No. 21-3039

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANDES PETROLEUM ECUADOR LIMITED,

Petitioner-Appellee,

v.

OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY,

Respondent-Appellant.

On Appeal from the United States District Court for the
Southern District of New York, No. 21-3930 (AKH)

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, IN SUPPORT OF RESPONDENT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (cont'd)

Cases (cont'd)

TABLE OF AUTHORITIES (cont'd)

Cases (cont'd)

TABLE OF AUTHORITIES (cont'd)

Cases (cont'd)

TABLE OF AUTHORITIES (cont'd)

Cases (cont'd)

Statutes

Treaties

Arbitration Rules

TABLE OF AUTHORITIES (cont'd)

Arbitration Rules (cont'd)

Other Authorities

IDENTITY, INTEREST AND SOURCE OF AUTHORITY[1]

Identity: The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch.

Interest: The Chamber has a strong interest in the law governing international arbitration. "As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985). Consequently, "a substantial proportion of international commercial,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b), *amicus* certifies that no party's counsel authored this brief in whole or in part. Furthermore, no party, no party's counsel and no person – other than *amicus*, its members or its counsel – contributed money that was intended to fund the preparation or submission of this brief.

financial, and investment agreements contain arbitration clauses . . . ." Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 1149 (6th ed. 2018). Many American companies, including the Chamber's members, employ arbitration clauses in their international dealings. Unlike forum-selection clauses, international arbitration clauses enable companies (including American ones) to opt into sets of arbitral rules that govern the proceedings and, specifically, set forth the rights and responsibilities of the parties, their counsel and the arbitrators.

To function successfully, this system of international arbitration depends critically on the rules and laws governing the appointment of arbitrators, including ones governing disclosure. The applicable rules in this case, the AAA Commercial Rules, require the arbitrators to disclose information that would call into doubt their independence or impartiality. *See, e.g.*, JA208; AAA Rules R-17. Complete and timely disclosure enables the parties to determine, both at the time of the tribunal's formation and throughout the arbitration, whether to request an arbitrator's removal. In rare situations involving arbitrators' failure to heed their ongoing duties of complete and timely disclosure, their nonfeasance can deprive the parties of the benefit of their bargain. When undisclosed conflicts come to light only after the final award has been rendered (as in this case), an aggrieved party's only remedy is to challenge the award. Unless corrected, certain such

extreme nondisclosures can severely undermine the benefits of international arbitration, discourage its continued use, and undermine the commerce-promoting goals of the current governing legal framework. *See Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 92 (2d Cir. 1999).

To vindicate these and other interests, the Chamber routinely files briefs in cases implicating international arbitration, including cases before this Court. *See, e.g.*, *Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petroleum Corp.*, No. 19-3361 (2d Cir. argued Jan. 22, 2021); *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, 832 F.3d 92 (2d Cir. 2016).

Source of Authority: Federal Rule of Appellate Procedure 29(a) authorizes the filing of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

International arbitration, like its domestic counterpart, fundamentally rests on principles of contract. Consequently, as the Supreme Court and this Court have repeatedly and recently advised, "the federal policy [under the Federal Arbitration Act ("FAA")] is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989); *see also Certain Underwriting*

Members of Lloyds of London v. Fla., Dep't of Fin. Servs., 892 F.3d 501, 508 (2d Cir. 2018) (describing private agreements to arbitrate as "creature[s] of contract"; explaining the courts' role in "hold[ing] parties to their bargain"). Provided that agreements are enforced "according to their terms," *Volt*, 489 U.S. at 476, the results of an arbitration – namely awards – should be (and are) presumptively enforceable subject only to the limited grounds set forth in Section 10 of the FAA and, where applicable, the corresponding articles of international treaties (like Article V of the New York Convention). *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 972-73 (2d Cir. 1974). That's how international arbitration should (and generally does) occur, and why international arbitral awards, in practice, should almost always be enforced.

This appeal presents the rare exception. In a dispute with hundreds of millions of dollars at stake, the parties bargained to resolve their differences under the AAA Commercial Rules. JA189 ¶3(d); JA294 ¶18.2.3.3. Those Rules give binding effect to an arbitration clause that entitles each party to appoint an arbitrator. *See* JA207; AAA Rules R-13. Those Rules also impose a continuing obligation on the arbitrators, the parties and their representatives to disclose "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including . . . any past or present relationship with

the parties or their representatives." JA207; AAA Rules R-17(a). Those Rules generally allow the parties to modify their terms. *See* JA201; AAA Rules R-1(a). Here, the parties did just that by embedding an additional obligation directly in the arbitration clause: "The arbitrator(s) shall be and *remain at all times wholly independent and impartial*." JA189 ¶3(c); JA294 ¶18.2.3.3 (emphasis added).

