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In the Matter of the Arbitration

between

PREBLE-RISH HAITI SA,

Claimant,

**PARTIAL FINAL AWARD**

August 6, 2021

and

REPUBLIC OF HAITI, BUREAU DE  
MONETISATION DE PROGRAMMES  
D'AIDE AU DEVELOPPEMENT,

Respondent

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Before: Robert G. Shaw  
LeRoy Lambert  
Louis Epstein, Chairman

Appearances:

On behalf of the Claimant  
Blank Rome LLP

By: William R. Bennett, III, Rick Antonoff, Lauren Wilgus

On behalf of the Respondent  
Harris Bricken Sliwoski, LLP

By: Daniel Harris, John B. McDonald

## Introduction

1. The Claimant Preble-Rish Haiti, S.A. (“PRH”) requests a partial final award directing the Respondent, Republic of Haiti, Bureau de Monétisation de Programmes d'Aide au Développement (“BMPAD”)<sup>1</sup> to provide security in the sum of \$30 million for PRH’s claims in this arbitration.
2. PRH claims damages for the alleged breach by BMPAD of three contracts, each dated May 13, 2020 (the “Contracts”), providing respectively for the supply by PRH to BMPAD of diesel fuel, jet fuel and gasoline.
3. Each of the Contracts contained the same arbitration clause which provided:

In the event of a dispute between the Buyer and Seller under this Contract, the dispute shall be submitted by either party to arbitration in New York before three arbitrators. The Party initiating the arbitration shall provide written notice of its intention to submit the matter to arbitration. Such notification shall contain a statement identifying the request for arbitration and specifying the arbitrator appointed by the initiating Party. Within ten (10) days of such notice of arbitration, the other Party will identify its appointed arbitrator. If such Party fails to appoint an arbitrator within the applicable 10-day period and fails to give timely notice of such appointment to the initiating Party, then the initiating Party shall also be entitled to appoint this second arbitrator. The third arbitrator will be chosen by the two arbitrators thus selected. Each Party shall bear and pay the expenses of the arbitrator appointed by (or for) it and the expenses of the third arbitrator shall be limited and paid equally by the Parties. The decision of the arbitrators shall be final, conclusive and binding on all Parties. Judgment upon such award may be entered in any court of competent jurisdiction. For disputes under \$25,000 USD, an arbitrator will be used as agreed by both Parties. If the two Parties are unable to agree on an arbitrator, the Seller will appoint an appropriate arbitrator. No arbitrator shall be an employee, representative or agent of a Party and each shall reasonably believe that the selecting Party has the experience, education and expertise in the matters to which the claim relates to enable that person to competently perform such arbitration function.<sup>2</sup>

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<sup>1</sup> During the proceedings herein, the Respondent has at various times also been identified by the acronyms “ROH” (Republic of Haiti) and “GOH” (Government of Haiti).

<sup>2</sup> The Contracts were in the French language. Quotations from the Contracts are from certified English translations provided by the Claimant as Exhibits A, B and C to the Affirmation of Josue Leconte dated March 24, 2021.

## **Procedural Background**

### **a. Demand for arbitration and appointment of arbitrators**

4. On November 20, 2020, counsel for PRH transmitted to BMPAD a Notice Demanding Arbitration (the “Arbitration Notice”) under the three Contracts.<sup>3</sup> The Arbitration Notice identified Robert G. Shaw as PRH’s appointed arbitrator, called upon BMPAD to appoint an arbitrator within 10 days and, in accordance with the arbitration clauses in the Contracts, stated: “If BMPAD fails to appoint an arbitrator within 10 days, PRH will select an arbitrator on your behalf. Both arbitrators will then appoint a third arbitrator.”

5. BMPAD did not appoint an arbitrator by November 30, 2020, the last day of the ten-day deadline given in the Arbitration Notice. On December 1, 2020, counsel for PRH transmitted to BMPAD a Notice of Appointment of Second Arbitrator identifying LeRoy Lambert as the second appointed arbitrator. On December 1, 2020, Mr. Shaw and Mr. Lambert appointed Louis Epstein as the third arbitrator and Mr. Epstein notified the parties of his appointment.

### **b. BMPAD state court motion for stay, temporary restraining order and preliminary injunction**

6. On December 22, 2021, BMPAD filed in the Supreme Court of the State of New York, New York County a petition seeking an Order, pursuant to CPLR § 7503(b), staying this arbitration upon the grounds that PRH’s demand for arbitration was procedurally deficient and that, under Haitian law, the arbitration clause in the contracts was invalid. BMPAD simultaneously filed a motion for a temporary restraining order and a preliminary injunction to halt proceedings in this arbitration. PRH opposed BMPAD’s motions and filed a cross-motion to compel arbitration.

### **c. PRH Request for Interim Partial Award of Security**

7. On March 24, 2021, PRH submitted to the Panel its Initial Claim Statement and Request for an Interim Partial Award of Security in the Sum of \$30,000,000 together with the Affirmation of Josue Leconte (also dated March 24, 2021) (“Leconte Aff.”) and Exhibits A through WW. PRH advised that the hearing in the state court on the parties’ motions would not take place until July 27, 2021, noted that at present, there was no court order staying the arbitration, and stated that to avoid irreparable prejudice to PRH, the arbitration should proceed and its request for an interim award of security should be granted.

8. By email on March 27, 2021, BMPAD submitted a two-page Response to PRH’s Initial Claim Statement and Request for an Interim Award (the “Response”). BMPAD stated that it did not recognize this Panel’s jurisdiction and had accordingly filed in the state court its petition for a stay and request for a temporary restraining order and preliminary injunction<sup>4</sup> After commenting briefly upon the merits of PRH’s request for security, BMPAD stated:

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<sup>3</sup> Documents filed in a related state court proceeding indicate that on November 10, 2020 the Notice of Arbitration was emailed by counsel for PRH to Fils Aimé Ignace Saint Fleur, Managing Director of BMPAD, at the email address provided in the notice provision of each of the Contracts with copies to other officials of BMPAD. See note 4 below.

<sup>4</sup> BMPAD attached to the email transmitting its Response copies of its state court submissions. In further correspondence and submissions concerning the Claimant’s application for security, the parties provided to the Panel

ROH reserves all of its rights in connection with this purported arbitration, the New York action, and the lawsuit it will file in Haiti against PRH. Because ROH does not waive or intend to jeopardize its position of non-arbitrability under CPLR 7503(b), it has no intention of filing a Statement of Defense or posting a bond in this action.

**d. April 5, 2021, Panel ruling that in the absence of a temporary restraining order halting proceedings, the arbitration would go forward and the Panel would consider and determine PRH's request for security**

9. In an email ruling on April 5, 2021, the Panel noted that “in its [state court] motion papers, ROH does not dispute that the parties entered into agreements containing an arbitration clause.... ROH contends, rather, that PRH's arbitration demand was procedurally defective and that the arbitration provisions in the agreements are invalid under Haitian law.” The Panel then considered whether this arbitration could proceed while BMPAD's motion to stay was pending:

In support of its motion to stay, ROH cites *Material Damage Adjustment Corp. v. Eliphene*, 261 A.D.2d 545, 690 N.Y.S.2d 601, 602 (2d Dep't 1999), for the proposition that “a temporary restraining order is necessary to halt arbitration proceedings pending a petition to stay arbitration.” ROH Memorandum at p. 4. In *Material Damage*, the Second Department affirmed the denial of a motion to vacate an award when, although the petitioners had commenced a proceeding to stay the arbitration, they had not obtained a temporary restraining order. The court held as follows:

Although the petitioners commenced a proceeding in the Supreme Court to stay arbitration, they never obtained a temporary restraining order to prevent the arbitration from proceeding pending its determination. As a result, the petition did not require the arbitrator to adjourn the hearing, and the arbitration award was not the product of misconduct.

261 A.D.2d at 546, 690 N.Y.S.2d at 602. See also *Ahern Painting Contractors, Inc. v. Dist. Council of New York City & Vicinity of United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 141 A.D.2d 791, 792, 530 N.Y.S.2d 21, 22 (2d Dep't 1988) (“On the absence of express language in CPLR 7503 indicating that a notice of petition to stay arbitration by itself operates as a stay, the arbitrator was free to proceed.”)

ROH has not obtained a temporary restraining order or preliminary injunction to prevent this arbitration from proceeding pending determination of its motion for a stay. Therefore, we are free to proceed with the arbitration.

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copies of substantially all of their state court submissions. The New York State Unified Court System electronic file containing what appear to be all of those submissions may be found at the following link: <https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=felJvUqFmk2lYjZsOC7Dgg==&display=all>.

10. Regarding whether the arbitration should proceed, the Panel stated:

If a decision on the motion to stay were imminent, the Panel might consider exercising its discretion to await the ruling of the court. We understand, however, that, although the initial return date for the motion was in January 2021, oral argument is not scheduled to take place until July 27, 2021 -- nearly four months from now and more than eight months after this arbitration was commenced. We assume that a decision on the motion will not issue until sometime thereafter.

In its Initial Statement of Claim and Request for Security, PRH contends that if the arbitration is not allowed to proceed and if security is not provided, it will suffer irreparable harm. In these circumstances, the Panel would be remiss if we did not, at a minimum, hear and decide PRH's request for security. A respondent in a New York arbitration should not be allowed to effectively put proceedings on hold for several months merely by making an application for a stay -- an application that may ultimately be denied.

