IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRETT BERKOWITZ, TREVOR BERKOWITZ, and AARON BERKOWITZ,	)	
Petitioners,	)	**Case No: 17-148**
v.	)	
REPUBLIC OF COSTA RICA,	)	
Respondent.	)	

PETITION TO VACATE OR SET ASIDE INTERIM ARBITRATION AWARD

The petitioners, Brett Berkowitz, Trevor Berkowitz, and Aaron Berkowitz (collectively the "Berkowitz Claimants"), move this Court to vacate or annul the partial final award identified as "Interim Award" by the Arbitration Tribunal (the "Tribunal") sitting in an international arbitration filed by the Berkowitz Claimants against the respondent, the Republic of Costa Rica ("Costa Rica"), pursuant to the terms of the Dominican Republic-Central America Free Trade Agreement ("CAFTA-DR"). Based on the applicable law and the facts, this Court should set aside or vacate the Interim Award for the reasons stated herein.

INTRODUCTION

1. Despite the foreboding language of court decisions, courts have the duty and ability to review the issues submitted to arbitration and the scope of the arbitration clause. These obligations may have a unique role based on the features of the underlying arbitration, but it no case can an arbitration tribunal subject to the Federal Arbitration Act exceed the authority given to it by the parties. In this case, the Tribunal exceeded its authority in four distinct circumstances:

- The Tribunal took it upon itself to find and prove facts it then considered crucial for purposes of denying jurisdiction, without notice or requiring Costa Rica to carry this burden;

- The Tribunal applied its own notions of policy to support its position without reference to any applicable law;

- The Tribunal failed to give the Berkowitz Claimants the opportunity to show that jurisdiction existed; and

- The Tribunal bifurcated the proceedings, despite the lack of a request by any party.

Each of these instances of exceeding its power resulted in the Berkowitz Claimants losing the ability to continue claims at a preliminary stage. The Berkowitz Claimants therefore request this Court vacate or set aside the Interim Award for the reasons described herein.

GENERAL BACKGROUND TO THE DISPUTE

2. The Berkowitz Claimants submitted claims for expropriation without compensation, denial of fair and equitable treatment, and treatment less favorable than that granted to other international investors. All of these claims arise under Articles 10.5 and 10.7 of CAFTA-DR. *See* Exhibit A, CAFTA-DR Art. 10. In essence, the Berkowitz Claimants filed their claims against Costa Rica in relation to certain measures taken by Costa Rica that deprived the Berkowitz Claimants of their rights over real estate they owned in Costa Rica without proper compensation.

3. As allowed by CAFTA-DR Article 10.16, the Berkowitz Claimants selected the UNCITRAL Arbitration Rules to govern the proceedings. The UNCITRAL Arbitration Rules are a set of arbitration rules promulgated by the United Nations Commission on International Trade Law ("UNCITRAL") and incorporated by reference in Article 10.16.3(c). The Tribunal rendered an Interim Award on October 25, 2016, dismissing certain claims brought by the Berkowitz Claimants and refusing to hear further evidence regarding others. The Motion follows as a result.

STATEMENT OF JURISDICTION AND VENUE

4. The Federal Arbitration Act (the "FAA") generally directs the parties in the method for seeking vacatur. "Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." 9 U.S.C. § 6; *see also Contech Const. Products Inc. v. Heierli*, 764 F.Supp.2d 96, 105-106 (D.D.C. 2011) ("the FAA does not allow a party to initiate a challenge to an arbitration award by filing a complaint or a petition to vacate the award"). That being the case, the FAA still requires the moving party to set out the basis for jurisdiction and venue.

5. The Berkowitz Claimants are all citizens of the United States. Brett Berkowitz is the father of Aaron and Trevor Berkowitz. The United States has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").[1]

6. The respondent, the Republic of Costa Rica, is a foreign state. *See* 28 U.S.C. § 1603. Costa Rica has ratified the New York Convention.

7. Because the arbitration is an international dispute between a national of a country where the New York Convention is in force and a sovereign state that has ratified the New York Convention, the New York Convention applies to these proceedings, as incorporated in 9 U.S.C. § 201, *et seq*.

8. As an action falling under the New York Convention, it arises under the treaties and laws of the United States, and the district courts of the United States have original jurisdiction, regardless of the amount in controversy. *See* 9 U.S.C. § 203.

[1] United Nations Commission on International Trade Law, Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1968), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (listing Costa Rica and the U.S. as having ratified the New York Convention).

9. Moreover, because the district courts have jurisdiction over this action pursuant to 9 U.S.C. § 203, venue is proper in the court for the district that embraces the place of arbitration, so long as the place of arbitration is in the United States. *See* 9 U.S.C. § 204. CAFTA-DR Article 10.20 allows the parties to select the legal place of the arbitration. The Berkowitz Claimants and Costa Rica agreed that Washington, D.C., would be the legal place of arbitration, and the Interim Award indicates the same. *See* Exhibit B, Procedural Order No. 1 ¶ 9. Washington, D.C., is the place of arbitration, and venue is therefore proper in this Court.