Despite these rules and detailed bargained-for provisions, they weren't followed here. One of the arbitrators ("Arbitrator Smit") did not "remain at all times wholly independent and impartial," *id.* At a minimum, both he and Andes' lead counsel[2] did not make the necessary disclosures to enable Appellant to assess that proposition and to request disqualification. Specifically, they failed to disclose that Arbitrator Smit was simultaneously serving alongside Andes' lead counsel in another arbitration under the rules of an entirely different institution (the International Chamber of Commerce or "ICC"). This nondisclosure, involving contemporaneous service with a party's counsel, was very different from a typical case about past concurrent service with another arbitrator. *Cf.* IBA Guidelines on

[2] This brief uses the term "Andes' lead counsel" to describe the lead counsel in the arbitration and to differentiate that individual from its counsel at post-award stages of these proceedings.

Conflicts of Interest ¶4.3.3 (2014). Under these unprecedented circumstances, joint service meant that he and Andes' lead counsel would necessarily have *ex parte* communications, including on matters such as how to conduct an arbitration, prior to any evidentiary hearing in this case. The content of such *ex parte* communications almost certainly would never be revealed to Appellant due to the confidential nature of an ICC proceeding and the immunity that arbitrators typically enjoy. *See* ICC Rules of Arbitration Art. 22(3) (confidentiality of ICC proceedings); Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 Ga. L. Rev. 151 (2004). Moreover, the record contains evidence, wholly ignored in the lower court's opinion, that under prevailing ICC practice, a "wing arbitrator" (like Arbitrator Smit) often plays a role in the selection of the tribunal's chair (like Andes' lead counsel). *See* Melissa Hunt Decl., Dkt.30 ¶26 (explaining how, under ICC Rules, the chair "is typically selected based on the recommendation of the party-appointed arbitrators"); Expert Report of Prof. Jack Coe, Jr., Dkt.38-10 ¶9 & n.14.

While failing to disclose this simultaneous service with Andes' counsel, Arbitrator Smit disclosed other, far more innocuous facts and relationships. This incomplete disclosure left Appellant with the distinct (but erroneous) impression that there was no need to request disqualification. Consequently, Appellant participated in this arbitration with the distinct (but erroneous) misimpression

about whether Arbitrator Smit was "remain[ing] at all times wholly independent and impartial" as the parties' agreement required. *See* JA189 ¶3(c); JA294 ¶18.2.3.3. Of course, Appellee was not laboring under a similar misimpression because its lead counsel was aware of, indeed participating in, that other proceeding. Had Appellant known of the simultaneous service, the opportunity for *ex parte* contacts, and the private knowledge that Andes' counsel was gleaning before the evidentiary hearing in this case, it could have swiftly requested Arbitrator Smit's removal pursuant to the AAA rules. *See* JA209; AAA Rules R-18(c); Melissa Hunt Decl., Dkt.30 ¶26. Instead, Appellant was placed on an unequal playing field relative to Appellee. In this critical respect, the arbitration agreement was not enforced according "to the contractual rights and expectations of the parties." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (quoting *Volt*, 489 U.S. at 479). Under these unprecedented circumstances, the award should be vacated. To be sure, that is not because of mere simultaneous service or mere nondisclosure; it is the combination, in light of the parties' agreement, occurring before the evidentiary hearing in this arbitration but discovered only after its conclusion, that requires the highly unusual remedy of vacatur.

Even if the award should not be vacated at this time, it certainly should not be confirmed. Apart from misapplying the vacatur standards, the district court's

opinion also erroneously collapsed two distinct legal inquiries – vacatur and confirmation – even though those inquiries are subject to entirely different analytic regimes under binding Second Circuit precedent, *see Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 20-23 (2d Cir. 1997). Vacatur (at least under Second Circuit precedent) is subject to the grounds set forth in Section 10 of the FAA. By contrast, confirmation is subject to an entirely different set of defenses set forth under Article V of the New York Convention. *See* 9 U.S.C. §207; *Yusuf*, 126 F.3d at 20. Before confirmation could occur, the district court needed to resolve the parties' distinct and fully briefed disagreement over the application of the Article V defenses. *See* 9 U.S.C. §207. Those defenses, among others, include whether "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . . ." Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, §(1)(d), June 10, 1958, 21 U.S.T. 2517, 2520 (entered into force Dec. 29, 1970). Applying that very defense, this Circuit has refused to enforce an award where the parties' agreed-upon procedures governing the tribunal's composition were not followed. *See Encyc. Universalis, S.A. v. Encyc. Britannica, Inc.*, 403 F.3d 85 (2d Cir. 2005). That's precisely what occurred here when the tribunal included an arbitrator who, contrary to the parties' agreement, failed to "remain at all times wholly impartial

and independent" and ultimately rendered an award. *See* JA189 ¶3(c); JA294 ¶18.2.3.3. Indeed, Appellant advanced that defense for opposing confirmation in its cross-motion for opposition. *See* Resp'ts Mem. of Law in Opp'n to Pet. to Confirm Arbitration Award 12-15. But that argument (indeed the entire motion) was entirely ignored by the district court. *See* SPA1-9. Instead, the court leapt straight from the (erroneous) conclusion that the award should not be vacated to the *ipse dixit* that the award, therefore, should necessarily be confirmed. *See* SPA9 (concluding, after only considering grounds for vacatur, that the "petition to confirm the Award is granted"). If reversal with instructions to vacate is not the proper remedy here, this independent legal error surely warrants reversal.