The opening sentence of the arbitration clause in the contracts between the parties states: "In the event of a dispute between the buying and selling parties under this contract, the dispute will be submitted by one or the other of the parties to arbitration in New York, before three arbitrators." We are presented with a dispute between the parties under the contracts. There is no stay in place and thus far there has been no determination that the arbitration demand was procedurally defective or that the arbitration provisions of the contracts are invalid.

11. In conclusion, the Panel ruled as follows:

We will therefore consider and decide PRH's application for security. We note that in response to that application ROH has thus far submitted a two-page document containing a number of assertions but without evidentiary support, legal argument or citation of authority. In the circumstances, we hereby direct as follows:

- a. ROH shall respond fully and substantively to PRH's Initial Claim Statement and Request for Security on or before April 23, 2021;
- b. PRH shall reply on or before April 30, 2021.<sup>5</sup>

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<sup>5</sup> The Panel further directed the parties to deposit into escrow by April 30, 2021 \$30,000 each ) as security for the Panel's fees in the arbitration. PRH promptly made its deposit of \$30,000. On June 6, the Panel directed that the parties make a further deposit of \$20,000 each. PRH promptly made its deposit of \$20,000. No deposits have been made by BMPAD.

12. On April 9, 2021, counsel for BMPAD submitted to the state court a request for a preliminary conference. A copy of the request was provided to the Panel. In that request, BMPAD stated:

PRH's arbitrators ... have directed ROH to submit a substantive response and pay them \$30,000 by April 23, 2021.... ROH has attempted to explain to both PRH and its arbitrators that it has sought a temporary restraining to prevent the arbitration, and that PRH's only remedy for compelling ROH to participate in the arbitration is through its pending Cross-Motion, to no avail. PRH continues to force the issue in the arbitration and seek ROH's participation. For that reason, ROH is left with no choice but to request a telephonic Preliminary Conference to discuss the parties' rights and obligations during the pendency of the Petition for Stay, Motion for Temporary Restraining Order, and Cross-Motion. It cannot be that ROH must participate in an arbitration that it contends on a good-faith basis is illegal during the pendency of its Motion for a Temporary Restraining Order.

13. Counsel for PRH responded to ROH's request, attaching to its response a copy of the Panel's April 5 ruling. We understand that a telephonic Preliminary Conference eventually took place but that, following the conference the state court did *not* issue any order preventing proceedings in this arbitration from going forward.

**e. Further Written Submissions on PRH's Request for Security**

14. In accordance with the Panel's April 5, 2021, order, counsel for BMPAD submitted on April 23, 2021, the Respondent's Initial Statement of Defense, Counterclaims, Reservation of Rights, and Response to Request for Security ("BMPAD Defense"), the Affidavit of Fils Aimé Ignace Saint-Fleur, Director General of BMPAD, dated April 23, 2021 ("Saint-Fleur Aff.") and appended Exhibits A through E-1. In addition, on April 23, 2021 counsel for BMPAD transmitted to the Panel what it described in a covering email as "a zip folder containing the briefs filed in the New York actions...."<sup>6</sup>

15. On April 30, 2021, counsel for PRH submitted its reply to the BMPAD Defense (the "PRH Reply") together with the Affirmation of Nathalie Brunet dated April 30, 2021 ("Brunet Aff.") and annexed Exhibits XX, YY and ZZ.

**f. Hearing scheduled for June 21-23, 2021**

16. By email on May 20, 2021, the Panel issued the following order::

We acknowledge receipt of: (a) the Respondent's Initial Statement of Defense, Counterclaims, Reservation of Rights and Response to Request for Security dated April 23, 2021, the Affidavit Of Ignace Saint Fleur, of the same date and the accompanying exhibits; and (b) the Claimant's April 30, 2021 Reply to the foregoing and in further support of its initial claim statement and request.

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<sup>6</sup> According to counsel for BMPAD, the zip folder contained documents filed in the state court proceedings but not exhibits to the affirmations filed there which counsel offered to provide if requested by the Panel .

In light of the amount of security sought and the issues that have been raised by the parties, we think it important, before ruling, to hold a hearing on the application for security in order to provide the parties with an opportunity to present their respective witnesses, Mr. Leconte and Mr. Saint Fleur, and to allow for cross-examination and oral argument.

Based on the submissions thus far and taking into account that a translator may be needed for one or both of the witnesses, the Panel does not anticipate that more than 3 days will be required and accordingly sets June 21-23, 2021 as the dates for such hearing.

The hearing will be held remotely via Zoom. We request that counsel for Claimant make the necessary arrangements for the Zoom link and for transcription of the proceedings.

17. In an email to the Panel on June 2, 2021, counsel for BMPAD, after repeating its objection to the jurisdiction of the Panel, asserted that “due process would require that any hearing take place live and in-person,” and that “various technical issues (including a recent Covid surge) in Haiti make a remote hearing—and GOH’s preparation for any hearing—a practical impossibility. To that end, GOH will not be attending any ‘hearings’ you have scheduled.” Counsel for BMPAD further contended that the timeline set by the Panel for hearings was not workable or reasonable as it would not allow for the pre-hearing deposition of several witnesses or for document discovery. In an email the same day, counsel for PRH disputed these assertions.

18. By email to counsel on June 4, 2021, the Panel responded as follows:

On the “timeline” for the hearing on the application for security, sufficient notice was given. Notice of the hearing was given on May 20, more than thirty days in advance.

Regarding the objections raised by ROH some twelve days later:

- We reject the assertion that due process requires an in-person hearing. During the past year, arbitrations, trials and hearings of all kinds in the United States and throughout the world have been held remotely by video. Courts that have considered the matter have held that virtual hearings are consistent with due process. *See e.g. Ciccone v. One W. 64th St., Inc.*, 69 Misc. 3d 585, 592, 132 N.Y.S.3d 261, 266 (N.Y. Sup. Ct. 2020) and cases cited therein. (“These courts have found that given ‘advances in technology,’ the “near-instantaneous transmission of video testimony” permits the court “to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, and his calmness or consideration.”) Most arbitration rules permit the taking of testimony by video conference. *See, e.g. Section 23 of the SMA*

Rules, Article 22 (2) of the AAA ICDR International Arbitration Rules, Article 26 (1) of the ICC Rules of Arbitration, Article 28(4) of the UNCITRAL Arbitration Rules. Counsel for the Claimant has in any event offered to make its witness available in person for cross examination by counsel for the Respondent, obviating any due process concern.

- Regarding the assertion of counsel for ROH that it wishes to take depositions, depositions are not normally part of arbitration proceedings in New York or elsewhere in the world.
- Regarding document production, nothing has prevented the Respondent from requesting the production of documents from the Claimant.
- Regarding the “various technical issues” mentioned, including the recent COVID surge, we would require further evidence of the nature of those technical issues and their precise effect in order to determine whether any delay in the presentation of ROH’s witness is warranted.

In conclusion, after considering the comments of the parties, we rule that the hearing on the application for security will go forward as scheduled. We urge ROH to participate in that hearing which it may do while reserving its position that the agreement to arbitrate in the contract between PRH and ROH is invalid under Haitian law.

**g. Adjournment of hearing because of illness of BMPAD’s principal witness**

19. By email on June 9, 2021, counsel for BMPAD advised that Mr. Saint-Fleur, BMPAD’s Director and its principal witness, had contracted COVID and that because of this he would not be able to attend the hearing remotely. In an email on June 12, 2021, the Panel stated:

We regret that Mr. Saint-Fleur contracted Covid and wish him a full recovery. We note that approximately three weeks have now passed since it was announced on May 24 that Mr. Saint-Fleur had been diagnosed and that approximately ten days remain until the hearing commencing on June 21. Mr. McDonald, can you kindly provide us with an update on Mr. Saint-Fleur’s condition and prognosis? If Mr. Saint-Fleur will not, for reasons of health, be able to testify by Zoom at the hearing commencing on June 21, please advise when he will be made available to testify.

20. On the evening of June 14, 2021 counsel for BMPAD submitted a Declaration of Mr. Saint-Fleur (“Saint-Fleur Decl”) stating that he had contracted COVID in or around late May, that he had been confined to his residence and that he would not be able to attend the June 21-23 hearing scheduled by the Panel. He attached what he referred to as a May 31 order prescribing certain restrictions on activities in Haiti to prevent the spread of COVID.

21. In an email on June 16, the Panel stated:

Mr. Saint-Fleur's June 11 affidavit, provided to us on June 14, is not responsive to our June 12 inquiries. It does not contain an update on his condition or prognosis. Although he refers to the May 31 order, nothing in the provisions of that order would appear to preclude Mr. Saint-Fleur from participating remotely in a Zoom hearing. Nor does the affidavit state when Mr. Saint-Fleur will be made available to testify. We again ask Mr. McDonald to urgently and fully clarify these matters latest by the close of business tomorrow, June 17.

22. By email on June 17, counsel for BMPAD responded:

I received the following update yesterday afternoon from one of the lead Haitian lawyers working on this case with our law firm:

"Saint Fleur is still infected by Covid. Apparently he has not answered his phone since 3 days. His assistant can't do anything without his authorization."

