sufficiency to establish crimes under the law of Guatemala by presenting that criminal complaint to this Tribunal as evidence in support of the removal or suspension of Mr. Gaitán as Company CEO, as an excuse for non-compliance with the November 12 Order, and as a factor in mitigation of potential sanctions.

pretextual effort to manufacture false evidence of criminality on the part of Mr. Gaitán and Ms. Echeverría for the specific purpose of deploying that false evidence of criminality to Respondents' tactical advantage in this arbitration. Many factors support this conclusion, as listed here:

1) Each of Mr. Gaitán and Ms. Echeverría in their oral testimony before the Tribunal on June 3, 2022, testified that the allegations made against them in the January criminal complaint were without any merit, and Respondents elected not to cross-examine them or to present other evidence that their testimony should be discredited in whole or in part.

2) The Tribunal found the oral testimony given by Ms. Echeverría and Mr. Gaitán to be highly credible and reliable, on the matter of the January 2022 criminal complaints and otherwise. The documentation obtained by them from the Guatemala court per the Tribunal's request during the June 3 hearing and delivered to the Tribunal by Company counsel on June 30, 2022 corroborated in all material respects their testimony on June 3 about what they had learned about the criminal proceeding through their counsel in that proceeding - notably as to (1) the fact that the action had been commenced by a complaint against an individual unknown to them (and evidently entirely fictitious) and thereafter had been extended to include them, (2) the fact that DTH had presented to the court as evidence of Mr. Gaitán's criminality photos taken by DTH purporting to show someone placing items in Mr. Gaitán's car at the Guatemala City office of DTH on September 27, 2021, which was not in fact a theft of company property but the deposit of Mr. Gaitán's personal belongings, as was personally verified by Mr. Briz in his inspection of Mr. Gaitán's vehicle and Mr. Gaitán's office on September 28, 2021, and (3) that Mr. Gaitán had delivered to the court and the prosecutor a written statement concerning the facts alleged in the criminal complaint.

3) The Tribunal in making its November 12, 2021 Order granting interim relief found Mr. Gaitán's version of the events of September 27-28, 2021 to be credible and Mr. Hernández's version of those events not credible -- after considering the evidence submitted including their respective witness statements and their respective oral testimony during the evidentiary hearing on October 22, 2021. Our November 12 Order would not have been made as it was if we had embraced the contention advanced by Mr. Hernández at that time that Mr. Gaitán and Ms. Echeverría had not been terminated but instead had abandoned their DTH positions.

4) The witness statements of Jorge Hernández presented by Respondents, dated January 28, 2022 and February 8, 2022, remain in the record but the Tribunal gives them no weight as a consequence of Mr. Hernández's unexcused refusal to appear as a witness in the evidentiary hearing announced in PO 2022-06, as specifically ordered in PO 2022-07. This entails that Mr. Hernández's insistence in those

witness statements upon a version of his interactions with Mr. Gaitán on September 27-28, 2021 that would support the claims of criminal conduct by Mr. Gaitán is not considered in support of Respondents' position, and in any event was persuasively contested by Mr. Gaitán's live, sworn testimony before us, which we credit.

5) The original and amended January 2022 criminal complaints filed on January 13 and 20, 2022, respectively, as provided to the Tribunal by Company counsel on June 30, 2022 in fulfillment of the Tribunal's request at the June 3 hearing, show that the lawyers involved in these court filings in Guatemala were William Rene Méndez (father of Terra's in-house counsel William Méndez Araújo, as noted earlier an eyewitness to the events of September 27-28, 2021) and Mario Roberto Méndez Álvarez. Those two attorneys were among the witnesses that Respondents inexcusably refused to cause to appear before our Tribunal to give oral testimony, in violation of PO 2022-07. Had they testified, they would have been asked what evidence of the alleged criminality was in their possession at the time these complaints were filed. Had they testified, and if Respondents had provided these criminal complaints to the Tribunal by May 12, 2022 as PO 2022-07 required, they would have been asked to explain why the criminal complaint was initially filed January 13, 2022, against an individual named Edward Perez Gonzalez, alleging that he had been an employee of DTH's Guatemala affiliate and had committed the alleged crimes on September 11, 2021. They would have been asked to explain why it was that on January 20, 2021, the Gonzalez Complaint was "extend[ed]" to Mr. Gaitán, Ms. Echeverría, and two other DTH employees Juan Berger and Marisabel Umana, why it was that the original complaint had been "involuntarily and mistakenly filed against" Mr. Gonzalez "who has no connection with the facts and is not [DTH's affiliate's] employee" (as was stated in the January 20, 2022 version of the criminal complaint).

6) That is to say, in other words, they would have been asked why the January 13 complaint was admitted by them and by DTH one week later to have been made against a mis-identified person who in fact never worked for DTH if he even existed, and to have been based on alleged set facts that were omitted entirely from the January 20 amended version. Mr. William Rene Méndez, whom the record shows to be the father of William Méndez Araújo, the latter an in-house lawyer of Respondents who was the principal link between Respondents and Morrison & Foerster, and who actively solicited the Morrison Memorandum from Morrison even before the Gonzalez Complaint was superseded by the January 20 "extend[ed]" version (), would also have been asked what he told his son, for purposes of relaying information to Morrison, about these criminal complaints and the facts that motivated the filings. Finally, Mr. William Rene Méndez would have been asked about the connections between the January 2022 criminal complaint filings in Guatemala and the solicitation by his son as a lawyer for Respondents within

the same week from Morrison of a Memorandum opining that Mr. Gaitán's alleged criminality made it inadvisable for Mr. Gaitán to remain in his Company position as the Company's FCPA compliance officer.

7) Based on Respondents' unexcused refusal to comply with PO 2022-07 in regard to (1) oral testimony of William Rene Méndez and Mario Roberto Méndez Álvarez[23], (2) production of documents concerning these criminal proceedings, and (3) production of documents provided to Morrison, the Tribunal draws an adverse inference: that neither witness would have been able to answer in a manner helpful to Respondents' positions in the arbitration questions such as those mentioned above about whether Mr. Gaitán and Ms. Echeverría had engaged in misconduct that made them unsuitable to continue in Company management roles and about whether their misconduct justified Respondents' non-compliance with our November 12, 2021 and March 15, 2022 Orders.

86. Because (1) Respondents elected not to cross-examine Ms. Echeverría and Mr. Gaitán on June 3, 2022, (2) Respondents did not reconsider that election after the Tribunal received on June 30, 2022 the written declarations of Mr. Gaitán and Ms. Echeverría filed in the Guatemala criminal case on April 25, 2022, and (3) the Tribunal found Mr. Gaitán and Ms. Echeverría to be credible witnesses, we accept and credit fully their accounts in written and oral testimony pertinent to the 2022 criminal complaint's allegations. We therefore determine the pertinent facts to be as set forth above.

87. Mr. Gaitán stated on April 25, 2022 in his motion to dismiss the criminal complaint (provided to the Tribunal and all counsel on June 30, 2022): "*The complaint. . . is a retaliatory action against me and the Executive Team … for having fully complied with our fiduciary duties to the company and for not having allowed ourselves to be intimidated by one of the shareholders.*" Without adopting that assertion in its terms, we do find that the pleaded allegation in the January 20, 2022 amended criminal complaint that on September 27, 2021 Mr. Gaitán assisted by Ms. Echeverría, Mr. Berger and Ms. Umana "*remove[d] all the legal and technical documentation from Proyectos Terrestres' offices …[and] abused my client's trust to take possession of such confidential documents, of high business and commercial value*" was false, and we draw the inference that a primary reason for the refusal of Respondents to comply with our order to

[23] Our purpose in requiring the testimonial appearances of Mr. William Rene MéndezMéndez and Mr. MéndezMéndez Álvarez was primarily to gather more specific information about the procedural aspects of the 2022 Guatemala criminal court proceedings and especially the written declaration of Mr. MéndezMéndez Álvarez concerning the February 4, 2022 provisional measures hearings that was the subject of his written declaration submitted into evidence by Respondents as Ex. R-126. It was not our intention to probe privileged communications between them and Respondents.

produce as hearing witnesses Mr. Hernández, Mr. William Rene Méndez, and Mr. Méndez Álvarez is that they could not have provided truthful evidence to support this allegation.

88. From the foregoing the Tribunal concludes that the allegations of criminality in the January 20, 2022 Guatemala amended criminal complaint were deliberate falsehoods and that the sources of the falsehoods were, directly or indirectly, Mr. Hernández and/or Mr. Briz and/or Mr. Méndez Araújo.

89. We take note at this juncture of how it evolved that the Tribunal ultimately came to have before it the facts that enable us to reach these conclusions. We do so because it is now obvious that the Guatemala criminal matter was presented to the Tribunal in a deliberately incomplete fashion so that the truth would not readily emerge.

1) We learned from Respondents on February 8, 2022 that in a criminal proceeding in Guatemala on February 4, 2022 an order for provisional measures — in the form of bank account attachment and "ne exeat" relief barring departure from Guatemala — had ostensibly been entered against Mr. Gaitán, Ms. Echeverría, Mr. Berger and Ms. Umana. An alleged "court assistant"'s summary of that February 4 interim relief proceeding was submitted by Respondents as Exhibit R-126 on February 8. This was part of an exhibit that also contained a declaration by Mr. Méndez Álvarez attesting to occurrence of the court proceedings in which the order had been entered and the alleged authenticity of the court assistant's summary annexed thereto. This Exhibit R-126, in turn, accompanied a witness statement of Mr. Hernández submitted in opposition to Claimant's initial motion for sanctions for non-compliance with the November 12 Order. The "court assistant" statement that is Ex. R-126 referred to an audio record of the hearing but Respondents did not provide a transcript or explain why they could not do so.

2) We received no judgment or order bearing the signature of a judge. We were not given the criminal complaints, original and amended, that have now recently been provided by Company counsel based on the Tribunal's request. By withholding those pleadings from the Tribunal, Respondents concealed from us, as discussed above, the fact that the January 2022 criminal complaint had initially been filed against another individual based on entirely different facts allegedly having occurred on September 11, 2021, concealed the fact that Respondents' counsel in the criminal case were somehow able to "expand" and "extend" that original complaint to Mr. Gaitán *et al.* even while admitting in the amended complaint that the original complaint had been made by them upon the basis of alleged criminal actions that were in fact never taken, by an individual who in fact never had been employed by the DTH Guatemala affiliate, if he even existed.

3) As previously indicated, we received from Respondents' co-counsel Mr. Joseph on March 30, 2022[24], a report of non-compliance with our March 15, 2022 sanctions order, PO 2022-01, directing publication of corrective notices concerning the status of Mr. Gaitán and Ms. Echeverría to mitigate the harm caused by the January 10, 2022 publication by DTH affiliates' of notices of disassociation from them. Mr. Joseph's letter explained that the justification for DTH's refusal to publish the corrective notices was, in part, that Mr. Gaitán and Mr. Echeverría **"are under indictment for criminal acts which potentially place each local subsidiary in violation of local laws."** (emphasis supplied). After the evidentiary process undertaken in this proceeding, it is irrefutable that there were no indictments. There were only criminal complaints by civilians (the DTH affiliate in Guatemala), and with the possible exception of the February 4 interim hearing whose bona fides have not been established, these complaints by DTH have never been the subject of a judicial hearing but only have been submitted to the prosecutor's office in Guatemala for investigation, and no indictments or equivalent formal criminal charges against Mr. Gaitán or Ms. Echeverría have ever ensued. Either Mr. Joseph knew, or at a minimum he should have known, that there had been no indictments when he told the Tribunal on March 30, 2022 that there were indictments.

4) When this Tribunal announced that it would conduct an evidentiary proceeding to determine the truth about the various categories of misconduct raised in Respondents' evidence, Mr. Joseph did not correct his false statement to the Tribunal and explain why it was that the DTH-sponsored criminal complaints to the Guatemala prosecutor had been mis-described by him as indictments. Even since June 3, when Respondents heard undisputed testimony from Mr. Gaitán and Ms. Echeverría that no charges were ever brought against them by Guatemala prosecutors, Mr. Joseph has not communicated with the Tribunal to explain the material error in his March 30 submission.

5) Mr. Rafael Briz, one of the co-counsel to Respondents had, as the record now establishes, personal knowledge that the alleged factual basis for the 2022 Guatemala criminal complaint (as amended) was false, and that it was therefore false and misleading to present evidence of the alleged criminality of Mr. Gaitán and Ms. Echeverría, whether in the form of the alleged record of the February 4, 2022 interim measures hearing or otherwise. He failed to disclose or cause his clients to disclose to the Tribunal facts personally known to him that disproved the spurious presentation of facts allegedly constituting crimes that victimized DTH.

[24] As a formal matter Mr. Joseph and his firm have identified themselves as counsel to DTH and Mr. Hernández. But save for Mr. Joseph having asserted his own unavailability as a basis to object to proposed hearing dates, all of the Respondents have joined in the positions taken by any of them. In the matter of DTH's Guatemala criminal complaints, however, Mr. Joseph, as the identified arbitration counsel for DTH, bore a particular obligation toward this Tribunal to inform us truthfully about DTH's actions.

6) Not only the Respondents but also the Respondents' counsel owe a duty of candor to the Arbitral Tribunal. See IBA Guidelines on Party Representation in International Arbitration (2013) at Guidelines 9-11[25] and the related Comments; Rules Regulating the Florida Bar (R. Regulating Fla. Bar) at R. 4.3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous…"), R. 4.3.3 (a) (A lawyer shall not knowingly … make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"); Code of Professional Ethics of the College of Lawyers and Notaries of Guatemala, Chap. 4, Art. 18 ("Honesty. In conducting matters before judges and authorities, the lawyer must act with probity and good faith, avoiding falsely affirming or denying, or making mutilated [incomplete] or malicious citations" (Translation by the Tribunal); New York Rules of Professional Conduct, 22 N.Y.C.R.R. Part 1200 (2021), Rule 3.3(a) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.")

The Morrison & Foerster Memorandum

90. A somewhat separate dimension of this sanctions proceeding arises from the submission into evidence by Respondents – as an exhibit that accompanied Mr. Joseph's letter of March 30, 2022 in which he reported falsely that Mr. Gaitán and Ms. Echeverría were under indictment -- of the Morrison Memorandum dated February 16, 2022. This memorandum concerned the suitability of Mr. Gaitán to retain the role of Compliance Officer for the Company in light of the misconduct allegations made against him. Respondents first made contact with Morrison by email sent by the Mayora y Mayora law firm on January 17, 2022. (PPT-AMLQ Ex. 68 at 19). The author of the email was an associate in the firm, Carlos Ortega, a member of the firm's counsel team in this arbitration who, like Mr. Briz, had directly received every submission and every Tribunal communication. Mr. Briz was copied on the email. That email did not

[25] Guideline 9 provides that "[a] Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal." Guideline 10 provides that "[i]n the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submissions." Guideline 11 provides in part that "[a] Party Representative should not submit Witness or Expert evidence that he or she knows to be false. If a Witness or Expert intends to present or presents evidence that a Party Representative knows or later discovers to be false, such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so."

mention the arbitration or the role of the Mayora firm as co-counsel of record in the arbitration. And we learned from the Morrison partner in charge of the engagement, Ruti Smithline, the co-chair of Morrison's Investigations and White Collar Criminal Defense Group, in her oral testimony on July 22, 2022, that nothing about this arbitration was disclosed to her by any of the persons who communicated with Morrison on behalf of Respondents or were cc recipients of the email communications with Ms. Smithfield– notably Mr. Briz and Mr. Ortega of the Mayora firm, Juan Rodriguez of Carey Rodriguez, and Danielle Kirby and William Méndez Araújo who are attorneys in the employ of Respondents. (Tr. 07/22 at 29-30,98-100,115-116).

91. To situate this January 17, 2022 first-approach email from the Mayora firm to Morrison in the context of DTH's pursuit of a criminal complaint in Guatemala, this was four days after the initial filing of the 2022 DTH criminal complaint against a non-existent individual falsely alleged to have been a DTH employee, and three days prior to the filing of the amended version of that criminal complaint that named Mr. Gaitán and Ms Echeverría and the two members of their team who had helped load Mr. Gaitán's personal belongings into his car on September 27, 2021, as alleged criminal law violators.

92. The email made no mention of the arbitration, and no mention of the criminal complaint. It was subject-titled to Morrison "Guatemalan client-FCPA matter," and stated that Terra and DTH (neither of them a Guatemalan company) "requires an opinion regarding the FCPA Compliance Officer's performance." (PPT-AMLQ Ex. 68 at 19).

93. The next day, Mr. Ortega, in an email to the Morrison managing partner introduced William Méndez Araújo as an in-house attorney for the client "so he can discuss the issue directly" with the Morrison-identified FCPA expert Ruti Smithline. (PPT-AMLQ Ex. 68 at 18). Thus, Morrison was now to be instructed by one lawyer who was an eyewitness to the true facts of September 28, 2021, Mr. Méndez Araújo, and the other eyewitness, Mr. Briz, was in the email loop.

94. Mr. Méndez Araújo had an initial call with Ms. Smithline on January 19, 2022 and Ms. Smithline followed up with an email that said: "William, It was great to meet you today. I can confirm that we have cleared conflicts. Let me know if you want to proceed, and I can send you our standard engagement letter. We should also set up a call to get the more detailed information to be able to write the memo." (PPT-AMLQ Ex. 68 at 16).

95. The absence of an engagement letter from the documents produced by Morrison was a matter of interest to the Tribunal, particular in light of Terra's assertion of attorney-client privilege and the implicated issue of what entity had engaged Morrison and whether for legal advice or expert opinion. Ms. Smithline testified that she could not recall receiving any response to her offer to send a standard engagement letter. (Tr. 07/22 at 124). She testified that she was responsible for not issuing an engagement letter (which we understood to mean that there was no instruction from Respondents to refrain from sending one), due in part to the urgency expressed by Terra to have Morrison's written memorandum on an expedited basis. (Tr. 07/22 at 34-35). However, when asked about the veracity of a statement made by Respondents' co-counsel Juan Rodriguez made in a submission to the Tribunal on June 15, 2022 concerning the attorney-client privilege issue: ("During the relationship, Terra's general counsel, Danielle Kirby, requested on multiple occasions a retainer agreement to evidence this relationship") Ms. Smithline testified that she could not recall any such request by Ms. Kirby. (Tr. 07/22 at 125). Because Ms. Kirby is a witness who failed to testify despite our Order to Respondents that she testify, we find as a fact that there was no such request by Ms. Kirby. As to whether Mr. Rodriguez knowingly presented a false statement to the Tribunal on June 15, 2022, we are not able to make such a determination. According to Ms. Smithline's testimony, she could not recall Mr. Rodriguez having been a participant in any telephone conversation she held with Respondents' representatives concerning the engagement. (Tr. 07/22 at 69). It is therefore possible that Ms. Kirby falsely reported to Mr. Rodriguez the facts that he in turn represented in the June 15 submission, and that as outside counsel he reasonably relied on the veracity of his client's report. On the other hand, whereas the June 15 submission was invited by the Tribunal explicitly as a submission **of evidence** to support Respondents' claim of attorney-client privilege, the obviously hearsay nature of Mr. Rodriguez's statement was inappropriate. Our concerns about Mr. Rodriguez's conduct (and that of Ms. Kirby and Mr. Briz) in regard to Morrison relate only in relatively small measure to this specific misstatement about seeking an engagement letter; our principal concerns arise from the withholding of material facts from Morrison, including every fact about this arbitration.. We return to that subject below.

96. When Mr. Méndez Araújo replied to Ms. Smithline on January 20, 2022 at 4:29 PM "We can proceed," (PPT-AMLQ Ex. 68 at 16) no mention was made of the amended criminal complaint filed that day by Mr. Méndez Araújo's father as DTH criminal complaint co-counsel. And no mention was made of an impending deadline in this arbitration of January 28, 2022 for submissions of written evidence and argument from

both sides concerning Claimants' motion for sanctions based on Respondents' non-compliance with the November 12 Order. We make the foregoing observations as an introduction to another fundamental problem in connection with the Respondents' engagement of Morrison that emerged from Ms. Smithline's oral testimony.

97. Ms. Smithline testified that during the entire course of the engagement, she understood from the client representatives' communications with her that Morrison's client was Terra Towers, that Peppertree and a Goldman Sachs affiliate were investors *in Terra Towers*, that the Company (that is to say, Continental Towers LATAM Holdings) was somehow affiliated with Terra Towers, and that there was no unanimity among the investors of Terra Towers about what to do about Mr. Gaitán's compliance role at Continental. (Tr. 07/22 at 26-32,82,110-113,120). Ms. Smithline, did not appreciate the circumstances sufficiently to obtain an internal conflict check in regard to Goldman Sachs, notwithstanding Goldman Sachs being identified as a "counterpart" in Mr. Ortega's initial email, a step that, according to her testimony, likely would have prevented Morrison from accepting the engagement because Goldman Sachs was an existing client of Morrison. (Tr. 07/22 at 117-119, 123-124, 126). Respondents -- with the direct knowledge of Ms. Kirby and Mr. Rodriguez and Mr. Briz (who were in the email loop, and in the case of Ms. Kirby in the telephone loop as well) -- elected to share essentially none of the facts and factual disputes involved in the arbitration, and none of the context about Mr. Gaitán.. Morrison simply knew nothing about this arbitration,the adversarial positions of the shareholders, or about the adversity between the shareholders concerning Mr. Gaitán's Company CEO role, until after the service of the Tribunal's subpoena in early May and, in most of the details, not before she was examined at the July 22, 2022 hearing. (Tr. 07/22 at 29-30,60, 74, 77, 98-100,111-119).

98. Exacerbating this lack of important information, Respondents affirmatively misled Morrison: Mr. Méndez Araújo on January 25, 2022 sent to Ms. Smithline the Guatemala news articles dated September 2, 2021, that reported that the lawyer representing Mr. Gaitán (in his employment case arising from what he claimed was his wrongful termination by DTH, a detail withheld from Morrison at that point) had been arrested for money laundering (PPT-AMLQ Ex. 68 at 16, 20-31) - but did not include the Guatemala news articles, dated September 30, 2021 reporting that this accusation had thereafter been dismissed. (PPT-AMLQ Ex. 73). The media reportage of the dismissal of the charges was first brought to Ms. Smithline's attention in the exhibits for the July 22, 2022 hearing delivered to her by Claimants' counsel the morning of her appearance. (Tr. 07/22 at 91-93)

99. The day after Mr. Méndez had reported the arrest of Mr. Gaitán's attorney, on January 26, 2022, Ms. Smithline sent to Mr. Méndez a "Discussion Draft" further titled "Considerations and Recommendations Regarding Fraud Allegations Against Chief Compliance Officer". Mr. Méndez responded within the day with a handful of changes, notably including changing the addressee of the Memorandum from Mr. Méndez Araújo to Continental Towers LATAM Holdings. Ltd. ((PPT-AMLQ Ex. 68 at 33). According to Ms. Smithline's testimony, there was client pressure to complete the Memorandum at that point, and with the implementation of Mr. Méndez Araújo's edits and delivery of the Memorandum on Januay 26, 2022, she believed the engagement had been completed. (Tr. 07/22 at 63). Ms. Smithline testified that Terra's representatives did not explain to her the urgency to complete and deliver the Memorandum in the space of a few days (Tr. 07/22 at 61-63). As it happens, Respondents were facing a January 28 deadline for evidentiary submissions to this Tribunal concerning Claimants' sanctions motion It is sufficient here to observe that had Morrison known about that impending arbitration submission deadline, and the fact that the proceeding at that point concerned potential sanctions for defying our November 12 Order to reinstate Mr. Gaitán, Morrison would have been disabused of its misconception – to which Ms. Smithline testified – that the Memorandum was for Terra's internal use only and the engagement likely would have gone in a different direction (Tr. 07/22 at 51-53) –presumably to an ending in view of the Goldman conflict.