ARGUMENT

At the outset of this appeal, it is critical to distinguish between vacatur of an international arbitral award (sometimes referred to as annulment or set aside) and confirmation of the same award. "Vacatur" of an award refers to the act of a court, typically in the arbitral forum (also known as the "primary jurisdiction"), denying the award legal effect (a decision that may have consequences in other jurisdictions such as third countries). *See* III Gary B. Born, *International Commercial Arbitration* (3d ed. 2021) §22.01[B][5] at 3151. By contrast, "confirmation" of an award "produces a national court judgment, incorporating or restating the terms of the award . . . that is then capable of enforcement in national (and foreign) courts in

the same manner as other judgments." *Id.* §22.01[B][3] at 3149 (footnote omitted); *see also CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 73 (2d Cir. 2017).

Not only do the two proceedings differ conceptually, they also are subject to different legal regimes (at least in the Second Circuit and a majority of circuits). First, under this Circuit's settled precedent,[3] Section 10 of the FAA applies when

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[3] There is a circuit split concerning the proper standards governing cross-motions to vacate and to confirm an international arbitral award like those at issue in this appeal. This Circuit, along with four others, holds that Section 10 governs vacatur (the relief sought by Appellant) whereas Article V governs confirmation (the relief sought by Appellee). *See Zeiler*, 500 F.3d at 164 (explaining how Article V of the New York Convention governs confirmation); *Yusuf*, 126 F.3d at 20-23 (finding that Section 10 of the FAA governs vacatur). By contrast, the Eleventh Circuit holds that Article V of the New York Convention supplies the operative standard governing both vacatur and confirmation. *See Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1445-46 (11th Cir. 1998); *see also Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291, 1301-04 (11th Cir. 2019) (reaffirming view). *See generally Goldgroup Res., Inc. v. DynaResource de Mexico, S.A. de C.V.*, 994 F.3d

deciding whether to *vacate* an international arbitral award (to be precise, here a non-domestic arbitral award within the meaning of Article I(1) of the New York Convention). *See, e.g.*, *Yusuf*, 126 F.3d at 23. Second, this Circuit applies Article V of the New York Convention when addressing whether to *confirm* an international arbitral award. *See, e.g.*, *Encyc. Universalis S.A.*, 403 F.3d at 90.[4]

The difference is material. A district court considering cross-motions from one party to vacate and another party to confirm has two closely related dispositions. First, the court must decide whether to vacate the award under the FAA. Second, and more subtly, if vacatur is not necessary, the court, looking to the New York Convention, must exercise its discretion whether to confirm the award. Against that legal backdrop, this appeal does not concern a garden-variety case of nondisclosure or even a garden-variety case of concurrent service. Rather,

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1181, 1189 (10th Cir. 2021) (collecting cases); Restatement (Third) U.S. Law of Int'l Comm. Arb. §4.9 (2019) (summarizing split).

[4] It is undisputed that the award in this case, while rendered in the United States, qualifies as a "nondomestic" award under this Circuit's test from *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983), and therefore falls under the Convention.

these unprecedented facts concern the interplay between vacatur, confirmation and an admitted, material nondisclosure by an arbitrator and Andes' lead counsel concerning their simultaneous service in another arbitration prior to the evidentiary proceeding in this one and in direct contravention of the parties' arbitration agreement. Whether analyzed through doctrines of vacatur or confirmation, the judgment below should be reversed.

Full and timely disclosure serves several important functions in international arbitration. First, at an early stage of the proceedings, disclosure allows parties to make an informed choice. The AAA rules entitle each side in an arbitration to appoint one arbitrator. So too, these rules entitle each side to request disqualification of an arbitrator on various grounds, including "partiality or lack of independence." JA209; AAA Rules R-18(a)(i). *See also Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 151 (1968) (White, J., concurring) (noting that assessment of the arbitrator's impartiality "is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business"). Full and timely disclosure enables the parties to decide whether to exercise the contractually granted entitlement to challenge an arbitrator's appointment before any proceedings commence. *See Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1338 (11th Cir. 2002) ("Disclosure ensures that

parties can view arbitration as a substitute for litigation, even though the former is not bound by the same strictures of procedure and formality as the latter.").

