[redacted]

December 19, 2023

Via Email

Luis M. Martinez, Esq.
Vice President
International Centre for Dispute Resolution
150 East 42nd Street, 17th Floor
New York, NY 10017
martinezL@adr.org

Re: ***Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al.***
Case No. 01-21-0000-4309

Dear Mr. Martinez:

The Tribunal in the above matter has been the subject of a prior petition to disqualify and is the subject of a current petition to disqualify that was filed on December 4, 2023. A party may file multiple challenges to the continued service of a Tribunal if new grounds for making a challenge arise. Respondents Terra Towers Corp., TBS Management, S.A., and DT Holdings, Inc. (collectively, "Terra") pursuant to Rule 18, again object to the continued service of the Tribunal and seek their disqualification on the matters raised herein which have just recently come to light.

On November 28, 2023, the Tribunal *sua sponte* issued an order noting that it had come to its attention that documents it considered "confidential information" had been published on Jus Mundi, a research and reference resource used by thousands involved in international arbitration worldwide.[1] The Tribunal further observed that the "confidential information" published by Jus Mundi had migrated there from the public docket of a pending judicial action between the Parties in the Southern District of New York ("SDNY") where these documents had been publicly filed pursuant to a joint stipulation of the parties and their counsel.[2] The Tribunal then noted these materials included mention of an article published on the internet by the website wallstreetwhistleblower.org ("WSW") which published allegations of corruption against the Tribunal's Chair. These public documents also alluded to the AAA's prior denial of Terra's request for disqualification of the panel without comment by the AAA on the merits of the corruption allegations.[3]

The Tribunal it its November 28th Order also asked the Parties to comment on allowing the Tribunal to make public statements about the WSW article and the AAA's denial of Terra's first request for disqualification to prevent "reputational harm" to the Tribunal, specifically, the Chair. *See* Ex. A. Then, on December 1, 2023, the Tribunal directed the parties to seek a sealing order before the SDNY of all submissions in the judicial proceedings in contradiction to the joint stipulation of the parties to maintain these documents on the public docket consistent with New

[1] A true and correct copy of the Tribunal's November 28, 2023, *sua sponte* Order is attached hereto as Exhibit A.
[2] A true and correct copy of Terra's filing before the SDNY (ECF No. 194) is attached hereto as Exhibit B.
[3] The first request for disqualification was filed May, 2022, and raised the fact that given these allegations, which prompted the Chair to make a supplemental disclosure of a familial connection to Goldman Sachs with whom the Chair had communicated, and given the fact that the Tribunal ***had refused Terra's request to investigate the substance of the allegations relating to the existence of a financial relationship with Goldman Sachs,*** the Tribunal could no longer be impartial and unbiased.

York law and their agreement.[4] The Tribunal also directed the parties to seek to have Jus Mundi remove from its site any documents relating to the SDNY judicial matter. *See* Ex. C. Following Terra's submissions in the SDNY proceedings, *see* Exhibit B, the Tribunal on December 18, 2023, *sua sponte* issued another order seeking comments on whether Terra's counsel should be sanctioned for willful violation of the Tribunals order to seek sealing of all judicial proceedings, and whether Terra's submission counsel—who has not made an appearance in the SDNY proceedings—should be sanctioned as well.[5]

All rules administered by the AAA require that the tribunal be impartial and independent. This is not a controversial proposition; the AAA's Statement of Ethical Principles (the "Principles") state that AAA rules, administrative procedures, and due process protocols follow the law.[6] The Rules also require that tribunals perform their duties with diligence and good faith, including the Code of Ethics for Arbitrators in Commercial Disputes (the "Code")—which this Tribunal is bound to observe. This Tribunal should be disqualified for three reasons. *First*, the issues set forth here demonstrate that the Tribunal is acting out of self-interest and encroaching on the Parties' discretion to determine the confidentiality of their own dispute, in violation of the AAA Principles and the Code. A reasonable person would determine that this Tribunal is unable to perform their duties in good faith due to their *sua sponte* assertion of "potential reputational harm" which turned a non-issue, the non-confidentiality of records in separate judicial proceedings, into a distraction that encroaches on the public's right to access judicial records and the AAA's partnership with Jus Mundi. *See* Ex. A, Ex. B, Ex. C, and Ex. D. *Second*, the issues here demonstrate there is a justifiable doubt as to the Tribunal's independence and impartiality when the Tribunal seeks to issue a public statement on Terra's previous challenge while the Chair simultaneously comments on his personal website blogging about issues pending in these proceedings, with references about Terra's principal, as well as improperly commenting on proceeding to enforce or challenge the Tribunal's own awards as demonstrated below.[7] And *third*, the issues set forth below demonstrate the Tribunal has made factual predeterminations about issues to be litigated in Phase II of these proceedings, which raises additional disclosure issues in and of themselves.[8] *See* Ex. A.

I. The Tribunal is Acting Out of Self-Interest.

The AAA's confidentiality Principles provide that the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. Contrary to a common misperception, arbitration is confidential—not secretive. Parties are free to talk about their cases; it is the AAA and the arbitrators who are bound to keeping parties' confidences, similar to a judge or jury.[9] These Principles are reiterated in New York, the seat of this arbitration which provides the controlling law. *See, e.g., Century Indem Co.,* 2012 WL

[4] A true and correct copy of the Tribunal's December 1, 2023, Order is attached hereto as Exhibit C.
[5] A true and correct copy of the Tribunal's December 18, 2023, *sua sponte* Order is attached hereto as Exhibit D.
[6] *AAA Statement of Ethical Principles*, American Arbitration Association (Dec. 14, 2023) https://www.icdr.org/StatementofEthicalPrinciples.
[7] A true and correct copy of *On Contempt* is attached hereto as Exhibit E; and a true and correct copy of *Gotham Novit Curia* is attached hereto as Exhibit F.
[8] Terra's Rule 17 correspondence is being filed contemporaneously in accordance with Administrative Review Council (ARC) Review Standards.
[9] *Our Mission: Putting the Public, the Process, and the Parties First*, American Arbitration Association (Dec. 14, 2023) https://www.icdr.org/Mission.

4354816, at *14 ("while the parties to an arbitration are generally permitted to keep their private undertakings from the prying eyes of others, the circumstance changes when a party seeks to enforce in federal court the fruits of their private agreement to arbitrate"). Yet on December 1, 2023, this Tribunal took a position on whether the Parties were permitted to abide by their agreement to keep the relevant filing's in a separate court proceeding non-confidential. *See* Ex. C, ¶ 9. And this Tribunal did so *sua sponte*, to protect a speculative asserted interest of "potential reputational harm" despite the Code providing that arbitrators should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. Code, Canon I(D).

Persons who act as arbitrators undertake serious responsibilities to the parties, including important ethical obligations. They are the individuals who have the power to decide and should observe fundamental standards of ethical conduct. Code, Preamble. Arbitrators should accept appointments only if fully satisfied they can serve impartially, which is a continuing obligation throughout all stages of the proceeding. Code, Canon I(B)(1) & (G). Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. Code, Canon I(D). The Parties here agreed to unsealing the record before the SDNY consistent with the requirements of New York law and pursuant to a stipulation of their counsel in those proceedings. *See* Ex. B. Yet the Chair, for the Tribunal, is directing the parties to pursue censorship of Jus Mundi, a legal database, due to publication of the *public* docket all to protect the Tribunal's personal interests, not an interest or issue presented by the parties. *See* Ex. A & Ex. C. All of this is in connection with a two-year old article that was the subject of the parties previous disqualification before the AAA. *See* Ex. A. This article has been in the public domain during that time. *See* Ex. B. Despite being duty-bound to *not be swayed by outside pressure, public clamor, and fear of criticism or self-interest*, this Tribunal's "potential reputational harm," raised *sua sponte*, has turned these proceedings into attempting to convince a legal database to scrub their *database* of publicly available judicial records that the parties stipulated to unsealing—and subsequently directing the Parties through their lawyers to request the wholesale sealing of judicial records contrary to a prior voluntary stipulation submitted to the court for adoption, and contrary to controlling legal precedent in New York. *See* Ex. B. This *sua sponte* disruption from the Tribunal comes on the eve of Phase II proceedings, wherein the Chair, for the Tribunal, ***further admits to speaking with third-party researchers about these proceedings and requests the parties' "comment" on the Tribunal making public statements.***[10] ***It is truly unprecedented to have a Tribunal which is sitting in judgment of a dispute to seek the ability to make public comments on issues involved in the proceeding, and to make comments on the AAA's own decision to deny its disqualification—as if that exonerated this Tribunal of any misconduct, which it did not—while directing the parties to simultaneously keep everything secret and free from public disclosure.***

Neither the AAA nor any arbitrator in a proceeding under the Commercial Rules is a necessary or proper party in judicial proceedings relating to the arbitration. R-52(b). Yet the Tribunal is forcing the Parties to go vitiate their stipulation on the non-confidentiality of their judicial filings to protect a speculative asserted interest of "potential reputational harm" of the Tribunal. *See* Ex. A & Ex. B. This makes the Tribunal an interested party in the judicial proceedings in the SDNY where the request to seal the entire judicial record of legal proceedings is being pursued ***for the benefit of the Tribunal.*** And this is the second occasion in these proceedings that the Tribunal injects itself as an interested party and provides testimony regarding matters at issue

[10] *Supra* n. 8.

in these proceedings. *See* Ex. A; *see also, e.g.,* May 26, 2022, Informational Supplement ("the Chair of the Tribunal has provided the following information, which the Tribunal shares here…"). *Contra* Code, Canon I(D).

II. The Tribunal is Demonstrating Partiality Against Terra.

The Chair of this Tribunal maintains a blog which provides commentary on various topics. On August 4, 2023, the Chair published an article titled *On Contempt and Award Compliance* which describes current issues in these proceedings and makes veiled references to Terra and the former director of the Company. *See* Ex. E. Therein, the Chair provides a brief sketch of a "multiple-forum war" where he ensures his readers are "well advised to understand how the applicable law of contempt may have an impact" and provides them "a brief sketch and discussion of some relevant aspects of the contempt law landscape affecting arbitration awards in US federal courts." *Id. The Chair described these proceedings.* The Chair's blog is included in the signature block of every correspondence the Chair, on behalf of the Tribunal, has provided to the parties in these proceedings. *On Contempt* is not a cumulative blog post like the previous posts were. Neither party in these proceedings, nor the parallel court proceedings, has moved for contempt. Instead, *On Contempt* foreshadows what the Chair hopes for, and provides public guidance to the Claimants in contemplation of future proceedings. E.g., Phase II of this proceeding. This alone provides an objective basis to suggest that a reasonable person would conclude that the Chair and the Tribunal are biased against Terra, because they have prejudged the issues of Phase II and publicly *blogged about it* for Claimants to observe in advance so they can be well *advised to understand how the applicable law of contempt may have an impact* on Phase II. *Cf.* Ex. E.

Arbitrators have been disqualified when they display extreme partisanship with respect to issues still to be determined in the arbitration. *Matter of Excelsior 57th Corp. v. Kern*, 218 A.D.2d 528, 530 (1st Dep't 1995). Here, the Chair, for the Tribunal, is blogging about throwing a party in the position of Terra's principle, Mr. Hernandez, in jail while the Tribunal is sitting in judgment of Phase II of these proceedings. *See* Ex. E, ¶ 3 ("arrest and lockup"). An arbitrator's failure to faithfully and fairly hear and examine matters can be demonstrated by revealing evident partiality, and it is revealed at length here where the Chair, for the Tribunal is assisting Claimants in proceeding to enforce his award, and informing Claimants of what the Tribunal's decision would be *in advance*, or what their moving papers *should* address after Phase II is concluded. *Cf.* Code, Canon VI(C).