100. The Morrison Memorandum remained in its January 26 version up to February 9, 2022 on which date Respondents' in house lawyer Danielle Kirby emailed Ms. Smithline, copying her in-house colleague Mr. Méndez Araújo and Respondents' arbitration co-counsel Juan Rodriguez, and deploying as the Subject "Discussion re Board Reporting". Ms. Kirby wrote: "My name is Danielle Kirby and I work with William Méndez who I understand you have been in contact with regarding the attached legal opinion. Would you have some time tomorrow (Thursday) for a quick call with William, my colleague Juan Rodriguez and myself." ((PPT-AMLQ Ex. 68 at 4)).

101. A Zoom call ensued on February 10, 2022 among Ms. Kirby, Mr. Méndez Araújo and Ms. Smithline. Whether Mr. Rodriguez was on the call, as Ms. Kirby's email had anticipated, Mr. Smithline could not recall. But she recalled the Zoom call as being relatively brief, and in regard to the facts rather "high-level" (Tr. 07/22 at 95) and that the version of the facts Morrison relied on in producing an updated version of the Memorandum was stated in Ms. Kirby's email to Ms. Smithline on February 12, 2022 with cc's to Mr. Méndez Araújo and Mr. Rodriguez. ((PPT-AMLQ Ex. 68 at 48)). The material facts clearly known to Ms.

Kirby and Mr. Rodriguez, and not contained in the February 12 email to Morrison or conveyed to Morrison thereafter by them included but were not limited to:

(1) that there was this pending arbitration and they were co-counsel in it, and the Memorandum was sought to aid in advancing Respondents' position, whether before the Board of the Company or the Tribunal or both,

(2) that Terra had no mandate from the Company to seek legal advice to the Company about Mr. Gaitán's suitability to continue as Company compliance officer, and in fact the Company had its own independent counsel appointed pursuant to a March 19, 2021 agreement signed after the arbitration was underway by the disputing shareholders,

(3) that Peppertree and AMLQ were not investors in Terra, but were investors in the Company pursuant to a shareholders' agreement that contained very specific provisions about corporate governance by its Board and treated a deadlock within the Board between the Peppertree-appointed two directors and the Terra-appointed two directors as a non-adoption of a proposed Board action,

(4) that DTH was an affiliate of Terra by reason of being under the common control of Jorge Hernández, and that DTH owed various obligations to the Company under agreements made in conjunction with the Shareholders' Agreement,

(5) that the Company's Board had effectively deadlocked over Peppertree and AMLQ's invocation of a right in the Shareholders'' Agreement to have the Company sold to a third party, that this was a primary reason for the arbitration, and that the arbitration had proceeded through a Phase 1 concerning that Company sale dispute with a decision from the Tribunal awaited,

(6) that apart from Phase 1 the Tribunal in this arbitration had been mainly occupied with disputes, up to that point resolved against Respondents to the extent they had been resolved, concerning the Respondents' efforts to oust Mr. Gaitán from his Company position and to oust the Company's independent counsel,

(7) that Terra's allegations of wrongdoing by Mr. Gaitán had arisen in the arbitration after the Tribunal's November 12 interim relief order, and DTH's filing of criminal complaints against Mr. Gaitán as submitted in Guatemala were expressly based on facts related to Mr. Gaitán's role as a witness in the arbitration and on a version of the facts surrounding Mr. Gaitán's separation from his employment at DTH that the Tribunal had already rejected in making its November 12 Order,

(8) that, as the Tribunal now knows from the undisputed evidence presented in these proceedings by Mr. Gaitán and Ms. Echeverría, the El Salvador forensic audit that allegedly found embezzlement on a large scale by Mr. Gaitán was not only a false portrayal of perfectly ordinary and

approved sales commissions and business expenses, but was motivated by Mr. Hernández's desire to create a false narrative of the termination of Mr. Gaitán's father, a termination that in fact came about because Mr. Gaitán's father refused to provide a written declaration to support Respondents' arbitration position about Mr. Gaitán by falsely impugning his own son's mental faculties, and

(9) an individual DTH employee named Carlos Guzman, listed on the organizational chart suppled to Morrison as successor country manager to Mr. Gaitán's father (PPT-AMLQ Ex. 68 at 54), was responsible both for the launch in El Salvador of the aforementioned forensic audit but also served as the named complainant in the December 2021 filing in Guatemala of a criminal complaint against Mr. Gaitán that complained that he had committed a series of crimes involving "theft" by reason of having given evidence in this arbitration on October 20, 2021.

102. Ms. Kirby's, Mr. Rodriguez's and Mr. Briz's deception of Morrison would be of no concern to this Tribunal if Respondents had sought out and relied upon the Morrison Memorandum only as a guide to their own conduct. But the record in this case shows that it was submitted to the Peppertree representatives on the Company's Board, and the Company's Shareholders, the morning after it was put in final form (PPT-AMLQ Ex. 82), in support of Respondents' advocacy of Board action to remove Mr. Gaitán. And the form that this sharing took is notable: Writing on Company letterhead, and without copying Morrison, Mr. Quisquinay, claiming to be acting as "Chief Legal Officer" of the Company, delivered the Morrison Memorandum, and stated that "I have consulted US compliance counsel who have issued the legal opinion submitted to you in conjunction with this letter." (Id.) Clearly from the record Mr. Quisquinay had no role in the engagement of Morrison or the development of the Morrison Memorandum, and neither he nor anyone else told Morrison that the Memorandum was being obtained for this purpose and not for the internal use of Terra. The Peppertree Board members shared it with Claimants' counsel, who wrote to Respondents' counsel seeking information and documents concerning the genesis of the Morrison Memorandum on March 9, 2022 -- requests that Respondents declined to answer - wrongfully, as it turns out, because their position that such communications were privileged lacked merit as we later determined (*see* Procedural Order 2022-12). Then, on March 30, 2022, as an exhibit to Respondents' opposition to the Claimants' sanctions motion that we adjudicate here, Respondents presented the Morrison Memorandum to the Tribunal, and argued in Mr. Joseph's letter to us that DTH could not reasonably comply with our Order to publish corrective press notices that would publicly re-associate DTH affiliates with Mr. Gaitán and Ms. Echeverría, because of the allegedly

unacceptable compliance risks that re-association with persons under criminal indictment would present to DTH.

103. Plainly, the reason to present to a Tribunal of US lawyers an opinion delivered by a law firm of Morrison's stature was that this stature would potentially lend credence to the underlying position that DTH's disassociation from Mr. Gaitán was justified and the Peppertree Board Members' refusal to support the Company's disassociation from Mr. Gaitán was unreasonable and potentially a breach of their fiduciary duties. The submission in evidence of the Morrison Memorandum was a substantial factor in the Tribunal's decision to conduct the evidentiary proceeding that now culminates in this Award. If Morrison had reviewed evidence that supported Respondents' purported concerns about Mr. Gaitán, that could have led the Tribunal potentially in one direction. If on the other hand Morrison had been misled about underlying facts, that would lead in another direction and affect the range and severity of sanctions for Respondents' disobedience of our Orders. It turns out the latter was the case.

104. In presenting the Morrison Memorandum as evidence, the legal representatives of Respondents who are counsel in the arbitration, Ms. Kirby, Mr. Rodriguez, Mr. Briz and Mr. Joseph, vouched to the Tribunal for the memorandum's integrity, which necessarily turned on the veracity and completeness of the facts provided to Morrison (We observe again that Mr. Joseph submitted the Morrison Memorandum as an exhibit to his letter of March 30, 2022, along with three other similarly-themed declarations from foreign lawyers made in reliance on the same purported facts). This turns out to have been a serious breach of their duty of candor, because as shown above, each of them either knew or recklessly disregarded that the facts supplied to Morrison were materially misleading by both omission and affirmative misstatement.

AWARD[26]

For the foregoing reasons the Tribunal awards the following as sanctions under AAA Commercial Rule R-58:

[26] The sanction we award with respect to Respondents' counsel takes into account that Respondents continue to be represented by four law firms (three of which have been involved from the outset), plus their in-house counsel, and that the senior lawyer appearing from the New York-based firm that joined the case in May 2022 meets the experience and New York Bar membership requirements we set forth for Respondents' Submission Counsel as that term is defined in Section 2a. of this Award. We also note that three law firms that have represented Respondents during all or some portions of the arbitration have withdrawn – the most recent departure having occurred only one week before issuance of this Award.

1. The stay of proceedings on Respondents' counterclaims provided for in Procedural Order No. 2022-14, entered on the date of this Award, shall be lifted only if Respondents shall demonstrate to the satisfaction of the Tribunal that they have complied in full with this Award, with PFA-1 (unless that Award is vacated or its recognition and enforcement is refused), and our Orders dated November 12, 2021, December 8, 2021 (including full reimbursement to Claimants of any expenditures borne by Claimants for the fees of the Company's counsel under PO 2022-08), and March 15, 2022.

2. In addition:
    a. It shall be a condition of the participation in this case as co-counsel for Respondents by the Mayora y Mayora law firm, the Carey Rodriguez law firm, the Fuerst Ittleman law firm, and Danielle Kirby, Esq. (collectively and individually the "Identified Co-Counsel") that each and every written submission to the Tribunal by or on behalf of any Respondent shall be submitted to the Tribunal by, and with the signature of, a member of the New York Bar having at least 20 years' experience at the Bar and who by making any such submission and providing such signature thereon will be deemed to represent to the Tribunal, upon penalty of disqualification from further appearance in this arbitration in case of violation, the matters that are considered to be associated with an attorney's signature in a submission to a court of the United States under Rule 11(b) of the Federal Rules of Civil Procedure ("Respondents' Submission Counsel"). The inclusion of any of the Identified Co-Counsel in the signature block or otherwise as associated with any such submission shall be a representation by them that they have also complied with the obligations of Rule 11(b) with respect to such submission.

    b. Respondents shall designate the attorney who shall assume the role of Respondents' Submission Counsel within 14 days from the date of this Award. In the alternative, if Respondents elect not to comply with the foregoing, then the law firms Mayora y Majora, Carey Rodriguez, and Fuerst Ittleman, and Danielle Kirby, shall no longer appear as co-counsel in the proceedings, shall not be entitled to received Confidential Information under the Confidentiality Order, and shall be removed from the counsel list by the ICDR. Respondents' failure to designate a Respondents' Submission Counsel under this paragraph within 14 days of the Award, or the failure of such counsel to have filed a notice of appearance in this proceeding within that time period (in the event the designated counsel has not already appeared in this matter) shall be deemed such an election not to comply.

3. No application by Respondents to the Tribunal will be entertained for the removal or suspension from their Company positions of Mr. Gaitán or Ms. Echeverría based upon conduct occurring prior to July 22, 2022 (the date of the last proceeding prior to this Award). The Tribunal makes no Award with respect to the conditions that would need to be satisfied for any such application based on conduct subsequent to July 22, 2022.

4. No claim against Claimants by Respondents will be allowed based upon the Peppertree-appointed directors having failed to support the removal of Mr. Gaitán and Ms. Echeverría from their Company positions on the basis of their conduct up to July 22, 2022.

5. As compensation to Claimants for their share of the costs for the Tribunal's fees and expenses associated with all of the proceedings relating to Mr. Gaitán and Ms. Echeverría from October

2021 to the present time, which the Tribunal finds to have been approximately $512,000[27], Respondents shall pay to Claimant Telecom Business Solution LLC ("TBS"), as a joint and several obligation of each of them, the sum of $321,000, to be paid not later than 30 calendar days after the issuance of this Partial Final Award.[28] TBS shall receive such payment on behalf of the Claimants jointly and shall distribute the payment in proportion to the Claimants' respective contributions toward the deposits for the fees and expenses of the Tribunal, or as the Claimants may otherwise agree. Interest shall accrue on any unpaid amount at the rate of 2.8 % per annum until paid. Such relief is without prejudice to Claimants' rights to seek recovery of reasonable attorneys' fees and expenses for such proceedings, including sums advanced by Claimants for the fees and expenses of Company counsel, to the extent they have not yet been awarded or ordered to be paid.

We, THE UNDERSIGNED ARBITRATORS, do hereby certify, for purposes of Article III of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded June 10, 1958, and Article 4 of the Inter-American Convention on Commercial Arbitration concluded January 30, 1975, that this Second Partial Final Award is made in New York, New York, USA.

August 12, 2022
Date

Type text here
Marc J. Goldstein, Chair

August 12, 2022
Date

Mélida N. Hodgson, Arbitrator

August 12, 2022
Date

Richard F. Ziegler, Arbitrator

I, Marc J. Goldstein, Chair, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Second Partial Final Award.

August 12, 2022
Date

Marc J. Goldstein, Chair

[27] This is based upon ICDR Finance records showing total disbursements for fees and expenses of the Tribunal of ~$912,000 as of the date of this Award, of which $400,000 was found in our first Partial Final Award to have been attributable to the Phase 1 proceedings that culminated in that Award.

[28] The awarded sum of $321,000 has two components: (i) Claimants' 50% share of deposits paid by the Claimants as a group and the Respondents as a group in the sum of ~$382,000, i.e. $191,000, and (ii) Claimants' payment of an unpaid sum due for deposits from the Respondents in the sum of ~$130,000. The balance of the total deposits collected by ICDR on a 50-50 basis from the Claimants and from the Respondents, $400,000, was the subject of our Award to Claimants of $200,000 for deposits for the fees and expenses of the Tribunal in our first Partial Final Award dated February 24, 2022.

I, Mélida N. Hodgson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Second Partial Final Award.

August 12, 2022_____ _____

Date Mélida N. Hodgson, Arbitrator

I, Richard F. Ziegler, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Second Partial Final Award.

August 12, 2022____ _____

Date Richard F. Ziegler, Arbitrator

2021 to the present time, which the Tribunal finds to have been approximately $512,000[27], Respondents shall pay to Claimant Telecom Business Solution LLC ("TBS"), as a joint and several obligation of each of them, the sum of $321,000, to be paid not later than 30 calendar days after the issuance of this Partial Final Award.[28] TBS shall receive such payment on behalf of the Claimants jointly and shall distribute the payment in proportion to the Claimants' respective contributions toward the deposits for the fees and expenses of the Tribunal, or as the Claimants may otherwise agree. Interest shall accrue on any unpaid amount at the rate of 2.8 % per annum until paid. Such relief is without prejudice to Claimants' rights to seek recovery of reasonable attorneys' fees and expenses for such proceedings, including sums advanced by Claimants for the fees and expenses of Company counsel, to the extent they have not yet been awarded or ordered to be paid.

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August 12, 2022
Date

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Marc J. Goldstein, Chair

August 12, 2022
Date

Mélida N. Hodgson, Arbitrator

August 12, 2022
Date

Richard F. Ziegler, Arbitrator

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Date

Marc J. Goldstein, Chair

[27] This is based upon ICDR Finance records showing total disbursements for fees and expenses of the Tribunal of ~$912,000 as of the date of this Award, of which $400,000 was found in our first Partial Final Award to have been attributable to the Phase 1 proceedings that culminated in that Award.

[28] The awarded sum of $321,000 has two components: (i) Claimants' 50% share of deposits paid by the Claimants as a group and the Respondents as a group in the sum of ~$382,000, i.e. $191,000, and (ii) Claimants' payment of an unpaid sum due for deposits from the Respondents in the sum of ~$130,000. The balance of the total deposits collected by ICDR on a 50-50 basis from the Claimants and from the Respondents, $400,000, was the subject of our Award to Claimants of $200,000 for deposits for the fees and expenses of the Tribunal in our first Partial Final Award dated February 24, 2022.

I, Mélida N. Hodgson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Second Partial Final Award.

August 12, 2022
Date

Mélida N. Hodgson, Arbitrator

I, Richard F. Ziegler, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Second Partial Final Award.

August 12, 2022
Date

Richard F. Ziegler, Arbitrator

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal

CASE NUMBER 01-21-0000-4309

THIRD PARTIAL FINAL AWARD (CONCERNING CLAIMANTS' APPLICATION FOR INTERIM RELIEF IN RELATION TO FOREIGN ARBITRATIONS)

ARBITRATION PURSUANT TO
THE COMMERCIAL ARBITRATION RULES OF
THE AMERICAN ARBITRATION ASSOCIATION

BETWEEN:

TELECOM BUSINESS SOLUTION, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, and LATAM TOWERS, LLC, on its own behalf and derivatively on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Claimants,

vs.

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC., JORGE HERNÁNDEZ and ALBERTO ARZÚ,

Respondents,

and

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Respondent,

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC. derivatively and on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Counterclaimants,

vs.

TELECOM BUSINESS SOLUTION, LLC, LATAM TOWERS, LLC, F. HOWARD MANDEL, JOHN RANIERI, RYAN LEPENE, and AMLQ HOLDINGS (CAY) LTD.,

Counterclaim Respondents.

-and-

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Respondent.

AMLQ HOLDINGS (CAY) LTD.,

Counterclaimant,

vs.

TERRA TOWERS CORP. and TBS MANAGEMENT,S.A.

Counterclaim Respondents.

A. Introduction

1. Claimants Telecom Business Solution, LLC and Latam Towers, LLC ("Peppertree")[1], together with AMLQ Holdings (Cay) Ltd.[2], initially a "Notice Party" and later named as a Counterclaim Respondent (hereinafter for ease of reference, collectively "Claimants" or "PPT/AMLQ") have applied to the Tribunal for an "anti-suit injunction" and/or other interim measures pursuant to Rules R-37 and R-47(a) of the Commercial Arbitration Rules of the American Arbitration Association, 2013 version, which apply to this case.

2. This application (the "Application") followed a notification to the Tribunal by counsel to nominal party Continental Towers LATAM Holdings Limited (the "Company") initially on January 3, 2023 and in more detail on January 6, 2023, that an arbitration case had been filed in Peru with the

[1] The Claimants referenced as "Peppertree" are controlled by a private equity firm, Peppertree Capital Management, Inc.

[2] AMLQ is an affiliate of Goldman Sachs & Co., LLC.

Arbitration Center of the Chamber of Commerce of Lima against the Company and Peppertree by the Company's Peru-based, Peru-organized wholly-owned indirect subsidiaries, and the Company Managers of those subsidiaries as co-Claimants, that allegedly made the same claims and sought the same damages already claimed by Respondents in this arbitration in counterclaims submitted in 2021. Those counterclaims were directly impacted by our Partial Final Award No. 2 ("2d PFA"), issued August 12, 2022, which determined that as a sanction under AAA Commercial Rule R-58 we would stay proceedings on the counterclaims pending compliance by Respondents with certain of our prior orders.[3] Two of the Respondents[4], Terra Towers Corp. and TBS Management, S.A. ("Terra"), each 100% owned and controlled by individual Respondent Jorge Hernandez, are together the majority Shareholders of the Company, while PPT/AMLQ are the minority Shareholders.

3. The Company develops, owns and operates wireless telecommunications towers ("Towers") in eight Central and Latin American countries including Peru and Guatemala. PPT/AMLQ have equity at the top, holding company, level of the Company. "On the ground" in each country in the Company's territory, operations are conducted in the name of indirect wholly-owned subsidiaries of the Company, each of which has one or more Company Subsidiary Managers. But this corporate structure is truly nominal because, based upon various contracts, and in reality, the operations are run by Respondent DT Holdings ("DTH") — 100% owned by Mr. Hernandez — through its affiliates organized in and under the laws of each country in the Company's operating territory,

[3] This stay was implemented in a contemporaneous procedural order.

[4] The Respondents named in the Demand for Arbitration also include DT Holdings Inc. ("DTH", another entity 100% controlled by Jorge Hernandez, and Alberto Arzu. Mr. Arzu was later replaced by Alejandro Sagastume as a Terra-appointed member of the Company's Board of Directors. At all relevant times up to February 10, 2023, Mr. Hernandez and Mr. Sagastume were the Terra-appointed members of the Company's Board of Directors. On February 10, 2023, Respondents notified the Tribunal that Terra had replaced Mr. Hernandez as a Board member with William Mendez Araujo, known to the Tribunal from prior proceedings as a Terra staff attorney. This change in the composition of the Company's Board is discussed later in this Award.

and the respective employees and contractors of each such affiliate. This is based on a contractual arrangement between PPT/AMLQ and Terra that provides for the Shareholders to pay DTH to furnish its personnel and infrastructure to the Company subsidiaries.

4. DTH however does not develop and operate Towers exclusively for the Company. Especially where the Company elects not to participate in a Tower development project proposed by DTH — which is to say, when the Company's Board is deadlocked because the Peppertree-appointed Directors oppose the project -- DTH may develop the Towers for itself or in concert with others. The Company Subsidiary Managers have multiple roles at DTH, working on Tower development and operations both for Company-adopted Tower projects and for non-Company Tower projects. Thus as a practical matter and in day-to-day operations, the Company Subsidiary Managers throughout the territory, including in Peru and in Guatemala, work for Mr. Hernandez.

5. These operating arrangements underlie the submissions by PPT-AMLQ that the Peru arbitration, and another similar arbitration filed January 13, 2023 at the Arbitration Center of the Chamber of Commerce of Guatemala – by the Company's Guatemala-organized indirect operating subsidiaries and their Company Subsidiary Manager -- are a product of collusion between Mr. Hernandez (on behalf of himself and the other Respondents) and the Company Subsidiary Managers as his and the other Respondents' agents.

6. After we granted PPT/AMLQ leave to file an application for interim relief including an anti-suit injunction against the Peru arbitration on January 4, 2023, Claimants reported that an agreement had apparently been reached among the Parties to bring about the termination of the Peru arbitration. Claimants asked that the deadline to file their application be suspended. This was request was granted on January 12, 2023. But on January 20, PPT/AMLQ informed the Tribunal that there was no agreement on termination of the Peru arbitration, that in the meantime the Guatemala arbitration had been commenced, and that they wished to proceed urgently with their

Application. We refer to the Peru and Guatemala arbitrations together as the "Foreign Arbitrations", to the Company Subsidiaries that are Claimants in those arbitrations as the Foreign Arbitration Corporate Claimants ("FACCs"), and to the Company Subsidiary Managers who are Claimants in the Foreign Arbitrations as the "Manager Claimants".

7. Terra and the other Respondents contended, in opposition to the Application, that they have supported and will advance the position of the Company and of PPT/AMLQ in the Foreign Arbitrations that exclusive arbitral jurisdiction over the subject matter of the Foreign Arbitrations and over PPT/AMLQ rests with this Tribunal. They emphasized that one of the two Terra-appointed Directors on the Company's Board, Mr. Hernandez, had responded to the filing of the Peru Arbitration by sending the Peppertree Directors a proposed Board resolution, already signed by him, that would disapprove the Peru Arbitration and call upon the Peru FACC and the Peru Manager Claimants to withdraw that action (Ex. R-7). Based on this evidence, Respondents contended that handling of the Foreign Arbitrations should be a Board matter and not an occasion for any intervention by the Tribunal.