10. Costa Rica cannot assert immunity from jurisdiction. When Costa Rica became a Party to CAFTA-DR, it waived its immunity from jurisdiction in relation to disputes covered by the treaty in accordance with 28 U.S.C. § 1605(a)(1) and (2), for the reasons to follow. Article 10.26.6(b) stays enforcement of an award rendered under the UNCITRAL Arbitration Rules pending an application for annulment. CAFTA-DR thus contemplates requests for annulment as part of the waiver of immunity from jurisdiction generally granted within Article 10, extending the express or implicit waiver to this proceeding. *See* 28 U.S.C. § 1605(a)(1). Article 10.26.10 clarifies that the dispute stems from a commercial relationship to the extent relevant for satisfying the requirements of the New York Convention. Because the dispute arose from a commercial relationship outside the United States with an impact on United States nationals, Costa Rica has no immunity from jurisdiction pursuant to 28 U.S.C. § 1605(a)(2).

11. In addition, Costa Rica waived its immunity from jurisdiction to the extent any party seeks to enforce an agreement to arbitrate with it that meets the requirements of 28 U.S.C. § 1605(a)(6). When a foreign state selects international arbitration, it waives its immunity from any action related to the confirmation, and concomitantly the vacatur, proceedings inherent in the process. For example, in *Ipitrade Int'l, S.A. v. Federal Republic of Nigeria*, this Court rejected a

claim of immunity because Nigeria implicitly waived its immunity from the enforcement of the award, based on § 1605(a)(6). 465 F.Supp. 824, 826 (D.D.C. 1978). The Court made no distinction in the text of § 1605(a)(6), finding that the reference to "confirmation," necessarily included proceedings to vacate. *See id*; *see also Markowski v. Atzmon*, No. 92-2865, 1994 WL 162407, at *1 (D.D.C. April 19, 1994) ("[a] motion for confirmation involves the same substantive consideration as a motion to vacate"). The underlying arbitration satisfies § 1605(a)(6)(A) because the place of arbitration is Washington, D.C., and it also meets the requirements of § 1605(a)(6)(B) because the New York Convention governs the Interim Award. In sum, Costa Rica cannot assert immunity from jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

The limited nature of arbitration under CAFTA-DR and UNCITRAL Arbitration Rules

12. Arbitration under CAFTA-DR involves different types of claims and a distinct framework to decide them. Article 10 determines the outlines of the consent to arbitration, and absent a separate agreement (not the case here), the consent contained in Article 10 is the only applicable arbitration clause. Article 10.16 is the relevant language, and it enables a claimant to "submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A . . ." *See* Article 10.16.1(a)(i)(A). A CAFTA-DR tribunal therefore has a more specific mandate than it might have in the context of a standard commercial arbitration.

13. CAFTA-DR contains other features in regards to the sets of rules that can govern the parties' proceedings. The claimant can select the arbitration rules of the International Center for the Settlement of Investment Disputes ("ICSID"), the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules. *See* Article 10.16.3(c). The selection depends on certain pre-

requisites, but in this case the Berkowitz Claimants selected the UNCITRAL Arbitration Rules, and the parties and the arbitration tribunal agreed to the UNCITRAL Arbitration Rules, except to the extent they are modified by CAFTA-DR. *See* Exhibit B, Procedural Order No. 1 ¶ 1.1.

14. The UNCITRAL Arbitration Rules are a set of rules that parties can select and do not require the administration of any particular arbitration institution. Here, the parties to the dispute agreed that ICSID could act as the administrator of the arbitration through its Secretariat. The UNCITRAL Arbitration Rules contain some provisions that are similar and others that are distinct from typical commercial arbitration rules. For example, the UNCITRAL Arbitration Rules permit the arbitral tribunal to conduct the arbitration in the manner it considers appropriate, "provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case." *See* Exhibit C, UNCITRAL Arbitration Rules, Art. 17.

15. The UNCITRAL Arbitration Rules also contain a unique provision regarding the proof of facts. Article 27 requires that "[e]ach party shall have the burden of proving the facts relied on to support its claim or defence." The UNCITRAL Arbitration Rules give significant direction in how a party must present its case. Article 20 requires the claimant to submit a statement of claim that contains the "points at issue," among other things, and "as far as possible, be accompanied by all documents and other evidence relied upon by the claimant[.]" As for the respondent, Article 21 requires a "statement of defence" that responds to the "particulars" of the statement of claim, including the "points at issue." The respondent must also submit all documents and other evidence upon which it relies. *See* Article 21(4). In other words, the tribunal should receive a detailed picture of the issues in dispute and all of the documents and

other evidence the parties rely on, eliminating the need for guesswork regarding the scope of the tribunal's mandate and authority over the dispute.