III. The Tribunal has Made Factual Predetermination's Prior to Phase II.

While public access and transparency are essential to the integrity of the arbitral process, an arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another. Code, Canon VI(A). The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. Code, Canon VI(B). After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award either. *But see* Ex. E. Moreover, the Code provides that an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration. Code, p. 4. *But see* Ex. A & Ex. E.

Just as in *Kern*, the Chair here has demonstrated that this Tribunal has prejudged Terra prior to Phase II. No argument can be advanced by Claimants that the Chair's blog is not referencing

the Parties' dispute before the Tribunal. Ex. E. If the Chair was not attempting to assist Claimants in their proceedings to enforce the Tribunal's own awards, then *On Contempt* would have been published *after* the proceedings took place, like prior posts. And the Chair's blog would not be hyperlinked in the Tribunal's correspondence to the Parties in these proceedings. But instead, the Tribunal's behavior has escalated. *See* Ex. D & Ex. E. An arbitrator who conducts research in pursuit of a legal analysis not articulated by either party, based on case law not cited by either party, but that would advantage one party over the other, "generally speaking is acting inappropriately." Ex. F. "But the infraction is not of a rule or a proscriptive norm against arbitrator research. ***It is a violation of the broader obligation to behave impartially***." *Id.*, p. 8 (emphasis added). The Chair, for the Tribunal, is aware of the ethical violations emanating from this proceeding, and he is acting in manifest disregard of the Code in his *sua sponte* pursuit of Terra.

IV. Transparency is Essential to an Effective Dispute Resolution Process.

Persons who act as arbitrators undertake serious responsibilities to the public as well, including those same ethical obligations. Access fosters integrity in the judiciary in that free disclosure acts as a check on foul play. *Witt v. Michelin North America, Inc.*, 2020 WL 5411 5228, at *11 n. 8. (citing Lloyd Dogget & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in Public Interest*, 69 Tex. L. Rev. 643 (1991). Jus Mundi sheds light on the efficiency, due process, and justice of the dispute resolution process.[11] Jus Mundi helps to gather substantive knowledge on specific topics, such as *transparency*, *conflict of interest*, and law issues.[12] Jus Mundi is a partner of the AAA because these international arbitration awards are an important element for the study and advancement of global conflict management.[13] Article 40 of the ICDR's International Arbitration Rules provides the ICDR with the ability to make an award public if they have become public in the course of enforcement or otherwise. And the AAA has partnered with Jus Mundi to provide full public access to all publishable international arbitration awards and related documents made as of June 25, 2022.[14] *But see* Ex. C. Nevertheless, this Tribunal seeks to seal the entire judicial proceeding pending in the SDNY, the entire appellate record on two related appeals pending before the Second Circuit Court of Appeals, and the Parties moving papers which provide parity to the Tribunal's awards on the public docket, while at the same time seeking approval of the parties *to issue a public statement regarding the very same issue the Tribunal directed the Parties to seal from the public docket.* Ex. A & Ex. C. The ability of the Tribunal to publicly comment on the AAA's first denial of disqualification is particularly troublesome when the filings before the AAA have not been made public, and the public, for example, would not be able to see that Terra provided expert opinions substantiating the existence of a banking relationship between Goldman Sachs and the email goldstein@lexmarc.us; and demanded that subpoenas be issued for those bank records—a request which the Tribunal denied but which would have led to the truth.

The fact that the Tribunal wants to publicly comment on the disqualification to draw its own favorable inference, while at the same time directing wholesale censoring of all judicial

[11] Martinez, Luis, *Partnership*, Jus Mundi (Dec. 14, 2023) https://jusmundi.com/en/partnership/icdr.
[12] Kaldunski, Marcin, *About Us*, Jus Mundi (Dec. 14, 2023) https://jusmundi.com/en/about. (emphasis added).
[13] *Partnership*, Jus Mundi (Dec. 14, 2023) https://jusmundi.com/en/partnership/icdr.
[14] *Partnership*, Jus Mundi (Dec. 14, 2023) https://jusmundi.com/en/partnership/icdr.

records regarding the same subject matter, denotes the extent of the bias and partiality of this Tribunal. Stated differently, if all "details" of this arbitration proceeding are considered "Confidential Information" and subject to being sealed from public view, then why would the Tribunal be entitled to make public statements about the "detail" of a disqualification motion filed by Terra to infer its own innocence from corruption? Or is it that only those details favorable to the Tribunal are subject to public disclosure but everything else is not?

CONCLUSION

Bias or prejudice consists of a mental attitude or disposition of a judge towards or against a party to the litigation and its existence depends on whether one can draw an inference of favoritism. The Chair's mental attitude demonstrated on his own blog consists of a desire to throw the Company's former director in jail. *See* Ex. E. The Tribunal's mental attitude demonstrated in the Exhibits hereto demonstrates the Tribunal is succumbing to outside pressure, in contravention of the Parties stipulation in the SDNY, in manifest disregard for the applicable law of New York, and in violation of the Code. The AAA should uphold the Code of Ethics and disqualify this self-interested, partial, and pre-determined Tribunal, as they attempt to marginalize Terra's right to due process, and the public's right to access, and the AAA's Code, in their quest to "arrest and lock-up" the "non-US controlling person of a foreign business entity." *See* Ex. E. The seat of this arbitration is not *Gotham*, where the "arbitrator-as-oracle model" applies because "the AAA Commercial Rules are and have long been silent" as to whether the tribunal should take what the parties give them and seek no more. *See* Ex. F. This proceeding is a creature of contract stemming from a business dispute where the applicable law is *Lex-New York*, not *Lex-Marc*, and the Code is supposed to be upheld. *Cf.* Ex. F ("the infraction is not of a rule or a proscriptive norm against arbitrator research. ***It is a violation of the broader obligation to behave impartially***.") This Tribunal has violated the broader obligation to behave impartially and should be disqualified as a result.

Date: December 19, 2023,

Respectfully Submitted,

EXHIBIT A

From: [redacted]
To: [redacted]
Cc: ICDR Ana Lombardia; ICDR Luis Martinez, Esq.; melida.hodgson@arnoldporter.com; rziegler@acumenadr.com
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., AAA Case No. 01-21-0000-4309 - Confidentiality Order Issue
Date: Tuesday, November 28, 2023 11:20:05 AM
Attachments: image001.png
oledata.mso

Dear Counsel:

In recent days it came to our attention that information related to this arbitration that is within the category of "Confidential Information" under the Confidentiality Order dated September 21, 2021, and also constituting "details of the arbitration" that are required to treated as private and confidential under para. 22 of Procedural Order No. 2 dated August 12, 2021, has been published on the Jus Mundi website (www.jusmundi.com). Jus Mundi is a research and reference resource used by thousands of persons involved in international arbitration worldwide. One of the documents related to this arbitration located on Jus Mundi is a letter dated June 1, 2022 from Claimants' counsel to the ICDR Case Managers (the "ICDR Letter") that discussed evidence relevant to the accusation of corruption made against the Chair of the Tribunal.

Evidently the ICDR Letter and other Confidential Information migrated to the Jus Mundi website from the public docket in the Southern District of New York ("SDNY") litigation as a result of decisions by the Parties, taken without consultation with the Tribunal, (i) to file certain submissions on the public docket despite an Order entered by the SDNY judge, upon Claimants' motion not opposed by Respondents, permitting Claimants' submissions to be filed under seal, and (ii) to unseal certain submissions originally filed under seal pursuant to that Order. It had previously been the Parties' practice, as we observed it, to obtain similar Orders from the Court permitting submissions to be filed under seal, and to file submissions under seal as so permitted. All Parties in making motions seeking such permission expressly referenced the confidentiality provisions in Procedural Order No. 2 and some of them also referenced the confidentiality provisions of the Shareholders Agreement.

Paragraph 8 of the Confidentiality Order provides: "All Parties shall take reasonable precautions to protect the confidentiality of Confidential Information and to ensure that any person receiving Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof."

The ICDR Letter was publicly filed in the SDNY case, on August 17, 2023, as Ex. 37 to Mr. Rodriguez's affidavit in opposition to Claimants' motion for an anti-suit injunction regarding the lawsuit commenced by Mr. Quisquinay in the British Virgin Islands. The entirety of that affidavit, including its exhibits, was filed on the SDNY public docket. The corruption accusation against the Chair had been first published in March 2022 in an article on a website called *wallstreetwhistleblower.org* (the "WSW Article"), and was ostensibly based upon information obtained from an anonymous "whistleblower" within the parent company of Claimant AMLQ Holdings. We understand that such allegations thereafter formed the basis of a challenge by Respondents under AAA Commercial Rule R-18 seeking to have the Tribunal removed from the case. It appears that the ICDR Letter was submitted by Claimants in

opposition to this challenge. As was noted in Judge Kaplan's Memorandum and Order dated September 6, 2023 -- wherein our Third Partial Final Award (PFA-3) was confirmed and Respondents' motion to vacate PFA-3 was denied -- the ICDR rejected Respondents' challenge (or challenges) to the continued service of the Chair and the Tribunal.

Despite the falsity of this corruption allegation, and despite its rejection by the ICDR and SDNY, the recent publication of the ICDR Letter on Jus Mundi is evidently correlated with a recent upsurge of search traffic to the *wallstreetwhistleblower.org* site by researchers seeking information about the Chair. We infer this from the fact that the WSW Article has regained prominence in the Google search results returned for such searches. Further, the search result leading to the WSW Article on the WSW website carries the headline "***Marc J. Goldstein At Center of Alleged Goldman Sachs Bribery Scheme***". Also, the WSW website as currently accessed carries a prominent link to the WSW Article on its home page, even though the original publication was in March 2022.

These developments are disconcerting, and are evidently linked to the Parties' decisions to depart from the treatment of Confidential Information that the Confidentiality Order and Procedural Order No. 2 of August 2021 require. Accordingly, we request that the Parties voluntarily seek to restore filed-under-seal status in SDNY to the submissions in connection with motions pending before SDNY (other than the public version of PFA-2), and upon the sealing of such documents, promptly request that Jus Mundi remove such sealed documents from its public database. Please advise if the Parties will accede to this request by close of business tomorrow, November 29.

In the event the Parties decline to accede to our request, we invite your comments by close of business on Thursday November 30, 2023 on the following:

1. Whether the Tribunal should direct the Parties to seek relief in SDNY to reinstate the sealing of the submissions in connection with motions pending before the court (other than the public version of PFA-2), and
2. Whether the Tribunal should direct the Parties to attempt to cause Jus Mundi to remove from its website all information about this case other than the public versions of the Tribunal's Awards and the SDNY decisions/judgments confirming them (and whether such a direction could as a practical matter be effectuated by Jus Mundi).

By the same November 30 deadline, we also invite your comments as to whether – particularly in view of the potential for continuing reputational harm -- the Tribunal may treat the WSW Article (including communications of the Tribunal with the Parties in 2022 concerning the WSW Article) and the unsuccessful ICDR challenge to the Tribunal made by Respondents based on the WSW Article as non-confidential matters on which the Tribunal might properly issue public statements (if it chooses to do so, and provided any such statements are made in compliance with all applicable rules).

With best wishes to all,
Marc J. Goldstein, for the Tribunal

Marc J. Goldstein, Esq.