8. Based on the submissions we have invited and received since then, and the oral argument hearing we conducted on February 2, 2023, and the change in Terra's representation on the Company's Board notified to the Tribunal on February 10, 2023 while the Application was *sub judice* (*see* para. 17 below), we find the Application to be meritorious and grant interim relief in the form of an Award as specified in the decretal paragraphs at the end of this Award. To summarize, we award a mandatory injunction requiring the Respondents to terminate the Foreign Arbitrations and to prevent the commencement of additional similar arbitrations, to confirm to the Tribunal that this has been accomplished, and if they should fail to accomplish these mandatory measures, then to indemnify and hold hamless PPT/AMLQ against damages and other

costs they may sustain as a result of the Foreign Arbitrations and as security for such indemnification to provide an escrow of funds in specified amounts.

9. As this is a Partial Final Award concerning interim relief, we clarify what we do not determine today but expressly reserve for a possible future determination: (1) what relief if any might be granted in favor of PPT/AMLQ against the FACCs and Manager Claimants; and (2) what additional relief if any might be appropriate if additional Foreign Arbitrations are filed that purport to submit to arbitration in other countries in the Company's territory, or as additional arbitrations in Peru or Guatemala or elsewhere, disputes that are being or that could be submitted to arbitration under the arbitration agreements applicable in this case.

B. Relevant Elements of the Prior Proceedings

10. Peppertree commenced this arbitration on February 3, 2021 after Terra failed and refused to join with PPT/AMLQ in selling the Company pursuant to Peppertree's notice, given pursuant to the SHA, of its desire to sell the Company. Among Peppertree's claims was a cause of action for specific performance of the SHA's provisions for sale of the Company upon Peppertree's and AMLQ's request for a Company sale upon expiration of the five-year holding period applicable to the shares in the Company, which they acquired in 2015 pursuant to contracts (the most relevant terms of which, for this Application, are discussed below). We entered a Partial Final Award granting such specific performance on February 24, 2022 ("1st PFA"). The U.S. District Court for the Southern District of New York recognized and enforced that Award pursuant to the Federal Arbitration Act and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), and denied Respondents' motion to vacate, in a decision of the Hon. Lewis A. Kaplan, USDJ, issued January 18, 2022, upon which judgment was entered on that date.

11. Terra in its Answer and Counterclaim in this arbitration in 2021 set forth, notably at paras. 22 *et seq.* and particularly as to alleged improper rejections of Towers projects by Terra, *e.g.*, paras. 55-76, facts concerning Peppertree's alleged improper, irrational and bad faith rejection of Terra's tower development proposals. The counterclaim pleading refers to these allegations collectively

as the "Tower Rejection Breach," and at paras. 146-163 states four causes of action based on the Tower Rejection Breach (and other alleged breaches): "Breach of Contract," "Breach of Fiduciary Duties of Care, Loyalty and Good Faith," "Breach of Fiduciary Duty of Candor" and "Conspiracy to Commit Breach of Fiduciary Duty". Terra sought money damages "in excess of $186,616,810 …. for the loss of enterprise value to the Company resulting from approximately 3,000 rejected tower acquisitions." (first request for relief at p. 117). These allegations were based upon the conduct of the Peppertree-appointed Board members carrying out the Board's Development Committee function. As discussed below in para. 105, the Foreign Arbitrations purport to place that same conduct under review before different arbitral tribunals under different rules, in Lima and in Guatemala City, under the laws of Peru and Guatemala.

12. We made a procedural order at an early stage of the arbitration that provided for Respondents' counterclaims to be addressed in a Phase 2 of the arbitration after the Company sale-specific performance question was addressed in Phase 1. Beginning about September 2021 and continuing after we issued the 1st PFA in February 2022 directing the sale of the Company, Respondents pursued a series of measures designed, first, to replace the Company's CEO through unilateral actions of Terra, DTH and Mr. Hernandez, and to discredit and disparage that Company CEO as a justification for the unilateral actions taken. We first ordered interim relief to halt such actions and restore the Company's CEO to his position, in November 2021. That Order was not complied with by Respondents and we had further proceedings concerning compliance and sanctions for non-compliance.

13. This led to an order of our Tribunal in March 2022 that, among other things, required Respondents to cause DTH affiliates that had published disavowals of their relationship with the Company CEO, Mr. Gaitán, to withdraw and correct those publications to make clear that Mr. Gaitán's status was as we declared it to be in our November 2021 order. Respondents did not comply with the March 2022 order either. After Claimants sought further sanctions, and given Respondents' insistence that their refusal to comply was justified, we determined to hold evidentiary hearings to determine the validity of the various allegations made by Respondents about the alleged unfitness of Mr. Gaitán to hold the position of Company CEO, and to continue to be employed in any capacity by any DTH entity -- allegations that Respondents had invoked to bring criminal complaints against Mr. Gaitán in a Guatemala court and to obtain *ex parte* asset freeze orders

against Mr. Gaitán (and certain other DTH employees allegedly aligned with him) from a judge of that court.

14. After proceedings in which Respondents participated only as observers, declining to provide evidence or to cross-examine witnesses on the basis of an argument that this Tribunal was *functus officio*, we made a second Partial Final Award that imposed sanctions for Respondents' non-compliance with our orders. ("2d PFA"). The 2d PFA, dated August 12, 2022, as relevant here, determined that, as a sanction under AAA Commercial Rule R-58, proceedings on Respondents' counterclaims would be stayed until Respondents had complied with the 1st PFA[5], the 2d PFA and our orders in (*inter alia*) November 2021 and March 2022. Respondents did not, and have not, complied. Instead, they have moved to vacate the 2d PFA, which PPT/AMLQ have applied to have recognized and enforced.

15. Respondents also commenced two separate litigations that are now pending as related cases before Judge Kaplan in the Southern District of New York. The first action seeks to set aside a written agreement made in March 2021, by which the Parties selected counsel to represent the Company in this arbitration, an agreement whose validity we recognized in our November 2021 Order. The suit includes allegations of legal malpractice against Company counsel. The second action, filed within two weeks after our 2d PFA, seeks a declaratory judgment that the members of this Tribunal are unfit to continue serving, on the basis of bias, and an order directing that a new tribunal be selected pursuant to the arbitration clause of the SHA.[6]

16. The Parties' respective positions concerning the Foreign Arbitrations stand to be assessed by the Tribunal not only on the basis of the record that has been made before us in January-February 2023, and the relevant terms of the Parties' contracts with one another, but in the procedural

[5] We required such compliance unless that Award was vacated or its recognition and enforcement was refused, but on January 18, 2023 recognition and enforcement was granted and the motion to vacate was denied.

[6] The Tribunal has not been given the complaint or otherwise reviewed its contents (the complaint is under seal in the federal court) but became aware of the suit when its existence was made public by Law360 on August 30, 2022. We have continued to sit as the Tribunal in this matter for the reasons outlined at note 8 in the 2d PFA.

context just recited. Claimants contend that the Foreign Arbitrations are instigated by Respondents and are an attack on the authority of this Tribunal and the integrity of the arbitration, including our 1st and 2d PFAs and our November 2021 and March 2022 orders, and a circumvention of the stay imposed by the 2d PFA. Respondents contend that the Foreign Arbitrations are the independent handiwork of the Peru and Guatemala Company Subsidiary Managers who filed them, and that although Respondents agree with the positions expressed by those managers, they are nevertheless aligned with PPT/AMLQ in seeking to bring about termination of the Foreign Arbitrations. This alignment, Respondents contend, makes the question of what to do about the Foreign Arbitrations a matter to be addressed by the Company's Board, not the Tribunal.

17. One new potentially pertinent fact emerged on February 10, 2023. Respondents notified the Tribunal that Terra had replaced Mr. Hernandez as one of its two appointees on the Company's Board. His replacement is William Mendez Araujo. The Tribunal received evidence about activities by Mr. Mendez Araujo in connection with our 2d PFA. As our findings herein might be seen to be affected by how we perceive this change, we note the following matters in regard to Mr. Mendez that were determined in the 2d PFA:
    a. Mr. Mendez Araujo is an in-house attorney for the Respondents. (2d PFA at para. 54)
    b. Mr. Mendez Araujo's father, William Rene Mendez, was outside counsel to Respondent DTH in Guatemala who represented DTH in filing a criminal complaint against Mr. Gaitán. (Id. & para. 69)
    c. Mr. Mendez Araujo was in attendance at a meeting of Mr. Hernandez with Mr. Gaitán and others in Respondents' offices in Guatemala City in September 2021 (Id. para. 64)
    d. Mr. Mendez Araujo participated in a search of Mr. Gaitán's car on the occasion of that meeting, at the instruction of Mr. Hernandez, that revealed no evidence of any wrongful taking of property by Mr. Gaitán but was portrayed to the Guatemala court by Mr. Mendez Araujo's father as evidence of theft by Mr. Gaitán, and that the Tribunal determined to have been mis-represented by Respondents in submissions to this Tribunal and to the Guatemala courts via Mr. Mendez Araujo's father as outside counsel (Id. paras. 69, 78(d)(f)).
    e. Mr. Mendez Araujo's father, William Rene Mendez, was also co-counsel on behalf of DTH in the filing of a second criminal complaint in January 2022, which was against Mr. Gaitán

in its eventual formulation (Id. para. 83), and which the Tribunal determined to have been baseless and based on a mis-portrayed version of the September 2021 encounters at Respondents' Guatemala City offices, to which William Mendez Araujo had been an eyewitness. (Id. paras. 85(5)(6), 88).

f. Mr. Mendez Araujo's father was ordered to appear in the proceedings before this Tribunal and did not appear. (Id.)

g. To support allegations of criminal activity by Mr. Gaitán, Respondents solicited a memorandum regarding FCPA compliance from the law firm Morrison & Foerster. Mr. Mendez Araujo was "the principal link between Respondents and Morrison & Foerster, and who actively solicited the Morrison Memorandum from Morrison" (Id. para. 85(b)), which solicitation was determined by the Tribunal to have been an unauthorized effort by Respondents, purportedly but not actually on behalf of the Company, to obtain a legal opinion that the Company bore compliance and liability risks if it permitted Mr. Gaitán to function as CEO. (Id. paras. 90-104). The Tribunal also found that Respondents failed to inform Morrison & Foerster of material information that was necessary for it to render a reliable opinion.

C. Relevant Provisions of the Parties' Contracts

18. To further place in context Respondents' contentions and submissions – in summary that the Foreign Arbitrations involve independent and unauthorized actions of the FACCs and the Manager Claimants against the wishes and directions of Mr. Hernandez (and by implication Terra, and DTH, which he owns and controls) -- it is helpful to summarize certain provisions of the network of contracts that were made when the minority shareholders, PPT/AMLQ, invested in the Company in October 2015.

C.-1. The Subscription and Contribution Agreement

19. PPT/AMLQ were required to devote roughly $101 million of their total initial investment of $112.6 million to pay off existing bank debt of (1) Terra, (2) the holding company through which Terra owned and controlled the Company Subsidiaries and (3) the Company Subsidiaries themselves. That includes the Company Subsidiaries that are now the FACCs. The Subscription and Contribution Agreement (the "S&C Agreement") required PPT/AMLQ to pay that sum directly to the bank creditors at the Closing. (S&C

Agreement at Section 1.02). In other words, the 2015 deal between the Parties initially took the form of a capital re-structuring, whereby Terra and its operating subsidiaries were able to have their bank debt paid off by PPT/AMLQ, to whom new equity in the Company was issued in exchange.

20. Second, the S&C Agreement recited that the entities that are now the FACCs (or their direct predecessors in interest, certain formal but non-substantive re-organizations have thereafter occurred) were among Terra's "regional operating Subsidiaries in Central America." Terra represented and warranted that it had "*full corporate power and authority to carry on the business in which it is engaged and to own and use the properties owned and used by it.*" (Section 2.01).

21. Terra further represented that it had "*full power and authority … to execute and deliver this Agreement and the other Transaction Documents to which it is a party, to perform its obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby.*" (Section 2.02). In other words, Terra represented and warranted that it had complete control over the entities in its corporate universe, including the FACCs, insofar as relevant to Terra's performance of the obligations Terra undertook toward PPT/AMLQ in consideration of their $112.6 million investment. Specifically, Terra gave a representation and warranty that "*This Agreement [has] been duly and validly executed and delivered by the Target Company and the relevant Target Subsidiaries and constitute(s) the legal, valid and binding obligation[] of the Target Company and the relevant Target Subsidiaries…*" except as limited by applicable creditors' rights laws and general equitable principles. (Id. Section 3.02). The Whereas clauses of the S&C agreement defined "Target Subsidiaries" to include the entities that are now the FACCs.

22. The fair reading of the S&C Agreement (and related agreements discussed below) is that PPT/AMLQ by entering into these agreements, accepted and relied upon Terra's representations and warranties about its "full power and authority" over the Company Subsidiaries including the FACCs and the due and valid execution and delivery of the S&C Agreement by, and the binding obligation of the S&C Agreement with respect to, each of those Company Subsidiaries.

23. The making of those representations by Terra was part of the contractual exchange for Terra to obtain the PPT/AMLQ investment and simultaneous payoff of corporate debt without having to make each and every one of the Company Subsidiaries, in the eight Central and South American countries where Terra was doing business, individually a Party to the S&C Agreement and the other agreements made at that time (as discussed below).

24. Further, the representations and warranties mentioned above were defined in the S&C Agreement as "Fundamental Representations" (Section 7.06 (c)) and the post-Closing "survival" of these Fundamental Representations was extended to the "expiration of the statute of limitations period applicable to the underlying subject matter of such representation and warranty" (Section 7.01(a) and (b)(ii). Accordingly, these Terra representations and warranties with respect to the FACCs and other similar Company Subsidiaries (and by implication their respective Managers) were continuing representations as well as "Fundamental Representation[s]."

25. The S&C Agreement contained an arbitration clause effectively identical to the arbitration clause in the Shareholders' Agreement ("SHA"). As a result, PPT/AMLQ made their initial investment with the reasonable expectation that the only forum in which Respondents or their Corporate Subsidiaries could subject PPT/AMLQ to dispute resolution would be a Tribunal constituted under the arbitration clauses of the S&C Agreement and/or the SHA, and therefore that a dispute about the authority of the FACCs to act autonomously, *i.e.* other than subordinate to the pre-existing "full corporate power and authority" of Terra that was transferred to the (re-capitalized, re-structured) Company as a result of the transaction, would be arbitrated in New York in English under the AAA Commercial Rules and under the arbitration laws applicable by virtue to choosing New York as the seat of arbitration.

26. The broad arbitration clause found in Sections 8.10-8.11 of the S&C Agreement – and replicated or cross-referenced in the other agreements discussed below – specifies that "any dispute regarding… [the Agreement's] enforceability" -- which per force includes a dispute regarding the enforceability of the arbitration agreement itself -- will be arbitrated in New York in English under the AAA Commercial Rules and (by necessary implication unless otherwise agreed) under the arbitration laws applicable at a New York seat of arbitration. And in Section 8.08 of the S&C Agreement – also replicated or referenced in the other agreements discussed below – the Parties stipulated that any breach of the Agreement causes irreparable harm, entitles the non-breaching party to specific performance, and warrants "the issuance of an injunction or the enforcement of other equitable remedies against it at the suit of an aggrieved party without the posting of any bond or other security."

27. By reason of the filing of the Foreign Arbitrations, the Company and Peppertree have already been forced, in order to avoid default, to submit a written objection to arbitral jurisdiction in the Peru

arbitration. (Ex. R- 25)[7] If the Foreign Arbitrations are not withdrawn, the arbitrators appointed in those arbitrations will decide what if any effect on their jurisdiction arises from (i) the arbitration agreements between the Parties here, and (ii) the prior submission by Terra of the same disputes before this Tribunal. (See Respondents' Original Answer and Counterclaims, dated February 19, 2021, at paras. 22 et seq. and particularly as to alleged improper rejections of Towers projects by Terra, e.g., paras. 55-57, 61-76)

C.-2. The Shareholders' Agreement (SHA)

28. The powers ostensibly available to the FACCs through their Managers in Peru and Guatemala feature prominently in this Application. Respondents have placed in the record constitutive documents of the FACCs about the scope of their and their Managers' powers under national law in those nations.

29. But the Application here concerns the duties owed to one another by the Shareholders of the Company as expressed in their Agreements, all of which are governed by the laws of New York. So we take a "top down" view – in terms of the corporate structure of the Company -- of the question of what conduct by the FACCs and the Manager Claimants may be tolerated by the Shareholders without effective intervention to direct their conduct or to replace those Manager Claimants with persons who would carry out rather than defy the Company's will and the Shareholders' obligations to one another.

30. Pursuant to the "WHEREAS' clauses forming the Preamble of the SHA, the post-Closing corporate structure of the Company was established. The Company owns 100% of a subsidiary called (in abbreviated format) Interco BVI. Interco BVI in turn owns 100% of the shares of BVI companies that had been direct subsidiaries of Terra. These are defined in the Agreement as the CT BVI Subsidiaries. Before the 2015 transaction, the CT BVI Subsidiaries, then Terra subsidiaries, owned, directly or indirectly, 100% of the shares of the locally-incorporated operating subsidiaries in each of countries where Terra operated (defined post-Closing as "CT Subsidiaries"), including the FACCs. Post-transaction, those FACCs, as CT Subsidiaries, have been 100% owned and controlled (via Interco and another layer of holding entities) subsidiaries of the Company.

31. The "**Constitutional Documents**" of the CT Subsidiaries were attached as Schedule 1 of the SHA, per Section 2.01 thereof. In that Section, "*[t]he Shareholders and the Company agree to take all necessary*

[7] As of the date of the last submissions on this arbitration the deadline for filing an Answer in the Guatemala arbitration had not arrived.

action to ensure that the above-mentioned organizational documents are modified to reflect the matters set out in this Agreement." (emphasis supplied). This language is important, because the "**Constitutional Documents**" of the Peru and Guatemala CT Subsidiaries, the FACCs, contain arbitration clauses, and, at least according to the FACCs and Manager Claimants, purport to authorize them under the laws of Peru and Guatemala to do what they have done in commencing the Foreign Arbitrations. (Company Ex. A (Peru Demand for Arbitration), PPT/AMLQ Ex. Q (Guatemala Demand for Arbitration)).

32. But the import of the language in Section 2.01 of the SHA, just quoted, is that any such language of the local level operating subsidiaries' arbitration clauses could not mean, as between the Company's Shareholders, that the CT Subsidiaries could bring arbitrations on subject matter arbitrable between the Shareholders under Sections 8.14-8.15 of the SHA (tracking Sections 8.10-8.11 of the S&C Agreement), and could not mean that the CT Subsidiaries could bring arbitration claims against PPT/AMLQ. The import of the quoted language in Section 2.01 is that, insofar as local law in Peru or Guatemala or in any other country hosting a CT Subsidiary would support an interpretation that local arbitrations are within the powers of CT Subsidiaries, then the Shareholders and the Company are obligated to "*take all necessary actions*" to modify those powers, or to cause them to be construed and applied as not having such meaning.[8]

33. Two representations and warranties of the Shareholders made in Section 2.02 bear directly on the above discussion of Section 2.01: First, that the Shareholders have "*all necessary power and authority… to carry out [their] obligations hereunder….*" ; Second, that the Agreement "*constitutes a valid and binding obligation of such Shareholder, enforceable against it in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general equitable principles….*" In light of this plain language, it is doubtful whether Terra may credibly argue that the laws of Peru or Guatemala may properly be taken into account by a Board member, as a matter of discretion, to oppose Board action to end the Foreign Arbitrations. In Section E below we find that Respondents cannot so limit the measures they are willing to have the Company's Board take to terminate the Foreign Arbitrations

[8] PPT/AMLQ in their Application rely mainly on Section 4.04(a)(viii) of the SHA, which assigns to the Company's Board exclusive authority over commencement of legal proceedings by a Company Subsidiary. But the issues presented by the Application require examination more broadly of the Parties' obligations toward one another, as set forth in their Agreements, with respect to Company Subsidiaries.

34. The governance powers of the Board to deal with the Foreign Arbitrations are not in dispute. The dispute as submitted to us in writing and orally on February 2, 2023 appeared to be over whether this is a circumstance in which the Tribunal may require Terra as a Shareholder and the Terra-appointed Directors on the Board to support a particular Board action proposed by the other Board members – in short, whether Terra's Board members must support replacement of the Manager Claimants in Peru and Guatemala should they maintain their refusal to withdraw the Foreign Arbitrations. However on February 10, 2023, the complexion of this Application changed. As previously noted, on that date, Respondents' counsel notified the Tribunal of Terra's decision to appoint William Mendez Araujo to the Company's Board of Directors in place of Mr. Hernandez. See para. 17 above. Respondents offered no explanation for this change and did not request an opportunity to make submissions on how this change bears on the Application. The change does, however, give us reason to address Respondents' obligations, in regard to the Foreign Arbitrations, more broadly than in terms of the participation of Terra-appointed Directors in Company governance.

35. As to the Company governance powers of the Board, Section 4.04 of the SHA gives the Board power over:

1. (v) "any amendment to … any Company Subsidiary's respective constitutional documents";
2. (vi) "the hiring or firing and compensation of members of the Management Team" which includes the "senior management of the Company Subsidiaries" (see the definitional SHA Art. I, at p. 9)
3. (viii) "the commencement, settlement, payment, discharge or satisfaction of any litigation, claim, liability or obligation … involving … (C) … any Company Subsidiary and any Shareholder or any Affiliate or Related Entity of a Shareholder pursuant to any other agreement, arrangement or transaction"
4. (xiv) "the transfer, in a single transaction or series of transactions, of assets or receivables of … any Company Subsidiary…."

36. In addition Section 4.06 (b) provides: "*Subject to approval by the Board, the Chief Executive Officer of the Company shall nominate the remaining senior managers of the Company and the senior management of the Company Subsidiaries.*"

C.-3. The Development Agreement

37. The Development Agreement, entered into in conjunction with the SHA and the S&C Agreement, is important to the analysis of this Application because it relates directly to the subject matter of the Foreign

Arbitrations and the counterclaims of the Respondents *in this arbitration*, which the Foreign Arbitrations mirror: i.e. the Peppertree-appointed Company Board members' allegedly improper refusals to approve proposals for Tower development advanced by Terra and its Tower-construction affiliate owned and controlled by Jorge Hernandez, DTH.

38. The Development Agreement provides that Terra will submit a "Site Candidate Profile" (SCP) to the Development Committee, and that within two business days "the Development Committee will notify Terra and the relevant subsidiary of DTH whether the Proposed Site will be developed by the Company." (Section 1.1 (c)).

39. The Parties to the Development Agreement are the Company, Terra and DTH. In Section 3.4 of the Development Agreement those Parties agree to resolve "any dispute between or among [them] relating to the terms of this Agreement or the transactions contemplated hereby" pursuant to the arbitration provisions of the SHA, i.e. Section 8.14 and 8.15 "which sections shall be deemed incorporated herein by reference."