None of our lawyers have been able to directly communicate with Mr. Saint Fleur since he first came down with COVID. The sworn affidavit provides as much information as is available at this time. Mr. Saint Fleur is still experiencing symptoms, there is no new prognosis, and he cannot (and should not) leave his home to go to his office for reliable internet access. We do not know when he can be made available to testify. To put it bluntly, his survival is not clear and Mr. Bennett's claim that he is "back to work" is both dishonest and callous.

As we've written before, the situation in Haiti is dire and we are not going to prioritize this hearing over the health and well-being of any person as Mr. Bennett urges us to do. We will not be appearing at the hearing set for next week because of the foregoing and for all the reasons stated in our prior emails.

23. By email that day, the Panel adjourned the hearing scheduled for June 21-23, stating:

The Panel thanks Mr. Harris for his below update. We again wish Mr. Saint-Fleur a complete recovery and express our support for all Haitians as they deal with this virus and its tragic consequences.

While we appreciate PRH's desire to have a prompt decision on its application, the Panel has carefully considered the matter and has decided, in these circumstances, to adjourn the hearing scheduled for next week.

We ask counsel to endeavor to agree to dates in mid- July for the hearing and to report back to us latest Wednesday, June 23. If counsel are unable to agree by then, the Panel will set new dates for the hearing.

If Mr. Saint-Fleur remains too ill to testify at the adjourned hearing, ROH should be prepared to present a substitute witness. There will be no further adjournments.

24. By email on June 23, 2021, counsel for BMPAD advised the Panel that it was unable to identify new dates for the hearing. On June 24, counsel for BMPAD advised the Panel that PRH had “initiated a Rule B attachment in the United States District Court for the Southern District of New York and had attached approximately \$24 million in funds in a Haitian Citibank account.... The reason I am writing you now is because PRH’s federal court action obviously moots the need for a security hearing before this panel in July.” In a response the same day, counsel for PRH disputed the assertion that the application for security was moot.

25. On June 26, 2021, the Panel responded as follows:

Thank you for your below messages. We take note of the views that you have expressed. The hearing on Claimant’s application for security will go forward. At the hearing, we will consider the parties’ conflicting positions on the effect, if any, of the Rule B proceeding on the application.

**h. Panel Order scheduling hearing for July 28-29, 2021**

26. As the parties had not been able to agree on new dates for the adjourned hearing, the Panel set new dates, stating that “the hearing on the application for security will take place July 28-29, 2021. There will be no further adjournments.”

On June 30, 2021, counsel for BMPAD advised the Panel as follows:

I spoke with one of the Haitian lawyers this evening and that person informed me that Mr. Saint Fleur has recovered from COVID.

27. The hearing in PRH’s application was thus set to go forward on July 28-29.

**i. Panel Order denying BMPAD request for further 60-day adjournment**

28. In an email to the Panel on July 16, 2021, counsel for BMPAD requested a 60-day adjournment of the hearing scheduled for July 28-29. Counsel gave two reasons for the requested adjournment. First counsel noted that on July 7, 2021, Haitian President Jovenel Moïse had been assassinated. Counsel asserted that its work on this arbitration “was always overseen and directed by President Moïse and his death means we now have nobody to whom we can turn for instruction/direction.” Second, counsel stated: “Seeing as how plaintiff has attached/frozen \$29 million in a Haitian bank account, this hearing is moot in any event.” Counsel noted that the day before, BMPAD had requested and had now received from the state court a 60-day adjournment of the hearing on its petition for a stay of the arbitration which had been set for argument on July 27.

29. By email on July 19, 2021, counsel for PRH stated its strong opposition to any further adjournment.

30. On July 21, 2021, the Panel denied BMPAD’s request for an adjournment. Regarding the grounds given by BMPAD for its request, the Panel stated:

*First*, counsel for ROH asserted that because of the assassination of President Moise, he has no one to whom he can turn for directions/instructions.

- As counsel for PRH pointed out in their email of July 19, 2021, ROH has previously alleged in these proceedings that Mr. Saint-Fleur is the person responsible for handling the claim for Respondents. There has been no previous indication of any involvement of President Moise.
- As counsel for PRH also pointed out, the assassination and alleged lack of instructions did not prevent counsel for ROH from announcing in a July 15, 2021, pre-motion letter to the United States District Court for the Southern District of New York, its intention to submit a motion to vacate on various grounds the maritime attachment order issued by that court and requesting that the motion be heard on July 22, 2021.
- In response, the court, in an endorsement to the pre-motion letter, stated: “BMPAD may file its proposed motion at its earliest convenience. Applicants will have ten days to respond and BMPAD will have seven days to reply.” Hence, in the coming weeks, counsel for ROH has undertaken to perform significant legal work in connection with this dispute, notwithstanding the assassination of President Moise.

*Second*, counsel for ROH asserted that the hearing on PRH’s application for pre-award security is moot because PRH already has a maritime attachment of \$29 million. That is not correct. ROH’s motion to vacate the maritime attachment, if successful, may leave PRH without any security whatsoever. In these circumstances, the Panel finds that the application to this Panel for pre-award security is not moot.

31. The Panel observed that PRH’s application for security was first made on March 24, 2021, nearly four months before, that the parties had exchanged detailed submissions, witness statements and exhibits and that BMPAD had had ample time to prepare for the hearing on PRH’s application. In conclusion, the Panel stated:

While we feel the utmost sympathy and concern for the people of Haiti, we must also take into account the interests of the claimant and the urgency of its request for security.

As we advised when granting ROH’s last request for an adjournment, the hearing on July 28-29 will go forward as scheduled and there will be no further adjournments.

**j. BMPAD's announcement that it "cannot and will not attend the hearing on PRH's request for an interim award of security."**

32. On July 23, 2021, counsel for BMPAD submitted to the Panel a letter dated July 22 stating that, for various reasons, BMPAD "cannot and will not attend the hearing on PRH's request for an interim award of security." Together with the letter, BMPAD submitted the papers it had recently submitted in federal court in support of its motion to vacate the Rule B attachment.

33. On July 25, 2021 the Panel responded to BMPAD's July 22 letter, stating again that it would not agree to any further adjournment of the hearing and repeating the reasons set forth in its prior rulings. The Panel rejected any suggestion that it had declined to adjourn the hearing because it was not "neutral or impartial" or that it wanted to run up its fees and rejected BMPAD's contention that the arbitrators had a "conflict of interest" In conclusion, the Panel stated:

The hearing on PRH's application for an interim award of security will go forward. In the absence of a stay, temporary restraining order or preliminary injunction preventing this arbitration from proceeding, PRH is entitled to a hearing on its application. ROH is entitled to appear under a reservation of rights and to oppose PRH's application on any grounds that it believes to exist. The parties have submitted evidence and argument on their respective positions. Among other things, the hearing is intended to provide ROH and Harris Bricken with the opportunity to cross-examine PRH's witnesses, to present ROH's witnesses in opposition to the application and to present oral argument. We again urge ROH to take advantage of that opportunity and to participate in the hearing while fully reserving its position on the issues mentioned above.

34. By email on July 27, 2021, counsel for BMPAD again wrote to the Panel repeating its assertions that the panel was biased, providing links to published reports suggesting past improper conduct on the part of PRH and its principals and objecting on due process grounds to the Panel's decision to proceed with the hearing. In its response that evening, the Panel said:

We have already considered and rejected, in our message of the July 25, the arguments raised by BMPAD to further delay tomorrow's hearing while BMPAD presses forward on an expedited basis with its motion to vacate the Rule B attachment. As we observed in that message, PRH's application for an award of security has been pending since March 24, 2021. BMPAD has opposed the application with documentary evidence and legal arguments and has had ample time and opportunity to submit additional evidence bearing upon the application – including any evidence supporting the allegations contained in your below message that PRH and Mr. Leconte have engaged in wrongdoing, to the extent that such evidence is relevant to the issues before us.

We again reject any suggestion that there is any conflict of interest or partiality on the part of the arbitrators

The purpose of the hearing commencing tomorrow is to afford PRH an opportunity to present witnesses and evidence on its application for security and to

afford BMPAD an opportunity to contest that application, to cross examine PRH's witnesses under oath (including Mr. Leconte) and to present its own witnesses. We again urge BMPAD to take advantage of that opportunity and to participate in the hearing under a full reservation of rights.

**k. July 28 hearing on PRH's application for an interim award of security**

35. The hearing on PRH's application for an interim award of security commenced on July 28, 2021, at 10:00 am. Counsel for BMPAD was given notice of the hearing and was sent a link to the Zoom session but chose not to attend or participate.<sup>7</sup>

36. On July 28, the Panel wrote again to counsel for BMPAD and again urged them to participate in the second day of the hearing, noting that counsel for PRH, the witnesses, arbitrators and court reporters had been asked to stand by and asking counsel to confirm its intention to participate by 11 pm that evening. No confirmation was received and the next morning, the Panel sent the following message to counsel:

We have received no response to our below email asking Harris Bricken to confirm by 11 pm Eastern time on July 28 its intention to appear and present a defense at the second day of hearings on PRH's application for an award of pre-award security. We therefore confirm that the second day of hearings, which was scheduled to commence at today at 10 am, is canceled.

Subject to receipt of any documents or information requested by the Panel or which PRH agreed to provide at the hearing yesterday, the Panel declares that proceedings on PRH's application are closed. The Panel will commence its deliberations and issue its partial final award in due course. The Panel reserves the right to reopen proceedings if questions arise during its deliberations which require clarification from the parties.