16. In the arbitration at issue, the Berkowitz Claimants and Costa Rica did not modify the UNCITRAL Arbitration Rules in any meaningful way that would change the unique nature of their arbitration.

The relevant procedural facts and context underlying the Interim Award

17. In 2003, Brett Berkowitz began to purchase land through a number of controlled entities along the Pacific coast of Costa Rica with the intent of building luxury homes. *See* Exhibit D, Notice of Arbitration and Statement of Claim ¶ 43. Brett Berkowitz thus purchased six of the lots at issue in the underlying arbitration. *See id.* The Tribunal and the parties eventually came to refer to these lots with one letter that correlated to the last name of the claimant controlling the relevant owner followed by a number. *See id.* ¶¶ 44-49. The Berkowitz Claimants owned lots B1, B3, B5, B6, and B8 (the "Berkowitz Lots").[2] *See id.*

18. Starting in 2005, Costa Rica started local court proceedings to expropriate the Berkowitz Lots (the "Local Litigation"), similar to an eminent domain proceeding in the United States. In 2013, Brett Berkowitz decided to give lots B1 and B8 to his sons, Trevor and Aaron. Litigation proceedings were ongoing as to all of the lots when the Berkowitz Claimants chose to file their arbitration.

19. The expropriations contradicted the assurances given to Mr. Berkowitz by the relevant minister prior to acquiring those lots–in meetings held to that precise effect as part of Mr. Berkowitz' due diligence– that they would not be expropriated. *See* Exhibit K, Interim

[2] Lots B2 and B4 were also purchased by Brett Berkowitz in September 2003, but these lots were subsequently sold to third parties and therefore did not form part of the Berkowitz Claimants' claims in the Arbitration. Lot B7 was sold to Glen Gremillion in 2004 and did not form a part of the claim brought by the Berkowitz Claimants.

Award ¶ 60. They also contradicted the authorization granted under Art. 1 of the 1995 Park Law being invoked as the basis for the Local Litigation, which allowed for the creation of an offshore park, one not requiring onshore expropriations. *See* Exhibit K, Interim Award ¶ 59. For these and other reasons, including the lack or patent insufficiency of any offered compensation, the conduct by Costa Rica breached several standards of treatment accorded to the Berkowitz Claimants under CAFTA-DR. As a consequence, the Berkowitz Claimants filed their Notice of Arbitration on June 10, 2013. *See* Exhibit D. At that time, other landowners in the same area had also chosen to arbitrate their disputes with Costa Rica, consolidating their claims with the Berkowitz Claimants. *See id.* ¶ 6. These other claimants have decided to voluntarily dismiss their case after the Interim Award for reasons distinct from the Berkowitz Claimants.

20. In their Statement of Claim, the Berkowitz Claimants informed the Tribunal of the Local Litigation under course between Costa Rica and the holding corporate owners of the land and their decision to waive any rights the Berkowitz Claimants had to initiate or continue court proceedings regarding their rights under the challenged Costa Rican measures. *See* Exhibit D ¶ 7. The Berkowitz Claimants did not hide the gift of Lots B1 and B8 to Trevor and Aaron. *See*, *e.g.*, Exhibit D, fn 49. The Berkowitz Claimants did not request a bifurcated proceeding or otherwise request the Tribunal to divide the arbitration in distinct phases related to jurisdiction and merits. *See generally*, Exhibit D.

21. Costa Rica prepared and submitted a Memorial on Jurisdiction and Counter-Memorial on the Merits (the "Counter-Memorial). In its Counter-Memorial, Costa Rica objected to the jurisdiction of the Tribunal on several grounds, largely on the fact that some of the facts related to the claims arose before the entry into force of CAFTA-DR and three year time bar in Article 10.18 of CAFTA-DR. *See* Exhibit F, Counter-Memorial at 56-63. Costa Rica did not

challenge the validity of the gift of Lots B1 and B8 to Trevor and Aaron. *See generally*, Exhibit F. Costa Rica did not request bifurcation of the proceedings, and it did not dispute the existence of the underlying Local Litigation related to the lots. *See id.*

22. Following the submissions of briefs, the parties exchanged their proposals for a Procedural Order 1 meant to guide the remainder of the proceedings. The Tribunal took those proposals and issued Procedural Order 1 on February 26, 2014. *See* Exhibit B. Procedural Order 1 required the parties in each pleading to "include all factual and legal arguments in support thereof, including written witness statements, expert opinions or reports, and exhibits." *See* Exhibit B, Procedural Order 1 ¶ 14.1. It further limited the scope of documents the parties could submit, stating that "[n]either party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission." *See id.* ¶ 17.3.

23. The Tribunal also had the ability to request documents from the parties on its own initiative, "[a]t any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine." *See* Exhibit C, UNCITRAL Arbitration Rules, Article 27(3).

24. The proceeding followed the guidelines set forth in the UNCITRAL Arbitration Rules and the Procedural Order with a further exchange of written briefs accompanied by witness statements, expert reports, and documentary evidence. The parties exchanged requests for documents and ultimately set a date for a hearing for oral testimony. *See* Exhibit B, ¶ 23.