40. Further, the Development Agreement is linked to the SHA through Section 4.04(b) of the latter, which provides for the composition of and procedure to be followed by the Development Committee:

> A committee (the "**Development Committee**") shall be established to review and approve the SCP Packages for Tower opportunities presented to the Company pursuant to the Development Agreement. The initial members of the Development Committee will be the Directors. The Board may establish procedures for voting, appointing, removing and replacing additional and/or alternate individuals to the Development Committee. Unless and until the Development Committee establishes a contrary procedure, decisions of the Development Committee will be made by the Board.

D. Relevant Facts Developed in The Proceedings on This Application

D.-1. The Respondents' Role If Any in the Commencement of the Foreign Arbitrations

41. In this Section of our Award we examine what the record reflects about the Parties' factual disputes over (1) Terra's and Mr. Hernandez's alleged involvement in causing the Foreign Arbitrations to be commenced, (2) Terra's and Mr. Hernandez's efforts to cause the Foreign Arbitrations to be withdrawn, and (3) Respondents' contentions that the Foreign Arbitration Claimants are maintaining the Foreign Arbitrations despite knowing that Terra and Mr. Hernandez disapprove and want those arbitrations withdrawn.

42. Three email exchanges summarized below, widely spread over a 12-month period, were combined by Respondents' counsel into a composite exhibit (R-1) to support the proposition that the Manager Claimants had understandable reasons -- of frustration with Tower rejections by the Peppertree Directors -- to take matters into their own hands by filing the Peru and Guatemala Arbitrations. (Resp. Jan. 24 Br. at 2).

43. The first thread in Ex. R-1 is from January 2022. The Manager Claimants — that is, Ms. Merino, Mr. Garzaro and Mr. Ortiz — were passive recipients of an email exchange between Ms. Pineda of DTH and Mr. Rainieri of Peppertree. (Ms. Pineda, we have found in the prior proceedings, was unilaterally installed by Mr. Hernandez to carry out the functions of Company CEO in violation of the Parties' agreement that this was Mr. Gaitán's position and in violation of the SHA in regard to the process for hiring and firing the Executive Team of the Company). The email exchange concerned the "call of funds" for site development in Peru. All members of the Company's Board, the Company's Executive Team, and every attorney appearing in this arbitration was a recipient of this exchange.

44. In Mr. Ranieri's response to Ms. Pineda, he (1) referred to Peppertree's prior rejections of the call of funds for the site developments of the five sites referenced by Ms. Pineda, (2) reiterated those rejections, (3) objected to use of Company funds to develop the rejected sites "until the parties' respective rights relating to this issue have been addressed by the Tribunal in Phase 1."

45. Two further exchanges of emails between Ms. Pineda and Mr. Ranieri are included in composite Exhibit R-1, with nearly identical content and an identical cast of "cc recipients." The first occurred on April 25, 2022 - which was two months after the Tribunal had issued its 1st PFA granting specific performance of Respondents' obligation to join in a sale of the Company. Mr. Ranieri opined that the proposed expenditures for site development were not justified because "[t]he required sale of the Company should be just months away, providing little time for asset appreciation."

46. A third exchange of emails between Ms. Pineda and Mr. Ranieri is also contained in composite exhibit R-1, again in regard to a proposal and rejection of a call of funds for site development. But the dates of this exchange, January 9 and January 15, 2023 skip over an important step in the chronology – to which we now turn.

47. Respondents' Ex. R-2 presents an email from Mr. Garzaro, one of the Peru Arbitration Manager Claimants, dated September 28, 2022, that followed a similar exchange of emails between Ms. Pineda and Mr. Ranieri. Mr. Rainieri's email, like the January and April 2022 emails that preceded it, found in Ex. R-1, concluded with a reservation of rights. Perhaps it was this reservation by Peppertree that served as the context for Mr. Garzaro to write in response: "*I have to let you know that as we reserve the right to initiate legal actions as well. Telecom Business Solution S.R.L. (TBS) is a Peruvian company that performs functions under the strict corporate guidelines and the Peruvian legal framework.*"

48. Our 2d PFA, wherein as a sanction we imposed a stay of proceedings on Respondents' counterclaims pending full compliance with our awards and orders, was delivered August 12, 2022. This email (Ex. R-2) came five weeks later.

49. When the Parties confirmed to us, on January 27, 2023, that there is a disputed issue of material fact about Terra's and Mr. Hernandez's role, if any, in instigating the Foreign Arbitrations, we called for document production by Respondents (PO 2023-02 at para. 12). The start date of the time frame for production was August 16, 2022[9]. So if there were any emails from Respondents or any of their representatives, to the Peru Manager Claimants or their representatives, opposing the issuance of this threat by Mr. Garzaro of local Peru proceedings against Peppertree, or opposing the substance of what Mr. Garzaro threatened, they were within our production order to Respondents.

50. Respondents have not produced a single email expressing Respondents' support for or opposition to the filing of the Foreign Arbitrations. (Putting aside the transmittals of the initial Board resolution calling for withdrawal of the Foreign Arbitrations, discussed in paras. 55-62 below). This is a failure of proof on the Respondents' part. In the context of this Application, considering access to evidence, and our findings in the prior proceedings, and the Manager Claimants' roles in this arbitration as witnesses for Respondents, it was Respondents' burden to provide evidence that explains the origins of the Foreign Arbitrations, or that might explain their lack of access to evidence showing the origins of the Foreign Arbitrations such as evidence that they lack voluntary access to the Company Managers emails and other records. They have failed to present such evidence.

[9] This date was a minor error in our recalling of the date of the 2d PFA.

51. That the Respondents' ultimate objective is the prolongation of the Foreign Arbitrations and not their prompt withdrawal was strongly denied by Respondents in their written submissions of January 24, 2023 and thereafter, and in the oral hearing held on February 2. But in assessing Respondents' objectives as channeled through the arguments of its counsel, we also need to take into account how counsel first addressed us on this matter in an email on January 4, 2023 after we were first informed of the Peru arbitration filing by the Company's counsel.

52. Respondents' counsel wrote to us on January 4 that any involvement of the Tribunal was "*an unnecessary waste of resources, since the Peruvian arbitration falls outside the scope of this arbitration....*" That was an untenable characterization of the Peru Demand for Arbitration that had been filed on December 28, 2022. That arbitration, and the one filed in Guatemala a few weeks later, objectively in the legal effects are -- without regard to who instigated them -- attacks on both of our prior awards. As we explain further below in paras. 98-101, the Foreign Arbitrations obstruct the Parties' ability to effectuate our 1st PFA because the Foreign Arbitrations impair prospects for sale of the Company. They also constitute a collateral attack on our 2d PFA because the Tower Rejection Breach counterclaim might be arbitrated piecemeal, potentially country by country across the eight countries of the Company's territory, in defiance of our stay of proceedings on those very claims and the compliance conditions we have established for lifting that stay (paras. 102-105 below).

53. Respondents' counsel went on to state in his January 4 email to us that"*[t]he Company and its shareholders should be focused on dealing with the Peruvian arbitration in Peru - not before this tribunal.*" In insisting upon "*the limited scope of this arbitration,*" Respondents' counsel did not acknowledge that this arbitration already included, since its earliest days in 2021, Terra's counterclaims asserted derivatively on behalf of the Company asking for $186 million in damages against Claimants arising from the Peppertree-appointed Directors' refusal to support Tower site development, in Peru and throughout the Territory. Had it been Respondents' intention, at that point, to shut down the Peruvian arbitration, one rational first response would have been a letter to the Peru Chamber of Commerce Arbitration Center reporting that the Claims were already submitted to arbitration before this Tribunal, that no arbitration agreement existed between the FACCs and Manager Claimants, on the one hand, and the Company and PPT/AMLQ on the other, and that the Peru Arbitration Center should take no steps to form a Tribunal. But Respondents did not draft or propose such a letter. They proposed that the Company and PPT/AMLQ gear

up to defend the Peru arbitration by hiring counsel – itself an obviously fraught issue because of the disputes among the Shareholders. Another straightforward first response would have been for Mr. Hernandez to instruct the Manager Claimants to withdraw the arbitrations, or else lose their DTH jobs and incomes. Instead, a purported *ex parte* interim measure from a Peru court conveniently surfaced a week later, purportedly applied for by the Peru Manager Claimants, purporting to enjoin the Company from taking any such steps. (*See* paras. 80-84 concerning that purported injunction).

54. The actions and inactions of Respondents in early January send quite a different message from their subsequent insistence that their actions have been directed toward securing the withdrawal of the Foreign Arbitrations.

55. The explanation for Respondents' shift in approach is evident in retrospect. The Respondents' strategy of faulting insubordinate local managers had not yet emerged on January 4. It only emerged three days later (Ex. R-7), on January 7th, when Mr. Hernandez personally sent an email to his fellow Board members transmitting a proposed Board resolution that he had already signed, and accompanied the transmission with an email that said "*I highly recommend we find out what is happening to management in Peru and why they have decided to act the way they have.*" The Tribunal does not believe that Mr. Hernandez needed to enlist the Peppertree Board members to have the ability to find out "*what is happening to management in Peru*" either on January 7, or, indeed, when Mr. Garzaro threatened local legal proceedings against Peppertree on September 28, 2022 (Ex. R- 2)[10] and Mr. Hernandez apparently issued no recorded reply. Within DTH, those Company Managers report directly to Mr. Hernandez and he could contact them immediately and demand answers.

56. The Respondents have not disputed Claimants' contentions that the Manager Claimants are hand-picked by Mr. Hernandez. This is corroborated by evidence submitted by Respondents. Ex. R-22 is the notarial certificate in Guatemala whereby the notary confirms Mr. Ortiz's authority to act as Manager for the Guatemala Company Subsidiary. The notary on that occasion in 2016 is one of the counsel for Respondents in this arbitration, Carlos Ortega of the Mayora e Mayora firm. Mr. Ortega was mentioned in our 2d PFA because he initiated Respondents' contact with the Morrison & Foerster firm to obtain the

[10] Coincidentally or not, this was the very same day that Mr. Hernandez and Mr. Mendez Araujo were conducting a coercive search of Mr. Gaitán's computers, office and personal vehicle in Guatemala City, gathering evidence that they would later use to falsely portray Mr. Gaitán as a criminal in complaints filed in a Guatemala court. See para. 17 above.

Morrison & Foerster Memorandum that became the subject of extensive proceedings summarized in that Award). (2d PFA at paras. 90-102, mentioning Mr. Ortega at paras. 90 and 93).

57. The evidence of Respondents' control over the Manager Claimants is considerable, while the evidence that they are acting without Respondents' blessing here is almost nil. Respondents have not disputed that Mr. Hernandez has the sole discretion to terminate the Manager Claimants from their non-Company positions at DTH. And the Manager Claimants provided evidence in this arbitration – extensive written witness statements that argued the merits of Terra's Tower Rejection breach counterclaims in support of Terra's position on those claims (PPT-AMLQ Exs. K, L, and S), at times when those issues were not actively the subject of our proceedings. Also, the Manager Claimants were in the forefront of Respondents' failed effort, before the Company's Board and in turn before the Tribunal, to justify disobedience to our Interim Relief Orders on the basis that Mr. Gaitán's alleged misconduct was a compliance risk to the Company (PPT/AMLQ Exs. M, N, O).

58. From the prior proceedings, there is more evidence of Respondents' willingness to act unilaterally in regard to the employment status of Company Subsidiary Managers. In 2021-22, when Mr. Hernandez purportedly became displeased with a different Company Subsidiary Manager, Mr. Gaitán's father in El Salvador, allegedly due to embezzlement of funds, he did not hesitate to replace him unilaterally without asking the other shareholders to join him to "find out what is happening to management." This Tribunal had a lengthy evidentiary process in 2022, and the evidence received, which Respondents elected not to contradict, showed that Mr. Hernandez brought about the dismissal of Mr. Gaitán's father as Company Subsidiary Manager in El Salvador in 2022 on the basis of accusations of fraud and embezzlement and other personal impropriety that had no factual basis. (See 2d PFA at paras. 55-61, 77).

59. Two days after Mr. Hernandez's January 7, 2023 "*find out what is happening*" e-mail, on January 9, 2023 a Washington, DC lawyer named Claiborne W. Porter, evidently acting for Respondents, sent an email to Claimants' counsel. It was introduced as Respondents' Ex. R-8 on January 24, 2023 and it reads as follows: "*Hi Mike and Gregg. We are reaching out to you as a matter of urgency. Given the exigency of the Peru arbitration - I believe the company must respond by January 11 - we are asking whether your clients are going to sign our proposed board resolution. Please advise as soon as possible.*"

60. Below this email in Ex. R-8 appears extensive redaction. The redacted matter, it turns out, was another email from Mr. Porter to Claimants' counsel Mr. Ungar, on January 8, 2023, a Sunday, saying in part: "*Per my text, I have attached the Board resolution Jorge sent.*" This was presented by Respondents on January 27 as Ex. R-14.

61. Respondents presented as Ex. R-10 another email from Mr. Porter, sent on Saturday afternoon January 14 to Company counsel Adam Schachter with copies to PPT/AMLQ's and Respondents' arbitration Counsel, stating in pertinent part: "*We learned from Sagastume that CT was noticed for arbitration in Guatemala by management.*" Mr. Sagastume is the second Terra-appointed member of the Company's Board.

62. These emails in turn factor importantly in our findings regarding Mr. Hernandez's role in the Foreign Arbitrations. It is inferable that Mr. Porter played some role in the genesis of Mr. Hernandez's Board resolution proposal of January 7. It is also inferable that Mr. Sagastume may have had knowledge about the genesis of the Guatemala arbitration. After we directed Respondents in PO 2023-02 to produce documents about the Foreign Arbitrations including those to or from "representatives," Respondents' lead counsel Mr. Smith in a January 31, 2023 email to the Tribunal requested an extension of time to comply with the production order, stating that this was needed to enable an ESI specialist to complete the required search; and his email provided a short list of "representatives" whose emails would be searched – a short list that included no attorneys.

63. In the Tribunal's response to Mr. Smith on February 1, we made it clear that "representatives" included attorneys and that any privileged documents should be identified in a privilege log that the Tribunal had already acknowledged might be necessary. The Tribunal did not grant Respondents' request for an extension of time, stating that it had not been shown why the process of identifying responsive documents required an ESI specialist's search.[11] But neither did we close the door to supplementation of the small

[11] Respondents' counsel's explanation at the February 2 hearing that an e-discovery vendor's services were necessary because the Tribunal would likely not credit the results of an informal search process is fair only to the extent that the Tribunal might be skeptical of inferences Respondents might seek to have us draw in their favor based on an absence or paucity of responsive documents following a diligent search. But in this case it is Claimants whose interests are advanced by an absence of responsive documents, and Respondents are readily in a position to rebut any such conclusion by producing even a handful of contemporaneous emails, texts or other messages in which Mr. Hernandez expressed opposition, in words or substance, to the Manager Claimants' consideration or initiation of their foreign arbitration proceedings. An informal search would be sufficient to identify at least some such messages if any existed.

number of emails (several of which were already in the record) produced 30 minutes before the February 2 oral hearing.[12]

64. At the close of the oral argument hearing on February 2, we directed both Parties that adding evidence to the record on this application would only be permitted upon leave obtained for good cause. When Respondents sought such leave on February 6, they did not explain the scope of their ESI specialist's work; they said nothing about what searches had been done to find communications to and from lawyers, or to and from Mr. Sagastume; and they tendered no privilege log. For these reasons, we did not grant Respondents' motion for leave to supplement.

65. Respondents' failure to produce more than a handful of documents, and any relevant documents other than ones already provided to Claimants, is a source of concern. It seems likely that there are one or more emails to and/or from Mr. Porter that pertain to the Foreign Arbitrations, other than those sent to PPT/AMLQ that we have seen. It would be odd indeed for any of Respondents' counsel to contact opposing counsel about a matter such as the Foreign Arbitrations without having first communicated with the client.[13] It also seems likely that Mr. Sagastume has emails about at least the Guatemala arbitration. Possibly certain of these emails would be subject to a privilege claim. But we received no privilege log. And despite our specific directions that the emails of counsel be searched, there was no representation made to us that this was done.

66. No emails or other communications about the Foreign Arbitrations between or among Respondents and the Manager Claimants (or their respective counsel) were produced by Respondents. We find it wholly implausible that these Foreign Arbitrations originated, and have subsisted for several weeks, without there being any such communications (save for the exceptions now mentioned). But among the handful of documents provided untimely by Respondents 30 minutes before the February 2 oral hearing was an email from one of Terra's in-house lawyers, Ms. Kirby, to the Manager Claimants on February 1, 2023 informing them of our document production request in PO 2023-02 (but without transmitting the Order

[12] On February 6, 2023, Respondents moved for leave to supplement the record with a small batch of emails derived from the ostensibly completed ESI search. Whereas Respondents stated that nearly all of emails found were already in Claimants' possession, and the others were not relevant, and whereas the motion made no representations about the scope of the search effort, we did not grant that application.

[13] On February 6, 2023, Mr. Porter entered his appearance in this arbitration as one of counsel of record for the Respondents.

or that excerpt of it). Another of the documents Respondents produced was a reply from Mr. Garzaro to Ms. Kirby, also on February 1, in which he asserted: "*Given that we are not parties to the US arbitration nor are we managers or representatives of any of the Respondents, we are not bound by paragraph 12 of the said order.*"

67. We make several observations.

68. First, it was established in our 2d PFA after an extensive evidentiary proceeding that when Mr. Hernandez wanted documents from the computers used by Mr. Gaitán, Ms. Echeverría and others who he perceived to be aligned with them — that is to say, who he perceived to be aligned against him in regard to this arbitration — he called them to a meeting with him in Guatemala City on short notice, flew to Guatemala City to attend the meeting, and prevented them from leaving a conference room until they had turned over the computers they used to Mr. Hernandez's IT assistant for purposes of copying their hard drives. This was, according to the evidence, under threat of physical force because armed security guards were present on the premises and they were under the direction of Mr. Hernandez. Mr. Hernandez, we found based on the evidence, had gone so far as to insist on a search of Mr. Gaitán's car and Mr. Gaitán's office by Mr. Hernandez's lawyers – including Mr. Mendez Araujo just now appointed to replace Mr. Hernandez on the Company's Board -- to determine if Mr. Gaitán had removed anything from the premises. And the fact that Mr. Gaitán had stolen nothing, as the search of his car and office had confirmed, did not deter Mr. Hernandez from causing the filing of criminal charges against Mr. Gaitán in a Guatemala court accusing him of theft. (2d PFA paras. 63-69, 78)

69. Second, we sent PO 2023-02 at 5 pm on January 29, 2023 and Respondents' counsel knew our deadline for production was February 1, 2023 at 6 pm. There is no evidence provided or even a representation from Respondents' counsel that even begins to justify having a search for the responsive documents in the possession of the Manager Claimants begin with Ms. Kirby's email sent at 1:42 a.m. on February 1.

70. Third, from the evidence before us, it is clear that at least two people in Respondents' camp know the origins of the Board resolution proposed by Mr. Hernandez on January 7: Mr. Hernandez and Mr. Porter. That is to say, those individuals possess evidence, electronic or otherwise, that would answer the disputed fact question of whether that Board resolution reflects an authentic commitment of Respondents to terminate an unauthorized foreign arbitration, or an orchestrated ruse to make it appear so. Invited to

produce evidence by our Procedural Order No. 2023-01 of January 25, 2023, Respondents declined, saying the burden of proof was on Claimants. Ordered to produce evidence in Procedural Order No. 2023-02 as clarified in Procedural Order 2023-03 and in our emailed guidance on February 1, 2023, they failed to comply.

71. The foregoing facts amply support an adverse inference, which we draw, that Respondents supported, if not instigated, the Foreign Arbitrations.

72. Further, just as Respondents on September 28, 2022 did not respond in opposition to Mr. Garzaro's threat of local legal proceedings against Peppertree in Peru (Ex. R-2), no evidence is presented of any response by Respondents to Mr. Garzaro's patently untenable and seemingly insubordinate insistence in his February 1, 2023 email that our orders for document production do not bind the FACCs and the Manager Claimants. That our orders directing conduct by DTH make DTH legally responsible for non-compliance by DTH subsidiaries, affiliates and employees was determined in this arbitration in our interim measures orders of November 2021 and March 2022, and was incorporated in our 2d PFA.

73. Equally here, DTH and its sole shareholder Mr. Hernandez are legally responsible for the Manager Claimants' resistance to our document production orders, and for Respondents' decision to suffer them to respond in this fashion rather than, if necessary, sequester and copy their email servers which based on evidence in this arbitration discussed above, are surely Company property. The Manager Claimants' resistance and Respondents' acquiescence in it seem to be aligned with the position taken by Respondents in the proceedings leading to our 2d PFA, i.e. that our Tribunal lacks power to command any conduct by affiliates of DTH and their employees. But that Award remains in full force and effect so today our prior rulings on DTH's and Mr. Hernandez's responsibility for the conduct of DTH employees, affiliates and employees control in proceedings before us.

74. Also, Respondents produced on February 1 an email from Mr. Garzaro to the Board members that was copied to every attorney appearing in this arbitration, dated February 1, 2023 at 2:31 a.m. In that email, Mr. Garzaro asserts that Claimants' allegation that the Peru arbitration was instigated by Mr. Hernandez is "*baseless*" and then states: "*We have no knowledge of your dispute in the US*" (an assertion that at odds with the fact that Mr. Garzaro and Ms. Merino and Mr. Ortiz submitted extensive written testimony in this arbitration).

75. As to allocation of burden of proof on disputed fact issues in an international arbitration, this is within the sound discretion of the Tribunal. The specific context reasonably affects that allocation, and here where the applicant seeking urgent interim relief cannot reasonably avail itself of the disclosure procedures that the Commercial Rules provide, we find it appropriate to allocate the burden to the party that has custody and control of the pertinent evidence, Respondents. We also find that Claimants shifted the burden of proof to Respondents on the disputed fact issue of Respondents' support for the Foreign Arbitrations by presenting evidence of (1) Respondents' and especially Mr. Hernandez's ability to direct and control, and indeed to dictate through intimidation, the conduct of the Manager Claimants and other employees of DTH and its affiliates and to act unilaterally to affect their status adversely upon only his own whim and preference, and (2) the prior written testimony in this arbitration in support of Respondents' positions including but not limited to the Tower Rejection Breach counterclaim by the Manager Claimants: Ms. Merino and Messrs. Garzaro and Ortiz.

