IN THE MATTER OF AN ARBITRATION PURSUANT TO THE BERMUDA INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993

BETWEEN:

EMPLOYERS' INNOVATIVE NETWORK, INC
JEFF MULLINS

Claimants

v

BRIDGEPORT BENEFITS, INC
VOLUNTARY BENEFIT SPECIALISTS, LLC
CASEY BLASMAN
WAYNE BLASMAN
STEPHEN SALINAS

First Respondents

-and-

CAPITAL SECURITY, LTD
UNIVERSAL RISK INTERMEDIARIES, INC
JEANA NORDSTROM

Second Respondents

COSTS AWARD

INTRODUCTION

1. In the FINAL AWARD dated 20 January 2022, I made the following findings:

> *"179. I AWARD AND DIRECT THAT, in full and final settlement of all claims in this arbitration, the Claimants' claims against the First Respondents and Second Respondents set out in the Statement of Claim are dismissed. More particularly, the Claimants' claims in paragraphs 60 through 67 of the Statement of Claim are dismissed, seeking relief for:*
>
> *Breach of the West Virginia Unauthorised Insurers Act;*
> *Negligence;*
> *Breach of Contract;*
> *Fraud;*

Civil Conspiracy;
The Fresh Allegations raised at the hearing; and
Damages.

O. RESERVED MATTERS

180. I reserve to my further final award determination, if not agreed, of the amount of recoverable costs for which purpose I shall give my further directions upon the application of the parties."

2. The parties have yet to agree who should pay costs and in what amounts. Therefore, I now consider whether costs should be awarded consequent upon my findings. In addition, I must also consider whether costs should be awarded in respect of:

INTERIM ORDER NO.1 dated 9 July 2020, in which I found:

"3. The central argument in these applications concerns whether the tribunal should exercise its interim powers to consider and decide that certain claims in the statement of claim are so deficient and defective they should be dismissed now before the final hearing. I reject the First and Second Respondents' dismissal applications for three reasons:

I. Without hearing full argument from the parties, I cannot determine the applicable substantive law of the dispute or discrete parts of the dispute. Further, the applicable substantive law of the dispute could have a material impact upon my assessment of the viability of the claims which the First and Second Respondents challenge in the Statement of Claim.

II. When I hand down this interim award, I will also provide proposed directions for the determination of applicable substantive law issues pursuant to paragraph 6 of Procedural Order No. 1. I do not think it is a proper exercise of my case management powers to schedule competing timetables for resolution of dismissal applications and the applicable substantive law issue. Uncoordinated resolution of both matters has the potential for producing inconsistent decisions.

III. The overriding objective of ensuring the arbitration is conducted efficiently and cost-effectively would more likely be impaired and derailed if the dismissal applications were heard now.

Reserved matters

27. I will hear the parties' submissions on costs at a mutually convenient time."

PROCEDURAL ORDER No. 2 dated 2 September 2020, in which I found:

> *"Having read the First Respondents' document request to the Claimants and the Claimants' response to the First Respondents' document request, the Tribunal orders the following:*
>
> 1. *Request No.1 is refused. The First Respondents' are already in possession of the requested documents.*
>
> 2. *Request No.2 is refused. The documents requested do not exist.*
>
> 3. *Request No.3 is refused. The First Respondents are already in possession of the requested documents.*
>
> 4. *Request No.4 is refused. The First Respondents are already in possession of the requested documents.*
>
> 5. *Request No.5 is refused. The documents requested do not exist.*
>
> 6. *Request No.6 is refused. Pursuant to Article 9.2(b) of the IBA Rules on the Taking of Evidence in International Arbitration 2010, the requested documents are privileged from production.*
>
> 7. *Request No.7 is refused. The documents requested do not exist.*
>
> 8. *Request No.8 is refused. The First Respondents are already in possession of the requested documents.*
>
> 9. *Request No.9 is refused. The documents requested do not exist.*
>
> 10. *Request No.10 is refused. The documents requested have been provided to the First Respondents or are already in possession of the First Respondents.*
>
> 11. *Request No.11 is refused. The documents requested have been provided to the First Respondents or are already in possession of the First Respondents."*