25. In their submissions to the tribunal, the parties did not submit any information regarding the validity of the donation of Lots B1 and B8. *See generally,* Exhibit D, Notice of Arbitration and Statement of Claim; Exhibit E; Response to Notice of Arbitration; Exhibit F, Memorial on Jurisdiction and Counter-Memorial on the Merits; Exhibit G, Memorial on the

Merits; Exhibit H, Counter-Memorial on Jurisdiction and Reply on the Merits; Exhibit I, Reply on Jurisdiction and Rejoinder on Merits; and Exhibit J, Rejoinder on Jurisdiction. The Berkowitz Claimants provided the documentation that showed the donation had occurred, but neither party presented further arguments regarding the legality or effect of the transfers. *See* Exhibit K, Interim Award, fn. 8.

26. The parties hotly contested the Local Litigation and its effects on jurisdiction generally, but at no time did Costa Rica present any evidence regarding the result of the Local Litigation as to Lot B1. *See generally,* Exhibits E, F and I. Costa Rica made no effort to prove the fact that there was any result, one way or the other, in relation to this lot. *See id.* Moreover, there was no request for bifurcation of the proceedings into a jurisdictional and then merits phase. *See* Exhibit K, Interim Award, ¶ 7.

27. A hearing was held the week of April 20, 2015, in Washington, D.C. Exhibit K, Interim Award ¶ 15. At the hearing, Brett Berkowitz testified and was cross-examined. *See e.g., id.* ¶ 181. Neither Trevor nor Aaron testified and neither was called for cross-examination. *See generally,* Exhibit K. No expert legal testimony was offered regarding the validity or effect of the donation of Lots B1 and B8. No request for bifurcation was made. *See id* ¶ 7.

28. The Tribunal issued an Interim Award on October 25, 2016, where it found that Brett Berkowitz knew that Lots B1 and B8 were within the ecological park.[3] *See* Exhibit K**,** Interim Award ¶ 181. Without receiving any argument from Costa Rica, the Tribunal went on to analyze the transfer of Lots B1 and B8 to Trevor and Aaron: "[a]lthough it might have been put to the Tribunal that the claims by Aaron and Trevor Berkowitz should not be afflicted by the

[3] The Berkowitz Claimants respectfully disagree with the Tribunal on this point and others, but in light of the limited scope of review, the Berkowitz Claimants can merely register their disagreement, not elevate it to a request for vacatur or set aside in the present Motion.

knowledge of their father, Brett Berkowitz, when first acquiring the lots, no such argument was advanced." *See id*. Costa Rica did not make this argument of imputing Brett's knowledge to Aaron and Trevor, and the Berkowitz Claimants had no notice of any challenge to the validity or effect of the donation of Lots B1 and B8. *See generally*, Exhibit K.

29. The Tribunal went on to question the sufficiency of the argument not made, stating that "no such argument would be sustainable given that Aaron and Trevor Berkowitz became owners of Lots B1 and B8 by what appears to the Tribunal to have been a simple share transfer to each of 50% of the nominal shares of Aceituno Mar Vista Estates (the holding company in respect of the B1 claim) and of Níspero Mar Vista Estates (the holding company in respect of the B8 claim), both transfers being recorded in a notarised certificate of joint ownership dated 11 January 2013." *See* Exhibit K, Interim Award ¶ 181.

30. The Tribunal continued to apply the reasoning of a commercial contract, even though Brett Berkowitz had testified that he "transferred Lots B1 and B8 as a gift to my two adult sons." *See* Exhibit K, Interim Award ¶ 181.

31. The Tribunal concluded its analysis on the gift of Lots B1 and B8, applying a presumption regarding Brett Berkowitz's knowledge and what appears to be its own policy considerations: "[a]bsent compelling evidence to the contrary, such a conclusion would risk opening the door to property 'sales' that had as their object the cleansing of the knowledge of the original purchaser of defects or restrictions in the original title." *See id*. There was no law cited for this conclusion, and neither party offered any evidence to prove the fact of Trevor and Aaron's knowledge or the law that would provide the policy rationale regarding the gift. *See id.*

32. As regards the Local Litigation, the Tribunal found that no decision had been issued in the Local Litigation regarding Lot B1, and that, as a result, it had no jurisdiction

regarding as to Lot B1. *See* Exhibit K, Interim Award ¶. 288 In support of this conclusion, the Tribunal decided, as a matter of fact, that "[t]here is therefore no act or other conduct that amounts to an independently actionable breach in respect of this property, including for entry into force and limitation period purposes." *See id.* Based on its proclaimed absence of a decision in the Local Litigation as to Lot B1, the Tribunal decided that it lacked jurisdiction regarding the result of the court proceedings concerning Lot B1:

> There is therefore no basis, by reference to Article 10.5, or indeed even arguably by reference to Article 10.7, on which the Claimants can sustain a claim to a justiciable cause of action. The Tribunal accordingly concludes, and so finds, that it has no jurisdiction to entertain the Claimants' claims in respect of Lot B1. *See id*.