76. Our allocation of the burden of proof, as well as our ultimate determination, is reinforced by the fact that Respondents' principal defense in this proceeding to Claimants' allegation that they supported the Foreign Arbitrations is -- apart from having no burden to disprove such allegations -- that Respondents not only had no motive to support the Foreign Arbitrations but that such proceedings were inimical to Respondents' interests. Yet Claimants pointed out convincingly that the pendency of the Foreign Arbitrations actually serves Respondents' longstanding opposition to the sale of the Company by thwarting the interest of prospective buyers in considering an acquisition of the Company, and by countermanding the effectiveness of our stay of proceedings on Respondents' counterclaims and the potential coercive effect of that stay in potentially causing Respondents to comply with our November 2021 and March 2022 Orders. (Feb. 2, 2023 Hearing Tr. at 40-41)

77. Respondents, in full control over evidence of their own conduct, therefore had the burden of proof on this disputed issue of fact, and they failed to sustain it. An email such as that created by Mr. Garzaro on February 1, 2023 does not sustain Respondents' burden of proof. It only serves to aggravate and deepen the dispute over whether Mr. Garzaro writes such emails in service to Mr. Hernandez. The same can be said of Mr. Garzaro's and Ms. Merino's correspondence dated January 13, 2023 (PPT/AMLQ Ex. B) sent to Peppertree counsel in Peru wherein they asserted that they were unable to confirm the authenticity of the Board resolution initiated by and signed by Mr. Hernandez, and their refusal to heed that resolution

even after emails from Mr. Rainieri and Mr. Hernandez on January 25, 2023 (produced by Respondents) confirmed its authenticity.

78. Therefore, based on the combination of adverse inference and failure to satisfy the burden of proof, upon Claimants' evidence, and upon Respondents' opposition to the relief sought by Claimants premised on several highly technical and unpersuasive grounds, we find as facts: (1) that Respondents at a minimum have supported the Foreign Arbitrations, and (2) that Respondents' proffer of a Board resolution purporting to seek dismissal of the Foreign Arbitrations was a pretense to mask their ongoing support for the Foreign Arbitrations.

79. It follows from these findings of fact that Respondents' legal arguments that interim relief is unnecessary because the Board should be left to determine how to respond to the Foreign Arbitrations cannot be accepted. The Terra-appointed members of the Board have not acted in good faith, and this justifies the Tribunal's intervention to require conduct that is not only in conformity with the express provisions of the SHA but also with the duty of good faith. On the record before us, the incoming Terra Board member, Mr. Mendez Araujo, is and in the course of this arbitration has been Mr. Hernandez's agent.

D.-2. The Peru Injunction Orders

80. The Parties in initial submissions made reference to an *ex parte* injunction order said to have been entered by a judge in Lima, Peru, upon the application of the Peru Manager Claimants. Neither party initially submitted the purported orders, and upon the request of the Tribunal the Respondents did submit them. What was submitted (as understood from the English translations submitted) appears in form to be two effectively identical purported injunction orders, so-called "precautionary measures," which may have been issued on January 12, 2023 by Judge Juan Gustavo Vasillas Solano of the Seventh Civil and Commercial Court in Lima. The Orders purport to direct the Company not to alter the status and ["ordinary and natural"] powers of Ms. Merino and Mr. Garzaro as Managers of the Peru Company Subsidiaries, for the duration of the Peru Arbitration. However the Orders bear no manual signature of the identified judge or any other officer of the Court. The translated documents bear indications that a digital signature may have been given by someone, but this is unclear – both as to the presence of a digital signature of a Judge and as to the effect if any of a digital signature in the issuing court.

81. Despite our Tribunal having ordered both Parties to obtain and provide duly authenticated copies of the Orders together with certified translations, and our guidance that on the question of whether the orders are self-authenticating we would be guided by Federal Rule of Evidence 903(b), the Parties have not complied but have instead merely provided the representations of their respective counsel, on what basis we do not know, that these Orders were in fact entered by a Judge in Peru. We have an email so stating from Respondents' counsel Mr. Smith on January 30, 2023, and an email from Claimants' counsel Mr. Djordjevic so indicating on January 31, 2023. Neither of these emails was a formal attestation. The Parties via these emails may be seen to have stipulated that they do not to contest the authenticity of the Orders. But whether there is any such stipulation is unclear to us, especially because in the oral hearing on February 2, 2023 Respondents' counsel did not place any reliance on the purported orders, a stance that was in contrast to Respondents' prior written submissions.

82. Our concerns about the authenticity of the Orders (in particular whether they are, rather, proposed Orders in the electronic file of the Court that still await the imprimatur of a Judge) were intensified upon receipt of a written opinion about the process applicable to service of the Orders, authored by the Peruvian co-counsel for the Company designated by Respondents, dated February 1, 2023 and submitted as evidence by Respondents on that date. (Ex. R-27). According to that opinion, there are three possible methods for service abroad on the Company, as a British Virgin Islands company:

> 1. The Company may unilaterally decide to appear before the judge, and request to be notified with the injunction order at a Peruvian address.
> 2. The Judge could send a formal notification from Peru to the legal address of the Company in British Virgin Islands with the Injunction Order.
> 3. Once the arbitration tribunal is installed in the proceeding initiated by the Peruvian Subsidiaries and the Managers, the Tribunal will serve the injunction order by email to the Company, as this is a formal notification toll according to the arbitration rules.

(Ex. R-27 at p. 7).

83. Evidently no Judge in the Peru court has sent a formal notification to the Company in the BVI, as the Company or the Parties would have notified the Tribunal if this had occurred. And transmission of the Orders in the first instance by the Peru Arbitral Tribunal once it is fully constituted seems antithetical to the time-sensitive interim relief purportedly given by these Orders, *i.e.* to forbid the immediate termination of the Manager Claimants in Peru from their Manager positions. If the Judge intended the Orders to have the immediate and urgent effect that is recited in the Orders, it would make no sense to

allow a gap period of indefinite duration, before the Tribunal is constituted, in which the Company and/or DTH could terminate the employment of, or change the responsibilities of, the Manager Claimants. What is more, the Orders as rendered in English call for a different method of service entirely, i.e. "by international warrant." This raises a question not only because it is not mentioned as a permitted method of service in the opinion of Peruvian counsel tendered by Respondents, but also because Peru is not, so far as we can discern, a Party to the Hague Service Convention. (www.Travel.State.Gov/Legal Resources/Judicial Assistance Country Information/Peru Judicial Assistance Information, last visited February 7, 2023). Further, the US State Department online resource just cited reports that Peru is a party to the Hague Apostille Convention and that "Peru's competent authority for the Hague Apostille Convention will authenticate Peruvian public documents with Apostilles." (Id.) But neither Party submits that this has been done, or that they even attempted it. Further, neither Party submits any evidence that the purported Orders have been served in any fashion that any interested party contends constitutes valid and effective service.

84. The Tribunal reaches no conclusions about the authenticity of the Orders. In the oral argument on February 2, 2023, they were not relied upon by Respondents as a basis to argue that potential violation of the Orders should be a factor for Company Board members to consider in deciding whether to remove the Manager Claimants in Peru from their positions and replace them with new Managers who would withdraw the Peru Arbitrations, or relieve them of responsibilities in regard to the commencement and pursuit of legal proceedings. This, together with the undisputed fact that the purported Orders have not been served, supports our determination that the purported Orders play no role in our consideration of PPT/AMLQ's interim relief application. We also note that the Orders were obtained – assuming they were – in an exclusively *ex parte* process in which the Company and Claimants were neither given notice nor an opportunity to be heard. Respondents asserted in their January 30, 2023 submission that in the accompanying opinion of their engaged Peruvian co-counsel for the Company (Ex. R-27) it would risk acceptance of service of the injunction order to ask the Court for a certified copy. But in fact this assertion cannot be found in Ex. R-27. Not only do Respondents cite an opinion of Peruvian counsel for a statement they did not make, but they offer no account of their failure to use the facility for authentication offered pursuant to the Hague Apostille Convention. Our doubts about the authenticity of the purported injunction orders are increased as a consequence.

E. Legal Analysis

E.-1. Applicable Legal Standards

85. Rule R-37 of the AAA Commercial Arbitration Rules states in pertinent part:

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

86. Further, whereas interim measures are a form of remedy or relief, Rule R-47(a) is also relevant. It provides that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including but not limited to, specific performance of a contract."

87. We should be clear, however, about how we interpret Rule R-37's requirement that interim relief should be "necessary." Implicit in that phrase, when the Rule is applied in an international arbitration, is a requirement that the measure should be necessary to avoid an injury to the applicant that is "not adequately reparable by an award of damages" and that such injury "substantially outweighs the harm" to the party against whom the measure is directed. *See* UNCITRAL Model Law on International Commercial Arbitration Art. 17A sub-section (1)(a); *see also* M.J. Goldstein, *A Glance Into History for the Emergency Arbitrator*, 40 Fordham Int'l L.J.779 (2017).

88. It follows logically that we also adopt the Model Law's criterion that the applicant for interim relief should demonstrate "a reasonable possibility that the requesting party will succeed on the merits of the claim." Whereas the interim measures sought by PPT/AMLQ are in aid of the effectiveness of relief we have already given, i.e. the 1st and 2d PFAs, rather than new relief PPT/AMLQ seeks, we consider that this criterion has clearly been satisfied. Stated differently, insofar as the interim relief relates to the prospects for a sale of the Company, PPT/AMLQ already prevailed on the issue of whether the Company must be sold, in our 1st PFA. Insofar as the interim relief seeks to require arbitration of the Respondents' counterclaims in this arbitration, Respondents' stated position is that they agree.

89. Where the Parties' arbitration agreements provide a standard applicable to the issuance of interim measures by arbitrators, arbitrators have the power to grant interim measures according to those standards even if the selected form of interim relief could not be given directly by a court under the law governing provisional relief in that court. *See* CE Int'l Resources Holdings LLC v. S.A. Minerals Ltd. Partnership, 2012 WL 6178236 at **3-5 (S.D.N.Y. Dec. 10, 2012). That is not to say, however, that our

discretion in deciding whether to grant an anti-arbitration injunction, or relief that will accomplish it, should not be informed by the principles courts would apply if measures had been requested in the courts. The measures we adopt today are fully consistent with New York arbitration law.

90. Under the arbitration law of New York, "[a] party seeking to enforce a valid agreement to arbitrate in New York under CPLR 7503(a) is entitled to injunctive relief against further prosecution of proceedings in tribunals of other jurisdictions concerning matters within the scope of the arbitration agreement." In the Matter of PriceWaterhouseCoopers, LLP v. Cahill, 205 A.D.3d 463,464 (1st Dep't 2022). *Cahill* is in a direct line of consistent New York arbitration jurisprudence from a case cited here by PPT/AMLQ and Respondents, Curtis, Mallet-Prevost, Colt & Mosle, LLP v. Garza-Morales, 308 A.D.2d 261, 263 (1st Dep't 2003), where the Appellate Division invoked "*the long-settled principle that a party seeking to enforce a valid agreement to arbitrate in New York under CPLR 7503(b) is entitled, as a matter of course, to injunctive relief against further prosecution of proceedings in other jurisdictions concerning matters within the scope of the arbitration agreement.*" (emphasis supplied).

91. The First Department in both cases, *Curtis* and *Cahill,* cited S.M. Wolff Co. v. Tulkoff, 9 N.Y.2d 356 (1964), where the New York Court of Appeals held that the forerunner of CPLR 7503, section 1451 of the Civil Practice Act, authorized a stay of proceedings brought before a federal agency outside New York in violation of an arbitration agreement providing for arbitration in New York. The State's highest court stated in pertinent part:

> [T]he courts of this State possess the power to stay proceedings wherever they may be pending. Had it been the design of our Legislature to limit the stay, as urged by the respondents, words were at hand to reflect that design. . . . To deny to our courts the power to grant specific performance of an arbitration clause by enjoining the prosecution of foreign proceedings would be a step backward. It would partially re-establish the long-abandoned doctrine that an agreement to arbitrate is revocable. We may not and should not take such a step unless expressly directed to do so by the Legislature.

9 N.Y.2d at 361-62.

92. Had the interim relief sought by PPT/AMLQ here been sought in the first instance from a court applying New York law, an argument might perhaps have been made that the court's power to stay prosecution of foreign proceedings under this case law is exercisable only in conjunction with a motion to compel arbitration. But that possible limitation does not affect us, because our powers to grant interim relief are

governed by the Parties' arbitration agreements, and in turn by Rules R-37 and R-47(a) of the AAA Commercial Arbitration Rules. *See* CE Int'l Resources Holdings, *supra*.

93. It is within our discretion, applying those arbitration rules, to conclude that the anti-suit injunction powers New York courts may exercise in support of enforcing an arbitration agreement providing for arbitration in New York under New York law are an appropriate frame of reference for the exercise of anti-suit injunction powers by New York-seated international arbitrators when confronted with collateral attacks upon and obstruction of the effectiveness of their own prior awards and orders that they made pursuant arbitration agreements providing for arbitration in New York under New York law.

94. Respondents urge us to be guided by the principles federal courts apply when considering whether to grant a foreign anti-suit injunction in a non-arbitration context, cases such as China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987) and Paramedics Electromedicina Comercial, Ltda v. GE Medical Systems Information Technologies, Inc., 369 F.3d 645 (2d Cir. 2004). (Respondents' Feb. 1, 2023 Br. at 4-6). (Indeed, the Tribunal brought those cases to the Parties' attention, to invite their comments on the federal anti-suit injunction case law, in PO 2023-02.) Under these cases, Respondents contend, the first requirement for an antisuit injunction is that the parties should be the same before the enjoining court and the court in which prosecution is to be enjoined. Respondents contend that this requirement is not met here because the FACCs and Manager Claimants are not parties to this case, and that our analysis should stop there with a finding that the first "requirement" for an antisuit injunction is not met.

96. But the *Paramedics* case, as Claimants have observed (February 2, 2023 Tr. at 81), interpreted the *China Trade* requirement of party identity to be satisfied where there is "*sufficient[] similar[ity]*." *Paramedics*, 369 F.3d at 652. And indeed in a recent case, a federal district court in the Southern District of New York observed that "[d]*ecisions interpreting China Trade have held that … the parties need not be identical in both matters, so long as the real parties in interest are the same. … Here, the parties to the two actions are … sufficiently similar to satisfy the first threshold requirement of China Trade because Banamex is a wholly-owned indirect subsidiary of Citigroup.*" Citigroup, Inc. v. Sayeg, 2022 WL 179203 at **8-9 (S.D.N.Y. Jan. 20, 2022) (internal citations and quotation marks omitted). [14]

[14] Neither party has cited this case. While this might be a discretionary reason for the Tribunal not to rely on it, or to give the Parties an opportunity to comment before we cite it, that is not necessary here, because this is an urgent interim relief context and also because we sent the Parties in the direction of the *Citigroup* case. In Procedural Order No. 2023-02, we directed the Parties to identify and consider relevant progeny of the *Paramedics* case, of which this *Citigroup* case is surely one and perhaps the most recent one.

96. In the Tribunal's analysis below, we address Respondents' contentions that the Parties in the Foreign Arbitrations are not entirely the same as the Parties to this arbitration, even though the FACCs are indirect wholly-owned subsidiaries of the Company and the Manager Claimants serve with the Company's approval. But we will engage in that analysis mainly to address Respondents' contentions, under the (counterfactual) hypothesis that we considered federal anti-suit injunction standards generally, rather than New York anti-suit injunction standards in relation to a New York arbitration, to provide the most suitable guidance.

97. However we are considerably more influenced by the New York case law discussed in paras. 90-91 above. That case law more precisely captures how a Tribunal asked to give effect to an arbitration agreement providing for arbitration in New York under New York law should treat foreign proceedings that undermine New York's pro-arbitration policy, the arbitration agreements at stake, and the outcomes in those arbitrations.[15] And that case law, as we find it, does not make the availability of an anti-suit injunction depend on the *China Trade* factors being met. The New York cases are focused on the commonality of the subject matter between the foreign proceedings and the New York arbitration that the parties agreed to.

E.-2. Application of the Standards

E.-2.1 *Obstruction of PFA 1 as Irreparable Injury*

98. PPT/AMLQ contend that they are irreparably harmed by the pendency of the Foreign Arbitrations and the threat of additional Foreign Arbitrations, because prospective purchasers of the Company, which our now-confirmed 1st PFA ordered to be sold, would be discouraged from bidding by these manifestations of internal dissension among the Shareholders and between the Company and its local operating subsidiaries. Respondents do not disagree. Their submission is that it is for the Board not the Tribunal to find a path to the termination of the Foreign Arbitrations.

99. We find PPT/AMLQ's contention to have merit. In the 1st PFA we found as a basis for granting specific performance for the Company to be sold (in the manner specified in the SHA) that money damages were not an adequate remedy, and we declined to accept Respondents' contentions that money damages

[15] Other than the *Curtis* case, the New York anti-suit injunction cases cited in Respondents' January 24, 2023 submission do not concern injunctions sought to protect the movant's choice to arbitrate in New York, and so we do not find them to furnish suitable guidance for our decision.

would be an adequate remedy. The impairment of an equitable remedy already granted in an Award – here, an interference with the effectiveness of the Company Sale remedy, by harming both the prospects of a sale, and the price obtainable, in ways that cannot be adequately measured – is itself an injury not adequately reparable by money damages.

100. Common business sense tells us that potential bidders for the Company will shy away because they cannot evaluate the impairment of the Company's operations resulting from the current state of affairs at the local level in Peru and Guatemala (and potentially elsewhere). A buyer might reasonably wonder if the buyer can effectively acquire the operations at those local levels, and whether enforceable general releases can be obtained from Respondents, from the FACCs and other Company Subsidiaries, and from the Manager Claimants and other Company Subsidiary Managers. In short, if clear title and clear control, without post-acquisition liability risk, cannot be obtained by a simple negotiation through an investment bank acting jointly on behalf of all the Shareholders, why should an interested buyer continue to be interested?

101. We are in no position to measure this harm *accurately* in money terms. We observed in the 1st PFA that we might eventually need to address a claim from Claimants to substitute a sum of money for the sale of the Company if the Company cannot be sold, or to award some money damages if there is a sale but at a price lower than what PPT/AMLQ contend would have been achieved in 2021 had there not been disputes and arbitration and the type of internal discord that have marked the period 2021 to date as described in detail in the 2d PFA. But as we observed in the 1st PFA, the fact that we might be forced to put a value on this loss does not make money damages *adequate*, but only potentially necessary.

E.-2.2 *Collateral Attack on PFA 2 as Irreparable Injury*

102. In the 2d PFA we imposed a sanction upon Respondents under AAA Rule R-58, for their non-compliance with several of our orders, that imposed a stay of proceedings on Respondents' counterclaims that would be lifted only upon full compliance by Respondents with all of our orders and awards with which they had not yet complied. At this time, it appears Respondents do not intend to comply. They have filed a Notice of Appeal from the federal court judgment confirming the 1st PFA. They are pursuing a petition to vacate the 2d PFA. They also maintain their separate action in the Southern District of New York for a judgment that would disband and require the replacement of this Tribunal on the basis that we are too biased against Respondents to be allowed to continue.

103. If interim relief is not granted to bring about termination of the Foreign Arbitrations without any proceedings taking place in those arbitrations, there is a substantial risk of impairment of the effectiveness of the stay of proceedings on Respondents' counterclaims that we have imposed in the 2nd PFA, a substantial risk that the pending confirmation and vacatur applications in the Southern District of New York cease to be the exclusive means to challenge that aspect of the 2d PFA, and that a judgment confirming the 2d PFA would not halt the Foreign Arbitrations.

104. Moreover, steps in the Foreign Arbitrations that are well short of final awards on the merits inevitably create harm not adequately reparable by money damages. Claimants and Respondents agreed to arbitrate disputes with one another under AAA Commercial Rules before a Tribunal selected pursuant to those rules, at a New York seat of arbitration, in English, with New York law as the governing law. The fact that the elements of such agreements have value for which money is no substitute is reflected in the fact that the Federal Arbitration Act, the New York CPLR Article 75, the 1958 UN Convention on the Recognition of Foreign Arbitral Awards (New York Convention) and the 1975 Inter-American Convention on Commercial Arbitration (Panama Convention) call for such agreements to be specifically enforced by courts and for courts to stay or dismiss litigation in contravention of such agreements. The carving of Respondents' counterclaims here into country-by-country arbitrations at the Company Subsidiary level deprives Claimants of rights clearly protected by the arbitration agreements in the SHA, the Development Agreement and the S&C Agreement, for which the New York and Panama Conventions, the FAA and Article 75 of the CPLR stand as clear evidence that money damages are not an adequate substitute for specific enforcement of such agreements.

105. Further, the Parties agreed that "the arbitration award … shall be final and binding on the parties." (SHA Section 8.15). By agreeing to binding arbitration in New York, the Parties agreed that vacatur of an award by a state or federal court in New York applying the FAA and the New York and/or Panama Conventions would be the sole form of recourse against a binding arbitration award. Arbitrating Respondents' counterclaims by subdividing them into multiple country-by-country pieces, and making the country-level operating subsidiaries and their managers the nominal claimants, and invoking arbitration clauses calling for arbitration under different rules and different laws and in a different language, when our 2d PFA stays those counterclaims until the 2d PFA's conditions for lifting the stay are met, violates not only the commitment to AAA arbitration in New York but also the commitment to the exclusivity of FAA review of the resulting awards. *See* Gulf LNG Energy, LLC v. ENI USA Gas Marketing LLC, 242 A.3d 575, 578 (Del. 2020), *cert. denied*, 142 S. Ct. 76 (2021) ("Under the FAA, the courts have the exclusive power to

review and enforce arbitration awards. A party cannot escape the FAA's time-limited and exclusive review procedure by filing a follow-on arbitration attacking the outcome of the prior arbitration").

E.-2.3 *Harm to Claimants if Interim Relief Is Denied Substantially Outweighs Harm to Respondents if Interim Relief is Granted*

106. Respondents are not "harmed" by the interim relief sought. It is interim relief that would simply maintain the current relevant *status quo* in this arbitration, *i.e.* the stay of proceedings on Respondents' counterclaims. Respondents' submissions, taken at face value, do not claim any such harm: they claim to want to see the Foreign Arbitrations terminated. In all events, Respondents' unilateral and unfettered ability to terminate the stay of proceedings on their Counterclaims will remain as it was before the Foreign Arbitrations were commenced. They simply need to comply with our prior awards and orders. And Respondents' motion to vacate our 2d PFA remains submitted to the US District Court for the Southern District of New York.

107. The potential positive effect on the prospects to sell the Company is not a harm to Respondents resulting from the granting of interim relief. It is a merely an attempt to restore the *status quo* in regard to marketability of the Company as it was before the Foreign Arbitrations were started.

E.-3. **Addressing Respondents' Contentions**

E.-3.1 *Deference to the Tribunal in the Foreign Arbitrations*

108. Respondents argued at the oral hearing that: "*The principle of deference to arbitration agreements should apply equally to the arbitrations down there even if we think they are meritless, even if we think they're vexatious.*" (February 2, 2023 Tr. at 105). This argument is not persuasive for the reason stated in the next paragraph.

109. Respondents' argument conflates two different principles into one. One principle concerning arbitration agreements, under the federal and New York arbitration law applicable to this arbitration, is that valid arbitration agreements should be enforced according to their terms by courts or arbitral tribunals having jurisdiction to enforce them, when they are asked to enforce them. *See, e.g,* Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co., 26 N.Y.3d 659, 665 (2016), *citing and quoting from* American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 233 (2013). Neither side here has asked us to enforce the arbitration agreements in the respective constitutive documents of the FACCs. A second principle is

that when an arbitral tribunal decides an issue that has been validly delegated to the tribunal pursuant to an arbitration agreement, judicial review of the tribunal's award on that issue is bound by the scope of review specified in governing arbitration law at the seat of arbitration or (if different) the arbitration law to which the parties have subjected the arbitration agreement. *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); Beijing Shougang Mining Inv. Co. v. Mongolia, 11 F.4th 144, 160-62 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2889 (2022); Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 21-23 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998). Here, we apply the Federal Arbitration Act and Article 75 of the New York CPLR. That is a principle that entails *judicial* "deference" to arbitration awards by courts, not *arbitral* deference to competing arbitrations where issues already submitted to the first tribunal are sought to be arbitrated anew elsewhere. The "*principle of deference to arbitration agreements*" as articulated by Respondents' counsel is not one that exists, to our knowledge, and so we have no occasion to apply it.