Fellow:
College of Commercial Arbitrators (CCA)
Chartered Institute of Arbitrators (CIArb)

Member:
International Council on Commercial Arbitration (ICCA)
American Law Institute (ALI)
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From: Marc Goldstein
Sent: Friday, November 10, 2023 4:59 PM

Cc: ICDR Ana Lombardia <AnaLombardia@adr.org>; ICDR Luis Martinez, Esq. <LuisMartinez@adr.org>; melida.hodgson@arnoldporter.com; rziegler@acumenadr.com
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., AAA Case No. 01-21-0000-4309 - PO 2023-10 Adopting Phase 2 Timetable

Dear Counsel:
Please see the annexed.

With best wishes to all.
Marc Goldstein

Marc J. Goldstein, Esq.

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Member:
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Cc: ICDR Ana Lombardia <AnaLombardia@adr.org>; ICDR Luis Martinez, Esq. <LuisMartinez@adr.org>; melida.hodgson@arnoldporter.com; rziegler@acumenadr.com
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., AAA Case No. 01-21-

0000-4309 - Peppertree/AMLQ Comments to Phase 2 Tribunal Draft Timetable

Dear Members of the Tribunal and Counsel: Now that Respondents have submitted their comments to the Tribunal's Phase 2 Draft Timetable, attached please find Peppertree/AMLQ's submission from earlier today.

[redacted]

[redacted]

Cc: ICDR Ana Lombardia <AnaLombardia@adr.org>; ICDR Luis Martinez, Esq. <LuisMartinez@adr.org>; melida.hodgson@arnoldporter.com; rziegler@acumenadr.com
Subject: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., AAA Case No. 01-21-0000-4309 - Peppertree/AMLQ Comments to Phase 2 Tribunal Draft Timetable

Dear Members of the Tribunal and Counsel: Pursuant to Paragraph 19 of Procedural Order No. 2, Peppertree/AMLQ have sent their comments to the Tribunal's Phase 2 Draft Timetable to the Tribunal and the Case Managers only. We will circulate this submission to the other Parties "as soon as reasonably possible after the other Parties' submissions to the Tribunal have been made."

[redacted]

[redacted]

From: Goldstein <goldstein@lexmarc.us>
Sent: Tuesday, November 7, 2023 7:37 AM

[redacted]

Cc: ICDR Ana Lombardia <AnaLombardia@adr.org>; ICDR Luis Martinez, Esq. <LuisMartinez@adr.org>; melida.hodgson@arnoldporter.com; rziegler@acumenadr.com
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., AAA Case No. 01-21-0000-4309 - Phase 2 Tribunal Draft Timetable for Final Comments

Dear Counsel:
Please find annexed the Tribunal's Phase 2 Timetable for Final Party Comments. Please provide us with your comment by close of business on Thursday November 9. Any narrative comments should be within a two-page limit. Note that there is one date in June 2024 for an organizational conference that is to be selected from among the three dates we have offered. We assume that 60-90 minutes will be sufficient for this.
With thanks and best wishes to all.
Marc J. Goldstein, for the Tribunal

Marc J. Goldstein, Esq.

Fellow:
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Chartered Institute of Arbitrators (CIArb)

Member:
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American Law Institute (ALI)
International Mediation Institute (IMI)

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Arbitration Commentaries: http://arbblog.lexmarc.us

[redacted]

Sent: Thursday, November 2, 2023 9:51 PM

[redacted]

Cc: ICDR Ana Lombardia <AnaLombardia@adr.org>; ICDR Luis Martinez, Esq. <LuisMartinez@adr.org>; melida.hodgson@arnoldporter.com; rziegler@acumenadr.com
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., AAA Case No. 01-21-0000-4309 - PPT-AMLQ Response to Procedural Order 2023-09

Dear Members of the Tribunal,

Please find attached Respondents' suggested timetable for Phase II. We also include, for ease of reference, a redline comparing it to Claimants' suggested timetable.

As the attached redline shows, the parties' position are not far off but Respondents consider that their suggested timetable is more international arbitration-oriented and more procedurally efficient. We understand the below to be the main differences between the parties' respective approaches:

- Respondents' suggested timetable includes two items that we understand were inadvertently omitted from Claimants' suggested timetable (*i.e.*, responses/objections and replies to the parties' respective Redfern or Stern Schedules).
- Respondents' suggested timetable increases the time between the two contemplated written submissions (*i.e.*, pre-hearing memorial and pre-hearing responsive memorials)

which should also include the expert reports. On this point, Claimants' suggested timetable seems to include separate items for the submission of the parties' respective expert reports, while at the same time contemplates the submission of expert reports with the parties' memorials. We understand this to be a an inadvertent omission from Claimants, as the position stated in their letter from earlier today suggests that Claimants prefer to submit expert reports prior to the parties submitting their respective memorials.

- Respondents' suggested timetable does not contemplate depositions, which are not contemplated in the timetable suggested by the Tribunal in Procedural Order no. 2023-09 (Appendix 2) nor in the AAA Commercial Rules, and are disfavored in international arbitration.

Respectfully submitted,

[redacted]

From: Marc Goldstein <goldstein@lexmarc.us>
Sent: Thursday, November 2, 2023 1:03 PM

[redacted]

Cc: ICDR Ana Lombardia <AnaLombardia@adr.org>; ICDR Luis Martinez, Esq. <LuisMartinez@adr.org>; melida.hodgson@arnoldporter.com; rziegler@acumenadr.com
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., AAA Case No. 01-21-0000-4309 - PPT-AMLQ Response to Procedural Order 2023-09

Receipt acknowledged. Thank you Ms. Poldneff.
With best wishes to all.
Marc Goldstein

Marc J. Goldstein, Esq.

Fellow:
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From: [redacted]
Sent: Thursday, November 2, 2023 1:00 PM
[redacted]
Cc: ICDR Ana Lombardia <AnaLombardia@adr.org>; ICDR Luis Martinez, Esq. <LuisMartinez@adr.org>; melida.hodgson@arnoldporter.com; rziegler@acumenadr.com
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., AAA Case No. 01-21-0000-4309 - PPT-AMLQ Response to Procedural Order 2023-09

Dear Members of the Tribunal: Please see attached for Peppertree/AMLQ's submission in response to Procedural Order No. 2023-09 and attached proposed Phase II timetable.

Best regards,

[redacted]

From: Marc Goldstein <goldstein@lexmarc.us>
Sent: Thursday, October 26, 2023 5:59 AM
[redacted]
Cc: ICDR Ana Lombardia <AnaLombardia@adr.org>; ICDR Luis Martinez, Esq. <LuisMartinez@adr.org>; melida.hodgson@arnoldporter.com; rziegler@acumenadr.com
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., AAA Case No. 01-21-0000-4309 - Procedural Order 2023-09

Dear Counsel:
Please see the annexed.
With best wishes to all.
Marc Goldstein

Marc J. Goldstein, Esq.

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EXHIBIT B

[redacted]

BY CM/ECF

The Honorable Lewis A. Kaplan
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: ***Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al.,***
Civil Action No.: 1:22-cv-01761

Your Honor:

Our firm represents Terra Towers Corp, *et al.* ("Terra") in the above action. Terra opposes Telecom Business Solution, LLC, LATAM Towers, LLC and AMLQ Holdings (Cay), Ltd.'s (collectively, "Peppertree-AMLQ") Letter-Motion seeking leave to file under seal their motion to seal Terra's opposition to their antisuit motion. (ECF No. 191). The Letter-Motion was filed at the instance of an order of the arbitral tribunal sitting in an arbitration pending between the parties and administered by the AAA, *Telecom Business Solution, LLC, et al., v. Terra Towers Corp., et al.,* AAA Case No, 01-21-0000-4309 (the "Arbitration"). Even though the Parties had stipulated to the non-confidentiality of the relevant judicial records (ECF No. 189), and even though Peppertree-AMLQ filed their reply in support of their antisuit motion publicly (ECF No. 184), the letter-motion to seal Terra's opposition was purportedly filed on behalf of all the parties, but Terra was not consulted, nor did it consent or approve the filing. (*See* ECF No. 192). The Letter-Motion should be denied for several other reasons as well. *First*, the Court should not permit Peppertree-AMLQ to unilaterally withdraw their stipulation which remains on the public docket. (*See* ECF No. 189). *Second*, Peppertree-AMLQ have agreed to the Tribunal's request to issue a public statement regarding the very same issue, acknowledging the public nature of the judicial records they now seek to seal. (*Infra* Ex. B). And *third*, there is no basis to seal judicial records which are publicly available from other sources, when the asserted third-party interest is insufficient to trump the presumption of public access. (*See* 192-1).

On July 20, 2023, Peppertree-AMLQ sought leave to file under seal their antisuit motion and supporting documents and stated "undersigned counsel will meet and confer with counsel for [Terra] in this action concerning confidentiality designations in this matter. [Peppertree-AMLQ] will then promptly re-file publicly any material ***that they agree is non-confidential*** and bring any remaining disputes concerning confidentiality to the Court for resolution." (ECF No. 170) (emphasis added). Thereafter, Terra filed their opposition to Peppertree-AMLQ's antisuit motion. (ECF No. 179-180). On September 7, 2023, Peppertree-AMLQ filed their reply in support. (ECF No. 184). And on September 11, 2023, Peppertree-AMLQ stated in conferral that they "intend to have the papers filed with their motion re-filed on the public docket…we presume you will have no objection to unsealing [Peppertree-AMLQ's] papers and have prepared the attached stipulation to that effect." Attached as Exhibit A. Terra had no objection. (Ex. A). Peppertree-AMLQ then submitted the Parties' stipulation they drafted. (ECF No. 189). The conferral between the parties reflected the Parties' intended stipulation on material *they agreed was non-confidential*. (*Cf.* ECF No. 170; *see, e.g.,* ECF No. 184).

On November 28, 2023, the Tribunal in the Arbitration *sua sponte* issued an order noting that information related to the Arbitration had been published on Jus Mundi, a research and reference resource used by thousands involved in international arbitration worldwide. (ECF No. 192-1). The Tribunal referenced the confidentiality provision contained in Procedural Order No. 2 (hereinafter, "PO-2") which Peppertree-AMLQ previously referenced on the docket. (*See* ECF No. 170; ECF No. 189). Section IX provides that the Parties "shall treat the details of the Arbitration as private and confidential, ***except to the extent necessary to comply with mandatory applicable law…."*** (ECF No. 6-1 ¶ 22) (emphasis added). And then provides "[n]otwithstanding paragraph 22 above, the Parties are permitted to disclose confidential information to third parties as required to prepare and present their claims or defenses," subject to a stipulated protective order, which the parties submitted to the Tribunal to encompass the exchange of documents in discovery. (*Id.* ¶ 24). Neither provision encompasses documents publicly available, much less those on a research and reference resource used by thousands in international arbitration. (*See* ECF No. 192-1). The same paragraph also provides "***nothing stated in this Section IX shall be construed to address whether a court should enter into such an agreement as condition of the ability of a party to seek in that court to confirm, modify, or vacate an award issued by the Tribunal or to seek any other judicial relief in relation to the Arbitration."*** (ECF No. 6-1 ¶ 24). That same day, the Tribunal also asked the Parties to comment on its ability to make public statements regarding the public article and Terra's request to disqualify the Panel due to its bias. (ECF No. 192-1). Two (2) days later, in response to the Tribunal, Peppertree-AMLQ stated:

> [T]he Tribunal ***may treat*** the WSW Article and the unsuccessful ICDR challenge ***as non-confidential and issue public statements*** on the matter as it deems appropriate under these most unusual circumstances. *First*, the WSW Article remains on the WSW website and is, therefore, ***public***. *Second* Respondents have publicly filed their Opposition (and exhibit 37 thereto addressing the ICDR challenge); therefore, it has been exposed ***in the public record for over 3 months*** already.