PROCEDURAL ORDER NO.3, dated 6 October 2020, which in paragraph 26 I found:

> *"The Claimants waived privilege in the witness statement of Kevin L Carr. The Claimants are therefore required to deliver up the documents referred to in paragraph 1 of the Second Respondent's written submissions, subject to any written submissions made by the parties on the extent of the disclosure. My order for production of the documents will not come into effect if within seven days the Claimants withdraw the statement of Kevin L Carr or withdraw the parts of Mr Carr's statement I have found waived privilege."*

INTERIM ORDER NO.2 dated 2 February 2021, in which, in paragraph 2, the Claimants contended that:

"the variously described applicable law, proper law or substantive law hereinafter ("applicable law") which I should apply to determine their claims against the 1st and 2nd Respondents is the law of West Virginia"

In paragraphs 75 and 76 of the order, I found the following:

"75. The applicable law of the claim alleging violation of the West Virginia Unauthorised Insurers Act is the law of West Virginia. The applicable law of both the contract and tort claims is the law of Bermuda.

76. I shall hear the Parties on the issue of costs and consequential directions at a mutually convenient time."

PROCEDURAL ORDER NO. 6, dated 12 March 2021, in which I found:

"3. The First and Second Respondent's witnesses of fact are granted permission to seek legal advice concerning the issues raised by the Claimant concerning potential breaches of the West Virginia Codes 33-44-4 and 33-44-9."

SUBMISSIONS OF THE PARTIES

3. The Claimants contend that the costs now claimed by the First and Second Respondents unjustifiably increased because, during proceedings before the United States District Court for the Southern District of West Virginia, the parties exchanged well over 100,000 pages of discovery. This is discovery that the Claimants requested be avoided but that the Respondents demanded.

4. The Claimants then set out their submission that no award for costs should be made; alternatively, list eight reasons why any award of costs should be reduced:

"Claimants submit that this Tribunal would not have permitted such extensive discovery in the Arbitration proceeding, thus limiting the amount of documents that had to be reviewed. Claimants further submit that Respondents obtained discovery that they would not have been able to obtain in the Arbitration Proceeding, and are now seeking reimbursement for their time reviewing said documents. To the extent Respondents seek costs for reviewing substantial amounts of documents in their written submissions, those costs should not be awarded.

Claimants also submit that the Tribunal has discretion to award no costs or fees, and such a finding would be fair in this instance. Claimants brought legitimate claims that survived motions to dismiss by both First and Second Respondents. In the event this

tribunal does decide to award costs and fees to Respondents, those costs should be reduced as follows:

1. *Any time associated with filing or responding to cross-claims between the respondents should not be attributed to Claimants;*
2. *Any time and Arbitrator fees associated with Second Respondent's motion to dismiss, which was denied (Claimants were successful);4*
3. *Any time and Arbitrator fees associated with First Respondents' Motion to Dismiss, which was denied (Claimants were successful);*
4. *The Arbitrator's fees in drafting the Interim Order denying the motions to dismiss;*
5. *Any time associated with First Respondents' motion to compel responses to its discovery requests and the Arbitrators' fees associated with Procedural Order No. 2 denying said requests (Claimants successful);*
6. *All costs associated with the taking of Mike Tate's deposition, which was at Respondents request and taken after he settled with Claimants;*
7. *All costs associated with the parties written submissions and oral arguments on the choice of law provisions and appointment of experts; and*
8. *All of the Arbitrator's fees associated with reviewing the written submissions on the choice of law and expert issues, conducting oral hearings on said issues, and issuing the written order on said issues.*

In its order regarding the choice of law issue, this Tribunal invited timely requests for fees associated with the order and none were submitted. Therefore, Respondents waived any entitlement to fees associated with that issue."

5. In their submissions responding to the First and Second Respondents' costs submissions, the Claimants rejected the contention that in the arbitration proceedings, the First and Second Respondents relied heavily on their review of over 100,000 pages of discovery in the United States Federal Court litigation. The Claimants roundly challenged the First and Second Respondent's costs submissions asserting their submissions required more information to support the claims for costs.