**Factual Background**

37. The facts relevant to this arbitration are set out in Mr. Leconte's affirmation and were, for the most part, undisputed by BMPAD in its written submissions.

38. BMPAD is an agency of the government of Haiti and is the only institution authorized to order petroleum products to make them available for consumption throughout the country. PRH is a Haitian limited liability company engaged in various businesses, including the supply of petroleum products. PRH has had prior contracts with BMPAD for the supply of asphalt and high sulfur fuel oil.

39. On April 27, 2020, BMPAD opened a bidding process to certain Haitian oil companies for three government contracts for the provision of the petroleum products Diesel, Gasoline, and Jet Fuel (the "Products") for a six-month period. On April 30, 2020, BMPAD reviewed the bidding offers it received and stated that it had determined that the offer from PRH best met the required

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<sup>7</sup> References herein to pages of the transcript of the July 28 proceedings are preceded by the abbreviation "TR".

criteria. On May 6, 2020, BMPAD declared that PRH was the winner of the contracts on May 6, 2020.

40. On May 13, 2020, the three Contracts were signed by the parties. Fils Aimé Ignace Saint-Fleur, Director General, signed on behalf of BMPAD. Josué Leconte, President of PRH, signed on behalf of PRH.

41. Appendix 1 of each Contract set forth the specific conditions for the supply of each Product.

Appendix 1 of the Diesel Contract provided:

**Product:** USGC WB No.2 Diesel

**Quantity:** 550,000 barrels (23,100,000 gallons) of Product each month, plus or minus 10% at the option of the Buyer or Seller, for a period of six months.

**Quality:** according to the specifications included in Appendix 2 of the Contract.

**Purchase price:** The purchase price for each shipment of product will be calculated per gallon and will be the sum of (A) the relevant USGC WB No. 2 (Diesel) Platt's rate per barrel plus (B) freight charge, finance and insurance of USD 6.55 per barrel.

**Due date:** The due date for each shipment will be 120 days after the Seller issues a Notice of Completion (NOR) for such shipment. Payment will be made by the Buyer in freely transferable US dollars to an account outside Haiti to be specified by the Seller.

**Amount of the letter of credit:** An amount sufficient to cover the purchase price for six shipments.

42. Appendix 1 of the Jet Fuel Supply Contract provided:

**Product:** USGC WB Jet 54

**Quantity:** 75,000 barrels (3,150,000 gallons) of product each month, plus or minus 10% at the option of the Buyer or Seller, for a period of six months.

**Quality:** according to the specifications included in Appendix 2 of the Contract.

**Purchase price:** The purchase price for each shipment of product will be calculated per gallon and will be the sum of (A) the relevant USGC WB Jet 54 Platt's rate per barrel plus (B) freight, finance and insurance charge of USD 6.28 per barrel.

**Due date:** The due date for each shipment will be 120 days after the Seller issues a Notice of Completion (NOR) for such shipment. Payment will be made by the

Buyer in freely transferable US dollars to an account outside Haiti to be specified by the Seller.

**Amount of the letter of credit:** An amount sufficient to cover the purchase price for six shipments.

43. Appendix 1 of the Gasoline Supply Contract provided:

**Product:** USGC WB MOGAS 87

QUANTITY 375,000 barrels (15,750,000 gallons) of Product each month, plus or minus 10% at the option of the Buyer or Seller, for a period of six months.

**Quality:** according to the specifications included in Appendix 2 of the Contract.

**Purchase price:** The purchase price for each shipment of product will be calculated per gallon and will be the sum of (A) the relevant USGC WB MOGAS 87 Platt's rate per gallon plus (B) freight, finance and insurance charge of USD 8.11 per barrel.

**Due date:** The due date for each shipment will be 120 days after the Seller issues a Notice of Completion (NOR) for such shipment. Payment will be made by the Buyer in freely transferable US dollars to an account outside Haiti to be specified by the Seller.

**Amount of the letter of credit:** An amount sufficient to cover the purchase price for six shipments.

44. Article 11 of each Contract provided for payment by BMPAD of 100 percent of the purchase price for each shipment 120 days after unloading of the cargo. This extended payment term was in consideration of and conditioned upon the establishment by BMPAD of a confirmed standby letter of credit. In this regard, Article 12 of each Contract provided:

The buyer [BMPAD], at his expense, will provide the seller [PRH] with an international bank irrevocable standby letter of credit (ESP 98) issued by the Bank of the Republic of Haiti and confirmed by an international bank. The confirming bank must have a first quality credit rating acceptable to the seller.

45. BMPAD failed to provide the standby letter of credit required under Article 12.

46. On May 19, 2020, the parties entered into an Amendment No. 1 to each of the Contracts See May 19, 2020, Amendment No. 1 to the Three Contracts. In Amendment No. 1, BMPAD acknowledged that its failure to provide the standby letter of credit constituted a default under the Contracts. Amendment No. 1 provided that, with respect to the first monthly shipments (i.e. the shipments to be specified in Order 001), PRH would waive the default if BMPAD made a prepayment of \$37,625,000 within 3 days of receipt of PRH's Provisional Invoice.

47. Although Amendment No. 1 applied by its terms only to Order 001, the parties used the same mechanism for subsequent orders. PRH contends that the parties thus established a course of dealing pursuant to which (a) BMPAD issued an Order specifying the quantities for delivery for the upcoming month; (b) PRH issued for prompt payment a Provisional Invoice in respect of that Order based on the estimated price multiplied by the quantities requested; (c) PRH arranged for the shipment of the Product ordered by BMPAD; (d) after discharge of the Product in Haiti, PRH issued a final invoice in respect of the Order based on Contract price multiplied by the exact quantities discharged plus demurrage and other charges in connection with that Order.

### **Order 001**

48. On or about May 19, 2020, BMPAD provided PRH with Order 001 specifying the quantities required for June 2020. (Leconte Aff. ¶ 10). On May 19, 2020, PRH issued its Order 001 Provisional Invoice for the sum of \$37,625,000. **Exh. E** (Leconte Aff. ¶ 11). On May 22, 2020 BMPAD paid on account to PRH the sum of \$37,625,000. **Exh. F** (Leconte Aff. ¶ 12). . On August 5, 2020, PRH issued Order 001 Final Invoice for the sum of \$29,715,745.21 (**Exh. J**) based on the Contract price of the quantities of Diesel, Gasoline and Jet Fuel delivered under that Order plus \$187,466.15 in demurrage owed by BMPAD to PRH in respect of the carrying vessels. Subtracting the amount due from the amount of the prepayment received, Order 001 Final Invoice reflected a credit to the account of BMPAD with respect to Order No. 1 as of August 5, 2020 of \$7,721,768.64. On March 3, 2021, PRH issued a further invoice to BMPAD in respect of Order 1 for deviation costs on the MT Citron (\$35,226.48) and on the MT Alpine Light (\$39,498.12) for a total of \$74,724.60.

### **Order 002**

49. On or about June 22, 2020, BMPAD provided PRH with Order 002 specifying quantities for delivery in July 2020. (Leconte Aff. ¶ 13). On June 22, 2020, PRH issued its Order 002 Provisional Invoice for the sum of \$48 million. **Exh. G** (Leconte Aff. ¶ 14). On June 24, 2020, GOH made a payment of \$48 million. **Exh. H** (Leconte Aff. ¶ 15). On August 17, 2020 PRH issued Order 002 Final Invoice in the sum of \$40,790,686.16 (Ex N), based on the Contract price of the quantities of Diesel, Gasoline and Jet Fuel delivered under that Order in July 2021, plus \$195,829.82 in demurrage owed by BMPAD to PRH in respect of the carrying vessels. Subtracting the amount due from the amount of the prepayment received. Order 002 Final Invoice reflected a credit to the account of BMPAD with respect to Order No. 2, as of August 17, 2020, of \$7,013,464.02.

### **Order 003**

50. On or about July 31, 2020 BMPAD provided PRH with Order 003. On July 31, 2020, PRH issued Order 003 Provisional Invoice for the sum of \$50,391,937.20. On August 7, 2020 BMPAD made payments of \$21 million (Exh. L) and \$15 million (Exh. M) for a total of \$36 million. On September 23, 2020, PRH issued Order 003 Final Invoice for the sum of \$45,669,623.05 based on the Contract price of the quantities of Diesel, Gasoline and Jet Fuel delivered under that Order in August 2021 plus demurrage of \$270,544.40 owed by BMPAD to PRH under Article 16.7 of the Contracts in respect of the carrying vessels (**Exh. R**). Subtracting the amount of prepayment

received from the amount due Order 003 Final Invoice reflected a debit to the account of BMPAD with respect to Order No. 3 as of September 23, 2020 of -\$9,944,669.95.

#### **Order 004**

51. On or about August 28, 2020, BMPAD provided PRH with Order 004. On August 28, 2020, PRH issued Order 004 Provisional Invoice for the sum of \$46,734,889.74. **Exh. P** On September 11, 2020, BMPAD made a payment of \$25 million. **Exh. Q** On 2 October BMPAD made a further payment of \$24,999,980 of which \$21,734,889.74 was applied to Order 004 with the remaining \$3,265,070.26 to be applied to Order 005. On or about October 1, 2020, PRH issued Order 004 Final Invoice for the sum of \$44,071,612.74 (**Exh. T**) based on the Contract price of the quantities of Diesel, Gasoline and Jet Fuel delivered under Order 004 at the end of August and in September 2021, plus demurrage (identified as partial) owed by BMPAD to PRH on the carrying vessels of \$136,243.35 plus a deviation cost (also identified as partial) of \$183,473.80. Subtracting the amount of prepayment applied to Order 004 from the amount due, Order 004 Final Invoice reflected a credit to the account of BMPAD with respect to Order No. 4 as of October 1, 2020 of \$2,343,559.85. On November 6, 2021, PRH issued a revised Final Invoice for Order 004 showing a revised demurrage charge of \$491,145.01. All other values were unchanged.