Peppertree's Nov. 30, 2023, submission, p 3. (emphasis added). Attached as Exhibit B. Terra provided the Tribunal a response as well. Attached as Exhibit C. Then, on December 1, 2023, the Tribunal issued Procedural Order 2023-11 requesting that the parties seek to seal all the judicial records in this matter, and "take similar steps with regard to the Record on Appeal and relevant portions of briefs already filed in the pending appeal of the Judgment confirming PFA-1, and the forthcoming Record on Appeal on the recently-filed appeal from the Judgment confirming PFA-3." (ECF No. 192-5).

Courts generally enforce stipulations that narrow issues in a case and a party to a stipulation is not entitled to withdraw from its agreement unilaterally. *U.S. ex rel Reilly v. New England Teamsters*, 737 F.2d 1274, 1278 (2d Cir. 1984). Where a party never consented to a withdrawal by the other party from a stipulation, the withdrawing party is bound by stipulation unless it could obtain relief by action of the Court. *Id.*; *see Sinicropi v. Milone*, 915 F.2d 66, 69 (2d Cir. 1990). Peppertree-AMLQ proposed the stipulation, drafted and prepared the stipulation, and filed it with Your Honor for adoption. (*See* Ex. A; *e.g.,* ECF No. 189). They filed their reply in support publicly (ECF No. 184), and they are bound by their agreement and their acknowledgment that nothing in the judicial records at issue here is confidential. (ECF No. 170; *and compare* ECF No. 189). New York law applies to this Arbitration and nothing about the filings is confidential under New York law, nor can an arbitral tribunal dictate to this Court, or Your Honor, what portions—if any—of

court proceedings must be sealed. Peppertree-AMLQ is therefore estopped from contending materials it agreed were *non-confidential* should now be sealed solely on the basis of prompting by the Tribunal which seeks to avoid "reputational harm" to its chairman due to public information that has been available for over eighteen (18) months. (*See* Ex. B, *e.g.,* ECF No. 184, ECF No. 189; *see also* ECF No. 192-1). The Tribunal also directed the Parties to seek to retrieve from a public database, Jus Mundi, ***publicly available information*** ostensibly to avoid reputational harm to the Tribunal stemming from an anonymous internet article which identified the Chair as being tied to allegations of corruption. (*See* Ex. B; *see also* ECF No. 192-5). The Rules require that when a party seeks leave to file sealed or redacted materials on the ground that an opposing or *third party* has requested it, that party shall notify the opposing party or third party that it must file, within three days, a letter explaining the need to seal or redact the materials. *See* Individual Rules of Practice (LAK), ECF Filing Practices at 2. (April 18, 2020). The Tribunal has become an interested party, even though it is duty-bound to remain impartial. Jus Mundi is an interested party but has not been given notice of the Tribunal's request to remove those publicly available submissions from its website. (ECF No. 192-5 ¶ 9). Sealing judicial records must be consistent with the ***presumption in favor of public access*** to judicial documents. *Lugosh v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-120 (2d Cir. 2006) (emphasis added). The parties' consent or the fact that information is subject to a confidentiality agreement between litigants is not, by itself, a valid basis to overcome the presumption in favor of public access to judicial documents. *In re Gen. Motors LLC Ignition Switch Litig*., No. 14-MD-2543(JMF), 2015 WL 4750774, at *4 (S.D.N.Y. Aug. 11, 2015). Because the "***rights involved are the rights of the public***." *Id.* (citation omitted) (emphasis added). That's the mandatory controlling law in the Arbitration and nothing in PO-2 or the subsequent stipulated protective order trumps that.

On November 30, 2023, Peppertree-AMLQ permitted the Tribunal to treat the WSW Article and the unsuccessful ICDR challenge as ***non-confidential and to issue public statements,*** acknowledging that the WSW Article is ***public*** and noting the fact that the relevant portions of the docket in this matter have been ***public for over three months***. (Ex. B p. 3). Peppertree-AMLQ now seeks to seal Terra's opposition to the antisuit motion which contains the same *non-confidential* and *public* information they consented *to allow the Tribunal to make public statements*. (*See* ECF No. 192). There cannot be a genuine basis to seal judicial records that touch upon the same non-confidential topic. (Ex. B p. 3). The Court is required to make its own inquiry to determine whether sealing court records is warranted and does not approve wholesale sealing of motion papers, even when both sides of the litigation request sealing. *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (holding a naked conclusory statement "woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal"). Unsubstantiated fears are insufficient to overcome the First Amendment presumptive rights of public access, which Jus Mundi and the public retain. *Doe v. Public Citizen*, 749 F.3d 246, 2014 WL 1465728 (4th Cir. 2014). The asserted interest here is not even that of the Parties, but rather that of the Tribunal, and its concern for "reputational harm" which is speculative. The Court should reject Peppertree-AMLQ's attempt to unilaterally withdraw their previous stipulation. Peppertree-AMLQ, themselves, stated that these judicial records have been public for three months. (Ex. B). They filed their reply publicly and sought to unseal their own moving papers. (*E.g.,* Ex. A). Peppertree-AMLQ's feigned prejudice seeks only to curry favor before the Tribunal, and it is contradicted by the record before the Court—ECF No. 184 & ECF No. 189—and the standards for sealing court records under New York Law. *See Joy*, 692 F.2d at 894. Leave should be denied.

Date: December 12, 2023,

Respectfully Submitted,

CC: All Counsel of Record.

EXHIBIT A

[redacted]

Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761 (S.D.N.Y.) **Date:** Monday, November 6, 2023 2:24:59 PM

Attachments: image001.png
image003.png
image004.png
image005.png

Thank you for following up on this. This fell through the cracks on my end. I have no objection to your filing the Stipulation, and have no objection to your filing your Petition and its accompanying exhibits in the public docket with the exception of the 2PFA which shall remain redacted as previously agreed.

[redacted]

We have not heard from you regarding the below request for your consent to unsealing Peppertree/AMLQ's motion to enjoin the BVI Action. Please provide your consent to our filing the attached stipulation no later than tomorrow, Tuesday, November 7, 2023 at 3 PM ET, or we will instead seek appropriate relief from the court.

Thank you,

[redacted]

This message (including attachments) is privileged and confidential. If you are not the intended recipient, please delete it without further distribution and reply to the sender that you have received the message in error.

From: [redacted]
Sent: Tuesday, September 12, 2023 4:29 PM
[redacted]
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761 (S.D.N.Y.)

Hi

Just circling back here to see if there's an update on the below or if you can provide an estimate on timing.

Thanks,

From: [redacted]
Sent: Monday, September 11, 2023 4:35 PM
[redacted]
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761 (S.D.N.Y.)

,

Let me consult with my co-counsel and get back to you. JJR

[redacted]

[redacted]

From: [redacted]
Sent: Monday, September 11, 2023 4:32 PM
[redacted]
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761 (S.D.N.Y.)

[redacted]

In light of the public filing of Respondents' papers opposing Peppertree/AMLQ's motion for an anti-suit injunction, Peppertree/AMLQ intend to have the papers filed with their motion re-filed on the public docket, with the exception of the exhibit containing the Second Partial Final Award. As the parties agreed in September 2022 to file a redacted version of the SPFA, we propose filing that version now.

Given that Respondents' papers were filed publicly and that Respondents previously agreed to the redactions to the SPFA, we presume you will have no objection to unsealing Peppertree/AMLQ's papers and have prepared the attached stipulation to that effect. Please confirm that is the case, and we will file accordingly.

Thank you,

[redacted]

This message (including attachments) is privileged and confidential. If you are not the intended recipient, please delete it without further distribution and reply to the sender that you have received the message in error.

From: [redacted]
Sent: Wednesday, September 14, 2022 10:46 PM

[redacted]

Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761 (S.D.N.Y.)

[redacted]ve agree to your additional proposed redactions to the Second Partial Final Award (re-attached here). When you file the proposed redactions with the Court, you can indicate that Peppertree/AMLQ agree to them.

[redacted]

From: [redacted]
Sent: Friday, September 09, 2022 2:31 PM
[redacted]
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761 (S.D.N.Y.)

Good Afternoon,

We write for further discussion of the redactions to the Second Partial Final Award. In addition to the prior redactions, Respondents propose two additional redactions to the Award. First, the accusation that Mr. Hernandez either participated in or knew about the embezzlement (p. 28) and second, the accusation that Mr. Hernandez held Mr. Gaitan hostage by armed guard (p. 35/36 and fn 19).

I have attached the Award with the additional proposed redactions.

Please let us know your position on these additional redactions.

[redacted]

From: [redacted]

Sent: Wednesday, September 7, 2022 4:49 PM

[redacted]

Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761 (S.D.N.Y.)

Thanks, Luke. We agree with your proposed redactions to the Second Partial Final Award. When you file the proposed redactions with the Court, you can indicate that Peppertree/AMLQ agree with them.

[redacted]

This message (including attachments) is privileged and confidential. If you are not the intended recipient, please delete it without further distribution and reply to the sender that you have received the message in error.

From: [redacted]
Sent: Tuesday, September 06, 2022 11:29 AM
[redacted]
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761 (S.D.N.Y.)

[redacted]

Please find attached Respondents' proposed redactions of the Second Partial Final Award. In short, Respondents propose two groups of redactions, the names of attorneys for Respondents in the Arbitration, and any mention of the bribery.

It is our position that a joint submission from the parties makes sense from a judicial economy standpoint. If you could let us know if the Petitioners have any additional redactions or objections to our redactions, it would be appreciated.

If the parties cannot come to an agreement, then we can submit separate briefs to the Court.

[redacted]
Sent: Friday, September 2, 2022 10:04 AM

[redacted]

Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761 (S.D.N.Y.)

[redacted]

I am following up on your email from last Friday, August 26, in which you stated that Terra/DTH would file their proposed redactions to the Second Partial Final Award by this past Tuesday, August 30. If Terra/DTH still have not filed their proposed redactions with the Court by Tuesday, September 6 at noon, Peppertree/AMLQ will file their own proposed redactions on Tuesday afternoon.

Thanks,

[redacted]

This message (including attachments) is privileged and confidential. If you are not the intended recipient, please delete it without further distribution and reply to the sender that you have received the message in error.

From: [redacted]

Sent: Friday, August 26, 2022 11:43 AM

[redacted]

Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761 (S.D.N.Y.)

[redacted]

Thank you for reaching out. We will be filing our letter motion with Judge Kaplan and the redacted PFA-2 by Tuesday of next week. As you know, Jonathan Lupkin and his firm are representing Respondents in the new case we filed before the New York Commercial Court. He just entered an appearance as well in the federal action. We are agreeable to your proposed briefing schedule.

[redacted]

From: [redacted]
Sent: Thursday, August 25, 2022 11:50 AM
[redacted]
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761 (S.D.N.Y.)

[redacted]

I am following up on your email from Friday. Please let me know when Respondents plan to file their proposed redactions to the Second Partial Final Award with the Court. Please also let me know whether Respondents agree to Peppertree/AMLQ's proposed briefing schedule concerning confirmation/*vacatur* of the Second Partial Final Award.