Second, during the proceedings, the continuing nature of the disclosure obligation ensures that changes in the arbitrator's relationships do not warrant reconstitution of the tribunal. Specifically, they enable the parties to decide whether to request disqualification of an arbitrator before the award is rendered. Indeed, until the final award has been rendered (and the tribunal becomes *functus officio*, *see* JA219-20; AAA Rules R-50), the AAA rules provide mechanisms for how to conduct the proceedings in case the sitting arbitrator is no longer able to serve (whether due to disqualification or other reasons). *See* JA210; AAA Rules R-20. This helps to reduce the risk that process failures deprive the parties of the benefit of their bargain. *See also Commonwealth Coatings*, 393 U.S. at 151 (White, J. concurring) ("[I]t is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award.").

Once the tribunal has rendered the final award, those remedial opportunities vanish. At that point, an aggrieved party can only request vacatur of the award or to oppose confirmation. *Cf.* AAA Rules R-52(e) (shielding arbitrators from being

called as witnesses in further proceedings). While that relief is rarely granted, this represents the extraordinary case warranting that extraordinary remedy. In addition to the arguments advanced by Appellant, *amicus* urges this Court to adopt the following narrow rule: an international arbitral award should be vacated under Section 10 of the FAA and should not be confirmed under Section 207 of the FAA and Article V of the New York Convention where: (1) the arbitration agreement required arbitrators to remain "wholly impartial and independent at all times," *see* JA189 ¶3(c); JA294 ¶18.2.3.3; (2) the neutral arbitrator or a party's representative failed to disclose joint arbitral service, *see* Melissa Hunt Decl., Dkt.30 ¶3-7; (3) the joint service occurred prior to an evidentiary hearing in the instant case, *see id.* ¶23; and (4) that joint service was not discovered until after the arbitration concluded.

I. THE AWARD SHOULD BE VACATED UNDER SECTION 10(a)(2) OF THE FEDERAL ARBITRATION ACT.

Section 10(a) of the Federal Arbitration sets forth the exclusive standards governing the vacatur of an international arbitration award rendered in the United States. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008); *Doscher v. Sea Port Grp. Secs., LLC*, 832 F.3d 372, 386 (2d Cir. 2016). Section 10(a)(2) provides that a court may vacate an award where "evident partiality or corruption in the arbitrators" exists. The seminal Supreme Court decision applying

that section is *Commonwealth Coatings*. In that case, the Court considered a situation where a neutral arbitrator failed to disclose regularly doing business with a party to the arbitration. *See Commonwealth Coatings Corp. v. Cont'l Casualty Co.*, 393 U.S. 145, 146 (1968). A fractured Court, consisting of a four-Justice plurality, two-Justice concurrence, and three-Justice dissent, found the nondisclosure required vacatur due to "evident partiality" of the neutral arbitrator. A plurality of the Court joined Justice Black's opinion finding that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." 393 U.S. at 150. Concurring separately, Justice White (joined by Justice Marshall) agreed that vacatur was the proper remedy but rested that conclusion on the arbitrator's failure to disclose the substantial business relationship with the party. *Id.* at 150-52.

The fractured decision in *Commonwealth Coatings* has left the lower courts groping for a federal standard. 8 Bruner & O'Connor, *Construction Law* §21:245 (rev. ed. 2021); *see also* Restatement (Third) U.S. Law of Int'l Comm. Arb. §4:18 reporters' note b (2019) (summarizing split). Consequently, in its foundational opinion following the unclear guidance from *Commonwealth Coatings*, this Circuit in *Morelite* found itself "attempting to delineate standards of impartiality on a relatively clean slate." 748 F.2d at 83. *Morelite* concluded that vacatur was necessary "where a reasonable person would have to conclude that an arbitrator

was partial to one party to the arbitration . . . remain[ing] cognizant of peculiar commercial practices and factual variances." *Morelite Constr. Corp v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984).

Morelite's approach forms part of a well-recognized circuit split. Like this Circuit, approximately six others ask whether "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Id.*[5] By contrast, at least three other circuits ask whether an arbitrator's "failure to disclose" might "create[] a reasonable impression of possible bias . . . ." *Schmitz v. Zilveti*,

[5] *See UBS Fins. Servs., Inc. v. Asociacion de Empleados Del Estado Libre Asociado de Puerto Rico*, 997 F.3d 15, 19 (1st Cir. 2021); *Sabre GLBL, Inc. v. Shan*, 779 F. App'x 843, 856 (3d Cir. 2019); *Three S Del., Inc. v. DataQuick Info Sys., Inc.*, 492 F.3d 520, 530 (4th Cir. 2007); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 682 (7th Cir. 1983). *See also Dodson Int'l Parts, Inc. v. Williams Int'l Co.*, 2020 WL 3216568, at *19 (D. Kan. June 15, 2020), *aff'd*, 12 F.4th 1212 (10th Cir. 2021).