#### **Order 005**

52. On September 29, 2020, PRH received BMPAD's Order 005 specifying the product quantities for delivery in October. On October 1, 2020, PRH issued its provisional invoice for Order 005 in the amount of \$48,721,905.54. On October 5, 2020, BMPAD submitted a revised Order 005 (**Exh. BB**) modifying the delivery windows with the following quantity breakdown and timeline:

- 49,000 barrels of jet A1 / 12-14 Oct
- 155,500 barrels of gasoline / 15-17 Oct
- 250,000 barrels of diesel / 19-21 Oct
- 155,500 barrels of gasoline / 30 Oct-1 Nov 2020
- 250,000 barrels of diesel / 2-4 Nov 2020

53. On October 5, 2020, PRH provided BMPAD with a revised provisional invoice for Order 005, applying \$3,265,070.26 of the payment received from BMPAD on October 2, 2020 to reduce the amount of the Provisional Invoice to \$45,456,835.28 and extending the deadline for payment of that amount until October 7, 2020. **Exh. CC**. In the ensuing days, PRH sent to BMPAD correspondence regarding the vessels that would carry the Product to be delivered pursuant to Order 005. On October 6, PRH sent a reminder that payment of prior invoices was due. On October 7, 2020, PRH provided BMPAD with a revised delivery schedule in accordance with BMPAD's revised Order 005, noting that it had incurred certain costs in order to accommodate BMPAD's changes.

54. On October 12, 2020, PRH sent shipping documents for the MT Aquila, which had completed loading on 9 October 2020 of 164,494.37 barrels of Gasoline and the MT Endeavor II which had completed loading on September 29 -30 of 49,135.54 barrels of Jet Fuel and 95,002.37 barrels of Diesel. Both vessels were due to arrive in Haiti on October 14, 2020. On October 12, 2020, PRH

requested and received from BMPAD approval for the MT Minerva Julie which was ready to commence loading a cargo of 155,000 barrels of Gasoline. On October 12, 2020, the MT SM Osprey completed loading a cargo of 189,767 barrels of Diesel.

55. The MT Endeavor II arrived in Haiti and tendered Notice of Readiness on October 13, 2020 at 19:30. The MT Aquila L arrived and tendered Notice of Readiness on October 14, 2020 at 00:30. On October 14, 2020 at approximately 13:42, the MV Endeavor II commenced discharge of its cargo.

#### **BMPAD's failure to pay the Provisional Invoice for Order 005**

56. As of October 15, 2020, prepayment from BMPAD for the provisional invoice for Order 005 had still not been received. By email on October 15, 2020, PRH urgently requested immediate payment plus interest and noted that demurrage of \$20,000 per day was being incurred on the MT Aquila L which was waiting offshore for payment prior to commencing discharge

57. On October 16, 2020, PRH and the BMPAD agreed that the second shipment of diesel fuel for Order 005 would be increased by 40,000 barrels provided that delivery was made on or about October 25, 2020. It was also agreed that the last shipment of diesel fuel under the Contract would be on November 10, 2020. PRH again expressed its concern over the BMPAD's long delay in making payment. **Exh. MM** (Leconte Aff. ¶ 57).

58. On October 21, 2020, PRH again wrote to BMPAD requesting immediate payment of the provisional invoice for Order 005 and confirmed future shipment arrival dates of October 25, October 31 and November 10. **Exh. NN** (Leconte Aff. ¶ 58).

#### **Haitian court issues order granting conservatory lien over and requiring discharge of the MT Aquila L cargo**

59. As of October 22, 2020, BMPAD had not paid the provisional invoice for Order 005. Nevertheless, based on assurances from officials of the government that payment would be immediately authorized, PRH ordered the MT Aquila L into port. Although no payment had been received by nightfall, the Aquila L berthed and began discharging its cargo of 164,178.43 barrels of Gasoline. **Exh. OO** (Leconte Aff. ¶ 59). On October 23, 2020, however, PRH learned that BMPAD was now refusing to pay PRH the amount due, and PRH therefore instructed the MT Aquila L to stop discharge at 06:16 that morning, by which time 49,991.95 barrels had been discharged. (Leconte Aff. ¶ 61).

60. On or about October 25, 2020, PRH learned that BMPAD had obtained an *ex parte* court order granting to BMPAD a "conservatory lien" and a right to discharge the cargo of the MT Aquila L. Pursuant to court order, the MT Aquila L resumed discharging at 21:18 on October 28, 2020 and all remaining product was discharged (Leconte Aff. ¶ 62).

#### **Diversion of the MT SM Osprey and Cancellation of the MT Minerva Julie**

61. On October 25, PRH advised BMPAD that the MT SM Osprey, the third shipment under Order 005, with 189,767 barrels of diesel fuel on board was scheduled to arrive in Haiti the next

evening but would not enter Port-au-Prince until the situation with MT Aquila L was resolved. In a letter to BMPAD on November 9, 2020, PRH advised BMPAD as follows:

As you know, the MT SM Osprey is carrying approximately 189,767 barrels of diesel that BMPAD ordered on September 29, 2020 as part of Order 5. That ship, which is the third one dispatched under Order 5, has been waiting in international waters for 13 days for BMPAD to make the required prepayment. To avoid a fuel shortages, we have made all preparations to direct the ship to discharge its cargo in Haiti in accordance with our contract, but only upon receipt of the required prepayment. As of today, BMPAD has failed to make the prepayment and has not responded to our letters asking it to do so.

Consequently, we are no longer able to keep this ship idle. If we do not receive the required payment by close of business on Tuesday, November 10, we must instruct the ship to go back. We will then sell the cargo to a third party. All of our costs and expenses will be for BMPAD's account.

62. No further payment was received from BMPAD and the MT SM Osprey cargo was sent elsewhere.

63. The MT Minerva Julie was due to load 155,000 barrels of Gasoline, the fourth shipment under Order 5. According to PRH, because of BMPAD's failure to make the required prepayment, it was necessary to cancel the shipment but only after the vessel had been waiting for some considerable time to load its cargo.

#### **Revised Final Invoice for Order 005 shipments**

64. On October 28, 2020, PRH issued a partial final invoice for Order 005 in the amount of \$26,486,860.20 based on the Contract price of the quantities of the Products loaded on board the Aquila L, Endeavour II and SM Osprey. **Exh. RR** (Leconte Aff. ¶ 65).

65. As noted above, because of BMPAD's failure to pay, the SM Osprey did not discharge its cargo in Haiti. Therefore, on December 1, 2020, PRH issued a revised Final Invoice for Order 005 for the sum of \$16,760,392.83 based on the Contract prices of the quantities of Products delivered under Order 005 aboard the MT Aquila L and the MT Endeavor II plus demurrage of \$398,500 on those vessels.

#### **Discussion**

66. The power of arbitrators to direct a party to provide pre-award security is firmly established in case law interpreting the Federal Arbitration Act. *See, e.g., Sperry International Trade, Inc. v. Government of Israel*, 689 F.2d 301, 306 (2d Cir. 1982). Many court cases and arbitration decisions have confirmed a panel's power to order the posting of security under U.S. law and New York law. *See, e.g., Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 262-63 (2d Cir. 2003); *Yasuda Fire & Marine Insurance Co. of Europe v. Continental Casualty Company*, 37 F.3d 345, 348 (7th Cir. 1994); *Island Creek Coal Sales Co. v. City of Gainesville*,

*Florida*, 729 F.2d 1046, 1049 (6th Cir. 1984); *Blue Sympathy v. Serviocean International, S.A.*, 1994 A.M.C. 2522 (S.D.N.Y. 1994); *Compania Chilena de Navegación Interoceanica S.A. v. Norton, Lilly & Co.*, 652 F. Supp. 1512 (S.D.N.Y. 1987); *Konkar Maritime Enterprises. v. Compagnie Beige d'Affrètement*, 668 F. Supp. 267 (S.D.N.Y. 1987).

67. The overall objective of requiring security is to prevent obtaining a final award in the arbitration from being a pyrrhic victory. Arbitrators do not exercise this power lightly and weigh certain criteria in considering applications for pre-award security including, among other things, the likelihood that the claim will succeed on the merits and whether there is a risk that the award will not be satisfied because of the financial situation of the award debtor or other reasons. No one factor controls and in any given case, one factor may take on significance that it might not have in another case. See generally “Pre-Award Security and Other Interim Remedies in New York Maritime Arbitration, published as chapter 8 in J.D. Kimball and D.W. Martowski, *Navigating Maritime Arbitration: The Experts Speak* (2019).