But on July 15, 2016, before the date of the Interim Award, the Costa Rican courts had, in fact, rendered a decision regarding Lot B1. *See* Exhibit L.[4] The Tribunal had not requested either of the parties to provide any information regarding the status of the court proceedings regarding Lot B1 as a prior step to making its decision dismissing jurisdiction on Lot B1, nor was it foreseeable to the Berkowitz Claimants that the fact of whether or not such a decision had been issued would be the sole basis on which its claim over Lot B1 would be dismissed. *See generally*, Exhibit K.

33. The Tribunal went on to decide it could conclude it has jurisdiction to determine if the rulings of the Costa Rican courts violated CAFTA-DR, just so long as those rulings were issued after June 10, 2013. *See* Exhibit K, Interim Award ¶ 289. In so doing, the Tribunal allowed the parties to present further evidence regarding Lots B5 and B6. *See id* ¶¶ 289-293. The Interim Award did not grant any further opportunity to present evidence regarding the Local Litigation as to Lot B1:

[4] The Berkowitz Claimants are filing the Spanish version and will supplement the filing with an English translation by Notice of Filing.

> The Tribunal accordingly concludes and so finds that, in the particular circumstances of this case, the Parties should be afforded an opportunity to present their views on the issue of whether the Tribunal has jurisdiction to entertain the Claimants' allegations of a breach of CAFTA Article 10.5 by reference to relevant and applicable judgments of the Costa Rican courts *rendered after 10 June 2013* in respect of Lots B5, B6 and B7.

See Interim Award at para. 294.

34. The Tribunal admitted there was no request for bifurcation made by either party:

> Costa Rica objects to the jurisdiction of the Tribunal on the grounds that the Claimants failed to initiate proceedings within the CAFTA's three-year limitation period under CAFTA Article 10.18.1 and/or that the alleged breaches occurred before the CAFTA entered into force between Costa Rica and the United States on 1 January 2009. No application for bifurcation was made and jurisdictional issues were pleaded alongside the merits.

See Exhibit K, Interim Award ¶ 7. Regardless, the Tribunal decided certain issues of jurisdiction and made some findings regarding liability. *See id.* ¶308.

35. On these points, the Tribunal exceeded its authority, and this Court should vacate the Interim Award.

MEMORANDUM OF LAW

I. Legal Standards

A. This Court should apply the grounds for vacatur found in Section 10 of the FAA to the Motion

36. One of the exclusive grounds for refusing confirmation under the New York Convention is where "[t]he award … has been set aside or suspended by a competent authority of the country in which, or under the law which, that award was made." *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(e), June 10, 1968, 21 UST

2517. This Court has recognized that Article V(1)(e) of the New York Convention grants U.S. courts the authority to apply domestic arbitral law when reviewing a motion to set aside or vacate an arbitral award. *See e.g., CPConstruction Pioneers Baugesellschaft Anstalt (Liechtenstein) v. Government of Republic of Ghana, Ministry of Roads and Transport*, 578 F. Supp. 2d 50, 53-54 (D.C.C. 2008) (citing *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997). A court's authority to vacate an arbitral award derives from 9 U.S.C. § 10(a), which enumerates the exclusive grounds for vacating an award. *See Hall Streets Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Therefore in reviewing a motion to vacate, this Court looks to the standards outlined in Section 10 of the FAA. *See id.*

37. Here, the New York Convention applies to the underlying arbitration because the Berkowitz Claimants are nationals of a contracting state (the United States), and Costa Rica is a contracting state. In addition, the Berkowitz Claimants seek to set aside or vacate the Interim Award by the competent authority in Washington, D.C., the place where the award was made. As such, this Court's authority to vacate arises under 9 U.S.C. § 10(a), and applying this standard, the Berkowitz Claimants seek to vacate the Interim Award because the Tribunal exceeded its powers. *See* 9 U.S.C. § 10(a)(4).

B. Section 10(a)(4) requires the Tribunal to only decide the issues submitted to it within the scope of the arbitration clause, while granting the Court the power to review both the submission of the issue and the scope of the arbitration clause

38. The tribunal cannot venture beyond the bounds of its authority. *See Matteson v. Rider System Inc.*, 99 F.3d 108, 112 (3d Cir. 1996). The tribunal's authority is defined not simply by the parties' agreement, "but is determined in large measure by the parties' submissions."[5] A