[redacted]

From: [redacted]

Sent: Friday, August 19, 2022 2:57 PM

[redacted]

Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761 (S.D.N.Y.)

[redacted]

Respondents will take the position with the Court that the Second Partial Final Award should remain sealed with narrowly tailored redactions. We will be filing our motion with the Court along with our proposed redactions by the early part of next week. As to your proposed briefing schedule, we are in general agreement with your proposed dates but we are bringing in new counsel to represent the Respondents for the actions pending before Judge Kaplan. Give us until the beginning of next week to confer with our new counsel as to the proposed schedule and we will confirm the briefing schedule by early next week.

Have a nice weekend.

[redacted]

From: [redacted]

Sent: Wednesday, August 17, 2022 5:11 PM

[redacted]

Subject: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., Case No. 1:22-cv-01761(S.D.N.Y.)

Counsel:

Peppertree/AMLQ write in connection with our August 16 Motion to Seal in the above-referenced action, in which we have sought to file our August 16 Letter-Motion related to the Second Partial Final Award and that award itself under seal. Consistent with the parties' positions regarding the February 24, 2022 Partial Final Award and related briefing, Peppertree/AMLQ do not believe that either the Aug. 16 Letter-Motion or the Second Partial Final Award need to remain under seal. As set forth in the Motion to Seal, we initially filed those documents under seal only out of an abundance of caution and in order to provide you with the opportunity to object to a public filing. We are mindful of the Court's policy favoring open dockets and the stringent requirements for filing —and maintaining—any documents or information under seal.

Accordingly, please promptly advise whether Respondents contend that the Second Partial Final Award or any portion thereof should be filed under seal. If we do not hear from you by 5:00PM EDT on August 19, 2022, we will assume that Respondents agree to publicly file the Second Partial Final Award and will so advise the Court, requesting that the August 16 Letter-Motion and the Second Partial Final Award be unsealed. If, however, Respondents contend that sealing the Second Partial Final Award or any part thereof is necessary, please let us know and you will be free to make an argument to the Court in support of any such continued sealing of the record.

Additionally, consistent with our August 16 Letter-Motion, we wanted to reach out to you to agree on a proposed briefing schedule regarding Claimants' forthcoming Petition to Confirm the Second Partial Final Award that the parties can then present to the Court. Although we are confident that the Second Partial Final Award will be confirmed, we understand from yesterday's conversations with Terra's counsel that Respondents plan to move to vacate the Second Partial Final Award. As such, we propose the following briefing schedule, which is consistent with how the parties agreed to brief confirmation/*vacatur* of the Tribunal's First Partial Final Award:

- Sept. 16 – Petition to Confirm/memo in support;
- Oct. 14 – Petition to Vacate/memo in support/Opposition to Petition to Confirm;
- Nov. 11– Opposition to Petition to Vacate/reply ISO petition to confirm; and
- Nov. 30 – Reply ISO Petition to Vacate.

Please let us know if you agree to this schedule.

Regards,

EXHIBIT B

November 30, 2023

VIA ELECTRONIC MAIL

[redacted]

Re: *Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., AAA Case No. 01-21-0000-4309* (the "Arbitration")—**Peppertree/AMLQ's Comments to the Tribunal's Questions Regarding Confidentiality in Their Nov. 28, 2023 Email**

Dear Members of the Tribunal:

Thank you for providing Peppertree/AMLQ with the opportunity to respond to the questions in the Tribunal's correspondence of November 28, 2023. Our responses follow:

1. **Whether the Tribunal should direct the Parties to seek relief in the SDNY to reinstate the sealing of the submissions in connection with motions pending before the court (other than the public version of PFA-2):** Peppertree/AMLQ respectfully submit that there is no need for the Tribunal to direct either the undersigned counsel or our clients to seek such relief in the SDNY. That said, if the Tribunal believes it prudent or wise to do so, then we have no objection to it either. No matter what, as stated in yesterday's comments to the Tribunal on this matter (the "November 29 Comments"), Peppertree/AMLQ will immediately request that Respondents' Opposition to the Motion for Anti-Suit Injunction (the "Opposition") and all exhibits thereto be sealed, and that Peppertree/AMLQ's briefing in connection with the Motion for Anti-Suit Injunction (the "Motion") remain under seal. Peppertree/AMLQ intend to file a motion in the SDNY for this purpose shortly. As set forth in our November 29 Comments, we will do everything we can to ask Judge Kaplan to seal the relevant briefing, especially Exhibit 37 to [redacted] Declaration, which explicitly references the false and defamatory WSW Article.

   Respondents' purported rationale for failing to agree to a stipulation to seal the briefing is pre-textual and reflects their clear intent to continue to publicize the false WSW Article—which they first initiated with their unilateral public filing of the Opposition. In their November 29 comments, Respondents claim that they "cannot accede to the Tribunal's request" because the parties recently filed a stipulation to unseal previously filed materials. This is absurd and not in accordance with either the parties' long-standing practice of sealing filings in the SDNY proceedings or the repeated orders of Judge Kaplan where he has readily agreed to seal certain sensitive filings.

   First, it is simply false that Respondents "*cannot* accede to the Tribunal's request"; rather, they don't want to do so. The fact that the parties have filed a stipulation (attached hereto) seeking to unseal Peppertree/AMLQ's briefing—which does *not* address the false and irrelevant WSW Article—has absolutely no effect on whether Respondents *can* now seek to seal the offending briefing and exhibit. The parties can easily withdraw that stipulation,

on which the Court has not yet ruled.[1] Respondents have provided absolutely no rationale or authority demonstrating otherwise. Notably, that stipulation does not address the primary issue here, which is Respondents' publicly filed Opposition (and Exhibit 37 thereto). It only stipulates that the parties agree that *Peppertree/AMLQ's* previously sealed briefing should be made public (even though that has not yet been agreed to or effectuated by the Court). Thus, that stipulation in no way limits Respondents' (or the parties') ability to seek that the Opposition be sealed, and our clients again commit to the immediate withdrawal of the stipulation given the emergence of this issue.

Second, in the SDNY action, the Opposition is the *only* time that the parties have failed to seal a substantive filing—and Respondents filed the Opposition (and Ex. 37) unilaterally *without* conferring with Peppertree/AMLQ, despite the parties' prior agreement that information related to the WSW Article should remain under seal. (*See* Redacted SPFA, attached to Peppertree/AMLQ's November 29 Comments). Judge Kaplan has consistently granted the parties' requests to seal their filings related to this arbitration. Indeed, he has done so no less than fifteen (15) separate times, *see, e.g.,* ECF Nos. 34, 68, 79, 85, 96, 107, 114, 123, 134, 144, 159, 165, 176, 187, and 188, and not once has he denied such a request. Thus, there is no reason to believe the he would deny such a request now, especially given the false and defamatory allegations relating to the WSW Article contained in Ex. 37.

Accordingly, Respondents provide absolutely no legitimate support for their refusal to accede to the Tribunal's request to seal the briefing relating to the Motion.

2. **Whether the Tribunal should direct the Parties to attempt to cause Jus Mundi to remove from its website all information about this case other than the public versions of the Tribunal's Awards and the SDNY decisions/judgments confirming them (and whether such a direction could as a practical matter be effectuated by Jus Mundi):** Peppertree/AMLQ respectfully submit that it is unnecessary for the Tribunal to direct the Parties to take this action, but will nonetheless respect and comply with whatever the Tribunal orders. As set forth in Peppertree/AMLQ's November 29, Comments, we will work to cause Jus Mundi to remove information from their website regarding this case, and especially the false and defamatory WSW Article. We do not need Respondents' assistance in this regard when it is clear that they have no desire to offer it. And Peppertree/AMLQ have every reason to believe that any purported assistance by Respondents at this point would, at best, be counterproductive, and, at worst, yield sabotage, given their stated position and clear intent to publicize the WSW Article and the accusations that led to it.

3. **Whether – particularly in view of the potential for continuing reputational harm – the Tribunal may treat the WSW Article (including communications of the Tribunal with the Parties in 2022 concerning the WSW Article) and the unsuccessful ICDR challenge to the Tribunal made by Respondents based on the WSW Article as non-confidential matters on which the Tribunal might properly issue public statements (if it chooses to do so, and provided any such statements are made in compliance with all**

[1] Even if the Court has ruled on the stipulation and Peppertree/AMLQ's briefing were made public, the parties could certainly stipulate to re-seal the documents and/or move to have them re-sealed.

applicable rules): Yes. Peppertree/AMLQ respectfully submit that the Tribunal may treat the WSW Article and the unsuccessful ICDR challenge as non-confidential and issue public statements on that matter as it deems appropriate under these most unusual circumstances. *First*, the WSW Article remains on the WSW website and is, therefore, public. *Second*, Respondents have publicly filed their Opposition (and exhibit 37 thereto addressing the ICDR challenge); therefore, it has been exposed in the public record for over 3 months already.

* * *

Should the Tribunal require any additional information from us, please let us know.

Respectfully submitted,

[redacted]

Counsel for Telecom Business Solution, LLC and LATAM Towers, LLC

[redacted]

Counsel for AMLQ Holdings (CAY) Ltd.

cc: [redacted]
All counsel of record

EXHIBIT C

From: [redacted]
To: [redacted]
Cc: [redacted]
Subject: RE: Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., AAA Case No. 01-21-0000-4309 - Confidentiality Order Issue
Date: Thursday, November 30, 2023 5:54:05 PM
Attachments: [redacted]

Dear Members of the Tribunal:

This email is in further response to the Tribunal's November 28, 2023, procedural order, in which the Tribunal requested comments on whether it should order the parties to seek a sealing order from the SDNY and direct the parties to seek to have third-party Jus Mundi retract materials published on its website. We note that Claimants have once again used an invitation by the Tribunal to comment on a matter relating to this case to make wholly unsubstantiated, factually false claims about the Respondents. The Respondents reserve the right to respond to those claims at an appropriate time.

As to the Tribunal's order itself, the Respondents, Terra and TBS, reiterate that the parties recently stipulated to unsealing previously-filed materials in SDNY case no. 1:22-cv-01761 because, after conferring, the parties agreed that those materials were not confidential under New York law. The Order of this Tribunal dated August 12, 2021, permits the parties to so agree. The stipulation of the Parties in this regard has already been filed in the SDNY and is before the Court for determination. (ECF No. 189). An order directing the parties to rescind their prior agreement, and to request from the SDNY a sealing order that may not be warranted by New York law, would not be appropriate. *See Doe v. MacFarland*, 66 Misc.3d 476 (Rockland Cty. Sup. Ct. 2019). Respondents make no comment on the Tribunal's request to make public statements regarding the WSW Article and the

unsuccessful ICDR challenge to the Tribunal.

Respectfully submitted,

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

EXHIBIT C

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, 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,

vs.

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

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.

PROCEDURAL ORDER NO. 2023-11
REGARDING CONFIDENTIALITY

1. This Procedural Order ensues from an inquiry to the Parties made by the Tribunal on November 28, 2023 concerning the publication by the Parties of information relating to this arbitration on the public docket of the United States District Court for the Southern District of New York ("Southern District") and the ensuing re-publication of such information by the Jus Mundi website. We assume Jus Mundi's republication resulted from its monitoring of public court dockets to obtain documents potentially of broad interest to its thousands of subscribers in the legal profession and especially those involved in international arbitration.