**1. Likelihood that PRH’s Claim will succeed on the Merits.**

**a. Breach by BMPAD of its obligations under the Contracts**

68. The Contracts provided for the supply by PRH to BMPAD of the monthly quantities of products specified in Annex 1 to each contract. Because of the initial default by PRH in its obligation to establish a confirmed standby letter of credit, PRH required as a condition of delivery prepayment of the estimated price of the Products ordered by BMPAD for delivery each month in accordance with PRH’s Provisional Invoice. The prepayment requirement was set out in Amendment 1 to each of the Contracts. Although Amendment No. 1 applied by its terms only to Order 001, the parties used the same mechanism for subsequent orders. PRH contends that the parties thus established a course of dealing pursuant to which a) BMPAD issued an Order specifying the quantities for delivery for the upcoming month; (b) PRH issued for prompt payment a Provisional Invoice in respect of that Order based on the estimated price multiplied by the quantities requested; (c) PRH arranged for the shipment of the Product ordered by BMPAD; (d) after discharge of the Product in Haiti, PRH issued a final invoice in respect of the Order based on Contract price multiplied by the exact quantities discharged plus demurrage and other charges in connection with that Order. In fact, the parties dealt with Orders 1-4 in this way.

69. Following receipt from BMPAD of Order 005, PRH issued on October 1, 2020, its Provisional Invoice for Order 005 in the amount of \$48,721,905.54 with payment due on October 2, 2020. On October 5, 2020, BMPAD issued a revised Provisional Invoice reducing the amount of the prepayment to \$45,456,835.28 with payment due on October 7, 2020. PRH proceeded to arrange for the purchase and shipment of the products ordered by BMPAD.

70. In breach of its obligations, BMPAD failed to pay PRH’s provisional invoice for Order 005. Despite BMPAD’s failure to pay, the first two vessels carrying products requested by BMPAD under Order 005, the MT Endeavour II, and the MT Aquila L, discharged their cargoes in Haiti (the latter vessel compelled to do so by court order).

71. In its November 9, 2020, letter, PRH advised BMPAD that it would not discharge the third vessel, the MT SN Osprey, unless payment of the provisional invoice was promptly received.

When BMPAD failed to make payment, PRH instructed the MT SN Osprey to proceed elsewhere and was compelled to cancel the shipment on the fourth vessel, the MT Minerva Julie. With no standby letter of credit to secure payment and with BMPAD refusing to pay the Provisional Invoice, PRH was not obligated to deliver these cargoes in Haiti and was justified in the actions it took.

**b. PRH's Claim for the Unpaid Invoiced Amount of \$18,796,931.71**

72. A running accounts statement kept by PRH in the ordinary course of its business (**Exh. VV**) shows that BMPAD owes PRH \$18,796,931.71 in respect of unpaid invoices for Orders 001-005. At the hearing, Mr. Leconte testified that this number had been slightly revised to \$18,796,931.56. (TR.119-20).

73. The \$18,796,931.56 claimed by PRH includes amounts invoiced by PRH for Product delivered to BMPAD and discharged in Haiti and for demurrage and other charges on the vessels carrying that Product. PRH has provided credible documentary evidence for these charges and BMPAD has provided no contrary evidence.

74. The unpaid invoiced amount also includes amounts invoiced by PRH to BMPAD on March 3, 2021, relating to the diversion of MT SM Osprey cargo and the cancellation of MT Minerva Julie cargo:

- PRH invoiced BMPAD for deviation costs of \$435,077.64 on the MT SM Osprey. PRH has provided a deviation calculation from its supplier, Trafigura, indicating that PRH incurred an overall deviation cost for the MT SM Osprey of \$419,144.84. The difference in the amounts appears to result from PRH's use of the contractual demurrage rate for its invoice to BMPAD which was slightly higher than the demurrage rate used by Trafigura.
- PRH invoiced BMPAD for demurrage on the MT Minerva Julie in the amount of \$932,319.44. PRH has provided a Laytime and Demurrage Calculation from its supplier, Trafigura, indicating that it incurred a demurrage charge for the MT Minerva Julie of \$839,087.50. The difference in amounts appears again to result from PRH's use of the contractual demurrage rate for its invoice to BMPAD which was slightly higher than the demurrage rate used by Trafigura.
- PRH also invoiced BMPAD for \$513,861.00, a cost that it claims to have incurred for cancellation of the freight of the MT Minerva Julie. In support of this charge and the other charges mentioned above, PRH provided an email sent by Marianna Papathanasiou, Trafigura's Freight Analyst to Anna Kotman, Operations Manager for a freight consultant to PRH, which states that "internal recharges" had been booked for the following items:
  - SI 93993 PI 282821 for freight and insurance (USD 410,443.00)
  - SI 93994 PI 282822 for Demurrage (USD 839,088.00)
  - 5193995 PI 282823 for Port Expenses (USD 103

75. Again, PRH has provided credible documentary evidence supporting these charges and BMPAD has provided no contrary evidence.

**c. BMPAD's contention that Product was incorrectly invoiced in barrels rather than in gallons and therefore that it paid PRH an excess of \$10,509,893.53**

76. BMPAD has not attempted to dispute any individual invoiced amount. Instead, BMPAD contends that Product was incorrectly invoiced in barrels rather than in gallons and that, as a result, BMPAD paid PRH \$10,509,893.53 in excess of the amount due.

77. In this regard, Mr. Saint-Fleur states in his affidavit that, although Amendment 1 to the Contracts was signed by the parties, it did not accurately reflect their agreement. In particular, Mr. Saint-Fleur states that, “[c]ontrary to what BMPAD and PRH discussed and agreed to in relation to the Amendment, the Amendment reflected PRH’s surreptitious and wrongful attempt to incorporate other changes to the terms of the Agreement, including, but not limited to, changing the price per gallon to price per barrel for the first shipment....”

78. Mr. Saint-Fleur further states that his efforts to get Mr. Leconte to correct this “mechanical error” were unsuccessful and that thereafter PRH continued to submit invoices for payment based on a calculation of price per barrel instead of price per gallon. According to Mr. Saint-Fleur, BMPAD determined, based on a review and reconciliation performed on or around October 10, 2020 (Saint-Fleur Aff. Ex. D) that BMPAD had paid PRH an excess of \$10,509,893.53 which, according to Mr. Saint-Fleur, “was a direct consequence of PRH’s wrongful attempt to change the payment terms in the Amendment (to price per barrel).” BMPAD has asserted a counterclaim against PRH for the alleged overcharge.

79. The Panel was perplexed by Mr. Saint-Fleur’s contention as it seemed to the Panel that as long as the contractual conversion factor (one barrel = 42 gallons) was used and the correct Platt’s reference price was applied, it should not make any difference whether the invoices stated the quantities in gallons or in barrels. On July 26, 2021, the Panel directed counsel for both parties to provide additional information to clarify this point. On July 27, 2021, after review of a spreadsheet and other material provided by counsel for PRH, the Panel followed up with additional questions. By email on July 27, counsel for PRH provided a revised spreadsheet and answers to the questions raised by the Panel. Based on the revised spreadsheet, the answers provided and testimony at the hearing, the Panel concludes that:

- First, invoicing in barrels rather than gallons would make no difference in the invoiced price since, if the correct conversion factor is used, the price will be the same regardless of which unit of measure is used.
- Second, as observed at the hearing, in addition to containing a number of errors, the reconciliation upon which Mr. Saint-Fleur relied purported to show the status of the account as of October 9, 2020, on which date, based on PRH’s running statement of account (**Exh. VV**), there was actually a balance in BMPAD’s favor of \$10,719,029.98 – larger than the balance computed on that date by BMPAD. This amount did NOT take into account the amounts which had become due after invoices for Order 005 were issued.
- The unpaid invoiced amount of \$18,796,931.56 claimed by PRH in this arbitration includes and relates to invoices issued *after* October 9, 2020, in respect of BMPAD Order 005.

80. Accordingly, the Panel concludes, for the purpose of this Partial Final Award, that the evidence submitted so far to the Panel does not support Mr. Saint-Fleur's assertion that there was an overcharge by PRH or BMPAD's counterclaim on this basis.

81. The Panel further takes note that, in connection with the alleged overcharge and at various places in its submissions and correspondence in this matter, BMPAD has asserted that PRH engaged in fraud or other improper conduct in connection with the Contracts. The Panel concludes that BMPAD has neither alleged with specificity, nor provided evidence to support, these allegations. In his testimony Mr. Leconte denied any corruption, and PRH insisted on including in the Contracts a clause by which both parties agreed to comply with the US Foreign Corrupt Practices Act. In any event, BMPAD remains free to make such case as it has in this regard during further proceedings before the Panel prior to issuance of a final award on the merits.

**d. Interest on unpaid invoiced amounts**

82. PRH claims damages for accrued interest on unpaid invoiced amounts. Article 11.4.1 of each contract provides:

11.4.1. In the event that payment is not made by a due date, the Buyer will be charged the outstanding balance from the date payment is due until the date payment is made at JP Morgan Chase's current base rate plus 5%, payable on demand.