6. The First Respondents relied upon Article 40(1)(e) of the UNCITRAL Rules in support of their claim for costs comprising attorney's fees and other costs of $345,305.72. The First Respondents noted the following:

"The arbitration was prosecuted for a period of two years.

The Claimants were seeking $53,764,720.40.

The total attorney's fees claimed is $198,513.

Arbitrators fees. $125,177

Court reporter fees, copying expenses, specialized legal advice and travel expenses $21,615.72."

7. In the First Respondents' Reply to the Claimants Submission Regarding Fees and Costs, they submit that the 100,000 documents produced during the prior litigation had to be reviewed to prepare their defences in the arbitration. The First Respondents reply to the Claimants' eight grounds for reducing costs as follows:

"The First Respondents' costs should not be reduced due to filing or defending cross-claims in the arbitration because no such claims were commenced or defended.

The First Respondents did not participate in the Second Respondents' motion to dismiss.

The ruling in favour of the Claimants on the First Respondents' motion to dismiss should not be viewed as a victory for the Claimants.

The Claimants should pay the arbitrator's fees on the First Respondents' motion to dismiss because they ultimately failed to win their substantive claims.

The Claimants did not win and successfully resist the First Respondents' request for the production of documents. Instead, the ruling reflected that the documents either did not exist or were already in possession of the First Respondents.

Mike Tate's deposition costs are recoverable despite Mr Tate settling with the Claimants because the deposition was designed to accommodate Mr Tate not attending the arbitration due to his settlement with the Claimants.

The Claimants provide no basis for their challenge to the costs associated with written submissions relating to the choice of law and selection of experts.

The Claimants challenged the arbitrator fees associated with the choice of law and selection of experts; however, these issues were essential to the tribunal's ultimate findings."

8. The Second Respondents submitted that the jurisdiction and power to award costs is as follows:

"3. This arbitration is seated in Bermuda. The procedural law of this arbitration is set out in the Bermuda International Conciliation and Arbitration Act 1993 (1993 Act). Section 32 of the 1993 Act confers a statutory power on you to award the costs of the arbitration at your discretion.

4. Further, under the procedural rules expressly chosen by the parties to govern the conduct of the arbitration, the parties delegated to you a broad discretion as to the allocation of costs. In particular:

4.1 Article 40(1) of the UNCITRAL Rules (Rules) states that the tribunal shall fix the costs of the arbitration in the final award and, if it deems appropriate, in another decision.

4.2 Article 40(2) sets out what the term "costs" means in an UNCITRAL arbitration, and includes the cost of the arbitrator(s) and the legal and other costs incurred by the parties in relation to the arbitration to the extent that the tribunal determines that the amount of such costs is reasonable.

4.3 Article 42(1) states that:

"The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case." [emphasis added]

4.4 Article 42(2) states that the tribunal may determine "any amount that a party may have to pay to another party as a result of the decision on the allocation of costs."

9. The Second Respondents rely upon paragraphs 9.96 to 9.98 of Redfern & Hunter: Law and Practice of International Commercial Arbitration (6th Edition) in support of the approach they urge I adopt when exercising my discretion to determine both the allocation and reasonableness of costs incurred in the arbitration.

"...At the time of writing, however, most international arbitral tribunals that decide to make an award of costs in favour of the winning party tend to adopt a broad approach in assessing the amount to be paid. In doing so, they tend to adopt the approach of an arbitrator in a case in the Iran–United States Claims Tribunal, who, in a separate opinion, proposed criteria along the following lines.

- *Were costs claimed in the arbitration?*
- *Was it necessary to employ lawyers in the case in question?*
- *Is the amount of the costs reasonable?*
- *Are the circumstances of the particular case such as to make it reasonable to apportion such costs?"*

After asserting that the first two tests are normally satisfied in complex arbitrations, he commented on the reasonableness criterion as follows:

> *"The classic test of reasonableness is not, however, an invitation to mere subjectivity. Objective tests of reasonableness of lawyers' fees are well known. Such tests typically assign weight primarily to the time spent and complexity of the case. In modern practice, the amount of time required to be spent is often a gauge of the extent of the complexities involved. Where the Tribunal is presented with copies of bills for services, or other appropriate evidence, indicating the time spent, the hourly billing rate, and a general description of the professional services rendered, its task need be neither onerous nor mysterious. The range of typical hourly billing rates is generally known and, as evidence before the Tribunal in various cases including this one indicates, it does not greatly differ between the US and countries of Western Europe, where both claimants and respondents before the Tribunal typically hire their outside counsel. Just how much time any lawyer reasonably needs to accomplish a task can be measured by the number of issues involved in a case and the amount of evidence requiring analysis and presentation.*
>
> *While legal fees are not to be calculated on the basis of the pounds of paper involved, the Tribunal by the end of a case is able to have a fair idea, on the basis of the submissions made by both sides, of the approximate extent of the effort that was reasonably required. Nor should the Tribunal neglect to consider the reality that legal bills are usually first submitted to businessmen. The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves."*
>
> *"A number of subsequent Iran–United States Claims Tribunal awards have referred to, and adopted, this test as a guide. Furthermore, in the more recent, much publicized, very substantial Yukos cases, a highly distinguished tribunal, also applying the UNCITRAL Rules, adopted a similar approach. These cases may provide a practical, common-sense, guide to the practice that international tribunals may adopt when they are required to exercise their discretion in relation to an award in respect of costs."*

10. The Second Respondents contend their claim is for costs in the arbitration and consequent upon the complexity of the case, it was necessary for their clients to employ lawyers. Further, their claim for costs is reasonable based on the circumstances of the case. The breakdown of the Second Respondents' claim is as follows:

> The legal fees invoiced and paid by the Second Respondents totalled US$510,992.
>
> Further costs incurred by the Second Respondents were as follows:
>
> Share of the arbitrator's professional fees: $125,177
>
> Expert fees of Mr McComb: $18,500

Share of court reporter's fees: $7,566.33

The total costs claimed by the Second Respondents is US$662,235.33.

11. In the Second Respondents' Reply Submissions on costs, the Second Respondents address the eight points the Claimants raise to reduce any award of costs.

> *"8.1 Paragraph 1 is not understood. The Second Respondents did not make or respond to any cross claims by the other Respondents. The Claimants' submission should be disregarded.*
>
> *8.2 As to paragraph 2, it is submitted that the underlying merits of the Second Respondents' application for summary dismissal of the pleaded claims against Mrs. Nordstrom have ultimately been vindicated by your conclusions in the Final Award. It is submitted that the application was therefore advanced on genuine, credible and entirely reasonable grounds, and it was reasonable to incur costs pursuing the application in all the circumstances.*
>
> *8.3 As to paragraph 3, and for the same reasons, it was reasonable for the Second Respondents to invite you to consider and rule on an application to summarily dismiss the claims against Mrs. Nordstrom.*
>
> *8.4 As to paragraph 4, the same arguments apply as for paragraphs 2 and 3.*
>
> *8.5 As to paragraph 5, it is submitted that all requests contained in the Second Respondents' Request to Produce pursuant to the IBA Rules were proportionate and focused towards the issues in dispute. The fact that you ultimately decided not to grant some of those requests does not mean by extension that the Second Respondents acted unreasonably in making them.*
>
> *8.6 As to paragraph 6, the Claimants' submission is not understood. The Claimants endorsed the decision to depose Mr. Tate, the Claimants' counsel participated fully in the deposition (Mr. Preservati questioned Mr. Tate for several hours) and the Claimants relied on Mr. Tate's evidence in their submissions. The Claimants' submission on this point should therefore be disregarded.*
>
> *8.7 As to paragraph 7 and 8, again the Claimants' submissions are not understood. The parties were in dispute as to (i) the law applicable to the Claimants' claims; and (ii) the need for expert evidence to decide those claims. Both of these questions were absolutely fundamental to the disposal of the claims. As it turned out, the expert evidence was pivotal to the outcome. Detailed legal and factual submissions, together with an interlocutory hearing, were therefore required. The Claimants lost on both issues. It is therefore difficult to conceive why the legal and arbitrator costs incurred in dealing with these issues should be discounted (and indeed no reasons have been articulated by the Claimants in any event).*

8.8 In the penultimate paragraph of their submissions the Claimants state that in your "Order regarding the choice of law issue, [you] invited timely requests for fees associated with the order and none were submitted." The Claimants therefore contend that the Second Respondents have waived their right to claim such costs. The order containing your ruling on applicable law is Interim Order No. 2 dated 2 February 2021. This states at paragraph 76 that you would "hear the Parties on the issue of costs and consequential directions at a mutually convenient time." So it is clear therefore that the factual premise on which the Claimants' waiver argument is based is incorrect. The submission must therefore be rejected."