[5] *Matteson* deals with a collective bargaining agreement, but there is no meaningful distinction in a court's review of any other type of agreement and a collective bargaining agreement and arbitration pursuant to it. *See, e.g., Granite Rock Co. v. Int'l Bhd. of Teamsters*,

tribunal can only decide the issues submitted to it. *See id.* at 112-13. The tribunal must interpret the parties' submissions, but the court can review that interpretation. *See id.* at 113; *see also, Geneva Securities,* 138 F.3d 688, 692 (observing that "arbitrators must make clear the matters that are deemed submitted for arbitration"). Similarly, in determining if the parties agreed to arbitrate, the courts review is *de novo*. *See, e.g., National Railroad Passenger Corp. v. Expresstrak, LLC,* 330 F.3d 523, 529 (D.C. Cir. 2003). If the parties do not submit an issue or claim, the tribunal has no authority to decide on it. *See, e.g., Davis v. Prudential Securities, Inc.,* 59 F.3d 1186, 1194-95 (11th Cir. 1995); *see also, PMA Capital Insurance Company v. Platinum Underwriters Bermuda, Ltd.,* No. 09-3963, 2010 WL 4409655, *656 (3d Cir. Nov. 10, 2010) (finding that "[t]he arbitrators in this case, by ordering unrequested relief . . . went beyond the scope of their authority").

39. Moreover, "when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' […] his decision may be unenforceable." *See Stolt Nielsen S.A. v. Animalfeeds Int'l Corp.,* 559 U.S. 662, 671 (2010). When a tribunal does not identify and apply a rule of decision derived from the FAA or the law applicable to the dispute, "the arbitration panel impose[s] its own policy choice and thus exceed[s] its powers." *See id.* at 676-77.

---

561 U.S. 287, 296, (2010) (finding that "it is well settled in both commercial and labor cases that whether parties have agreed to 'submi[t] a particular dispute to arbitration' is typically an 'issue for judicial determination.'). Moreover, in *Granite* the court found that "cases invoking the federal 'policy favoring arbitration' of commercial and labor disputes apply the same framework." *See id*. at 301. *See also Mala Geoscience AB v. Witten Techs., Inc.,* No. CIV 06-1343, 2007 WL 1576318, at *3 fn 7 (D.D.C. May 30, 2007) ("[t]he Court recognizes that labor arbitration, drawing its authority from the collective bargaining agreement, and commercial arbitration under the FAA are related, but distinct, legal *fora.* Principles may nonetheless be borrowed from one to the other.")

40. The Berkowitz Claimants will show that the Tribunal exceeded its powers by deciding on issues of fact in the absence of any submission by Costa Rica, applying its own policy rationale without looking to a rule of decision from the FAA or applicable law, failing to give the Berkowitz Claimants the opportunity to show that jurisdiction existed, and bifurcating the proceedings, despite the lack of a request by any party.

C. The mere fact that the Berkowitz Claimants seek to vacate or set aside an interim award, not the ultimate and final award on all issues, poses no hurdle to this Court's analysis

41. The Berkowitz Claimants seek to vacate the Interim Award, but this merely invokes the same standards applied to a final award. Interim awards are final confirmable awards where they conclusively dispose of an independent claim. *See, e.g., Zeiler v. Deitsch,* 500 F. 3d 157, 169 (2d Cir. 2007). In other words, an interim award is considered final "if it resolves the rights and obligations of the parties definitively enough to preclude the need for further adjudication with respect to the issue submitted to arbitration." *See EcoPetrol S.A. v. OffShore Exploration and Production LLC,* 46 F. Supp. 3d 327, 336 (S.D.N.Y. 2014). For the purposes of satisfying the "finality" requirement, courts consider whether an award "finally and conclusively dispose[s] of a separate and independent claim. . . ." *Metallgesellschaft A.G. v. M/V Capitan Constante,* 790 F.2d 280, 283 (2d Cir. 1986). To permit review, an award does not need to be final as to all issues of liability and damages. *See Home Ins. Co.* v. *RHA/Pennsylvania Nursing Homes*, 127 F. Supp. 2d 482, 487 (S.D.N.Y. 2001). And finality need not mean the ultimate, conclusive arbitral award. *See id*. Finally, when a court has vacated an award that is final as to the merits of a claim, the proper course is to remand the claim to a new arbitrator. *See Muskegon Cent. Dispatch 911 v. Tiburon, Inc.*, 461 Fed. App'x. 517, 527 (6th Cir. 2012).

42. The Interim Award is not the ultimate, conclusive arbitral award on all claims submitted to arbitration, but it is certainly the final disposition of all claims as to Lots B1 and B8, and most claims as to Lots B3, B5, and B6. Procedural Order 1 states that "[d]ecisions of the Tribunal shall be issued in writing and be final and binding on the parties." *See* Exhibit B, Procedural Order 1 ¶ 4.2. The Interim Award is a decision of the Tribunal, and it found that the Tribunal had no jurisdiction over Lots B1 and B8 generally, that it only had jurisdiction over certain claims, not others, as to Lot B3, and that it might have jurisdiction over certain claims, again, not others, over Lots B5 and B6, among other things. *See generally*, Exhibit K. The decision rejecting jurisdiction over Lots B1 and B8 and the dismissed claims as to Lots B3, B5, and B6 is therefore final as to those claims, enabling this Court to review the Interim Award, vacate or set aside the Interim Award, and remand to a new tribunal.