83. J.P Morgan Chase's base rate is 3.25 percent per annum. Hence the applicable contractual interest rate for late payments is 8.25%. per annum The Panel finds that that BMPAD is likely to succeed on its claim for interest at this rate on the unpaid invoiced amount of \$18,796,931.56. For purposes of this award of security, the Panel calculates interest on that amount for a period of one year from November 1, 2020 to October 31, 2021, which results in a total of \$1,546,498.23

**e. Damages for lost profits**

84. PRH also claims damages for lost profits that it would have earned on the unfulfilled shipments

85. First PRH claims as damages the profits it would have earned if (a) BMPAD had received and paid for the product that was to have been delivered on board the MT Minerva Julie and (b) had received and paid for the product remaining to be delivered on a vessel yet to be named under Order 005. The quantities for this aspect of PRH's lost profit claim are:

| Vessel           | Product  | Quantity<br>(bbls) |
|------------------|----------|--------------------|
| MT Minerva Julie | Gasoline | 49,904             |
| MT Minerva Julie | Gasoline | 48,607             |
| TBC              | Diesel   | 44,608             |

86. Second, PRH claims as damages the profits it would have earned if BMPAD had received and paid for the Product it was required to Order in November 2020. Under Appendix 1 of each of the Contracts, BMPAD was obligated to purchase the following quantities of Products in the month of November 2020:

| <b>Product</b>      | <b>Quantity</b>                                                                                                    |
|---------------------|--------------------------------------------------------------------------------------------------------------------|
| USGC WB No.2 Diesel | 550,000 barrels (23,100,000 gallons) of Product each month, plus or minus 10% at the option of the Buyer or Seller |
| USGC WB Jet 54      | 75,000 barrels (3,150,000 gallons) of product each month, plus or minus 10% at the option of the Buyer or Seller,  |
| USGC WB MOGAS 87    | 375,000 barrels (15,750,000 gallons) of Product each month, plus or minus 10% at the option of the Buyer or Seller |

87. For the purpose of calculating lost profits, the Panel assumes that BMPAD would exercise its option to order the minimum monthly quantities required under the Contracts – i.e., the number of barrels stated *minus* 10%. The resulting quantities are:

| <b>Product</b>      | <b>Quantity<br/>(bbls)</b> |
|---------------------|----------------------------|
| USGC WB No.2 Diesel | 495,000                    |
| USGC WB Jet 54      | 67,500                     |
| USGC WB MOGAS 87    | 337,500                    |

88. PRH initially claimed \$4,053,535 for lost profits. At the July 28 hearing, the Panel questioned whether PRH’s calculation of lost profit took into account the amounts PRH would have paid to Trafigura. PRH confirmed that it did not. Mr. Leconte indicated that, like PRH’s contract with BMPAD, PRH’s contract with its supplier, Trafigura, provides that the price of the Products shall be the price published in Platt’s plus a premium and that PRH’s profit for each product is the difference between (a) the premium that PRH must pay to Trafigura for that product and (b) the premium that PBH charges to BMPAD under the Contract. If that is correct, damages for lost profit would be a simple calculation, involving multiplying the above quantities by the difference in premiums for the relevant product. By the end of the hearing, after the Panel had questioned PRH’s method of calculation of lost profit, PRH submitted a revised calculation in the amount of \$2,740,930 (TR 210).

89. Presumably, the difference in premiums and the amount of lost profit could be substantiated by reviewing the Contract with Trafigura. Accordingly, in an email on August 4, 2021, the Panel directed PRH to provide a copy of the Trafigura Contract if it wished the Panel to consider awarding security in respect of its claim for lost profits. The Panel further ruled that “the Trafigura Contract and the information contained therein is confidential information, that dissemination is limited to the attorneys in this arbitration and to their clients on a need-to-know basis, and that it may be used only for the purpose of this arbitration. Any person breaching these confidentiality provisions shall be subject to sanctions/damages.”

90. In a response on August 5, counsel for PRH stated:

.... PRH cannot unilaterally disclose the Trafigura contract for numerous reasons. First, there is a confidentiality provision in the contract. Accordingly, the contract cannot be disclosed to BMPAD without Trafigura's consent, which PRH has sought but doubt will obtain. Second, the information contained therein is proprietary to PRH and, if disclosed to BMPAD, will quickly be supplied to all of PRH's competitors in Haiti. Third, BMPAD has been unequivocal of what it believes the power of this Panel is, and PRH fears any threat of sanction for disclosure of the Trafigura contract would, regrettably, be ineffective.

At present, the quantum of PRH's lost profits (1) was sworn to by Mr. Leconte in his affirmation accompanying the Initial Statement of Claim, (2) explained by Mr. Leconte during the hearing, and (3) unrebutted by BMPAD who voluntarily defaulted. Also, considering BMPAD's purchase price for the partially unfulfilled Order No. 05 and the unfulfilled Order No. 06 was a combined total estimate of between \$50 and \$60 Million, a profit of \$2.75 million, or 4.5 - 5%, is not unreasonable. In short, notwithstanding the Trafigura contract, PRH has met its burden of establishing the likelihood of success on the merits of its claim for lost profits.

91. On the afternoon of August 5, in a further response to the Panel's direction, counsel for PRH transmitted to the Panel a copy of the Trafigura Contract. However, because of the confidentiality concerns mentioned in his message, counsel for PRH requested that the Panel not disclose the Trafigura Contract to BMPAD.

92. It is unfortunate that an issue regarding how to handle this confidential document has emerged at the last minute, as the Panel was in the final stages of preparing its draft award. PRH had ample time and opportunity to develop its claim and should have realized that proof of its lost profits on the remaining contractual quantities would require evidence of the price PRH would have had to pay for the product under the Trafigura Contract. Ideally, issues concerning how to protect the confidentiality of that contract could have been resolved well before the July 28 hearing and the eve of this Panel's award.

93. On the other hand, BMPAD, in its defense submissions, failed to address PRH's calculation of lost profits or any of the individual elements of PRH's claim, confining itself to the gallons/barrels issue (discussed above) and to a general attack on the validity of the Contracts as to which it submitted no evidence to the Panel. BMPAD also chose not to participate in the hearing or cross examine PRH's witnesses, despite the Panel repeatedly urging it to do so. In addition, as counsel for PRH observed, there is a serious question as to whether BMPAD or its counsel would comply with any confidentiality order issued by this Panel based on their repeated statements that this Panel lacks any authority.

94. The Panel has considered carefully whether it should include an amount for PRH's claim for lost profits in this Partial Final Award for security. If, as we have provisionally found, BMPAD breached the Contracts entitling PRH to cease performance, a claim for lost profits is a valid head of claim. Based on the Panel's questioning at the hearing, PRH substantially reduced its claim for lost profits to take into account the costs it would have incurred to perform the balance of the

Contracts. The Panel concludes that PRH is likely to succeed on its claim for lost profits and has decided to include in its award the amount of \$2,700,000 as security for that claim.

95. In further proceedings in this arbitration and before the issuance of a Final Award, PRH will be required to fully substantiate its claim to the satisfaction of the Panel and to make available to counsel for BMPAD all documents supporting that claim, subject to suitable and enforceable restrictions to protect their confidentiality.. BMPAD will have the opportunity to participate in the arbitration and defend the merits and quantum of PRH claims.

**f. Additional damages of \$923,113.80 relating to the Minerva Julie**

96. PRH claims to have suffered additional damages of \$923,113.80 charged by Trafigura for unloading and reselling the fuel on the Minerva Julie. However, no documents evidencing this charge have been provided. Therefore, the Panel is unable to assess the likelihood of PRH succeeding on this aspect of this claim. In further proceedings in this arbitration and before the issuance of a Final Award on the merits, PRH will have the opportunity, and be required, to substantiate its claim in this respect also.

**g. Damages for breach of minimum volume requirements of the Trafigura Contract.**

97. Finally, PRH claims that because of the breach of contract by BMPAD, it was unable take the minimum volume of fuel that it was required to purchase under the Trafigura contract and therefore will be liable to Trafigura for an amount not less than \$1 million. PRH has not provided evidence of the damages suffered or claimed by Trafigura for this alleged breach and Mr. Leconte testified that no amounts have yet been paid by PRH in this regard. Therefore, at this point, the Panel is unable to assess the likelihood of PRH succeeding on this aspect of its claim. Again, in further proceedings in this arbitration before the issuance of a Final Award on the merits, PRH will have the opportunity to further substantiate its claim.

**h. Conclusion on Likelihood of Success on the Merits**

98. The Panel is satisfied that PRH has made a sufficient showing that it is likely to prevail on the merits with respect to its claims to justify an award for security in the following amount: .

|                                                                       |                        |
|-----------------------------------------------------------------------|------------------------|
| Unpaid invoiced amount                                                | \$18,796,931.56        |
| Interest on unpaid invoiced amount (11/1/2020 to 10/31/22021 @ 8.25%) | \$1,546,498.23         |
| Lost profit                                                           | \$2,700,000.00         |
| <b>Total</b>                                                          | <b>\$23,043,429.79</b> |

99. BMPAD has not shown that it has viable grounds for disputing its liability for the above amounts or to support its counterclaim against PRH.

100. We emphasize that these determinations of the likelihood of success on the merits are for the purpose of this interim award of security only. As we have also already noted and again wish to emphasize, in further proceedings in this arbitration before the issuance of a Final Award on the merits, BMPAD will continue to have a full opportunity to contest PRH's claims, to challenge the

evidence and witnesses presented by PRH, and to present its own witnesses and evidence, should it change its present stance and choose to take advantage of that opportunity.

**2. Risk that an Award will not be satisfied**

101. In its Initial Claim Statement, submitted on March 23, 2021, PRH asserted that it would be

...extremely difficult for PRH to enforce a Final Award against the GOH in the Haitian courts controlled by the GOH. However, the problem now goes well beyond the lack of an independent judiciary; the Haitian government itself is now in danger of total collapse. Political unrest in Haiti has increased dramatically in recent months and the country's security situation has deteriorated rapidly. For-ransom kidnappings have increased exponentially over the last year, the influence of armed gangs is growing and, as described below, Haiti has endured rounds of protests and civil unrest over the legitimacy of the current government.