12. Following email exchanges on 14 March 2022 between the legal representatives for the Claimants and the Second Respondents, it became apparent that the Claimants sought and the First and Second Respondents were prepared to submit details of the costs they claimed. I, therefore, produced Costs Procedural Order NO.2 as follows:

"Any party seeking to claim their costs in the arbitration shall submit to the parties their actual costs incurred by 31 March 2022.

The parties shall reply to the actual costs incurred in the arbitration by 21 April 2022.

Any party receiving a reply to their actual costs incurred in the arbitration shall, if so advised, reply to the challenge to their costs by 1 May 22.

The Tribunal will thereafter produce and circulate a written Award to the Parties."

13. The First Respondents produced a written submission setting out proof of actual costs with a detailed billing schedule. I have carefully considered the First Respondents' submissions regarding the total amount of its attorneys' fees, the legal work performed by the First Respondents' attorneys, the arbitrator's fees, and the case costs, which I attach as Schedule A to this award.

14. In response to Costs Procedural Order NO.2, the Second Respondents produced a detailed schedule of the date, fee earner/ lawyer, hours worked, the amount claimed, and hourly rate with a narrative for each billing entry. I have considered these billing entries against the work conducted before me in the arbitration. In light of the Claimants' concerns regarding the amounts billed, I also attach the Second Respondents' detailed billing as Schedule B to this award.

15. On 4 April 2022, the Claimants filed a Notice of Challenge to the Arbitrator. The Bermuda Committee of the Chartered Institute of Arbitrators considered the challenge to the

arbitrator. The parties to the arbitration made submissions to the Bermuda Committee of the Chartered Institute of Arbitrators. On 21 September 2022, the Claimants' challenge to the arbitrator was rejected.

16. Upon rejection of the challenge to the arbitrator, The First Respondents seek $5,310.50 (24.7 billable hours x $215 per hour) for the legal fees reasonably incurred in opposing the Claimants' challenge to the arbitrator.

17. The Second Respondents submitted that I should rely upon the same legal principles they relied upon in support of their claim for costs of the substantive hearing in support of their claim for additional costs against the Claimants for an unsuccessful challenge to the arbitrator.

18. In support of their submissions that the Claimants should pay the costs for a failed challenge to the arbitrator, the Second Respondents relied upon the following extract from Chapter 4-106 of Daele's Challenge and Disqualification of Arbitrators in International Arbitration:

> *"None of the UNCITRAL Rules, ICC Rules, LCIA Rules and SCC Rules contain provisions on the costs incurred by the challenge procedure. Under the UNCITRAL Rules and the LCIA Rules, there is an assumption that 'costs follow the event' and that the challenging party will therefore bear the costs of a rejected challenge. The author reviewed thirty challenge decisions issued by the LCIA Court under the LCIA Rules or the UNCITRAL Rules in the period between 1996 and 2010. Sixteen decisions reserved both the arbitration costs and the parties' legal fees in connection with the challenge. Eight decisions ordered the unsuccessful challenging party to bear the entirety of the arbitration costs and the legal fees of the non-challenging party. Six decisions ordered the unsuccessful challenging party to bear the arbitration costs and reserved the payment of the parties' legal fees"*

Daele goes on to say:

> *"The challenge decision usually reserves the right to allocate the costs of the challenge procedure for the final award. The Tribunal has discretionary powers to allocate these costs. Some Tribunals have applied the principle of equal sharing. This appears to be the correct approach, especially if the challenge was made in good faith and/or raised novel questions. Other Tribunals have attributed a substantial part of the costs to the challenging party as a sanction for bringing a frivolous challenge. Again, other Tribunals have applied the 'costs follow the event' principle according to which the challenging party will incur the full costs of the challenge procedure in case the challenge is unsuccessful. This should not become the standard practice, at least not in investment arbitration. It should not be forgotten that there is virtually no control at*

the appointment stage over the qualities of the arbitrators appointed; that the filing of a challenge is the only option open to a party that has doubts over an arbitrator's impartiality or independence; that it is an absolute requirement that each member of the Tribunal is and remains throughout the arbitration competent, independent and impartial; that the challenging party must decide to bring a challenge within a short period of time on the risk of losing the right to bring a challenge and that the stakes in investment arbitration cases are huge and often involve a public interest aspect. Based on these elements, a party should not be penalized by having to bear the full costs of a good faith challenge, even if it is ultimately dismissed."

19. The Second Respondents contend that based upon the above legal principles, the Claimants, should pay the Second Respondents legal costs of the challenge to the arbitrator in the sum of $20,875.

THE LAW

20. I accept the submission that the seat of the arbitration is Bermuda. Consequently, the procedural law of the arbitration is governed by the Bermuda International Conciliation and Arbitration Act 1993 (1993 Act). Section 32 of 1993 Act gives me discretion to award costs of the arbitration in the following terms:

Costs

32 (1) Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, the costs of an arbitration, including—

(a) fees and expenses of the arbitrator and the costs of expert advice and of other assistance required by the arbitral tribunal;

(b) legal fees and expenses of the parties, their representatives, witnesses and expert witnesses;

(c) administration fees and expenses of an arbitral institution; and

(d) any other expenses incurred in connection with the arbitral proceedings, shall be in the discretion of the arbitral tribunal.

(2) Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, an arbitral tribunal may in making an award—

(a) direct to whom, by whom, and in what manner, the whole or any part of the costs that it awards shall be paid; and

(b) fix the amount of costs to be so paid or any part of those costs.

21. I also accept that the parties adopted the UNCITRAL Arbitration Rules as the procedural rules governing the conduct of the arbitration.

22. In my view, the award costs of this arbitration are entirely a matter for my discretion; however, absent a good reason to deviate from it, the usual position at the conclusion of an UNCITRAL arbitration seated in Bermuda conducted under the 1993 Act is that the losing party or parties should pay the costs reasonably incurred by the winning party or parties.

23. Regarding the law concerning the First and Second Respondents' claim for additional costs incurred resisting the Claimant's unsuccessful challenge to my appointment, the legal authority to award costs to the party successfully opposing a challenge to the arbitrator is again based upon section 32 of the 1993 Act and Articles 40 and 42 of the UNCITRAL Rules.

FINDINGS

24. I have read, considered, and take note of the written submissions made by counsel for the Claimants, First and Second Respondents. Based upon the statutory, procedural, and legal authorities concerning the award of costs in Bermuda-based international arbitrations, I find no reason to depart from the normal rule that the wining party should recover their reasonable legal costs from the unsuccessful party. Consequently, I make the following awards for costs:

I. The costs of the arbitration proceedings leading up to and resulting in the Final Award are awarded to the First and Second Respondents.

II. The costs of Interim Order No.1 are awarded to the Claimants.

III. The costs of Procedural Order No.2 are awarded to the Claimants against the First Respondents.

IV. I make no order as to costs with respect to Procedural Order No.3.

V. Both parties succeeded in the arguments concerning the applicable substantive law of the various disputed issues between the parties. Therefore, I make no order as to costs concerning Interim Order No.2.

VI. The costs of Procedural Order No.6 are awarded to the First and Second Respondents; however, these costs were proportionately smaller than the other Interlocutory costs orders.

VII. The costs of the Claimants' unsuccessful challenge to my appointment are awarded to the First and Second Respondents.

SPECIFIC COSTS ISSUES RAISED BY THE PARTIES

100,000 Pages of Discovery

25. The Claimants complain that the 100,000 pages of discovery relied upon by the parties in the United States proceedings in the United States District Court for the Southern District of West Virginia are reflected in the First and Second Respondents' billing for which they now seek an award of costs.