E.-3.2 *Tribunal Acting Beyond Its Jurisdiction*

110. Linking the "limited jurisdiction" observation in Respondents' counsel's January 4 email (quoted in paragraph 53 above) with the arguments advanced by Respondents in their subsequent written and oral submissions, we understand Respondents' position to be that the Application is outside our jurisdiction because the SHA makes the question of what to do about the Foreign Arbitrations an issue for the Company's Board, not a dispute between the Shareholders.

111. Summarizing this position at the oral hearing, Respondents argued "*If there truly is a deadlock, if there truly is no path forward and one of us is acting in bad faith, that's when it comes to you and that's when you get to decide for us. But we're not there yet.*" (February 2, 2023 Tr. at 113).

112. We see the matter differently. In our view, any proposal or action or failure to act by a Board member such as Mr. Hernandez, or the Shareholder that appointed the Board member, i.e. Terra, the effect of which is to deprive the other Shareholder or the Company of the *full and complete benefit* of the agreements to arbitrate in the SHA, the Development Agreement, and the S&C Agreement is a violation of the covenant of good faith and fair dealing implicit in the agreements to arbitrate, and implicit in the wider agreements in which those arbitration agreements are situated.

113. By the very terms of Respondents' argument, when one of the Parties has acted in bad faith, the Tribunal may deploy its remedial powers to address the adverse effects of the bad faith conduct. We need

not, according to Respondents' argument, stand aside simply because a member of the Company's Board (Mr. Hernandez), or the Shareholder that appointed him (Terra), purports to seek Board action to rectify the consequences of its own bad faith action and inaction. And here, apparently, if we understand what Respondents assert, we should find that such rectification is in progress. But all that occurred in the time between February 2, 2023, when Respondents during the oral hearing asked us to wait while the Board sought an agreed path forward, and the date of issuance of this Award, is that (i) Terra replaced Mr. Hernandez as a Terra-appointed Board member with William Mendez Araujo, a Terra staff lawyer whose history relevant to this arbitration is recounted in paragraph 17 above, and (ii) Mr. Porter entered his appearance in this arbitration as one of the Respondents' counsel.

114. When the Board member and/or the Shareholder acts in a fashion that suffers the existence of Foreign Arbitrations that raise claims already submitted to arbitration here, *for any period of time*, and seeks to limit what the Board member or Shareholder is prepared to do to terminate those arbitrations, or to balance the professed desire to terminate the Foreign Arbitrations with alleged concern about other risks, there is potentially a breach of that duty of good faith. And once there has been an alleged breach of that duty of good faith, the line is crossed from a matter for Board deliberation to a dispute for resolution by an arbitral tribunal. Claimants by alleging that Mr. Hernandez instigated the Foreign Arbitrations alleged such a breach of the duty of good faith. That made this an arbitrable dispute *prima facie*.

115. Under New York law, "[t]he implied covenant of good faith and fair dealing embraces a pledge that neither party ***shall do anything*** that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract… and is breached when a party acts in a manner that deprives the other party of the benefits of the contract." Parlux Fragrances, LLC v. S. Carter Enters., 204 A.D.3d 72, 91 (1st Dep't 2022) (emphasis supplied) (internal citations and quotation marks omitted).

116. Our finding that Mr. Hernandez has supported the Foreign Arbitrations, made in paras. 71 and 78 above, compels the conclusion that Mr. Hernandez breached the implied covenant of good faith and fair dealing, and that this breach is attributable to the other Respondents, who are under his control. Mr. Hernandez's failure to threaten the Manager Claimants with immediate termination of their DTH employment and Company Manager positions, if they did not immediately withdraw the Foreign Arbitrations, was also such a breach. His failure to have terminated them by now and replaced them with Company Managers who would immediately withdraw the Foreign Arbitration is also such a breach. His inclusion in his proposed Board resolution (Ex. R- 7) of conditions concerning the engagement of Company

counsel, and his omission from that proposed resolution of determinations to replace the Manager Claimants if they failed forthwith to withdraw the Foreign Arbitrations, *i.e.* his fashioning of the Resolution in a way that would require concessions from Claimants and would tend to make the resolution potentially ineffectual, was also such a breach. His failure to immediately convene Shareholder meetings of the direct subsidiaries of the Company that are the Shareholders of the FACCs, to have them revoke or modify the powers of the Manager Claimants with respect to legal proceedings, was also such a breach. All of those breaches are attributable to the other Respondents by reason of Mr. Hernandez's control.

117. Respondents' arguments in favor of deference to the Foreign Arbitrations, and in favor of steps to participate in those arbitrations by defending them, advocate for depriving PPT/AMLQ of the full benefit of the arbitration agreements that apply here, and if adopted would condone continuing breaches of the duty of good faith by Respondents. Indeed, Respondents' choice to make such arguments – while acknowledging that the foreign tribunals lack jurisdiction over PPT/AMLQ and agreeing that the Foreign Arbitrations are "bizarre" (February 2, 2023 Tr. at 102) – itself betrays Respondents true objective to disrupt this proceeding. The characterization of the Foreign Arbitrations as "bizarre" seems indisputable since the proceedings involve subsidiaries seeking damages from their parent company that indirectly wholly owns it, and which Respondents concede could direct the repayment of any such damages back to the parent company.

118. At the oral hearing and in the written evidence, Respondents invoked alleged labor law liability risks as a basis for Respondents reasonably to exercise discretion through their Board members to balance steps to terminate the Foreign Arbitrations with such alleged collateral risks to the Company. Counsel argued: "*I am not an expert in Peruvian or Guatemalan law. We've provided you with expert opinions both of which say in those countries there's a real risk of a labor lawsuit if they're terminated and that that will result in, among other things, embargoing bank accounts.*" (February 2, 2023 Tr. at 120).

119. This argument might resonate if labor law risks at the Company Subsidiary level were being balanced against some other Company objective, but not when balanced against the arbitration agreements. The arbitration agreements are unconditional. They require disputes to be resolved pursuant to their terms, and not elsewhere, and nothing in the arbitration agreements makes their specific enforcement subject to other values the Shareholders might hold dear. If Respondents' argument were accepted, then any of the Shareholders could bring litigation in any desired forum on a dispute arising from the SHA, and argue in opposition to a motion to compel arbitration that the question of arbitration v. litigation is a Board matter, for the Board to determine in its discretion by balancing the collateral risks associated with dispute

resolution in one forum or the other. That is simply not the way these arbitration agreements read, or the way US and New York arbitration law work.[16]

120. For these reasons, Respondents' contention that this is presently a Board matter, not a Tribunal matter, is not accepted.

E.-3.3 *Federal Judicial Anti-Suit Injunction Standards Not Satisfied*

121. Respondents' counsel argued at the hearing that parallel lawsuits arising from the same facts are not unusual, and that under federal case law this circumstance alone is not a basis for an antisuit injunction. Respondents refer to the *Paramedics* case and argue that it is "not uncommon for there to be parallel litigations arising out of the same set of facts." (February 2, 2023 Tr. at 104).

122. But this case involves far more than just parallel lawsuits in two courts on the same facts. Respondents' argument leaves out decisive considerations that go well beyond parallel arbitrations involving parallel underlying facts. Terra got a $112.5 million capital infusion from PPT/AMLQ in 2015 in important part by agreeing to arbitrate disputes in New York in English under AAA Commercial Rules, and representing its own full power and authority to carry out the commitments made in the agreements including this agreement to arbitrate. Terra made those representations of power and authority in the specific context of the fully-disclosed and fully-articulated parent-subsidiary operating structure of Terra's multi-national business.

123. Then Terra submitted its Tower Rejection claims against PPT/AMLQ as Shareholder-derivative Counterclaims in this arbitration in 2021, and submitted written evidence in support of those claims from the Manager Claimants who Respondents now allege to be insubordinate free agent actors. An award we made in 2022, now enforced as a Judgment in the Southern District of New York, requires the Company to be sold. And Respondents, rather than cooperate in putting the Company out for bids and focusing efforts on maximizing the sale price, offer reasons why they lack power, or should be excused from exercising the power they have, to force the FACCs and Manager Claimants to drop the Foreign

[16] In all events, Respondents' contentions that there are genuine labor law liability risks for the Company in potentially terminating employment relationships with the Manager Claimants due to their insubordination, on a matter so fundamental to the Company as the choice of the forum in which to arbitrate $186 million of shareholder-derivative counterclaims, strikes us as highly implausible.

Arbitrations -- arbitrations whose very existence can be expected to chill investor interest in the Company. Such conduct is irrational.

124. A second award we made in 2022, whose enforcement (or vacatur) is *sub judice* in the Southern District of New York, sanctioned Respondents in part by staying prosecution of their Tower Rejection (and other) Counterclaims until they comply with our awards and orders. The Foreign Arbitrations, whatever might be their prospects for early dismissal, (i) stand as a collateral attack on that second award, (ii) stand a better chance of proceeding to the merits than do the Counterclaims in this arbitration, so long as Respondents maintain their refusal to comply with the conditions we have set to lift the stay, and (iii) risk being the vanguard of additional Foreign Arbitrations in the six other countries where Company Subsidiaries run by Company Subsidiary Managers who report to Mr. Hernandez operate the Company's business locally.

125. Therefore it oversimplifies matters unpersuasively to invoke, as Respondents do, a general principle that merely having parallel disputes in different courts is not a sufficient basis for an anti-suit injunction.

126. Respondents also argued that the FACCs and Manager Claimants are not the same parties as those involved here, and that this is determinative against an antisuit injunction under federal antisuit injunction standards. As noted above at paras. 90-97 we have determined to be guided by the New York case law on injunctions to protect agreements to arbitrate, not federal antisuit injunction standards generally. But even if we considered such federal law standards, we would disagree that they lead to the conclusion Respondents would have us draw. The real parties in interest in the Foreign Arbitrations and in this Arbitration are precisely the same. The FACCs in the Foreign Arbitrations have no separate economic interest from that of their ultimate parent company, the Company, and the Manager Claimants stand in the capacity of agents for the FACCs so their own personal economic interests are irrelevant. The damages claimed in those arbitrations belong to the Company and are within its complete control under the SHA – unless the SHA is disregarded, which is one of the moral and legal hazards of the Foreign Arbitrations. So the real parties in interest in Peru and Guatemala are the Company, the Shareholders of the Company, and the controlling shareholders of those Shareholders, *i.e.* the exact same parties that are before us in this case.

F. Conclusion

127. To summarize and reiterate: We disagree with Respondents' conclusion that "*we're not there yet.*" It is a violation of the covenant of good faith and fair dealing for Respondents to advance the position that while they are willing, up to a point, to work toward termination of the Foreign Arbitrations, replacing the Manager Claimants is a step they are unwilling, or even reluctant, to take. It is a violation of the Shareholder Agreement, including its covenant of good faith and fair dealing, for Respondents to assert that the Foreign Arbitrations should be allowed to "*play out*" (February 2, 2023 Tr. at 109), for *any* length of time. There is a violation of the covenant of good faith and fair dealing in the Respondents' response to the Foreign Arbitrations, by their sufferance of them, whether or not they were involved in the commencement of them. So we are "*there*," today, and we will make an Award that requires Respondents to bring about the termination of the Foreign Arbitrations and prevent new ones, and bear financial risk if they fail to do so. [17]

AWARD

1. Respondents shall cause the Foreign Arbitrations to be terminated within 10 days of the date of this Award.

2. Respondents shall notify and submit sufficient proof to this Tribunal of the termination of the Foreign Arbitrations not later than the first business day after the 10th day from the issuance of this Award.

3. Respondents shall prevent the commencement of any similar Foreign Arbitration or other legal proceeding involving all or any of the subject matter of Respondents' counterclaims in this arbitration (as set forth in Respondents' Answer and Counterclaims dated February 19, 2021).

[17] The Tribunal considered carefully the Parties' proposals for relief, and their written comments on the relief as fashioned by the Tribunal. (The latter were received in response to our invitation to comment on a draft we shared).

We decline to make relief applicable to persons who are not parties to the arbitration, while expressing no opinion as to whether some persons that PPT/AMLQ proposed to be within the scope of relief could become parties.

FRCP 65 is not applicable before this Tribunal; for us in this case the scope of permissible arbitral interim relief in an Award is set by AAA Commercial Rule R-37 in conjunction with Rule R-47(a).

We think the Parties' proposals for injunctive relief are unnecessarily specific as well as more susceptible to potential delays or other evasions, and otherwise stand to be less effective – from compliance and enforcement perspectives -- than the relief we grant. We have carefully considered Respondents' contentions about alleged limits on their capacity in regard to ending the existing Foreign Arbitrations and preventing new ones, and found them to be without merit.

4. Whereas the Tribunal has determined that Respondents have full capacity to bring about the termination of the Foreign Arbitrations, and to prevent the commencement of additional similar Foreign Arbitrations or proceedings, they shall not present in any forum as an excuse for non-compliance with this Award that their efforts to bring about termination of the Foreign Arbitrations, or to prevent the commencement of other similar Foreign Arbitrations or proceedings, were appropriate but unsuccessful.

5. Respondents shall pay the legal fees and expert fees, and related expenses, of PPT/AMLQ and the Company in the pending Foreign Arbitrations and any new Foreign Arbitrations or proceedings promptly upon presentation of invoices, and Respondents shall indemnify and hold harmless the Company and PPT/AMLQ (as defined herein) against any and all damages, liabilities, awards, judgments, costs and expenses that may result from their involvement as parties to the pending Foreign Arbitrations and any new Foreign Arbitrations or proceedings.

6. Should Respondents fail to accomplish the requirements of paragraphs 1 and 2 above within 15 days from the date of this Award, then on that 15th day Respondents shall deposit into an escrow account upon terms acceptable to the Claimants, as security for the full performance of the indemnification obligations imposed in paragraph 5, an amount equal to one-half of the money damages demanded in the Foreign Arbitrations: $41,416,371.17 USD.

7. Should any new Foreign Arbitration or proceeding covered by paragraph 3 above be filed, Respondents shall make additional deposits to the escrow of one-half of the maximum damages demanded. If no reference is made to damages in a specific sum or range, the additional deposit for any such Foreign Arbitration or proceeding shall be $10 million.

8. The terms of the escrow shall provide for release of escrowed funds to the Respondents in whole or in part, upon proof satisfactory to the Claimants of the termination of the Foreign Arbitration(s) or proceeding(s) associated with a particular portion of the escrow.

9. PPT/AMLQ shall be awarded the reasonable legal costs and arbitration costs of this Application. A Procedural Order concerning submissions to be made regarding the costs award, which will be made in a further Partial Final Award, will be issued shortly.

We, THE UNDERSIGNED ARBITRATORS, do hereby certify, for purposes of Article III of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded June 10, 1958, and Article 4 of the Inter-American Convention on Commercial Arbitration concluded January 30, 1975, that this Third Partial Final Award is made in New York, New York, USA.

February 22, 2023
Date

Marc J. Goldstein, Chair

February 22, 2023
Date

Mélida N. Hodgson, Arbitrator

February 22, 2023
Date

Richard F. Ziegler, Arbitrator

I, Marc J. Goldstein, Chair, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Third Partial Final Award.

February 22, 2023
Date

Marc J. Goldstein, Chair

I, Mélida N. Hodgson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Third Partial Final Award.

February 22, 2023
Date

Mélida N. Hodgson, Arbitrator

I, Richard F. Ziegler, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Third Partial Final Award.

February 22, 2023
Date

Richard F. Ziegler, Arbitrator

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

International Arbitration Tribunal

CASE NUMBER 01-21-0000-4309

ARBITRATION PURSUANT TO
THE COMMERCIAL ARBITRATION RULES OF
THE AMERICAN ARBITRATION ASSOCIATION

BETWEEN:

TELECOM BUSINESS SOLUTION, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, and LATAM TOWERS, LLC, on its own behalf and derivatively on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Claimants,

vs.

TERRA TOWERS CORP., TBS MANAGEMENT, S.A., DT HOLDINGS INC., JORGE HERNANDEZ and ALBERTO ARZÚ,

Respondents,

and

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Respondent,

TERRA TOWERS CORP., TBS MANAGEMENT, S.A., DT HOLDINGS INC. derivatively and on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Counterclaimants,

vs.

TELECOM BUSINESS SOLUTION, LLC, LATAM TOWERS, LLC, F. HOWARD MANDEL, JOHN RANIERI, RYAN LEPENE, and AMLQ HOLDINGS (CAY) LTD.,

Counterclaim Respondents.

-and-

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Respondent.

AMLQ HOLDINGS (CAY) LTD.,

Counterclaimant,

vs.

TERRA TOWERS CORP. and TBS MANAGEMENT, S.A.

Counterclaim Respondents.

Fourth Partial Final Award

Introduction

1. This Award addresses quantification of the reasonable attorneys' fees, expenses, and arbitrator fees, which we awarded to Claimants Telecom Business Solution LLC and LATAM Towers, LLC (together, "Peppertree") and to Claimant AMLQ Holdings (Cay) Ltd. ("AMLQ"), collectively "Claimants," - in our Third Partial Final Award dated February 22, 2023 ("3d PFA") but did not then quantify.

2. The 3d PFA provided that procedural directions would be issued setting a schedule for submissions concerning quantification of the awarded costs, and that a further award quantifying those costs would then be made.

3. We directed Claimants to make their submissions by March 8, 2023 and for Respondents to submit their comments by March 17. Claimants made their submissions on March 8, 2023 (a joint brief, and separate affidavits of their respective lead counsel accompanied by exhibits). Respondents made no submissions.

4. The matter is thus ripe for decision and we therefore make this Fourth Partial Final Award herein.

Peppertree's Costs Claim

5. Peppertree supported its costs submission with a Declaration from the lead attorney Michael N. Ungar of the law firm Ulmer & Byrne LLP.

6. The billing records of Ulmer & Byrne underlying Peppertree's claim to recover the fees incurred in regard to the Application were submitted as Exhibit A to Mr. Ungar's Declaration.

7. In his Declaration and the accompanying exhibits, Mr. Ungar provided information about the professional stature of Ulmer & Byrne and the professional credentials of Mr. Ungar and the other Ulmer & Byrne lawyers who worked on the Application. He also reported the hourly billing rates charged to Peppertree for his time and that of those other attorneys.

8. According to a chart contained in Mr. Ungar's Declaration, summarizing the billing records submitted as an exhibit, Ulmer & Byrne lawyers recorded 584.3 hours in relation to the Application, and Peppertree paid or incurred $342,473 for those hours of work, with the average billable hourly rate for those hours amounting to $586.29.

9. Mr. Ungar summarized in his Declaration the work performed by Ulmer & Byrne lawyers in regard to the Foreign Arbitrations and the Application, including: initial evaluation of the Peru Arbitration filing; vetting and engaging Peru counsel for the Peru Arbitration; reviewing the Company's initial submission to the Tribunal in regard to the Peru Arbitration; initial evaluation of the Guatemala Arbitration; participating in communications with Respondents' counsel concerning the Foreign Arbitrations; preparing the Application in conjunction with AMLQ

counsel; submitting additional written comments as requested by the Tribunal; and participating in the oral hearing on behalf of Peppertree.

10. Mr. Ungar states in the Declaration that nearly all of the Claimants' submissions to the Tribunal were made jointly by Peppertree and AMLQ with Peppertree having taken primary responsibility.

11. Peppertree, per Mr. Ungar's declaration, claims $22,219.15 for the incurred cost of translation and stenographer services for which supporting documentation is provided in Exhibit A to Mr. Ungar's Declaration.

12. Peppertree also claims $166,000 as its share of the fees of the Arbitral Tribunal in regard to the Application. This quantification is based on the estimated hours submitted to the ICDR by the Tribunal as the basis to send invoices to the Parties.

AMLQ's Costs Claim

13. AMLQ supports its application for costs with a Declaration from the lead attorney for its counsel in this arbitration, Gregg Weiner of Ropes & Gray LLP.

14. Mr. Weiner in his Declaration describes the Ropes & Gray firm, summarizes his own professional credentials and recognition, and provides as exhibits the professional biographies of the Ropes & Gray lawyers involved in the arbitration.

15. Mr. Weiner provided a chart that summarized the time spent by each attorney in connection with the Application and revealed the total dollar amount of the fees incurred to Ropes & Gray. These totals were 201.7 hours and $118,200.59. Thus the average hourly rate for time spent on the Application by Ropes & Gray attorneys was $586.02.

16. Mr. Weiner explained in his Declaration that the hourly rates charged by his firm to AMLQ were based on a discount from the firm's standard hourly rates that is extended to all clients who are affiliates of Goldman Sachs. He stated that the amount of the discount is competitively sensitive information, and was therefore redacted, but AMLQ offered to reveal the actual hourly rates charges for *in camera* review by the Tribunal.

17. When notified by AMLQ counsel that they proposed to submit the redacted information for *in camera* review, the Tribunal directed AMLQ to refrain from making this submission. The Tribunal invited Respondents to submit comments on whether the Tribunal should accept AMLQ's offer of *in camera* submission of the redacted hourly rates. No comments were submitted.

18. The Tribunal thereafter notified the Parties that it would not accept an *in camera* submission. The Tribunal's reason for that decision is that the reasonableness (or not) of Ropes & Gray's hourly rates charged to AMLQ can be assessed by comparing the average hourly rate to the average hourly rate charged by Ulmer & Berne to the Peppertree-related Claimants. The amount of the discount is not relevant to our analysis. We can take notice based on our own knowledge and experience that the usual and customary hourly rates charged by prominent New York and Boston law firms are generally higher than those of their peers in Cleveland. Here the outcome was that the average

hourly rates charged by Ropes & Gray and Ulmer & Berne were nearly identical, so there could not be (and there was not) any contention by Respondents that Ropes & Gray's hourly rates charged to AMLQ were unreasonable.

19. Mr. Weiner's declaration summarized the work performed by AMLQ lawyers in regard to the filing of the Foreign Arbitrations and the Application: initial review of the Peru Arbitration filing; review of the Company's initial submission to the Tribunal; assisting Peppertree counsel in fashioning strategy in regard to the Application; sharing with Peppertree counsel the work involved in drafting, researching and otherwise preparing the Application; analyzing the Guatemala Arbitration filing and vetting potential counsel for the Guatemala Arbitration; participating in communications with Respondents' counsel concerning the Foreign Arbitrations; and preparing and presenting portions of the oral argument made by Claimants and the February 2, 2023 oral hearing.

20. AMLQ also claims $71,400 as its share of the fees of the Arbitral Tribunal in regard to the Application. This quantification was based on the estimated hours for the proceedings submitted to the ICDR by the Tribunal as the basis to send invoices to the Parties.