In the event the current government collapses it will be replaced by a transitional government with very limited powers. In the past, transitional governments have been unwilling to honor debts incurred by the prior administration

102. PRH further noted that the president of Haiti had refused to hold elections, had been clinging to power after his term had legally expired, had suspended members of legislative bodies and other elected officials and was governing by decree:

This controversy, and the civil unrest that has resulted from it, has reached the United States Congress where it was the topic of a hearing before the House Foreign Affairs Committee on March 13, 2021. At that hearing, Congressman McCaul stated that "there really is no law in Haiti right now."

103. In its initial March 29, 2021 response, BMPAD suggested that the concerns expressed by PRH about the imminent collapse of the Haitian government were greatly exaggerated and that, in any event, an award in this arbitration this "would apply to whatever government is in place in Haiti and it could be easily enforced against ROH assets anywhere in the world."

104. As subsequent events, including the, assassination of the Haitian president on July 7, 2021, have shown, PRH's concerns about the collapse of the Haitian government were not exaggerated.

105. The continuing deterioration of the financial condition of the Haitian government and BMPAD's position, in parallel proceedings on the Rule B attachment, that Haitian government assets are immune from attachment or execution, belie BMPAD's assertion that an award in this arbitration could be "easily enforced" against such assets outside of Haiti.

106. BMPAD has made it clear in its Statement of Defense that it will not voluntarily comply with an award in this case stating that if it is directed by the state courts, after exhaustion of all appeals, to participate in this case, its response would be to "pursue fraud and corruption litigation

against PRH and its principals in Haiti.” BMPAD stated that it was “in the process of seeking the extradition of PRH principals for criminal trials, which will ultimately make proceeding with this arbitration nearly impossible.” As PRH pointed out in its Reply, BMPAD “on six different occasions in its short opposition, threatens the liberty of PRH’s principals if they continue with the arbitration.”

107. The Panel also notes the concerns expressed by PRH about the independence of the Haitian judiciary from the government respondent in this case and more generally whether, with the breakdown in civil society in Haiti, an award could be enforced there.

108. In these circumstances, the Panel concludes that unless the requested relief is granted, there is a substantial risk that any award in favor of PRH in this arbitration will not be satisfied and that PRH’s success in obtaining such an award will be rendered a pyrrhic victory.

### **3. Applicability of the Foreign Sovereign Immunities Act**

109. Although it is not mentioned in BMPAD’s defense submissions, counsel for BMPAD seemed to suggest, in a July 22, 2021, letter, that the Foreign Sovereign Immunities Act, 28 U.S.C. § 1609 *et seq.*, precluded an award of pre-award security by this Panel. In a July 26 email to on this subject, the Panel stated:

Anticipating that ROH would raise a defense on this ground, PRH, in its Initial Claim Statement, observed that this contention had been rejected in *Arbitration Between Commodities & Minerals Enterprise Ltd., Claimant v. Cvg Ferrominera Orinoco, C.A.*, SMA No. 4296 (2017)(Siciliano, Wentz, Kimball) which held, *inter alia*, that the FSIA did not apply in arbitration.

If ROH does contend that the FSIA bars pre-award security in this case, we direct ROH to articulate the basis for that contention and to cite any supporting authority in a written submission to be provided to the Panel on or before Wednesday, July 28, 2021 at 9:00 a.m., Eastern time.

110. Counsel for BMPAD did not provide a written submission on this point. The Panel has nevertheless considered the question.

111. In *Arbitration between Commodities & Minerals Enterprises Ltd. and CVG Ferrominera (M/V General Piar)*, SMA Arbitration No. 4296 (2017) (Siciliano, Wentz & Kimball, Chairman) (“CME”) the Panel issued a partial final interim award of security for \$62,730,729.98 against FMO, an organ of the Venezuelan state. The Panel held that the FSIA, 28 U.S.C. § 1609, did not apply in arbitration and did not bar an arbitration panel from ordering an agency of a foreign sovereign to post pre-award security.

112. The Panel in CME referred to *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 260 (2d Cir. 2003) in which the Court of Appeals for the Second Circuit affirmed two district court decisions confirming interim arbitration awards of security against a reinsurance corporation which was wholly owned by the Government of Uruguay. In the course of its decision, the court stated:

The FSIA is designed to “protect the rights of both foreign states and litigants *in United States courts*.” 28 U.S.C. § 1602 (emphasis added). It “sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states *before Federal and State courts in the United States*.” H.R.Rep. No. 94–1487, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610 (emphasis added). *The language of the statute and its legislative history do not suggest that the FSIA was intended to apply to private commercial arbitration*. We need not decide this issue, however, because Banco expressly waived any immunity it may have enjoyed to an award of pre-hearing security.

344 F.3d at 260 (emphasis added).

113. As the Panel in *CME* observed, the holding in *Banco de Seguros*:

...does not preclude an arbitration panel from ordering a foreign sovereign to provide pre-judgment security. Moreover, to the extent the FSIA may be applicable in an arbitration, we find that FMO's acceptance of the arbitration agreement in the TSMC constitutes a waiver of immunity from pre-judgment attachment under the FSIA.

See also *Arbitration Between Asil Gida Ve Kimya Sanayii Ve Ticaret (M/V Mustafa Nevzat)*, SMA Arbitration No 3784 (2003) (Bulow, Nichols, Sheinbaum, Chairman) (“The Panel unanimously concludes that the FSIA does not bar or prohibit the Panel in this arbitration proceeding from requiring Charterer to post pre-judgment security for the claims asserted by Owner.”)

114. The Panel concludes that the FSIA does not apply in arbitration and therefore does not preclude an award directing BMPAD to provide pre-award security in this case. We also conclude that, even if the FSIA applied, by entering into the arbitration agreements in the Contracts, BMPAD waived any immunity it may have had under the FSIA from pre-award attachment.

#### 4. Significance and effect of pending Rule B attachment proceedings on PRH’s application

115. On June 4, 2021, PRH commenced an action seeking to attach under Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture of property of BMPAD held by Citibank. That Court granted PRH’s request and entered an Order directing the clerk to issue the writ of attachment. On June 23, 2021, the court entered a supplemental order directing attachment of funds from an account entitled “Banque de la Republique d’Haiti” from which BMPAD’s payments were allegedly made. Between June 24-25, Citibank confirmed it attached the aggregate sum of \$29,290,086.91.<sup>8</sup>

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<sup>8</sup> PRH has also obtained a Rule B writ of attachment in the United States District Court for the Southern District of Texas. As of the July 28 hearing in this arbitration, it was unclear what funds if any were attached.

116. BMPAD has moved to vacate the Rule B attachment on various grounds. That motion is now pending and both parties have provided us with copies of their submissions.

117. As noted above, in correspondence submitted to the Panel in this arbitration, BMPAD argued that the existence of the Rule B attachment renders moot PRH's request for pre-award security in this arbitration. The Panel rejected that contention, observing that if BMPAD is successful in its effort to vacate the Rule B order, PRH will have no security for its claim.

118. During the July 28 hearing, the Panel asked whether an award of interim security by this Panel will result in PRH being doubly secured. Counsel for PRH represented on the record that this would not occur. Counsel stated that the award it seeks would require BMPAD to deposit the amount of security required into an escrow account in a bank in New York. Counsel represented that it would seek to enforce that award in same court where the Rule B proceedings are pending and request an order requiring the transfer of the funds attached under the Rule B into the escrow account. The Panel is satisfied with this representation. If any issue arises concerning double security, the parties may seek appropriate relief from the Panel which will be vigilant to take any necessary measures to avoid such double security.

**AWARD**

119. PRH's motion for partial pre-award security is hereby granted in part and denied in part. BMPAD is ordered to make a deposit in the amount of **\$23,043,429.79** in an escrow account to be established by the parties and held by a first-class New York bank which shall act as escrow agent and must irrevocably agree to abide by the orders of the Panel or the United States District Court for the Southern District of New York concerning payment of the funds so held. The Panel shall designate an independent escrow agent in the absence of agreement between PRH and BMPAD. The escrow deposit shall serve solely as pre-award security for PRH's claims in this arbitration, subject to the further orders of the Panel or the United States District Court for the Southern District of New York or the courts of the state of New York.

120. The parties shall report to the Panel within thirty (30) days of the date of this award concerning the appointment of an independent escrow agent to hold the security hereby awarded and the deposit of the funds. All fees and expenses of the escrow agent shall be shared 50/50 by PRH and BMPAD pending the issuance of the Panel's final award, which may apportion those fees differently.

121. This Partial Final Award may be confirmed by the United States District Court for the Southern District of New York or any other court which may have jurisdiction.

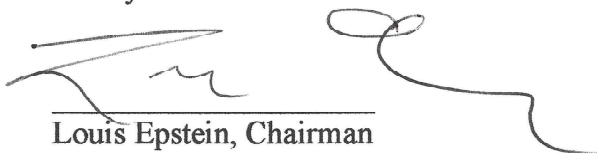
122. The Panel reserves decision on allocation of attorney's fees and costs as well as its fees in connection with the present application and proceedings to date.



Robert G. Shaw



LeRoy Lambert



Louis Epstein, Chairman

New York, New York  
August 6, 2021