26. The Claimants contend the First and Second Respondents' reliance upon all 100,000 documents was unnecessary in the arbitration proceedings and that 100,000 documents would not have been disclosed in the ordinary course of these arbitration proceedings. Consequently, I should exclude any review or consideration of the 100,000 documents disclosed in the United States proceedings from the First and Second Respondents' claims for costs.

27. The parties agreed to a trial bundle in this arbitration comprising 3271 pages; pages 75 to 2536 of the trial bundle contained the bulk of the documentary exhibits, albeit not exclusively. I have reviewed the billing sheets of the First and Second Respondents to discern whether excessive billing took place considering irrelevant documents in the 100,000 pages of disclosure arising out of the United States proceedings. In this arbitration, it is difficult for me to know whether all, failing which, how many documents

disclosed in the United States proceedings were directly or indirectly relevant to these proceedings and therefore justifiably relied upon in this arbitration.

28. In my view, reliance upon and charging for the review of 100,000 documents in this arbitration is disproportionate compared with the documents I had to review at the trial. Therefore, I will reduce the costs awarded to the First and Second Respondents by ten per cent (10%).

Costs associated with the Mike Tate Deposition

29. The Claimants oppose payment to the First and Second Respondents of any costs associated with taking the deposition of Mike Tate. Mr Tate was one of the Third Respondents in these proceedings. On 16 November 2020, I made the following award dismissing claims against the Second and Third Respondents:

> 1. *The matters in dispute between the Claimants and the Third Respondents in this arbitration contained in the Claimant's Article 20 Statement of Claim served on 30 April 2020, and the Third Respondents' Defence and Counterclaim dated 21 May 2020 are dismissed.*
>
> 2. *The matters in dispute between the Third Respondents and the Second Respondent Capital Security, Ltd contained in the Third Respondents Points of Defence and Counterclaim and Points of Claim against Capital Security, Ltd dated 21 May 2020, are dismissed.*
>
> 3. *As between the Claimants and the Second and Third Respondents, I make no order as to costs.*

30. The Claimants endorsed the decision to depose Mr Tate and participated in the deposition hearing. Further, the Claimants relied upon Mr Tate's deposition in their final submissions. For these reasons, I do not reduce the award of costs to the First and Second Respondents concerning billing directly or indirectly connected with Mr Tate's deposition.

Number of lawyers employed by each party

31. The Claimants and the First Respondents conducted the arbitration with two lawyers, whereas the Second Respondents conducted the arbitration with four. For this reason, I do not award the Second Respondents' costs for the lawyers Keith Robinson and Gavin Woods, who did not feature heavily in the arbitration.

Billing rates

32. The hourly billing rates for the "worked amount value" of the lawyers Mr Stevens are $650 and Mr Wade, $495 (calculated as worked amount value divided by worked hours) are substantially higher than those for Mr Entsminger and Mr Estep ($215 reduced from $350). The Claimants did not state what the hourly rates are for their lawyers. However, I accept the Second Respondents' submission that the hourly rates of their lawyers in a Bermuda-based arbitration are not out of line with Bermuda market norms and are, therefore, reasonable hourly rates in all the circumstances.

Costs associated with the arbitration

33. The Claimants do not challenge my fees for conducting the arbitration. However, the Claimants contest payment of my fees for specific applications. I have taken account of the Claimant's objections, which are reflected in my decision to award costs for the various interlocutory applications.

34. I accept as reasonable and award the First Respondents claims for the following costs:

$125,177 Share of arbitrator's professional fees
$7,566.33 Transcription services.
$1,691.10 Court reporter and transcription costs incurred taking Mike Tate's deposition.
$2,150.29 Copying fees and hearing notebook preparation.
$2,500 Specialized legal advice on criminal matters.
$7708 Travel expenses.

35. I accept as reasonable the Second Respondents' claims for the following costs:

$125,177 Share of arbitrator's professional fees.

$18,500 Expert fees of Mr McComb.

$7,566.33 Share of Court reporter's fees.

$20,875 Costs of preparing written costs submissions.

$1,590 Arbitrators fees following submissions filed on 11 March 2022.