20 F.3d 1043, 1048 (9th Cir. 1994).[6] *See also Burlington N. R.R. Co. v. TUCO, Inc.*, 960 S.W.2d 629, 634-36 (Tex. 1997) (rejecting *Morelite* standard and discussing divisions among state courts over the proper standard).

Under the *Morelite* standard, subsequent decisions of this Circuit have unpacked its meaning in the context of alleged nondisclosure by an arbitrator. On occasion, this Circuit has consulted a four-factor test developed by the Fourth Circuit.[7] But ultimately this Circuit's precedent makes clear that the "evident

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[6] *See Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 283 (5th Cir. 2007); *Univ. Commons-Urbana, Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331, 1338 (11th Cir. 2002). *See also Ploetz for Laudine L. Ploetz, 1985 Tr. v. Morgan Stanley Smith Barney LLC*, 894 F.3d 894, 898 (8th Cir. 2018) (trending toward this standard).

[7] *See ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493 (4th Cir. 1999). Those factors include (1) any personal interest, pecuniary or otherwise that the arbitrator has in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of the relationship to the arbitration; (4) the proximity in time between the relationship and the arbitration proceeding. *Id.* at 500.

partiality" standard requires a case-by-case determination as opposed to bright-line rules. *Morelite*, 748 F.2d at 85. *See also Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 700 (2d Cir. 1978) ("These decisions demonstrate that we have viewed the teachings of *Commonwealth Coatings* pragmatically, employing a case-by-case approach in preference to dogmatic rigidity."). *Accord Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 28 (2d Cir. 2004) (quoting *Marc Rich*).

Applying that case-by-case determination to nondisclosure, this Circuit has "not been quick to set aside the results of an arbitration because of an arbitrator's alleged failure to disclose information." *Marc Rich*, 578 F.2d at 700. This makes sense and comports with the presumptive enforceability of most awards. Some "undisclosed relationships . . . are too insubstantial to warrant vacating an award." *Commonwealth Coatings*, 393 U.S. at 152 (White, J., concurring). In some industries, arbitration offers the advantage of a tribunal with industry expertise, and such expertise "in an industry is accompanied by exposure, in ways large and small, to those engaged in it," *Marc Rich*, 579 F.2d at 701. Routine vacatur "would make the results of arbitration less rather than more certain and would run counter to the general policy of encouraging and supporting arbitration." *Lucent Technologies*, 379 F.3d at 29.

Consequently, this Court has generally declined to set aside an award on the basis of nondisclosure. This includes situations where (1) the arbitrator failed to disclose his experience "as a claimant-side expert witness," *see STMicroeletronics, N.V. v. Credit Suisse Secs. (USA) LLC*, 648 F.3d 68, 73-74 (2d Cir. 2011); (2) the arbitrator previously had served as an expert witness for one of the parties, *see Lucent*, 379 F.3d at 31-32; (3) an arbitrator had a "close personal and professional relationship with" the president of a firm with a property interest in an arbitration that included regular service on industrial arbitral panels, *see Marc Rich*, 579 F.2d at 701 (quotation omitted); and (4) arbitrators failed to disclose concurrent service as co-arbitrators in another arbitration, *see Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72-79 (2d Cir. 2012). Similarly, in *Certain Underwriting*, this Circuit reversed a vacatur order and remanded a case where a party-appointed arbitrator failed to disclose extensive business dealings between the party and arbitrator's business, *see* 892 F.3d at 504-05.[8] This is

[8] Some courts have misread *Certain Underwriting* to impose a yet higher standard in nondisclosure cases involving party-appointed arbitrators in international arbitration. *Certain Underwriting* said "the principles and circumstances that counsel tolerance of certain undisclosed relationships between arbitrator and litigant are even more indulgent of party-appointed arbitrators, who

are expected to serve as *de facto* advocates." 892 F.3d at 508. The district court appeared to (erroneously) read this language to impose a heightened standard in all cases where a party seeks to vacate an award based upon a nondisclosure by a party-appointed arbitrator. *See* SPA6. This view is incorrect. It confuses the concepts of a "party-appointed" arbitrator and a "party-appointed non-neutral arbitrator." A party-appointed non-neutral arbitrator, as the name implies, is an advocate for the party and part of a three-member tribunal with a neutral chairperson, typically used in discrete industries. *See Certain Underwriting*, 892 F.3d at 508 (stating party-appointed arbitrators "are expected to serve as *de facto* advocates"); *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002) (explaining how the "modern law merchant" utilizes arbitral panels with "industry insiders" to gain expertise for the cost of impartiality). Such an individual is quite explicitly not bound to be impartial or independent. By contrast, a party-appointed arbitrator, including in an international arbitration like this one, has independent obligations of impartiality and independence, indistinguishable from those governing the chairperson. This case offers an opportunity to remedy that confusion and make clear that a single standard governs vacatur of arbitral

because "nondisclosure does not by itself constitute evident partiality." *Scandinavian Reinsurance*, 668 F.3d at 77.