The Tribunal's Analysis

21. The arbitration agreements that supply the basis for this Tribunal's jurisdiction provide for costs to be awarded. Section 8.11 of the Subscription and Contribution Agreement states: "The Award may include an award of costs, including reasonable attorney's fees and disbursements."

Identical language appears in Section 8.15 of the Shareholders Agreement, and that Section is incorporated by reference in Section 3.4 of the Development Agreement.

22. Rule R-47(d)(ii) of the AAA Commercial Arbitration Rules, 2013 version, applicable here by agreement of the Parties, provides that "[t]he award of the arbitrator(s) may include: … an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement."

23. Rule R-47(b) provides that "in any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate."

24. Therefore the AAA Rules in conjunction with the arbitration agreements of the Parties provide this Tribunal with power to assess and award legal fees and expenses incurred by any party, and arbitrator fees incurred by any party.

25. Implicit in the Parties' arbitration agreements as we construe them, and in the AAA Rules cited above as they have been applied in international and domestic cases, is that costs may be assessed in favor of a party that prevails on the merits. On this basis our power to award costs including arbitrator fees and reasonable legal fees and expenses to Claimants as the prevailing party in our Third Partial Final Award is clear.

Reasonable Attorneys' Fees and Legal Expenses

26. Both the parties' agreements and the applicable Rules are reasonably construed to permit costs assessment to be made in a separate Award after the merits have been determined in a partial Award. This is particularly true as to interim relief where the importance of issuing an award with dispatch militates against a delay in award issuance based on proceedings to assess and allocate costs. In all events no objection to our proceeding in this way has been raised by any party.

27. Whereas "reasonable attorney's fees" is a term of the Parties' agreements and these agreements are governed by New York law, the specific content given to that term by New York courts applying New York law informs our application of the agreement: "'In evaluating what constitutes… reasonable attorney's fees, factors to be considered include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount of money involved, the customary fee charged for such services, and the results obtained." Lippes v State University of New York at Buffalo, 213 A.D.2d 1316 (4th Dept 2023), *quoting from* Matter of Dessauer, 96 A.D.3d 1560, 1561 (4th Dep't 2012). *Accord*, A&M Global Mgt. Corp. v. Northtown Urology Assoc., 115 A.D.3d 1283, 1290 (4th Dep't 2012).

28. We apply these criteria in the context of an arbitration that has been ongoing since February 2021, with Claimants having chosen counsel in 2021 who remain in their roles. This dispute was initially valued by Claimants at approximately $195 million, corresponding to the sum Claimants

alleged they would have derived if Respondents had accepted the offer to purchase the Company in the offer originally presented by an entity named Torrecom in 2020. Therefore the original decisions of Peppertree and AMLQ to be represented by eminent law firms in their respective locales (Cleveland and New York) whose hourly billing rates correspond to their stature is not open to question here (and in all events is not challenged by Respondents who have submitted no comments on the reasonableness of Claimants' attorney fees). Further analysis of the reasonableness of the hourly rates of counsel therefore should be made in terms of the allocation of work among lawyers at various points along the range of hourly rates of lawyers involved in the case.

29. This was a complex and high stakes matter. In allocating responsibility among lawyers of various levels of experience and expertise, Claimants might reasonably have feared that the Foreign Arbitrations were a stratagem of Respondents to circumvent the stay of proceedings on Respondents' counterclaims imposed by the Tribunal and to harm irreparably the prospects for a sale of the Company.

30. It added to the high stakes of the matter that the potential existed for additional Foreign Arbitrations to be commenced in each of the Central and South American countries in which the Company operates and has operating subsidiaries. That risk has been confirmed by the commencement of Foreign Arbitrations in El Salvador and Honduras, reported to the Tribunal by Respondents after issuance of the 3d PFA.

31. Effort was justifiably spent on selecting counsel for the Foreign Arbitrations and understanding the legal landscape for those arbitrations in terms of such initial matters as counsel selection for the Claimants as individual respondents and for the Company as a Respondent, arbitrator selection, objections to jurisdiction, and filing of an answer. Effort was also justifiably spent negotiating with Respondents' counsel over potential joint action to terminate the Foreign Arbitrations. And effort was justifiably spent to present to the Tribunal a clear picture of the relevant corporate structure and where the Foreign Arbitration Claimants fit. We have no basis to question either the time devoted to these matters or the judgments made about what lawyers at what billing rates would handle this work.

32. Claimants' counsel made a number of written submissions to the Tribunal all of them invited and these were accompanied by (in total) more than two dozen exhibits. Those submissions covered a number of issues pertinent to the Application. These issues included the basic factual issue of whether there was an identity of issues between the claims asserted in the Foreign Arbitrations and the counterclaims earlier asserted by Respondents in this arbitration.

33. Uncertainty about the authenticity, service, and significance of a purported *ex parte* judicial injunction of a court in Peru, its relevance to the Application, and its consequence if any for the Company's or the Respondents ability to terminate the Company Manager Claimants, also added complexity to the matter that contributed to the time that Claimants' counsel (and the Tribunal) were required to spend.

34. The Tribunal directed the Parties to prepare and submit comments concerning the doctrine of direct benefits estoppel, in aid of the Tribunal's consideration of the scope of injunction powers. The Tribunal also called for documents to be produced by Respondents, and the scope of Respondents' compliance became an issue to which counsel time was reasonably devoted.

35. We stop short of awarding Claimants 100% of the fees they claim, however, because Claimants' proposals for injunctive relief were based on a legal premise that we did not embrace: that Federal Rule of Civil Procedure 65 is applicable in this arbitration and authorized the Tribunal to enter an anti-arbitration injunction that would bind the named claimants in the Foreign Arbitrations. The particular interim relief granted by the Tribunal was fashioned by the Tribunal and accepted by the Claimants when their comments on the proposed relief were invited. In this sense Claimants were less than 100% successful on the remedy branch of the Application. In our discretion, we apply a 10% reduction to the legal fees claimed by Claimants, and award Claimants 90% of the fees of the Tribunal incurred in connection with the Application.

36. Accordingly, we award the Peppertree Claimants, jointly and severally, the sum of $308,225.70 in respect of their claim for attorneys' fees, representing 90% of the claimed amount of $342,473. We also the award Peppertree Claimants, jointly and severally, $22,219.15 as claimed for expenses incurred for translation services and the hearing transcript for the February 2, 2023 oral hearing.

37. We award AMLQ the sum of $106,380.53 in respect of its claim for attorneys' fees, representing 90% of the claimed amount of $118,200.59. (AMLQ submits no claim for expenses for services other than those of its counsel).

Fees of the Tribunal

38. In regard to arbitrator fees, the Parties' submissions indicate that they had made or would make deposits for the fees of the arbitrators, applicable to satisfy arbitrator invoices during the period when the Tribunal function in regard to the Application, in the sum of $238,000 with Peppertree depositing 70% ($166,400) and AMLQ depositing 30% ($71,400). They payment of those sums has been confirmed to the Tribunal by the ICDR. It is not disputed that Claimants are and have been bearing 100% of deposits for arbitrator fees and expenses because Respondents are unwilling to pay their share or any portion thereof.

39. The Claimants' claims for arbitrator fees are based on the sums invoiced to them by the ICDR, and these invoices were based on estimates provided by the Tribunal. However, the proper basis for awarding such costs is the sum of the Tribunal's actual invoices submitted to and paid by the ICDR related to the Application, including work on this costs Award and post-Award issues related to the 3d PFA. The sum of such invoices approved and paid by ICDR is $223,175.00 and for the reasons stated in paragraph 35, we award 90% of that sum, or $200,857.50, of which 70%, $140,600.25 , is awarded to the Peppertree Claimants jointly, and 30%, $60,257.25, is awarded to AMLQ.

Interest

40. The amounts payable under this Award shall bear simple interest from the date of this Award until the date of payment at the rate of Eight Percent (8 %) This is the current Wall Street Journal Prime Rate (www.bankrate.com/rates/interest-rates/wall-street-prime-rate) (last visited April 10, 2023).

AWARD

1. The Respondents, jointly and severally, are obligated to pay, and one or more of them shall pay the Peppertree Claimants (as defined herein), in total, the sum of $471,045.10, within ten (10) business days from the date of this Award.
2. The Respondents, jointly and severally, are obligated to pay, and one or more of them shall pay AMLQ (as defined herein), in total, the sum of $166,637.78, within ten (10) business days from the date of this Award.
3. Simple interest at the rate specified above in paragraph 40 shall accrue from the date of this Award to the date of payment.

We, THE UNDERSIGNED ARBITRATORS, do hereby certify, for purposes of Article III of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded June 10, 1958, and Article 4 of the Inter-American Convention on Commercial Arbitration concluded January 30, 1975, that this Fourth Partial Final Award is made in New York, New York, USA.

April 10, 2023

MG Type text here

Marc J. Goldstein, Chair

April 10, 2023

Mélida N. Hodgson, Arbitrator

April 10, 2023

Richard F. Ziegler, Arbitrator

I, Marc J. Goldstein, Chair, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Third Partial Final Award.

April 10, 2023

Marc J. Goldstein, Chair

I, Mélida N. Hodgson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Third Partial Final Award.

April 10, 2023

Mélida N. Hodgson, Arbitrator

I, Richard F. Ziegler, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Third Partial Final Award.

April 10, 2023

Richard F. Ziegler, Arbitrator

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal

CASE NUMBER 01-21-0000-4309

ARBITRATION PURSUANT TO
THE COMMERCIAL ARBITRATION RULES OF
THE AMERICAN ARBITRATION ASSOCIATION

BETWEEN:

TELECOM BUSINESS SOLUTION, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, and LATAM TOWERS, LLC, on its own behalf and derivatively on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Claimants,

vs.

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC., JORGE HERNANDEZ and ALBERTO ARZÚ,

Respondents,

and

CONTINENTAL TOWERS LATAM HOLDINGSLIMITED,

Nominal Respondent,

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC. derivatively and on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Counterclaimants,

vs.

TELECOM BUSINESS SOLUTION, LLC, LATAM TOWERS, LLC, F. HOWARD MANDEL, JOHN RANIERI, RYAN LEPENE, and AMLQ HOLDINGS (CAY) LTD.,

Counterclaim Respondents.

-and-

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Respondent.

AMLQ HOLDINGS (CAY) LTD.,

Counterclaimant,

vs.

TERRA TOWERS CORP. and TBS MANAGEMENT,S.A.

Counterclaim Respondents.

PROCEDURAL ORDER NO. 2024-15 CONCERNING ISSUES AFFECTING THE INTERGRITY OF THE ARBITRATION

A. INTRODUCTION

1. This arbitration has been marked by the unusual circumstances of multiple attacks, by Respondents and unknown persons publicly expressing positions supportive of Respondents, on the integrity of the Tribunal and of this proceeding. Many of these attacks have been made on obscure Internet websites that have published content that appears to be aligned with Respondents' challenges to the integrity of the Tribunal[1] and with

[1] Respondents have alleged that the Tribunal lacks impartiality, in challenges before the ICDR as administrator, directly to the Tribunal and in the context of vacatur proceedings in the U.S. District Court for the Southern District of New York ("SDNY") as well as a plenary suit seeking the Tribunal's disqualification (but not naming the Tribunal as a party) initially filed by Respondents in New York state court and subsequently removed to the SDNY.

Respondents' continuing efforts to portray the Company's CEO as a criminal. Unfortunately, as discussed below, these attacks appear to have accelerated recently.

2. We are mindful of our obligation, as a tribunal responsible for a significant international commercial arbitration, to protect the integrity of the arbitration process – a concept that includes not only the procedures before us, but the enforceability of our awards in national courts to which those awards might be brought for enforcement. *See* AAA Code of Ethics for Arbitrators in Commercial Disputes (2004), Canon 1, para. A ("An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved"). The obligation calls for us to address proactively, given the extraordinary circumstances, apparent "red flags" of serious misconduct that have disrupted and threaten to disrupt the orderly progress of this arbitration. In addition, the recent judgment of the UK High Court, which vacated an $11 billion award on the basis that the award had been procured by fraud and corruption, has prompted considerable recent attention in the international arbitration community to a perceived need for proactive vigilance by arbitral tribunals when aspects of the arbitration process may be affected by misconduct. *Nigeria v. P&ID,* Judgment of the High Court of England and Wales, [2023] EWHC 2638, Oct. 23, 2023.

3. We are concerned that the conduct in question may threaten the enforceability of our existing and potential future awards in certain jurisdictions outside the United States. The conduct also appears intended to intimidate members of the Tribunal either to influence improperly their deliberations or to induce them to resign, which would delay and obstruct the integrity of this proceeding in which hundreds of millions of dollars is at stake. On July

9, 2024, we received an unsolicited email communication from a person in Guatemala City claiming to be an attorney for the estranged wife of the Company CEO, with a subject line lodging a "formal complaint regarding [the Tribunal's] failure to investigate," and asserting in the text that the members of the Tribunal may face "legal consequences for obstruction of justice and aiding and abetting criminal activities." [2]

4. For the reasons already expressed in our Second Partial Final Award ("PFA-2") at p. 14 n. 8, as reinforced by the authorities we cite here[3], the Tribunal continues to understand that under the AAA Rules and applicable law, false and misleading *ad hominem* attacks on arbitrators do not warrant disqualification, impel recusal, or justify vacatur of the arbitrators' awards. That position appears to have been sustained in the decisions of the ICDR and the SDNY concerning this arbitration.

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[2] Earlier today we received a similar email from the same person with the subject line: "Failure to report and investigate Gaitans [sic] Crimes, orders of arrest issued." In contrast to earlier emails from this sender, the July 9 and July 12 emails do not reflect that they were copied to the Parties; if any Party has not received one or both of the July 9 and 12 emails the Tribunal will provide copies on request.

[3] As stated by the Supreme Court of the United States in a judicial recusal context: "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. …[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated, favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). "The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed toward the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion produced are properly and necessarily acquired in the course of the proceedings….." Id. at 551-52. *Accord*, *In re Reed*, 2016 WL 11880171 at * 107 (Bkr. E.D. Mo. Apr. 20, 2016) ("[H]aving a bias is the condition of having an *improper* predisposition towards someone or something. By contrast, having a lack of respect, is merely the condition of not having esteem for someone or something. Unlike a bias, a lack of respect may be entirely proper, if it is deserved. A person cannot act sanctionably, then demand judicial disqualification because the court develops an understandable lack of respect for that person, based on his sanctionable acts") (emphasis in original); *Republica v. Oswald*, 1 U.S. 319, 326 (Supreme Court of Pennsylvania 1788), wherein the Court rejected as a basis for recusal the personal resentment a judge might feel toward a party that unfairly criticized the judge's conduct, writing: "for if it could, every man might evade the punishment due to his offenses, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion, because their treatment has been such as would naturally excite resentment in the human disposition."

5. The Tribunal considers that the concerns expressed in this Order should either be validated or dispelled and consequently makes this Order directing the Parties, as described in greater detail below, to provide written (a) submissions disclosing information in their possession concerning the publications and websites, including the identities of those responsible for them, and the circumstances involving the recent unsolicited submissions to the Tribunal by non-parties; and (b) comments addressing what other and further steps the Tribunal should take in regard to these matters. The submissions we direct and the comments we elicit are intended to assist us in assessing what further process if any should be adopted to examine whether one or more Respondents and/or others have engaged in serious misconduct and what remedial steps might be appropriate.

B. RECENT FACTUAL DEVELOPMENTS AND THE SEVERAL QUESTIONABLE WEBSITES

6. The Tribunal has recently discovered that a website called Arbitration Monitor presently features at least three articles pertaining to this arbitration, dated (or bearing "updated" dates of) April 10, April 11 and May 15. The first of these articles came to our attention on or about March 15, 2024, and soon thereafter we forwarded the article to the Parties for comment. The Claimants and the Respondents each submitted in writing through counsel, on March 19, statements that they had no knowledge concerning the website or the article published about this arbitration on the website.

7. The attention paid by the Arbitration Monitor website to the Respondents' contentions about bias of the Tribunal and misconduct by the Company's CEO is aligned with contentions Respondents have made in this arbitration, in the SDNY before Judge Kaplan, in foreign arbitrations that continue despite an anti-arbitration injunction we issued that Judge Kaplan enforced, and in a British Virgin Islands litigation that Judge Kaplan

enjoined. We do not find on the Arbitration Monitor website other content that is similarly partisan in supporting the position of a particular litigant in an arbitration or other proceeding (although we have not studied in detail every article on the site).

8. As the Parties are aware, from prior proceedings in this arbitration, at least two other websites have published articles about this arbitration that raised allegations of misconduct against, respectively, the Chair of the Tribunal -- who was accused of accepting a bribe from the parent company of Claimant AMLQ Holdings in an article on a website called WallStreetWhistleblower.org ("WSW") – and the principals of Claimants Telecom Business Solution, LLC and LATAM Towers, LLC – who were accused of violations of the Foreign Corrupt Practices Act in an article on a website called NewsZoom.click. The WSW website continues to feature its article about the alleged bribery of the Chair on its home page, even though the article originally appeared in March 2022 (a few weeks after issuance of our First Partial Final Award).
9. We also take note that Respondents have submitted as evidence within the past ten days an FBI Internet Crime Complaint made by the Company CEO concerning the publication of articles pertaining to this arbitration or his fitness to act as Company CEO on five other websites and on at least 29 occasions between December 2023 and February 2024. (Ex. R-317 at p. 90).
10. The most recent article we examined on the Arbitration Monitor website dated May 15, 2024 featured evidence ostensibly obtained from the docket of the enjoined BVI action brought by DTH employee and Company CFO Juan Francisco Quisquinay, which appears to correspond to the evidence that Respondents submitted to the Tribunal on May 11, 2024 in support of an emergency motion for the removal from office of the CEO of the Company,

a motion that we denied in Procedural Order No. 2024-13 on May 13. This May 15, 2024 article, including the photographs published as illustrations in the article, also appears to correspond to the material sent to the Tribunal unsolicited by a person named Derick Rodriguez in Guatemala City on June 19, 2024 (who as mentioned above has also written to us again by email on July 9 and July 12, 2024) and may also correspond to the material attempted to be presented unsolicited to the Tribunal in emails from a person named Victor Barrios in Guatemala City in early June.

11. The three websites identified in our prior proceedings (WSW, NewsZoom.click and Arbitration Monitor) share certain characteristics: (1) their ownership and the physical locations of their owners are not readily identifiable from the websites (in the case of Arbitration Monitor, an address is given in Casper, Wyoming that a rudimentary Google search reveals to be a UPS store); (2) their content other than the articles about this case appears not to be focused on the evidence presented or arguments made during an arbitration by a particular party; (3) their content about this arbitration is focused on Respondents' allegations of Tribunal corruption and bias that have been rejected by the ICDR in a challenge context, by the SDNY in the proceedings to vacate and enforce each of our four Partial Final Awards, and in the separate lawsuit that was commenced by Respondents to disqualify the Tribunal; and (4) not one of the identified articles about this case on these websites reported on the fact that these allegations were not successful in removing any of the arbitrators, disqualifying the Tribunal, or causing the SDNY to vacate any of our four awards.

12. The Arbitration Monitor articles suggest that they are based on an unidentified journalist's examination of public court dockets, including material that had recently been placed

publicly on such dockets by Respondents notwithstanding the Parties' past practice in the SDNY to seek leave, which the Court has consistently granted, to file all comparable matters under seal. The articles avoid any mention that Respondents' applications to the Court all failed.

13. In the case of the WSW and NewsZoom.click articles, they purported to be based on information delivered to the websites by whistleblowers within Goldman Sachs and Peppertree, assertions that, in the context of the corroborated denials by Goldman, Peppertree and the Chair, raise the concern that no such whistleblowers actually exist.

C. RESPONDENTS' POTENTIAL ROLE

14. The Tribunal's view is that if the Respondents, or any of them or their agents, are directly or indirectly responsible for the public posting of false and/or materially misleading information on any or all of the three websites (and potentially others such as those mentioned in the Company CEO's 2024 FBI Internet Crime Complaint, referenced above), such surreptitious conduct by or on behalf of any Respondent would constitute grave misconduct. Indeed, we believe such misconduct would violate various provisions of federal criminal law.[4]

15. In addition to the evident alignment of the Respondents' interests with the information published on the three websites, and the publication on the Arbitration Monitor website of information during the brief period after Respondents improperly filed such information

[4] Our concerns are only heightened by Respondents' delivering to the Tribunal last week, as new proffered evidence, a letter from the Company CEO's criminal counsel in Guatemala City (Ex. R-317 at p. 94) stating in pertinent part: "In both Guatemala and El Salvador, as in most of Latin America, fake news are a weapon used in legal procedures and social pressure - with fake news sites popping up continually with made up stories, serving for character assassination, emotional distress, and pressuring victims to yield, and as supporting evidence in trials that lack rule of law procedures." (par. 5, slightly revised for clarity).

on the public court docket and before the Court ordered it to be sealed, additional facts support the reasonableness of an inference that one or more Respondents may bear responsibility for the conduct associated with the websites. Such facts include but are not limited to:

a. Respondents' pursuit of allegations of criminal and other misconduct by the CEO of the Company, conjoined with their failure to submit any evidence of such misconduct in the hearings leading to our Second Partial Final Award (PFA-2) when we specifically called upon Respondents to provide such evidence[5];

b. The findings of fact we made in PFA-2 concerning (i) Respondents' role in advancing false accusations of criminality as the basis for prosecutions of the Company CEO in Guatemala, and (ii) the involvement of certain of Respondents' co-counsel in the creation or advancement of false evidence of the Company CEO's alleged misconduct, which led to the sanction requiring appointment of Submission Counsel in PFA-2.

c. Respondents' bringing the existence of the WSW report of bribery of the Chair by Goldman Sachs to the attention of Claimants, and their subsequent insistence on defending the plausibility of the WSW report in the face of the Chair's clear and detailed denial and of Goldman's report of its internal investigation, including Respondents' filing an unusual purported forensic expert affidavit asserting that

[5] To this we now add the written report of the Company's Counsel on July 11, 2024 that, according to the Company CEO, an arrest warrant in Guatemala may be about to be served upon him that would prevent him from attending in person the merits hearings in this case that he had planned to attend, and that he was notified of such impending delivery by an officer of the Respondents, Mr. Porras.