II. This Court should vacate or set aside the Interim Award because the Tribunal exceeded its powers

A. The Tribunal exceeded its authority when it reached findings of fact without Costa Rica offering any evidence, and substituted its own policy judgments in place of applicable law

43. Just as an arbitration tribunal is bound by the issues submitted by the parties, it is further bound by the requirements of the applicable rules. The parties and the Tribunal agreed to be bound by the UNCITRAL Arbitration Rules, and Article 37 requires each party to bear the burden of proving the facts supporting its case. *See* Exhibit C. The Tribunal made findings of fact on key issues, even though Costa Rica had submitted nothing in this regard. *See generally*, Exhibit K. More specifically, the Tribunal found that Trevor and Aaron shared Brett's knowledge of potential expropriation of Lots B1 and B8. *See id.* at ¶ 181. The existence (or not) of this knowledge would certainly be a fact, as would be the transfer (or not) of this knowledge to Trevor and Aaron through the gift of Lots B1 and B8. By deciding on these facts and using

them to reject jurisdiction without requiring Costa Rica to submit any evidence or argument, the Tribunal exceeded its authority.

44. In addition to being bound by the submissions of the parties, arbitration tribunals cannot choose to apply their own policy preferences instead of the requirements of applicable law. This is especially true where the arbitration tribunal has not reached the threshold question of which law applies. *See* Exhibit K, ¶ 181. Turning to the legal effect of the donation of Lots B1 and B8, the Tribunal did not select the law that would apply, deciding instead to apply its own policy preferences to the effect of the transfer. *See id.* The Tribunal found convincing policy rationales to dismiss claimant's claims, such as the "risk [of] opening the door to property 'sales' that had as their object the cleansing of the knowledge of the original purchaser of defects or restrictions in the original title." *See id*. This risk is nothing more than a policy consideration substituting a legal analysis of gifts pursuant to Costa Rican (applicable) law. The Tribunal did not otherwise cite a rule of decision from the FAA or applicable law. As such, the Tribunal exceeded its powers.

45. The Interim Award seems to implicitly recognize these failings, but the Tribunal did not give the Berkowitz Claimants a chance to offer any evidence or argument. The Tribunal found that "it might have been put to the Tribunal that the claims by Aaron and Trevor Berkowitz should not be afflicted by the knowledge of their father, Brett Berkowitz, when first acquiring the lots, no such argument was advanced." *See* Exhibit K, Interim Award, ¶ 181. Given the chance, the Berkowitz Claimants would have responded, an especially concerning result because Costa Rica also did not make this argument.

B. The Tribunal exceeded its authority when it declined jurisdiction stemming from the court rulings after June 10, 2013, in the Local Litigation as to Lot B1

46. Arbitration tribunals have the obligation to define the issues they will decide, including objections to jurisdiction. In the context of an arbitration according to the UNCITRAL Arbitration Rules, the Tribunal has the ability to decide on its own jurisdiction. As a part of this power, it can request documents and evidence from the parties. In any event, an arbitration tribunal's decision on its own jurisdiction is subject to review by courts, and in the case of a request to set aside or vacate the award under Section 10(a)(4), the courts have the ability to review *de novo* the arbitration tribunal's findings.

47. Here, the Tribunal's decision declining jurisdiction over the result of the Local Litigation as to Lot B1 was an excess of the Tribunal's authority. In the Interim Award, the Tribunal found that the parties had not adequately made any submissions regarding the Tribunal's jurisdiction over the effect of the decisions made in the Local Litigation after June 10, 2013, as to Lots B5 and B6.[6] *See* Exhibit K ¶ 294. In so doing, it gave the parties an opportunity to show that jurisdiction existed over Lots B5 and B6 because there were court rulings in the Local Litigation after June 10, 2013. *See id.* ¶¶ 289-294. Without any submission by the parties, the Tribunal found that there were no court rulings in the Local Litigation after June 10, 2013, as to Lot B1. *See id.* ¶ 288. As such, the Tribunal decided that the absence of any court ruling meant it had no jurisdiction over the Local Litigation as to Lot B1.

48. However, there had been a court ruling in the Local Litigation after June 10, 2013, as to Lot B1. The Tribunal had the power under the UNCITRAL Arbitration Rules to

[6] "The Tribunal accordingly concludes and so finds that, in the particular circumstances of this case, the Parties should be afforded an opportunity to present their views on the issue of whether the Tribunal has jurisdiction to entertain the Claimants' allegations of a breach of CAFTA Article 10.5 by reference to relevant and applicable judgments of the Costa Rican courts *rendered after 10 June 2013* in respect of Lots B5, B6 and B7." (emphasis in original)

request any documents showing any court ruling in the Local Litigation as to Lot B1, and had the Tribunal made this request, it would have found that on July 15, 2016, there was a court ruling in the Local Litigation as to Lot B1. The existence of the court ruling, under the Tribunal's analysis of Lots B5 and B6, would have changed the Tribunal's analysis of Lot B1, at least giving the Berkowitz Claimants the opportunity to show that jurisdiction existed over the court proceedings as to Lot B1. But the Interim Award foreclosed this opportunity, constituting an excess of powers by the Tribunal and another reason to vacate the Interim Award.