2. There are two Orders in this arbitration that pertain to the confidentiality of information relating to this arbitration. One is Procedural Order No. 2 dated August 12, 2021 ("PO2"). The other is the Confidentiality Order dated September 20, 2021 ("Confidentiality Order") (together the "Orders"). While each of those Orders was entered after the Parties had shared

with the Tribunal their views on what the scope of confidential treatment should be, neither of these Orders was the product of a stipulation. These are Orders that bind the Parties unless relief from their terms is obtained from the Tribunal. Had the Orders been the product of stipulations, they might have provided for the Parties to agree by further stipulation to exclude certain information or documents from the scope of those Orders. But there is no such provision in either Order.

3. PO2 provides that the procedural rules of the arbitration shall include "such procedural measures as the Tribunal may adopt pursuant to the AAA Commercial Rules." PO2's provisions regarding confidentiality, and the Confidentiality Order, are such procedural rules of this arbitration.

4. In regard to Confidentiality, PO2 provides:

IX. Confidentiality and Privacy

22. The Parties shall treat the details of the Arbitration as private and confidential, except to the extent necessary to comply with mandatory applicable laws, including regulatory obligations, court orders, or orders of a regulatory or an administrative body, or to comply with obligations to insurers, auditors, accountants, or investors. In such cases, the disclosure shall not extend beyond what is legally required and any non-governmental recipients shall commit to maintain the information in confidence.

23. After reviewing the AAA-ICDR Best Practices Guide for Maintaining Cybersecurity and Privacy, and after discussing what specific precautions might be required about cybersecurity, privacy, and data protection in order to ensure an appropriate level of security for this case, the Parties shall endeavor to enter into a protective order that governs the electronic transmission of confidential information in this case and submit such stipulated protective order (or competing proposed protective orders) for the Tribunal's consideration. The deadline for such submission is September 10, 2021.

24. Notwithstanding paragraph 22 above, the Parties are permitted to disclose confidential information to third parties as required to prepare and present their claims or defenses. The Parties' stipulated protective order shall provide for a mechanism by which third parties to whom confidential information is disclosed will agree, in writing, to maintain the confidentiality of such information. Nothing stated in this Section IX shall be construed to address whether a court should enter into such an agreement as a condition of the ability of a party to seek in that court to confirm, modify, or vacate an award issued by the Tribunal or to seek any other judicial relief in relation to the Arbitration.

25. A party may make any additional requests to the Arbitral Tribunal for any measures required to protect confidential information. The Arbitral Tribunal may require the

> production of a document or of any other piece of evidence to be subject to a specific undertaking of confidentiality by any party or person that is to receive the document or other piece of evidence.

5. Although they make no specific reference to a paragraph in PO2, Respondents in emails to the Tribunal on November 29 and 30 submit that the Parties were at liberty to agree to treat information presumably falling within para. 22 of PO2 as non-confidential. Claimants do not so state in their recent submissions to the Tribunal, but it appears that Claimants acted upon a similar view, in seeking to unseal documents initially filed under seal in the Southern District, and in responding to Respondents' public filing of opposing submissions on August 17, 2023 not by seeking to have those submissions placed under seal, but by seeking parity of treatment by unsealing their own submissions.

6. It also appears that the Parties have not treated as applicable to their submissions in the Southern District our Confidentiality Order. That Order states in paragraph 1 that it:

> shall apply to all information exchanged in this arbitration in any manner, including without limitation, in responses to requests for documents; Documents (as defined in the requests for disclosure and Procedural Order No. 2 in this action); physical items, information obtained from inspection of premises or things; all testimony, whether written or oral ("Testimony"); information produced in any other form in response to requests for disclosure in this case, or information disclosed pursuant to subpoena and as part of any motions, briefs or other filings; and any portions of any arbitration papers that quote from or summarize any of the foregoing, as produced by any party or non-party in this action.

7. Paragraph 8 of the Confidentiality Order also states that: "All Parties shall take reasonable precautions to protect the confidentiality of Confidential Information and to ensure that any person receiving Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof." Like PO2, the Confidentiality Order contains no provision permitting the Parties to stipulate to non-confidential treatment of Confidential Information, but does provide in para. 15 that a Party may apply to the Tribunal "to enforce, modify, or have relief from the terms of this Order."

8. Thus we find that the Parties' conduct in causing submissions in connection with Claimants' motion in the Southern District for an anti-suit injunction to be filed on the public

docket of the Court was not in compliance with PO2 and the Confidentiality Order. As noted in our email to the Parties of November 28, 2023, the information that has been made public broadly exposes false and derogatory allegations of which the continued publication risks ongoing reputational and related harm.

9. We accept the undertaking Claimants' counsel have made to rectify this matter by application to the Southern District to have those submissions restored to an under-seal status on the Southern District docket, and to request that Jus Mundi remove those submissions from its website. We request that the Parties will take similar steps with regard to the Record on Appeal and relevant portions of briefs already filed in the pending appeal of the Judgment confirming PFA-1, and the forthcoming Record on Appeal on the recently-filed appeal from the Judgment confirming PFA-3. The Parties are directed to report not later than December 7, 2023 as to their compliance with this request.

10. We regret that Respondents have not accepted our request to join in the rectification effort. They may wish to do so in light of this Order. We do not order them to join, but if Respondents were to oppose the sealing/re-sealing of those submissions, or their removal from the Jus Mundi website, on the basis that the Parties were at liberty to stipulate to non-confidential treatment, those actions would violate both PO2, Par. 22, and the Confidentiality Order, par. 8.

11. Nothing in this Order inhibits Respondents from continuing to advance the positions that the Tribunal's Partial Final Awards should be vacated on the basis of evident partiality and/or corruption, and that the Tribunal or one or more of its members should be removed from the Tribunal based on misconduct. However the public disclosure of the specific details of those contentions is not a necessary element of their advancement, threatens substantial harm, and contradicts the Tribunal's Orders on confidentiality that date from a time very early in the case, many months before these contentions were first raised.

It is SO ORDERED this 1st day of December 2023

MG

Marc J. Goldstein, for the Tribunal

EXHIBIT D

[redacted]

Cc:	ICDR Luis Martinez; ICDR Ana Lombardia; rziegler@acumenadr; Mélida Hodgson
Subject:	Terra TBS Arbitration- Confidentiality Issue
Date:	Monday, December 18, 2023 10:33:12 AM

Dear Counsel
We refer to the letter to Judge Kaplan from Respondents' counsel Mr. Rodriguez dated December 12, 2023, filed on the public docket of the U.S. District Court for the Southern District of New York in Case 1:22-cv-1761 at ECF No. 194.
We direct the Parties to submit comments in writing, within a limit of three single spaced pages, by close of business on December 20, 2023, addressed to the following questions:

1. Mindful of what the Tribunal stated in paragraph 10 of Procedural Order 2023-11, have the Respondents, and Mr. Rodriguez and his firm, by the public filing of this letter, disregarded that paragraph 10 and violated Procedural Order No. 2 paragraph 22 and paragraph 8 of the Confidentiality Order?
2. If there was such disregard and violation, (i) was it willful, and (ii) what consequences should ensue for Respondents and/or for Mr. Rodriguez and his firm?
3. What responsibility for any such disregard and violation is borne by Respondents' other counsel in the arbitration? Do they have a duty to cause their clients to comply with our Orders, even when compliance affects Respondents' conduct in the above-referenced litigation where they have not appeared ? If they have such duties in this arbitration, what consequences should ensue from any breaches of duty?

With best wishes to all
Marc J. Goldstein, for the Tribunal

Sent from my iPhone

EXHIBIT E

(https://arbblog.lexmarc.us)

August 04, 2023

On Contempt and Award Compliance

Arbitral tribunals are in the habit of thinking seriously about how their handling of the case affects the "enforceability" of their Awards. But we mainly think of "enforceability" as the potential for confirmation under the New York or Panama Convention, and/or applicable domestic arbitration law, and potential vacatur in a court at the arbitral seat. We give less attention to true "enforcement" – the forced compliance of the losing party with a Judgment confirming an Award. When the Award simply orders payment of money, or declares ownership of property, the laws and mechanisms of execution come into play. But if the Award regulates the conduct of the losing party, as by specific performance or an injunction, the merger of an Award into a Judgment brings into play the court's powers to coerce compliance with its Judgments by imposing contempt sanctions.

If a losing party in such a case is determined to fight on, not only after an adverse Award but beyond the judicial confirmation of the Award, the contempt scenario may arise. Arbitrators who sense they are in a "fight to the finish" type of case are well advised to understand how the applicable law of contempt may have an impact. What follows is a brief sketch and discussion of some relevant aspects of the contempt law landscape affecting arbitration Awards in US federal courts.

1. Before a contempt sanction may be imposed, it must be shown by the applicant that the conduct required by the judgment or order was clear and unambiguous, leaving no doubt of what the prospective contemnor was required to do. That means our Awards, especially those that entail a remedy of specific performance or an injunction (whether mandatory or prohibitory) should state with precision the conduct that is required or forbidden. This guidance is seemingly straightforward. But if the Tribunal anticipates that non-compliance, at any cost, may be the objective of the losing party, arguments that could be raised before the enforcing court that the Award (as converted to a Judgment by recognition) lacks a clear conduct mandate ought to be anticipated in the Award drafting. To take a recent example, a US federal court denied a contempt sanction where the alleged non-compliance with the Award/Judgment was the refusal to grant the applicant two appointees to a corporate board of directors. The stumbling block for the applicant was that the Award/Judgment, while it recognized the ongoing validity of the agreement that provided the right to have two seats on the board, did not direct specifically that the losing party should implement the applicant's board nominations.
2. Tribunals may find it useful to know that non-compliance with a Judgment confirming an arbitral award may be addressed by contempt sanction in a US distric court even while an appeal of the Judgement is pending – absent a stay from the Judgment-rendering court or the appellate court. (This is the general rule as to any Judgment, not a special attribute of award-confirmations). So while it may be anticipated that the well-resourced and determined losing party may litigate over recognition of the Award all the way to a denial or grant of review in the US Supreme Court, a process that might consume several years, the coercive force of a contempt sanction may be sought (barring a stay) once the Judgment has been entered and after the passage of any deadline for compliance fixed by the Award/Judgment. It is regrettable, but a fact, that

coercion is a factor Tribunals must sometimes take into account. It may bear on the Tribunal's effective ability to regulate party and/or counsel conduct in an ongoing arbitration. It may well bear on the efficacy of the entire arbitral process, if a party determined to pay any price for victory decides to marginalize the arbitration into but one of many battlefronts in a multiple-forum war.

3. US federal law permits coercive incarceration as a civil contempt sanction, upon the theory that the contemnor goes behind bars while holding the keys to her release: compliance with the Judgment turns the latch. And the coercive effect of such a sanction may have international commercial dimensions that begin before any actual arrest and lockup. The prototype may be the non-US controlling person of a foreign business entity, who may travel to the United States regularly to carry on business and may also have one or more US places of residence for herself and her family. For that person, the coercive effect of incarceration as a civil contempt sanction may begin with the Court's order to notify US Customs and Border Protection to detain the contemnor upon her attempt to enter the US for any purpose. Judges may naturally prefer to test the efficacy of monetary civil contempt sanctions before ordering incarceration, but upon a proper record concerning a contemnor's conduct, business practices and obduracy, a confinement order as a contempt sanction for non-compliance with a judicially-confirmed Award may be obtainable.