Goldman's inquiry was flawed in failing to identify a theoretical prior account at Goldman maintained by the Chair.

d. The fact that we determined in PFA-2 that Respondents submitted an Opinion Letter to the Tribunal from Morrison & Foerster (purporting to advise the Company about the compliance risks of permitting the Company CEO to continue as the Company's FCPA compliance officer) that had effectively been obtained from Morrison & Foerster under false pretenses through a series of material factual omissions, facilitated by certain of the Respondents' then-counsel of record in this arbitration.

e. The withdrawal as co-counsel for the Respondents of six different law firms during the course of this arbitration – which has now been followed, even as this Order was being prepared, by the withdrawal or termination of all the many counsel who have heretofore represented the Respondents, and in one instance a re-designation of one of the co-counsel as a "party representative" -- all on the eve of the impending evidentiary hearing. We perceive that these changes were designed to remove the role of Submission Counsel under our Second Partial Final Award ("PFA-2) and the Judgment enforcing it. As we imposed the requirement of Submission Counsel to provide some assurance that Respondents' misconduct would not recur, we cannot help but be concerned by the most recent reconfiguration of Respondents' counsel that obviates the obligation of designation of any Submission Counsel under the terms of PFA-2.

f. The fact that Respondents pursued a separate lawsuit to seek disqualification of the Tribunal despite the provision in the AAA Commercial Rules (Rule R-18(c) in the 2013 Rules applicable to this case) that makes the AAA-ICDR decision on a challenge, which we understand that Respondents had already attempted, conclusive.

g. The fact that Respondents have expressed in many ways a preference to resolve their disputes with Claimants - including notably disputes concerning the status and conduct of the Company CEO - by means other than this arbitration, including (1) bringing a lawsuit involving claims of legal malpractice against the Miami law firm that represents the Company and takes instruction from the Company CEO, (2) declining to comply with our Orders and Awards – many of them derivative of our proceedings concerning the status and conduct of the Company CEO – even though this has resulted in a sanction that prevents Respondents from pursuing their counterclaims until they comply; (3) seeking to re-litigate the determinations we have made concerning the status and conduct of the Company CEO by having Mr. Quisquinay bring a lawsuit in the British Virgin Islands[6], (4) permitting (if not

[6] As to the BVI civil action (that Respondents ultimately caused to be withdrawn by Mr. Quisquinay, but only several months after it had been enjoined by Judge Kaplan), we have a concern that the principal motivation for the filing in the BVI action of Mr. Sagastume's affidavit and its exhibits on May 10, 2024, the day before their use in this arbitration in support of Respondents' "emergency" motion to remove the Company CEO from office, was not - as was reported to the Tribunal by Respondents in that motion on May 11- opposition to the costs application of the Company's CEO, but that the true motive may have been to situate this evidence on a public judicial docket so that Arbitration Monitor (and perhaps other websites) could claim to have found it there. In similar vein, we have a concern about the filing by Respondents' then-co-counsel, Juan Rodriguez, on March 19, 2024, improperly on the public docket of the SDNY case in which the Court had already denied Respondents' petition to disqualify the Tribunal on February 20, 2024, and ostensibly in support of a motion for reconsideration made on the last day before the deadline for filing a Notice of Appeal, of a copy of Respondents' unsuccessful ICDR bias

indeed causing) officers of Company subsidiaries to pursue separate arbitrations in several Central American countries, despite an injunction we imposed that the SDNY enforced, to determine a central disputed issue in Phase 2 of this arbitration before we reach it, i.e. the scope of Claimants' obligation to approve proposals for the construction of new Towers by the Company, and (6) refusing to produce evidence that the Tribunal ordered to be produced, even at the risk of having adverse inferences drawn (*see* PFA-2) and potentially to be drawn (*see* Procedural Order No. 2024-10) based on their noncompliance.

h. The fact that the Tribunal has received on at least five occasions in the past several weeks, most recently earlier today, unsolicited submissions from purported Guatemala City lawyers who are not counsel in this arbitration, purporting to represent and relay information from the estranged wife of the Company CEO, accusing the Company CEO of misconduct and, especially in the July 9 and July 12 submissions, threatening that the Tribunal members could face "legal consequences for obstruction of justice and aiding and abetting criminal activities" if we should fail to investigate the allegations allegedly made by the estranged wife of the Company CEO.

D. NEXT STEPS

16. Accordingly, we direct the Parties to submit, on or before July 26, 2024, sworn statements accompanied by relevant documents that provide any and all information the Parties

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challenge against the Chair. This was followed on March 22, 2024 by an article on the Law360 website focused on Respondents' allegations of bias against the Chair.

currently have concerning the publication of the articles referenced in this Order, the nature, origin, ownership and control of the websites on which they appear, and the circumstances involving the recent unsolicited submissions of information to the Tribunal from non-parties.

17. The questions to be addressed in the written submissions include: (a) the identities of the publishers of the three websites identified in our prior proceedings and any or all of the additional websites identified in the Company CEO's 2024 FBI Internet Crime Complaint and any other similar publications or websites of which any Party is aware; the authors of the articles on such sites that relate to this proceeding, the Tribunal or the Parties, and the facts and circumstances by which such information came to be published on such sites, including whether the Tribunal's concerns based on the information described in this Order that one or more of the Respondents may be responsible for such publications are well-founded; and (b) the facts and circumstances by which recent information concerning the Company CEO have been supplied, unsolicited, to the Tribunal, much of which has now been proffered as evidence by Respondents, along with threats apparently seeking to intimidate the Tribunal.

18. The Parties are also invited to comment, on or before July 26, 2024, on appropriate and available additional procedures the Tribunal might adopt to advance an understanding of the operative facts, and the remedies to terminate and reverse this ongoing misconduct that might be pursued if warranted, including not only steps to be taken within this arbitration but possibly also referral to federal law enforcement authorities in New York or elsewhere. Within these comments, we direct that the Parties offer their views on whether the Tribunal has authority, under Rule R-36 or otherwise, to conduct an investigation into the matters to

be addressed in the requested submissions, including by designating an independent investigator (as requested with respect to other topics in the unsolicited emails submitted by attorney Derick Rodriguez allegedly transmitting a communication of the estranged wife of the Company CEO).

SO ORDERED this 12th day of July, 2024

Marc J. Goldstein, for the Tribunal

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal

CASE NUMBER 01-21-0000-4309

ARBITRATION PURSUANT TO
THE COMMERCIAL ARBITRATION RULES OF
THE AMERICAN ARBITRATION ASSOCIATION

BETWEEN:

TELECOM BUSINESS SOLUTION, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, and LATAM TOWERS, LLC, on its own behalf and derivatively on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Claimants,

vs.

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC., JORGE HERNANDEZ and ALBERTO ARZÚ,

Respondents,

and

CONTINENTAL TOWERS LATAM HOLDINGSLIMITED,

Nominal Respondent,

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC. derivatively and on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Counterclaimants,

vs.

TELECOM BUSINESS SOLUTION, LLC, LATAM TOWERS, LLC, F. HOWARD MANDEL, JOHN RANIERI, RYAN LEPENE, and AMLQ HOLDINGS (CAY) LTD.,

Counterclaim Respondents.

-and-

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Respondent.

AMLQ HOLDINGS (CAY) LTD.,

Counterclaimant,

vs.

TERRA TOWERS CORP. and TBS MANAGEMENT,S.A.

Counterclaim Respondents.

PROCEDURAL ORDER NO. 2025-02 CONCERNING MODIFICATION OF THE CONFIDENTIALITY ORDER

The Company made an application on March 11, 2025 for amendment of the Confidentiality Order (the "Order") to permit the parties to make public the Tribunal's orders and awards in this arbitration. The context of that motion, as reported to the Tribunal by the Company initially on March 6, 2025, and further discussed in the motion, is that the CEO of the Company is incarcerated in a Guatemala prison, ostensibly being detained by order of a Guatemala court for extradition to El Salvador to face criminal prosecution there. (That matter is discussed further in the Preamble to our Fifth Partial Final Award ("PFA-5"), issued today). We invited written comments from the Parties, which we have received and considered. The Claimants support the Company's motion, and Respondents have not opposed the Company's motion.

The Order was not intended to prohibit or inhibit publication of our orders and awards and does not contain such prohibition expressly. For avoidance of doubt, however, and for the reasons explained in PFA-5, we grant the Company's motion and declare the Order to be amended to permit the publication of all our prior and future orders and awards in this arbitration. We of course reserve the right to modify the Order further as may be appropriate.

SO ORDERED this 24th day of March 2025

Marc J Goldstein

Marc J. Goldstein, for the Tribunal

IN THE MATTER OF AN ARBITRATION

IN THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Case No. 01-21-0000-4309

BETWEEN

TELECOM BUSINESS SOLUTION, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, LATAM TOWERS, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, and AMLQ HOLDINGS (CAY), LTD., on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Claimants

v.

TERRA TOWERS CORP., TBS MANAGEMENT, S.A., DT HOLDINGS INC., JORGE HERNANDEZ, ALBERTO ARZU, ALEJANDRO SAGASTUME and WILLIAM MENDEZ

Respondents

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

and

Nominal Respondent

TERRA TOWERS CORP. and TBS MANAGEMENT, S.A.,

derivatively and on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED

Counterclaimants

v.

TELECOM BUSINESS SOLUTION, LLC, LATAM TOWERS, LLC, F. HOWARD MANDEL, JOHN RANIERI, RYAN LEPENE, and AMLQ HOLDINGS (CAY), LTD.,

Counterclaim Respondents

and

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Counterclaim Respondent

PROCEDURAL ORDER NO. 2024-13 CONCERNING RESPONDENTS' MOTION FOR LEAVE TO SUBMIT AN APPLICATION UNDER AAA COMMERCIAL RULE R-37(A)

1. In this Procedural Order we address the application received on Saturday, May 11, 2024 from the Respondents (the "Application"), made pursuant to Rule R-37(a) in the 2013 AAA Commercial Rules:[1]

> [T]o remove [Mr.] Gaitán and [Ms.] Echeverría from management of the Company and (ii) to terminate the Company's engagements with Gelber Schachter & Greenberg ("GSG") and Dechamps International Law Firm ("Dechamps") due to Mr. Schachter and Mr. Dechamps' breaches of their engagement letters with the Company by exceeding the scope of their engagement and breaching the covenants of the March 19, 2021 Framework Agreement to remain neutral, not to align with any party and to act in the best interest of the company. [2]

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[1] In what we assume is a typographical error, the Application refers to Rule "37(i)". Rule R-37(a) states: "The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods." We have also used in the quoted text from the Application the correct spelling of the name of the law firm that is co-counsel to the Company in this arbitration – Dechamps – rather than encumber the text with "sic" where "Deschamps" was used.

[2] We invited comments from Claimants on the Application, and such comments, opposing the Application, were received on May 13, 2024. Our invitation for such comments stated:

> Dear Counsel:
>
> The Tribunal acknowledges receipt of Mr. Dunning's letter today, but declines to receive the share-file of accompanying exhibits, considering this to be in excess for proper boundaries for a motion for leave application in the circumstances. Mindful that the application may be related to matters to be addressed in the Status Conference to be held with Judge Kaplan on Monday May 13, at 4:30 p.m. -- of which we were informed by Claimants in their submissions on May 7, 2024 - we direct the filing by Claimants of a written response to the motion for leave by Monday May 13 at 10 a.m. This should be of a maximum length comparable to Mr. Dunning's letter and without exhibits unless this is strictly necessary to our consideration of the motion leave as opposed to the merits of the proposed interim relief motion. However, if both Parties agree that (i) the matter is not so urgent as to require a disposition of the motion for leave on an accelerated basis, and (ii) no party desires a ruling from the Tribunal upon the motion for leave prior to the Status Conference with Judge Kaplan, we would be prepared to fix the deadline for Claimants' response to the motion for leave at a later time in the coming week that is agreeable to the Parties, but not later than Friday May 17.
>
> With best wishes to all.
>
> Marc J. Goldstein, for the Tribunal

2. For the reasons stated below, the Application is denied.

3. In our Second Partial Final Award in this case ("PFA-2"), issued August 22, 2022 and confirmed as a Judgment of the United States District Court for the Southern District of New York ("the Southern District Court") on February 20, 2024 (hereinafter the "PFA-2 Judgment") we granted a sanction under AAA Rule R-58 (in the 2013 Commercial Rules), providing that proceedings on Respondents' counterclaims in this action are stayed until "the Respondents shall demonstrate to the satisfaction of the Tribunal that they have complied in full with this Award, with PFA-1 (unless that Award is vacated or its recognition and enforcement is refused), and our Orders dated November 12, 2021, December 8, 2021 (including full reimbursement to Claimants of any expenditures borne by Claimants for the fees of the Company's counsel under PO 2022-08), and March 15, 2022)."

4. Thus, whether and to what extent the relief requested in the Application is permissible under the PFA-2 Judgment without the conditions for lifting the stay of counterclaims having been satisfied — that is to say, whether the application presents what are in substance counterclaims albeit in form requests for interim measures under Rule R-37 — is a question to be addressed by the Southern District Court - and by the Tribunal only to the extent directed by the Southern District Court.

5. Further, decretal paragraphs 3 and 4 of PFA-2 provided:

> 3. No application by Respondents to the Tribunal will be entertained for the removal or suspension from their Company positions of Mr. Gaitán or Ms. Echeverría based upon conduct occurring prior to July 22, 2022 (the date of the last proceeding prior to this Award). The Tribunal makes no Award with respect to the conditions that would need to be satisfied for any such application based on conduct subsequent to July 22, 2022.

Claimants responded in an email on May 13, 2024 at 10 a.m. They stated in relevant part: "Peppertree/AMLQ submit that entertaining the motion Respondents seek leave to file and engaging in substantive briefing on the issues therein is a waste of the Tribunal's time, as well as the parties' time and money."

4. No claim against Claimants by Respondents will be allowed based upon the Peppertree-appointed directors having failed to support the removal of Mr. Gaitán and Ms. Echeverría from their Company positions on the basis of their conduct up to July 22, 2022.

6. Based on the PFA-2 Judgment, questions as to whether and to what extent the relief requested in the Application is permitted notwithstanding the foregoing decretal paragraphs is a question that can only be answered by the Southern District Court unless the Court directs a determination by the Tribunal. This observation applies in particular, but is not necessarily limited to, the allegations in the Application that Mr. Gaitán and Ms. Echeverría entered into a non-disclosure agreement with a competitor of the Company that was also a potential purchaser of the Company, with respect to the potential sale of the Company, in November 2021.

7. Insofar as the Application seeks to direct the termination of the attorney-client relationship between the Company and its counsel in this arbitration, we understand this issue to be presented by certain Respondents, as plaintiffs in the Southern District Court in Civil Action 1:22-cv-06150 (LAK). We do not believe the Tribunal has jurisdiction to address this question unless and until (i) Respondents expressly submit this issue for arbitral determination and dismiss the aforementioned the Southern District Court action, or (ii) that action is stayed or dismissed with a referral to arbitration. Even in one of these two scenarios, the Southern District Court would also need to determine (or remand to the Tribunal to determine) whether the Respondents' pursuit of this claim is presently permitted notwithstanding the stay of counterclaims in the PFA-2 Judgment.

8. The Application is not adequately specific about why the specified relief under Rule R-37 is sought with respect to Mr. Gaitán's alleged uses of funds advanced by the Claimants on behalf of the Company. Insofar as it alleged that Claimants knowingly advanced sums to be used for purposes other than those for which they are asserting damages claims in Phase 2, Respondents are not prevented for presenting their evidence in defense against Claimants' claims. Further, the Application makes vague innuendos that funds were misapplied to pay for investigations into the assets of Respondent Hernandez. But for this to be a viable basis for interim relief, Mr. Hernandez or one or more other Respondents would have to show irreparable harm, and some relationship to the merits of a claim (assuming the claim could be asserted notwithstanding the counterclaims stay). Mr. Hernandez is a judgment debtor of costs awards in this arbitration that have been

confirmed by the Southern District Court. Unless those money judgments have been satisfied, we fail to see in the Application how Respondents propose to show that such an investigation of Mr. Hernandez's assets in the name of the Company, by or through the Company's CEO and/or its counsel, is relevant at this juncture of the proceedings.

9. We make the following additional observations concerning the role of Submissions Counsel in preparing the Application, and we do this in the interest of the integrity of the arbitration albeit these remarks are not necessary to –but they do reinforce -- our ruling that the Application should be denied.

10. The Application purports to be based on "unsolicited information" delivered to Hugo Ortiz, who is said be the "legal representative" of the Company's subsidiaries in Guatemala. The Application states that this unsolicited information "***demonstrates beyond any doubt*** that Jorge Gaitán and Carol Echeverría have been actively working against the interests of the company for several years." (emphasis supplied).

11. But Mr. Ortiz has not provided a verification of the Application, and Mr. Ortiz does not present an affidavit attesting to the facts stated in the Application. The (indirectly) attesting witness is one of the Respondents, a member of the Board of the Company at the time of Claimants' most recent (October 2023) amended pleading, Alejandro Sagustume. And Mr. Sagustume's affidavit dated May 9, 2024, the day before the Application, is not originally submitted by Mr. Sagastume in this arbitration. It was prepared for and submitted in the action brought in the Eastern Caribbean Supreme Court in the British Virgin Islands, an action that was enjoined by the Southern District Court. (We assume but do not know that Submissions Counsel has played no counsel role in the BVI Action and therefore had no involvement in preparing the Sagastume Affidavit). The stated purpose of Mr. Sagastume's affidavit, in the context of an application for cost-shifting, was to demonstrate to the BVI Court that the decision of Claimant in that action to discontinue the action -- the Company's Chief Financial Officer Juan Francisco Quisquinay (an employee of Respondent DTH designated as Company CFO by Respondents) – was allegedly the result at least in part of coercion and threats by Mr. Gaitán and not entirely because discontinuance had been ordered by the Southern District Court.

12. This confusing labyrinth of evidence – one of Respondents' agents, Mr. Sagastume, giving written evidence in a foreign court about the motivations of another of Respondents' agents, Mr. Quisquinay, and supporting that written evidence by reference to facts and documents allegedly gathered from a stranger to the proceedings by yet another of Respondents' agents, Mr. Ortiz – a veritable telenovela - would seem to us to have invited some level of inquiry by Submissions Counsel before sending this Tribunal the May 9 Sagastume affidavit in the BVI Action only 24 hours later, on a Saturday afternoon, in support of an application for "emergency relief" from this Tribunal.

13. PFA-2, now incorporated into the PFA-2 Judgment, provides that Respondents' Submissions Counsel, by making a written submission to the Tribunal, "will be deemed to represent to the tribunal, upon penalty of disqualification from further appearance in this arbitration in case of violation, the matters that are considered to be associated with an attorney's signature in a submission to a court of the United States under Rule 11 (b) of the Federal Rules of Civil Procedure."

14. It is to be understood by the Tribunal, therefore, that Respondents' Submissions Counsel certifies to the Tribunal, upon penalty of disqualification, that "to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances… [that] the factual contentions have evidentiary support or, if specifically so identified will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." (Rule 11(b), FRCP).

15. Were this Application to be something the Tribunal could consider, which as indicated it cannot, the Application leaves the Tribunal with uncertainty about the scope of inquiry, if any, conducted by Submissions Counsel with respect to the reliability of what the Application calls "unsolicited information" that "***demonstrates beyond any doubt*** that Jorge Gaitán and Carol Echeverría have been actively working against the interests of the company for several years." (emphasis supplied).

16. With respect to what level of inquiry by Submissions Counsel might be "reasonable under the circumstances," three matters stand out:

(1) Mr. Sagastume in his affidavit refers to communications that are not between him and the third party alleged to be Mr. Gaitán's wife and adversary in a pending divorce case in Guatemala, but rather between that person and Hugo Ortiz. Mr. Ortiz is the individual Claimant in the Guatemala arbitration that is the subject of a mandatory injunction directing termination of that arbitration (and another commenced in Peru at about the same time). The mandatory injunction was issued by the Tribunal in its Third Partial Final Award on February 22, 2023 ("PFA-3") and was confirmed by the Southern District Court on September 6, 2023 (the "PFA-3 Injunction Judgment");

(2) Based on the Parties' reports to the Tribunal, we understand that the PFA-3 Injunction Judgment has not been complied with; instead the Guatemala arbitration is continuing to be prosecuted by Mr. Ortiz as a Claimant[3]; and

(3) Mr. Ortiz is, as recorded in PFA-3 at para. 57, one of "the Manager Claimants [who was] in the forefront of Respondents' failed effort, before the Company's Board and in turn before the Tribunal, to justify disobedience to our Interim Relief Orders on the basis that Mr. Gaitán's alleged misconduct was a compliance risk to the Company."

17. Without any acknowledgment in the Application of these circumstances, we question – but certainly do not decide at this juncture -- whether Submissions Counsel has conducted the required reasonable inquiry to satisfy himself of the reliability of the facts presented by Mr. Sagastume in his May 9 BVI Action affidavit, or of the facts indicated in the documents contained in the portfolio

[3] Also based on the Parties' reports, we understand that there are at least four similar foreign arbitrations that are ongoing. The one in Peru was the subject of PFA-3 as well. The ones filed in El Salvador and Honduras were reported to us later. We have not seen the pleadings in the later cases, but the record in this case establishes that Mr. Ortiz is a Company Manager of the Honduras subsidiary, and we presume he is a Claimant in the Honduras arbitration. PFA-3, and in turn the PFA-3 Judgment, anticipating such additional foreign arbitrations, enjoined Respondents to prevent them from being filed, and if they were filed to cause them to be terminated.

of exhibits to that affidavit – a portfolio whose existence and provenance is within the personal knowledge of Mr. Ortiz, not Mr. Sagastume.

18. We are troubled, in the context of this arbitration, and Mr. Ortiz's prior roles in relation to it, by the appearance that Submissions Counsel in a May 10 Application relied entirely upon the premise that the facts, circumstance and allegations contained in Mr. Sagastume's May 9 BVI Affidavit were trustworthy and that no meaningful investigation was warranted before the filing of the Application.

19. Our concern about the potential inadequacy of any investigation undertaken by Submissions Counsel is reinforced by the representation provided to the Tribunal on May 12 by the Company's counsel that Submissions Counsel made no attempt to discuss, much less verify, with the Company's counsel the allegations of misconduct the Application asserts against that counsel. This is an arbitration that has been uniquely influenced in its course by what the Tribunal has found to have been contrivances of false evidence by the Respondents, collaboration by many of Respondents' co-counsel either in the creation of false or improper evidence or in its presentation to the Tribunal, and unjustified refusals by Respondents to provide evidence the Tribunal ordered them to produce. This is why the Submissions Counsel sanction was imposed.[4] The scandalous, salacious and otherwise dramatic content of certain of the communications, as quoted by Mr. Sagastume in his May 9 BVI affidavit, and the fact that the affiant is Mr. Sagastume and not Mr. Ortiz, raise additional questions that ought to have warranted inquiry by Submissions Counsel before passing along the entire BVI Affidavit file to the Tribunal on the very next day after it was filed in the BVI, on Saturday May 10, in what is styled as an emergency application.

20. We reach no judgment at this time as to whether there has been a violation by Submissions Counsel of its obligations under the PFA-2 Judgment such as would require disqualification. But

[4] Respondents sought to file the exhibits portfolio of Mr. Sagastume's BVI May 9 affidavit with our Tribunal in conjunction with the Application. We declined to receive it, on the basis that such evidence exceeds the scope of an application for leave in the circumstances. But we do not think a closer inspection of it would satisfy the Tribunal that Submissions Counsel could place reliance on those exhibits without inquiry directly to the person or persons who provided them to Respondents.

if this Application is renewed (insofar as the Southern District Court determines that it may be presented), that issue may be raised by the Tribunal *sua sponte*, and we would be guided — both as to the potential granting of leave and as to the disqualification issue, by the reasonableness of the inquiry described by Submissions Counsel in the circumstances of this arbitration.

21. The Application is denied.

It is SO ORDERED this 13th day of May 2024

MG

Marc J. Goldstein, for the Tribunal