CLAIMS FOR CHALLENGE TO THE ARBITRATOR

36. Section 32 of the 1993 Act gives me broad discretion to award costs in arbitration proceedings. Although Section 32 of the 1993 Act and the UNCITRAL Rules make no reference to the award of costs in a failed challenge to my jurisdiction, I accept the view expressed in Chapter 4-106 of Deale Challenge and Disqualification of Arbitrators in International Arbitration, the UNCITRAL Rules and I would add Section 32 of the 1993 Act, that there is an assumption that 'costs follow the event' and that the challenging party will therefore bear the costs of a rejected challenge.

37. The First and Second Respondents successfully resisted the Claimant's challenge to the arbitrator. In my view, there is no reason why costs should not follow the event. Consequently, I make the following award of costs against the Claimants in favour of the First and Second Respondents:

$5,310.50 awarded to the First Respondents.

$31,825 awarded to the Second Respondents.

THE QUANTUM OF COSTS

38. Having decided which parties are liable to pay costs in the arbitration, I must also determine the quantum of costs. The arbitration has spanned over three years and involved complex issues of both law and fact. The pleaded claims included allegations of fraud and, during the hearing, allegations of criminal conduct. I am mindful that the sum claimed in the arbitration was $53,764,720.40, and any costs awarded should be proportionate to the sums in issue *Home Office v Lownds 2002 1 WLR 245.*

39. In my view, the billing sheets and time entries submitted by the First and Second Respondents reflect the work they were required to carry out in this long and complex arbitration spanning three years. Consequently, the sums claimed for costs by the First and Second Respondents are reasonable.

THE AWARD

40. **I, THEREFORE, AWARD AND DIRECT** that the Claimants pay the First and Second Respondents the following costs:

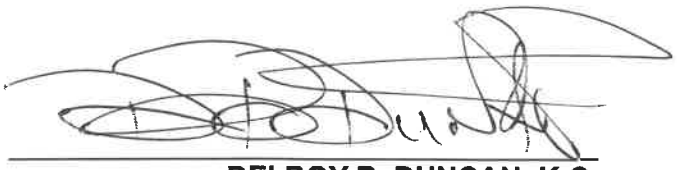
To The First Respondent

• $198,513.00 legal fees reduced by 10%, reflecting the disparity between the 100,000 documents disclosed in the United States proceedings and relied upon in the arbitration as compared with the 3271 documents comprising the arbitration trial bundle. I reduce the award by a further 2% for determinations in favour of the Claimants in the interlocutory applications.	$ 174,691.44
• Resisting challenge to the arbitrator	$ 5,310.50
• Share of arbitrator's professional fees	$ 125,177.00
• Transcription services	$ 7,566.33
• Court reporter and transcription costs incurred taking Mike Tate's deposition	$ 1,691.10
• Copying fees and hearing notebook preparation	$ 2,150.29
• Specialized legal advice on criminal matters	$ 2,500.00
• Travel expenses	$ 7,708.00
TOTAL	**$ 326,794.66**

To The Second Respondents

- $510,992.00 legal fees reduced by $6,885.00 fees for Keith Robinson and $7,861.00 fees for Gavin Woods. The net sum of $496,246.00 is reduced by 10%, reflecting

the disparity between the 100,000 documents disclosed in the United States proceedings and relied upon in the arbitration as compared with the 3271 documents comprising the arbitration trial bundle. I reduce the award by a further 2% for determinations in favour of the Claimants in the interlocutory applications	$ 436,696.48
• Resisting challenge to the arbitrator	$ 31,825.00
• Share of arbitrator's professional fees	$ 125,177.00
• Expert fees of Mr McComb	$ 18,500.00
• Share of Court reporter's fees	$ 7,566.33
• Costs of preparing written costs submissions	$ 20,875.00
• Arbitrator's fees owed by the Claimants, paid by the Second Respondent following submissions filed on 11 March 2022	$ 1,590.00
• Arbitrator's fees owed by the Claimants, paid by the Second Respondent on Invoice 80333	$ 9,633.00
TOTAL	**$ 651,862.81**



DELROY B. DUNCAN, K.C.
Arbitrator
5 May 2023