4. Not to be overlooked in this survey is that the companion category of civil contempt sanctions, alongside the "coercive," is the "compensatory." The legal costs incurred by the successful civil contempt sanctions applicant, or other out-of-pocket costs resulting from the non-compliance, are comfortably within this category. But there could be more complicated scenarios. Suppose the judicially-confirmed Award directed specific performance of a contractual obligation. If coercive sanctions prove unfruitful, may the applicant obtain in a compensatory civil contempt judgment a sum of money to be substituted for the unattainable specific performance? Does the question of damages as an alternative remedy for the contract breach remain arbitrable? Or does the judicial confirmation of a conduct-regulating Award transform what would be, in other circumstances, a squarely arbitrable issue of breach of contract damages, into a matter of Judgment enforcement that is exclusively in the judicial realm? Or are both solutions possible, with the claimant/applicant having the option to pursue one or the other? I did not happen upon an answer in the reading that supported this post. But this is an issue that some court or Tribunal may well have faced, or may have to face, as more arbitral awards involving conduct-based rather than monetary relief are resisted by the losing side not only in confirmation/vacatur litigation but beyond that in contested contempt sanction proceedings.

[The cases informing this post include: Smagin v. Yegiazaryan, 2023 WL 4002730 (C.D. Cal May 22, 2023); Micula v. Gov't of Romania, 2023 WL 2127741 (D.C. Cir. Feb. 21, 2023); Absolute Nevada, LLC v. Grand Majestic Riverboat Co., 2022 WL 17156624 (S.D.N.Y. Nov. 22, 2022); Inversiones Y Procesadora Tropical Inprotsa, S.A., 2021 WL 3508370 (S.D. Fla. Aug. 19, 2021); Telenor Mobile Communications AS v. Storm LLC, 587 F.Supp.2d 594 (S.D.N.Y. 2008), aff'd 351 Fed.Appx. 467 (2d Cir. 2009); CE Int'l Resources Holdings LLC v. S.A. Minerals Ltd. Partnership, 2013 WL 324061 (S.D.N.Y. Jan. 23, 2013).]

Leave a Reply

Name *

Email

EXHIBIT F

(https://arbblog.lexmarc.us)

November 02, 2023

Gotham Novit Curia

If you insist that international arbitrators sitting in an environmentally common law case cannot properly look at or consider any legal authorities other than those submitted by the parties, stop reading here. I am here to preach to the convertible.

Let's begin this discussion with a nod toward a legal doctrine that has essentially no shelf space in US arbitration law or US practice of domestic or international commercial arbitration: *Jura Novit Curia* ("JNC"), or in its arbitral variant, *Jura Novit Arbiter* ("JNA"). We start there because among those who arbitrate in a procedural culture called the adversary system, which accounts for probably the vast majority of international arbitration whether contract-based or treaty-based, we are well-advised to have in our grasp the historical and theoretical foundation for the arbitrator to take any initiative to figure out the content of the law she is charged with applying. And by "initiative" we do not mean opening and reading the authorities submitted by the Parties. We mean anything other than that, including what you simply remember.

One contemporary commentator purports to credit Aristotle as a pioneering advocate for JNC, and quotes the Great Greek from Stagira as having said at least once:

> [A] litigant has clearly nothing to do but to show that the alleged fact is so or is not so, that it has or has not happened. As to whether a thing is important or unimportant, just or unjust, the judge must surely refuse to take his instructions from the litigants: he must decide for himself all such points as the law-giver has not already defined for him.

[as quoted in Fried Rosenfeld, "*Iura Novit Curia in International Law,*" European Int'l Arb. Rev. Vol. 6, Issue 1 (2017)].

Granted this view of the judge as oracle predates by well over a millennium the emergence of an adversary system based on advocacy, never mind the refinement of the adversary system into the party-created body we now know as the arbitral tribunal. But even if it there is only negligible support for an arbitrator-as-oracle model in contemporary international arbitration, does that imply that there is **no** space for oracular behavior within the adversarial framework of arbitration? Do we, as avowed non-oracles, simply keep our fingers off the keyboard and our noses out of the legal databases where authorities the parties did not furnish to us might be found? Do we, moreover, purge our minds of whatever legal knowledge of arbitration law and applicable substantive law that (presumably) qualified

us in the eyes of the parties to be selected as arbitrators, and approach each case as voracious neophytes craving legal education from the parties?

To answer this question, it is probably helpful to have a working knowledge of what JNA is, and what it isn't. You can spend a good portion of your remaining lifetime reading volumes that have been written on the subject. Or trust your Commentator's reductionist version: It is the principle that an arbitral tribunal may — consistent of course with due process — decide a case on the merits by furnishing legal reasoning for the outcome that has been fashioned by the Tribunal rather than by any of the parties. And the due process right, in reductionist terms, is the right of the parties to learn of the proposed Tribunal reasoning from the Tribunal, and to endorse or deplore it, and to endorse or deplore the very fashioning of it (that is to say, the adoption of JNA methodology) before the Final Award is issued.

My source for these reductive nuggets on JNA? — The writing of a respected comparative law scholar in her chapter of a recent major academic compilation on JNA. To quote Professor Guiditta Cordero-Moss:

> It is widely recognized that the will of the parties plays a determinant role in international commercial arbitration. The aim of this book is to investigate to what extent the arbitral tribunal may nevertheless develop its own legal reasoning. An independent legal reasoning will not necessarily be based on the will of the parties as manifested in the terms of the contract, in the law chosen in the contract or in the legal arguments presented by the parties.

[G. Cordero-Moss, *General Report on Jura Novit Arbiter*, in F. Ferrari and G. Cordero-Moss eds., Iura Novit Curia in International Arbitration (Juris 2018), Ch. 17 at p. 463].

Another contemporary commentator, possibly channeling his inner Aristotle, also suggests that the quest for the right legal reasoning to resolve the merits is at the core of JNA:

> "Knowledge of law" must be understood in a manner related to the specific case. The arbitrator is not obliged to know all the laws, but his mission is to use the legal tools (within the rules of the game) to settle the dispute in accordance with justice. Is it not precisely for this reason that they were appointed by the parties? It would be absurd to say that a tribunal exercises its powers to settle the dispute only on the basis of what has been said by the parties.
>
> If within their analysis of the laws the arbitrators identify some rule or principle that has been ignored by the parties (involuntarily or intentionally) and that could be crucial for the decision of the case, should the tribunal simply ignore said rule or principle because the parties did not mention it? The task of the tribunal to submit an award strictly according to law is not bound by what has been said by the parties.

[C. Collantes, *Give Me The Facts and I'll Give You the Law: What Are the Limits of the Iura Novit Arbiter Principle in International Arbitration?*, Kluwer Arbitration Blog, Jan. 10, 2019].

If the core content of JNA is the power of the arbitrator to fashion the legal reasoning that resolves the merits, then the Americanized version of the JNA question — roughly, "*can we as arbitrators ever do our own legal research?*" — asks a question that is not the same as the JNA question, and while that question may intersect with JNA it is very far from a concentric overlap with JNA [*See, e.g.,* P.B. Marrow, *Can an Arbitrator Conduct Independent Legal Research? If Not, Why Not?* (May 6, 2013). Available at SSRN: https://ssrn.com/abstract=2261305 (https://ssrn.com/abstract=2261305) or http://dx.doi.org/10.2139/ssrn.2261305 (http://dx.doi.org/10.2139/ssrn.2261305)]

The troubling implication of the JNA doctrine's core principle is that it is possible, not likely but certainly possible, that an arbitral tribunal could see its way to reject a legal outcome based on the submissions of either party, determine the outcome based on entirely on legal theories and authorities identified by the Tribunal, and salvage its award from annulment by sharing those theories and authorities with the parties for them to provide comments in advance of the award. In that case, so much for party autonomy beyond picking the panel. That JNA core principle, however rare might be its implementation by an arbitral tribunal in actual practice, is rejected by legal cultures based on the adversary system, which is to say most common law legal cultures.

The difficulty JNA presents for arbitrators sitting in US seated international cases or foreign seated cases governed by US substantive law is what guidance for our conduct do we take from our rudimentary understanding that the adversarial system rejects JNA (or, stated differently, that we are presiding in an adversarial, not an inquisitorial process)? In the perennial unresolved debate in our community about the proper role if any for arbitrators in identifying legal authorities other than those presented by the parties, the understanding that we reject JNA divides us into more or less two camps: the absolute rejectionists, who see no role for any legal inquiry by the Tribunal beyond the submitted authorities of the parties, and the moderate rejectionists who permit that such legal inquiry may be made but in narrow windows whose opening does not fundamentally alter the party-driven character of the overall process.

Consider this Commentator to be a moderate rejectionist, and let's look at the content of moderate rejectionism. Several practical examples can lead the way.

EXAMPLE NO. 1. In a New York-seated arbitration, the contract provides that New York law governs and that mediation shall be completed before arbitration is commenced. The Federal Arbitration Act is clearly applicable. Even before the Tribunal is fully constituted, Claimant files (with the provider organization) a motion to dismiss Respondents' counterclaim, arguing that there is no arbitral jurisdiction over the counterclaim until a mediation of the counterclaim is completed. The Claimant cites only New York state court non-FAA cases concerning when mediation is treated by a state court a condition precedent to its subject matter jurisdiction. Respondent responds, also citing only New York State non-FAA cases, and argues that mediation is not a condition precedent to jurisdiction under that case law as properly understood and as applied to the present facts.

It would be apparent to many arbitrators that case law under the FAA treats an agreement for pre-arbitration mediation as a procedural condition whose fulfillment is a procedural aspect of the arbitration and not a condition precedent to the parties' consent to arbitration. (*BG Group*, anyone? Maybe *Howsam*?) The presiding arbitrator taps into her preferred legal research tool, retrieves and reads the leading cases, shares the cases with counsel, and invites written comments on how they bear (if at all) on the jurisdiction motion.

Fair or foul?

Has the Tribunal exceeded its powers, or otherwise overstepped a procedural norm of arbitration? The parties remain free to instruct the Tribunal that they are in agreement to have the obligation to mediate be enforced as it would be enforced in a non-arbitrable case in the New York courts. If they do not have such an agreement, they are free to comment upon and argue for or against the treatment of mediation indicated by

the federal cases. Whether the Tribunal has impermissibly intervened in favor of the party opposing the jurisdiction objection is more complicated, but only slightly so. The Tribunal's powers are defined by the contract, and the contract by necessary implication (because it involves interstate and international commerce and specifies a New York seat) calls for the Tribunal to apply federal and New York arbitral procedural law. The Tribunal would exceed its powers by applying New York judicial civil procedure law to a question of arbitral jurisdiction, unless the parties, modifying their written agreement, now agree that the Tribunal should do so.

Has the Tribunal committed a due process violation by saving one party from the outcome that might have resulted from proper application of the wrong body of law? I think not: The Tribunal was motivated to apply the right content of the agreed applicable law, not to help one party win. At least one commentator agrees, so I am not alone;

> [A]n arbitrator should not be deterred from seeking the information he needs to correctly resolve a case just because that information may weigh in favour of one of the parties' positions. In requesting such information, the arbitrator is not seeking to help one party over another. He's trying to reach the right result. The right result will necessarily go in favour of one party and against the other, but that fact alone does not convert an arbitrator's request for further information into a due process violation.

[J. Kirby, *How Far Should an Arbitrator Go to Get it Right?*, in The Powers and Duties of an Arbitrator, *Liber Amicorum* Pierre A. Karrer, Ch. 20 p. 193 at 197 (Kluwer 2017)].