At the same time, true to both Justice Black's and Justice White's opinions in *Commonwealth Coatings*, this Circuit has never given a completely free pass to arbitrators in cases of extreme nondisclosure contrary to the parties' agreement and agreed-upon rules. This too makes sense. To look the other way in certain cases of nondisclosure would "abjure [this Court's] responsibility to maintain the integrity of the federal courts' role in affirming or vacating awards." *Morelite*, 748 F.2d at 84. Thus, this Court has vacated awards where nondisclosure concerned an undisclosed father-son relationship between an arbitrator and the president of a labor union that was party to the arbitration, *see Morelite*, 748 F.2d at 84-85 & n.5, and where an arbitrator failed to investigate or disclose an intention not to investigate a potential conflict, *see Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 138-39 (2d Cir. 2007). So too it has remanded a case for an evidentiary hearing where a relationship between an

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awards in cases of arbitrators who are duty bound to be impartial and independent, irrespective of whether a party happens to appoint them.

arbitrator and the party/party's counsel was not fully disclosed, *see Sanko S.S. Co. v. Cook Indus.*, 495 F.2d 1260, 1262-63 (2d Cir. 1973).

Here's the unifying principle of this Circuit's Section 10(a)(2) decisions on nondisclosure: vacatur in case of nondisclosure about a concurrent relationship with a party or party's counsel is warranted only where the nondisclosure implicates concerns about conflicting duties that "support a material conflict of interest." *Scandinavian Reinsurance*, 668 F.2d at 77. Joint service as arbitrator or service as an expert poses less of a problem because all duties (neutrality/impartiality/ independence) all point in one direction. *See, e.g.*, *Scandinavian Reinsurance*, 668 F.3d 60 (finding nondisclosure of two arbitrators' concurrent service on another panel did not demand vacatur). By contrast, concurrent service with a party's counsel is especially concerning because counsel has an independent legal duty to advocate on behalf of its client. That was the import of *Sanko*. *Accord Cont'l Ins. Co. v. Williams*, 1986 WL 20915 (S.D. Fla.), *aff'd*, 832 F.2d 1265 (11th Cir. 1987) (finding an undisclosed relationship between a neutral arbitrator and a party's counsel required vacatur where the two served as co-arbitrators and had financial dealings with one another). It's especially problematic in cases involving joint contemporaneous service before an evidentiary hearing because of the inevitable *ex parte* contacts about how to conduct an arbitration. That's why *ex parte* contacts are prohibited not just in

judicial proceedings but also in arbitral proceedings when it concerns the arbitration. *See* Model Code of Jud. Conduct r. 2.9 (Am. Bar. Ass'n, amended 2010); *see also* JA209; AAA Rules R-19.

To be sure, consistent with the presumptive enforceability of most awards, this Court has rejected vacatur in cases involving undisclosed service on other arbitral panels. This Court first in *Marc Rich* denied vacatur where (to generalize) a neutral arbitrator did not disclose previous service on past arbitral panels with a party to the arbitration. *See* 579 F.2d 691. The court characterized the vacatur claim as a mere pretext due to (1) the moving party's own appointed arbitrator's failure to disclose the same contacts as the neutral arbitrator, *see id.* at 701-02; (2) the three panel members' previous service together on arbitral panels, *see id.* at 697; and (3) the undisclosed information's public availability via online databases, *see id.* at 702.

This Court then denied vacatur in *Scandinavian Reinsurance* where two arbitrators (one the neutral chair, the other party-appointed) failed to disclose concurrent service on a panel. *See* 668 F.3d at 76-77. Notwithstanding that the concurrent arbitration concerned similar (1) factual issues, (2) legal issues, and (3) witnesses, this Court found that the nondisclosure did not concern any "material relationship with a party" demanding vacatur. *See id.* at 74 (finding that two arbitrators' overlapping service "without more" did not show predisposition).

Whatever the precise contours of *Marc Rich* and *Scandinavian Reinsurance*, this case involves exceptional dangers not present in those prior decisions. Indeed, it represents the rare case presenting precisely the sorts of risks about which this Court has warned.

First, this case involves a neutral arbitrator's undisclosed concurrent arbitral service with a party's counsel contrary to the parties' agreement. That is exactly what this Court cautioned against in *Scandinavian Reinsurance* when declining vacatur due to a lack of any "material relationship with a party." *See* 668 F.2d at 77. In other words, this case involves a danger that rightly satisfies the "evident partiality" standard. Partiality is evident where, as here, Arbitrator Smit was concurrently serving with Andes' lead counsel in another arbitration, and both failed to disclose it prior to the evidentiary hearing, even as Arbitrator Smit disclosed other, far less material relationships. *Accord Univ. Commons-Urbana*, 304 F.3d at 1340 ("[A] reasonable person might envision a potential conflict if an arbitrator, *concurrently with the arbitration*, partakes in a proceeding in which counsel for one of the parties to the arbitration is also participating.").