C. The Tribunal exceeded its authority when it bifurcated the proceedings, denying the Berkowitz Claimants the opportunity to be heard on the relevant jurisdiction objections raised *sua sponte* by the Tribunal

49. While the UNCITRAL Arbitration Rules give the arbitration tribunal the ability to issue one or more awards, including a separate award on jurisdiction, arbitration tribunals do not have the authority to bifurcate the proceedings into multiple phases without at least a request by one of the parties, coupled with the opportunity to be heard by the others.

50. When the parties went to the hearing in April 2015, they had prepared a hearing on both jurisdiction and the merits, taking into consideration that all jurisdictional objections had been lodged and that the Tribunal would render an award on the issues before it. None of the parties requested the Tribunal to split, or bifurcate, the proceedings between jurisdiction and merits, a fact recognized by the Tribunal in the Interim Award. *See* Exhibit K, ¶ 7. Due to the lack of a request to bifurcate, the Berkowitz Claimants did not have notice of the distinct legal arguments and evidence it should have presented as to the effect of the donation of Lots B1 and B8 and the Local Litigation as to Lot B1. Had there been a request to bifurcate, coupled with any indication of the jurisdictional issues raised by the Tribunal (though not by Costa Rica), the Berkowitz Claimants could have submitted full arguments, testimony, and evidence as to those

jurisdictional issues. But the Berkowitz Claimants did not get that opportunity, leading the Tribunal to find against the Berkowitz Claimants on the points raised above. At a minimum, there should have been a request to bifurcate by Costa Rica or some sort of notice of the jurisdictional issues to be addressed. Absent a request or notice, the Tribunal exceeded its authority by *sua sponte* bifurcating the arbitration and rendering an Interim Award.

51. Strangely enough, the Tribunal appeared cognizant of its ability to give the parties an opportunity for further submissions as to jurisdiction. For example, the Tribunal found that Costa Rica's limited submissions on the effect of the rulings in the Local Litigation as to Lots B5 and B6 required the parties to receive a chance to submit further arguments and evidence as to this issue. The Tribunal could have followed the same process as to the donation of Lots B1 and B8 and the effect of the Local Litigation as to Lot B1. By failing to do so, the Tribunal exceeded its powers, requiring this Court to vacate the Interim Award.

III. This Court should stay the arbitration proceedings pending the resolution of the Motion

52. On filing a motion to vacate, courts have the ability to stay the underlying arbitration proceedings. *See* 9 U.S.C. § 12; *see e.g. Aurum Asset Managers, LLC v. Banco do Estado do Rio Grande do Sul*, Miscellaneous Action No. 08-102, 2010 WL 4027382 at *1 (E.D. Pa. Oct. 13, 2010). The stay functions to stop any enforcement of the award. *See* 9 U.S.C. § 12. Similarly, CAFTA-DR prohibits a "disputing party" from seeking enforcement of an award in the case of a final award under the UNCITRAL Arbitration Rules until "a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal." *See* Article 10.26.6(b)(ii).

53. This Court should immediately stay the underlying arbitration proceedings. The Berkowitz Claimants have met the condition of timely filing and serving a motion to vacate an

award that is final as to certain claims and issues brought by the Berkowitz Claimants. The Tribunal has already ordered the proceedings to continue, essentially enforcing the Interim Award as it relates to grounds for vacatur mentioned herein, and further steps in the underlying arbitration will severely harm the rights of the Berkowitz Claimants, requiring them to participate before a tribunal that has already exceeded its powers. Moreover, the Berkowitz Claimants may take potentially different positions in the underlying arbitration, putting at risk any future arbitration before a new tribunal. Both the FAA and CAFTA-DR contemplate exactly the relief sought by the Berkowitz Claimants. This Court should therefore stay the underlying arbitration until a final decision has been issued as to the Motion.

CONCLUSION

Wherefore, the Berkowitz Claimants respectfully request this Court vacate or set aside the Interim Award, stay the arbitration proceedings pending the outcome of the ruling on the Motion, and grant such other relief the Court deems proper.

Dated this the 23rd day of January, 2017.

Respectfully submitted,

/s/ Megan C. Connor
Megan C. Connor (DCB# 996991)
mconnor@pilieromazza.com
Paul W. Mengel III (DCB# 457207)
pmengel@pilieromazza.com
PILIEROMAZZA PLLC
888 17th Street, N.W., 11th Floor
Washington, D.C. 20006
Telephone: (202) 857-1000
Facsimile: (202) 857-0200