I should add that I do not read the quoted commentator as limiting "information" to evidence and excluding information about the content of the law. Nor do I read the position as limiting the request to a request to the parties and not to an online legal library at rue arbitrator's disposal. The transparency-due process issue needs to be separated from the question of the legitimacy of the arbitrator's quest for the content of the law.

EXAMPLE NO. 2. The Tribunal in a partial final award has decided that it will impose a sanction by entering a contemporaneous procedural order, and specifies in the PFA that relief from the sanction may be obtained only upon the fulfillment of certain conditions. The entire subject matter of this PFA is what if any sanction should be imposed and what should be the conditions for relief from the sanction. No merits claims are resolved in this PFA. The affected party applies for relief from the sanction, admits that only some of the PFA conditions for relief have been met, but advances no legal arguments about how the *functus officio* doctrine (or the limits in the agreed arbitration rules on modifying an award) impacts the Tribunal's power to grant the requested relief. The presiding arbitrator taps into her preferred legal research tool, refreshes her recollection on the leading cases defining the contours of the *functus officio* doctrine and its exceptions, and with agreement of the co-arbitrators after sharing those cases, invites the applicant to submit written comments on how the making of an award bears on the Tribunal's power to grant the requested relief under the *functus officio* doctrine or other limits on Tribunal powers to modify an award.

Has the Tribunal exceeded its powers or otherwise encroached on a procedural norm by "doing its own research"? I put the term in quotes here, because what the Tribunal has in fact done is not to embark on independent research for a Tribunal-motivated legal solution that the movant has not addressed, but has simply resorted to its recollection about a well-established universe of case law concerning a legal doctrine affecting the power of the Tribunal that obviously ought to bear on the decision. It seems unlikely that the *functus officio* doctrine is inapplicable just because the parties fail to mention it, although they might agree to dispense with it.

In this instance the Tribunal elects not to present specific cases for comment because relevant principles might be found in various cases and the applicant, having the burden of persuasion, does not deserve to have the Tribunal conduct legal research for (or against) her. Depending on what is received from both parties, there would be another opportunity if the briefing is inadequate to ask both sides to comment on specific cases that the Tribunal might be inclined to cite in a ruling. This is not to suggest, however, that a Tribunal must always revert to the Parties for comment on specific cases if it wants to cite a case that neither party has cited. One consideration is that if the decision involved is a procedural matter, an aggrieved party may seek to have the order vacated or modified by the Tribunal and may argue that the case law the Tribunal cites is inapposite. Another consideration is that if the Tribunal's question seeking comments is adequately phrased, the case law the Tribunal cites is unlikely to be obscure and reasonably ought to be found in competent research by the parties. (Unpublished decisions known to Tribunal members for unique reasons may be viewed differently).

EXAMPLE NO. 3. Suppose one party has sought issuance of an arbitral subpoena that would require a witness in California to testify via Zoom in a New York-seated arbitration. The other party objects to the subpoena in various respects but raises no issue about the Tribunal's power to command Zoom testimony from a non-party. But one or more Tribunal members, tapping the databases of their own recollections in the first instance, know there is case law on both sides of the question of arbitral power to require non-party Zoom testimony under FAA Section 7. In an email to the Parties, the Tribunal mentions a few of those cases and directs the parties to comment on what they believe to be the right approach. This recourse to case law that has not been mentioned by either party has nothing to do with the merits directly — although the non-party's evidence might well affect the outcome. Rejection of JNA in a common law environment should not mean that arbitrators must pretend to forget about an unsettled and controversial issue of arbitral power that is well known to them but possibly much less familiar to the parties.

EXAMPLE NO. 4. The fourth and final example for today's Commentary relates to how common law court decisions are reported in certain online legal research tools: with hyper-linked citations to precedents cited (approvingly or otherwise) in the opinion. Do the arbitratorsimpermissibly "do their own research", in violation of our Rejection-of-JNA, by reading the court-cited precedents within the party-cited precedents to obtain a more complete understanding of the legal doctrine invoked by the party? This Moderate Rejectionist would say NO. My first defense: this conduct does not seek a legal theory to resolve the case that neither party has mentioned. The arbitrator is seeking clarity about the contours of the legal theory invoked by a party, contours that might be clearer from reading the embedded precedents within the party-cited case. My second defense: If a legal theory is advanced by a party, the Tribunal should apply that legal theory (or principle) as it exists in the law, not only as it exists in the renditions of the law advanced by the Parties. The prescriptive norms of arbitration as an adversarial process will lead the Tribunal to give procedural primacy to the submissions of the Parties. But a quest for correctness in the content of the law, if the Parties' renditions are not fully satisfactory, should not to be conflated with adoption of a Tribunal-conceived legal theory. This is not the importation of JNA into common law arbitration.

If I am an outlier in believing the arbitrator has a power of inquiry, and that the fairness issue is separate and is addressed by transparency to the parties about the results of the inquiry, then at least I have some good company. As the International Law Association stated in its 2008 Report on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration:

> [Arbitrators] should inquire about the applicable law within the general parameters of the arbitration defined by the parties and, considering costs, time and relevance issues, may conduct their own research, provided the parties are given an opportunity to be heard on material that goes meaningfully beyond the parties' submissions.

We often debate the implications of what provider rules say or fail to say on a given issue. And on this issue we find mostly silence. The AAA Commercial Rules are and have long been silent. The CPR Non-Administered Rules are also silent save that "*[s]ubject to these Rules, the Tribunal may conduct the arbitration in such manner as it shall deem appropriate.*" (Rule 9.1). This leaves the door open. The JAMS Comprehensive Rules are also silent. This is a curious institutional silence, given that there is considerable sentiment in the domestic arbitrator ranks in the USA that when it comes to the law, the panel should take what the parties give them and seek no more.

When we look to the leading international rules, our attention goes first to the LCIA, whose Rule 22.1 (iii) (in the 2020 version) has provides expressly — and has done since at least the 1998 version of the Rules that:

> The Arbitral Tribunal shall have the power, upon the application of any party or … upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide … (iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in … ascertaining … the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute.

Let's call the LCIA Rules approach — not widely adopted as far as I can find — Ambivalent Moderate Rejection of JNA. Ambivalent in the sense that it gestures in the direction of party autonomy by requiring input from the parties to be considered (but without requiring party acceptance) before the Tribunal starts foraging. That ILA Report formulation, which came ten years after the LCIA Rule, does not require this preliminary party-consultation step. And we find that most international rules leave the door wide-open for whatever position the Tribunal may wish to take. See for example ICC Rule 21(1): "*In the absence of any [party] agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.*" The Singapore Centre Rules list among the "Additional Powers of the Tribunal" absent agreement of the parties limiting such power : "*to … conduct such enquiries as may appear to the Tribunal to be necessary or expedient*" (SIAC Rule 27(c)) and also "*to … decide, where appropriate, any issue not expressly or impliedly raised in the submissions of a party provided such issue has been clearly brought to the notice of the other party and that other party has been given adequate opportunity to respond*" (SIAC Rule 27(m)). Broadly speaking, the landscape of international

arbitration rules is marked by approaches more flexible than the LCIA model, leaving the Tribunal broad discretion to conduct inquiries into the content of the applicable law without previewing with the parties the prospect that such inquiries will or may be made. The ultimate criteria universally applicable are post-inquiry: was there equal treatment of the parties and were the parties given an opportunity to be heard on any outcomes of the Tribunal research into the content of the law that might affect the outcome in a material way?

Let's address one more objection from the JNA literature before you leave.

Some commentators object in principle to Tribunal initiatives to ascertain the law, saying that the JNC principle as applied in civil law courts, i.e. the version inherited from Aristotle, rests on the premise that judges in the courts of a state are protectors and purveyors of a law of their forum (*lex fori*), and that arbitrators, having no comparable position and instead serving the parties not the state, have "no forum ." [*See, e.g.*, P. Landolt, *Arbitrators' Initiatives to Obtain Factual and Legal Evidence*, Vol. 20 No. 2 Arb. Int'l at pp. 184-85 (2012)]. Not to argue the issue exhaustively, I would only point out by way of examples: (1) if the Parties in a international case governed by New York substantive law constitute a Tribunal of two party-appointed retired New York judges and as Chair one lioness of the New York litigation bar who has also given long service as an international arbitrator, did they not intend to have a Tribunal function on New York substantive law as a New York court would?, and (2) if the Parties to an international case governed by the law of Ontario constitute a Tribunal composed of two lions of the Toronto litigation bar and one retired Justice of the Supreme Court of Canada, did they not intend to have the Tribunal function on Ontario law as an Ontario court would?

It is time for some takeaways, as you have other blogs to read and other work to do!

The commentator who writes in favor of flexible arbitral power in the search for the content of applicable law risks to be mis-branded as a zealot and a maverick, as a closeted autonome perpetually foraging for his own legal guidance in disrespect of the parties' autonomy, not to mention the competence of their legal representatives. I hope to be acquitted of these charges. But it seems that we as a community can do better than the broad homilies that buttress polar positions: "*arbitration is a party-driven process*" at one extreme, and "*due process is all that matters*" at the other. Perhaps we can draw some guiding principles from the examples and the discussion provided in this post.

1. Occasions for input on the applicable law from the Tribunal do not arise only when a merits award is being written. Applicable law may come into play at any number of mileposts, including threshold objections to jurisdiction, proposed issuance of arbitral subpoenas, etc. Parties may not even be aware of applicable law affecting the proposed procedural step, as in the case of a proposed arbitral subpoena. If the Tribunal asks the Parties "*what about these cases concerning our power to command a Zoom appearance?*" it is not taking sides between the parties, but is seeking in good faith to exercise its powers in regard to non-parties within applicable legal limits. If the Tribunal, in the mediation-as-condition-precedent example, asks "*what about the FAA case law on this subject from the US Supreme Court?*" it fairly raises the question of whether the Parties' counsel truly wish to mutually exclude application of the FAA, or rather are skilled courtroom advocates who misconceived the application New York civil procedure law in an FAA-applicable arbitration.

2. The context for arbitrator research may be critical to how we view it. Suppose a Tribunal decides during deliberation that it is important to study the cases cited, discussed and quoted within the cases cited by the Parties, and the Tribunal proceeds to do so, then deliberates further about whether the older precedents are sufficiently material to warrant asking the parties for further comments. By doing this the Tribunal carries out, in a manner that is fair to both sides, a process that may generate a more precise rendition of the law the parties have agreed to have the Tribunal apply to decide the case, and legal theories under that law that they have specifically invoked. On the other hand, a party-appointed arbitrator who conducts research in pursuit of a legal analysis not articulated by either party, based on case

law not cited by either party, but that would advantage the party that appointed her if embraced by the Tribunal, generally speaking is acting inappropriately. But the infraction is not of a rule or a proscriptive norm against arbitrator research. It is a violation of the broader obligation to behave impartially.

3. Timing is crucial. When arbitration is in a common law environment, the parties expect the development of claims and defenses, the legal theories and authorities supporting those theories, to be primarily their counsels' handiwork. If an arbitrator in such a case suggested at a preliminary conference that case A v. B might well be controlling on the merits, the parties would naturally be dismayed. On other hand, parties arguably do have a reasonable expectation that the Tribunal might at the post-hearing stage of deliberations and award-drafting check to see if there have been new developments in a line of authorities relied upon by the parties, or appellate reversals of authorities cited by the parties. If this were not aligned with the expectations of the parties, we might expect to see party initiatives to stipulate that the Tribunal will not, or will not without the parties consent, conduct any legal research.

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