The line this Court drew in *Scandinavian Reinsurance* makes sense given advantages and biases baked into a neutral party's undisclosed service with a party's counsel. The party's counsel, serving with the neutral arbitrator, would receive unfathomable insight as to how the neutral arbitrator thinks and conducts

arbitrations, where many procedural rulings turn on the tribunal's (or the chair's) discretion. *See* Restatement (Third) U.S. Law of Int'l Comm. Arb. §4.19 cmt. a & reporters' note a (2019). That informational asymmetry gives the party an innate advantage because the party's counsel, in receipt of this information, would necessarily be bound to use that information to the client's advantage. *See* Model Rules of Pro. Conduct r. 1.3 cmt. 1 (Am. Bar Ass'n, amended 2020) (requiring lawyers to act zealously towards client goals). Finally, as indicated by Appellant's expert, *supra* at p.6, in an ICC arbitration, a "wing-arbitrator" (like Arbitrator Smit) is often consulted in connection with the appointment of the tribunal's chair (like Andes' lead counsel). For all these reasons, the nondisclosure here was "material" and worthy of vacatur within the meaning of *Scandinavian Reinsurance*.

Second, this case does not involve mere pretext for vacatur, unlike the circumstances this Court considered in *Marc Rich*. Appellant avers, without fail, they would have moved to disqualify Arbitrator Smit had the contacts been disclosed. *See* Melissa Hunt Decl., Dkt.30 ¶23 ("[Appellant] would have [moved to disqualify Arbitrator Smit] had it known of this relationship, to ensure that [Arbitrator] Smit was replaced by an arbitrator who was 'wholly independent' from [Appellee's] lead counsel, Shore, and truly impartial."). And while some facts indicate the undisclosed service was available on an ICC website, *see* JA515,

imposing a duty on the party to continually research its panels' arbitrators would flip what arbitral rules (and this contract) require: the *arbitrators* bear the duty to disclose conflicting arbitral service. Here, the parties bargained for a right to rely on these disclosures by agreeing upon the AAA Rules and explicitly requiring the tribunal to "remain at all times wholly independent and impartial."

In sum, a reasonable person would have to conclude that a neutral arbitrator who concurrently served on an arbitral panel with a party's counsel prior to an evidentiary hearing and failed to disclose that service contrary to the parties' express agreement might not hold true to the impartial nature of the role. In these unprecedented circumstances, discovered only after the conclusion of the arbitration, vacatur is warranted.

II. IN THE ALTERNATIVE, THE AWARD SHOULD NOT BE CONFIRMED UNDER FEDERAL ARBITRATION ACT SECTION 207 AND ARTICLE V OF THE NEW YORK CONVENTION.

Apart from its erroneous application of Section 10 of the FAA, the lower court's opinion committed a second, independent error, warranting reversal. The district court's opinion erroneously collapsed two entirely distinct inquiries – vacatur and confirmation – even though those inquiries are subject to "very different regimes" under binding Second Circuit precedent. *Yusuf Ahmed*

Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 18-23 (2d Cir. 1997). *Accord Zeiler v. Deitsch*, 500 F.3d 157, 164-65 (2d Cir. 2007).

In contrast to vacatur motions, confirmation motions are subject to an entirely different set of defenses, namely those set forth under Article V of the New York Convention. *See* 9 U.S.C. §207; *Yusuf*, 126 F.3d at 18-19. In the confirmation proceedings below, both parties fully briefed those defenses. While they agreed that Article V governed the question of confirmation, they disagreed over whether any of the Article V defenses had been satisfied. Despite this full briefing, the lower court's opinion inexplicably leapt from the (erroneous) conclusion that the award should not be vacated directly to the *ipse dixit* that it should be confirmed. That's no more defensible than a district court immediately concluding that summary judgment should be granted for a plaintiff after denying the defendant's motion to dismiss.

Article V sets forth seven exclusive defenses to enforcement of an international (or nondomestic) award. *Zeiler*, 500 F.3d at 164; *Yusuf*, 126 F.3d at 19-20; *Parsons & Whittemore*, 508 F.2d at 973. *See also* SPA17. While endorsing (but not repeating) Appellant's argument, *amicus* briefly offers an additional argument why Article V(1)(d) provides an apt ground for denying confirmation of the award in this exceptional case.

Article V(1)(d) provides that an award may be denied enforcement (and thus denied confirmation pursuant to Section 207) where "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." Convention art. V, §(1)(d). The language is critical because Article V(1)(d), unlike FAA Section 10(a)(2), does not require a court to find that the arbitration "evinced" evident partiality. *Tatneft v. Ukraine*, 21 F.4th 829, 838 (D.C. Cir. 2021). Instead, given its precise phrasing, "the *critical inquiry* under the first prong of Article V(1)(d) is whether the arbitrator(s) had *the degree* of independence and impartiality (and other qualifications) *required by the parties' agreement*." III Born, *International Commercial Arbitration* §26.05[C] at 3049 (footnote omitted) (emphasis added). *See generally BSH Hausgeräte GmbH v. Kamhi*, 291 F. Supp. 3d 437, 443 (S.D.N.Y. 2018) (stating that "[t]he parameters of the arbitration" for purposes of Article V(1)(d) "are dictated by the underlying agreements"). While courts often are counseled to apply this ground (and others) narrowly and with a healthy deference to the tribunal's discretion, *see Parsons & Whittemore*, 508 F.2d at 976, that justification for that deference fades when the alleged violation of the parties' agreement concerns the very composition of the tribunal as opposed to the procedural choices of the tribunal whose composition is not called into question. *See* Restatement (Third) U.S. Law of Int'l Comm. Arb. §4.13 reporters' notes a & d (2019).

Applying Article V(1)(d), this Circuit has refused to enforce an award where the parties' agreed-upon procedures governing composition of the tribunal were not followed. *See, e.g.*, *Encyc. Universalis, S.A. v. Encyc. Britannica, Inc.*, 403 F.3d 85 (2d Cir. 2005). In *Encyclopaedia Universalis*, this Circuit closely analyzed the particular contractual provisions governing the formation of the tribunal and concluded that, even though some of those provisions had been observed, the failure to follow scrupulously the provisions governing the appointment of the third arbitrator rendered the award unenforceable. *Id.* at 90-91. This was the case even though there was no suggestion that appointment of the third arbitrator would have resulted in a different outcome. Despite the strong federal policy generally favoring the enforcement of international arbitral awards, this Circuit stressed that, consistent with their fundamental obligation to enforce arbitration agreements "according to their terms," courts must not "overlook agreed-upon arbitral procedures in deference to that policy." *Id.* at 91. Rather, because the parties "settled on a form" governing the tribunal's formation, "the New York Convention requires that their commitment be respected," 403 F.3d at 91, and the failure to do so necessitated denying confirmation of the award. *See also* III Born, *International Commercial Arbitration* §26.05[C] at 3049 (noting that "in applying [Article V(1)(d)], the parties' agreement and expectations are not only highly relevant, but decisive.").

Here too, the parties "settled on a form" governing the tribunal's composition–specifically that they "remain at all times *wholly* impartial and independent." *See* JA189 ¶3(c); JA294 ¶18.2.3.3. The term "wholly" (for it to have independent meaning relative to the standard incorporated from the AAA Rules) brokered no exception and certainly entailed an obligation to make full and complete disclosures so that the parties could judge for themselves whether disqualification was warranted. Just like in *Encyclopaedia Universalis*, the parties' "agreed-upon procedures" were not respected and resulted in the composition of a tribunal (and ultimately an award) inconsistent with the parties' express agreement. Specifically, Arbitrator Smit failed to heed his ongoing obligation under the contract to "remain at all times wholly impartial and independent." *Id*. Moreover, Arbitrator Smit and Andes' lead counsel did not discharge their duty under the AAA Rules to "disclose . . . any circumstance likely to give rise to justifiable doubt as to [Arbitrator Smit's] impartiality or independence, including any . . . present relationship with . . . [Appellee's] representatives," *see* JA208; AAA Rules R-17(a). Just as the appointment mechanism employed in *Encyclopaedia Universalis* deviated from the parties' agreement and resulted in a lack of equal treatment of the parties, the same occurred here: the nondisclosure by Arbitrator Smit and Andes' lead counsel deviated from the parties' agreement and accorded Appellee asymmetric access to information about Arbitrator Smit's decisional process (and,

indeed, asymmetric access to Arbitrator Smit himself) relative to Appellant. Consistent with *Encyclopaedia Universalis*, that failure alone necessitates denying confirmation of the award in this case.

CONCLUSION

For the foregoing reasons, the lower court's judgment should be reversed, and the case should be remanded with instructions to vacate the award under Section 10 of the Federal Arbitration Act or, in the alternative, not to confirm it.

Respectfully submitted,

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April 5, 2022

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

Pursuant to Federal Rule of Appellate Procedure, I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because it contains 6,787 words, as determined by the word count function of Microsoft Word, excluding parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

April 5, 2022

/s Peter B. Rutledge
Peter B. Rutledge

CERTIFICATE OF SERVICE

I hereby certify that, on April 5, 2022, an electronic copy of the foregoing Brief Amicus Curiae of the Chamber of Commerce of the United States of America, in Support of Respondent-Appellant was filed with the Clerk of Court using the ECF system and thereby served upon all counsel appearing in this case.

April 5, 2022

/s Peter B. Rutledge
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