United States District Court
for the
Southern District of Florida

Cardno International PTY, Ltd. and others, Plaintiffs,	)	
v.	)	Civil Action No. 17-23964-Civ-Scola
Carlos Diego Fernando Jacome Merino and others, Defendants.	)	

Order Confirming Arbitration

Cardno International PTY, Ltd., Cardno Limited ACN 108 112 303, and Cardno Holdings PTY, Ltd. (collectively "Cardno") initiated this action against Carlos Diego Fernando Jacome Merino, Eduardo Jacome Merino, Rafael Alberto Jacome Varela, and Galo Enrique Recalde Maldonado (collectively the "Caminosca Shareholders"), seeking confirmation of an international arbitration award. (Pls.' Pet., ECF No. 1.) Defendants Carlos Diego Jacome, Eduardo Jacome, and Galo Recalde (collectively the "Defendants"[1]) responded to Cardno's petition (Defs.' Resp., ECF No. 17) and at the same time filed their own petition to vacate the award (Defs.' Pet., ECF No. 16). Both petitions have been fully briefed. Although the Court agrees with the Defendants that their motion to vacate is not time barred, the Defendants have not persuaded the Court that the award should in fact be vacated or confirmation denied. The Court therefore, as set forth in detail below, **grants** Cardno's petition to confirm the award **in part** (**ECF No. 1**) and **denies** the Defendants' counter petition to vacate as well as their alternative motion to partially deny Cardno's petition to confirm (**ECF No. 16**).

1. Background

Caminosca, S.A., an Ecuadorian company, was founded in 1976 by Defendants Carlos Diego Jacome and Eduardo Jacome. Defendants Galo Recalde and Alberto Jacome became Caminosca partners a few years later. Caminosca provides engineering consulting services throughout Ecuador, participating in infrastructure projects on a national scale. Cardno, on the other hand, is an Australian professional infrastructure and environmental services company, founded in 1945. Cardno offers a range of integrated

[1] Defendant Alberto Jacome died prior to Cardno's filing of its petition. The effect of this order on this particular Defendant is discussed below, in section 3.F. When the Court refers to "the Defendants" in this case, it means to implicate only the three Defendants who have appeared in this matter.

services in ten primary market sectors worldwide: buildings; land; coastal and ocean; environment; emerging markets; management services; energy and resources; transportation; water; and defense.

In May 2012, the Caminosca Shareholders and Cardno began negotiating the sale of Caminosca to Cardno. The parties executed a share purchase agreement (the "SPA") in December 2012, which originally contemplated the private sale of the entirety of Caminosca to Cardno. Because of various complications, however, relating to the need for certain governmental consents in connection with the proposed transfer, the parties amended the SPA five times. The first three amendments appear to have involved just extensions of the closing date to accommodate delays relating to the consents. When it became clear, however, that one Ecuadorian governmental entity would not consent to the sale, the parties endeavored to take advantage of an exception to the consent requirement. This exception, under Ecuadorian law, provides that, where consent from a state-entity client of the company to be sold is not forthcoming, only 25%, or less, of a company's shares may be sold privately, with the remaining 75%, or more, requiring transfer through a public stock exchange. Accordingly, Amendment No. 4 to the SPA divided the Caminosca shares into two tranches: the first consisted of 24% of the shares which were sold privately to Cardno; the second consisted of the remaining 76% which were pledged and physically delivered to an escrow agent. Finally, under Amendment No. 5 to the SPA, the parties agreed to the immediate release of the second tranche shares from escrow and the immediate release of the cash consideration for those shares. Thereafter the second tranche shares were transferred, through a series of four transactions, via the Guayaquil Stock Exchange to Cardno.

The SPA incorporates what the parties agree is a broad arbitration agreement: "Any claim or dispute arising out of or related to this Agreement, or the interpretation, making, performance, breach or termination thereof, shall . . . be finally settled by binding arbitration . . . ." (SPA, Ex. B to Defs.' Pet., ECF No. 16-3, 48; Pls.' Resp. and Reply at 15–16 (noting that the Caminosca Shareholders described the provision as "broad" in urging United States District Court Judge Darrin P. Gayles to compel arbitration in the first place).) In Amendment Nos. 4 and 5 the parties "ratif[ied] all the terms and conditions of the Share Purchase Agreement" that were not amended or waived by the amendment. (Am. No. 4, Ex. B to Defs.' Pet., ECF No. 16-3, 85; Am. No. 5, Ex. B to Defs.' Pet., ECF No. 16-3, 91.) The arbitration clause is not specifically mentioned in any of the amendments.

After the sale of Caminosca had been completed, Cardno learned the Caminosca Shareholders had been "engaged in a far-reaching and intricate . . .

scheme to bribe Ecuadorian government officials in order to get government contracts for Caminosca." (1st Partial Arb. Award, Comp. Ex. A to Defs.' Pet., ECF No. 16-1, 8.) After learning of the schemes, Cardno initially sought injunctive relief in the Southern District of Florida, before Judge Gayles. (*Id.* at 3; ECF No. 16-1, 9). In its application for a temporary restraining order, Cardno sought an order freezing the Caminosca Shareholders' bank accounts and noted that Cardno intended to seek rescission of the SPA. (*Id.* at 3–4; ECF No. 16-1, 9–10.) In response, the Caminosca Shareholders argued the SPA required the parties to arbitrate Cardno's request for injunctive relief. (*Id.* at 4; ECF No. 16-1, 10.) Judge Gayles thereafter denied Cardno's TRO request and ordered the parties to comply with their arbitration agreement. Cardno then filed its initial demand for arbitration, in April 2015, seeking, among other things, rescission of the SPA. The arbitral tribunal issued a "First Partial Arbitration Award" in November 2016, followed by a "Final Arbitration Award" in October 2017. Combined, the awards span over 150 pages. Ultimately, the tribunal concluded that the Caminosca Shareholders' bribery scheme went to the heart of the parties' deal and left Cardno with no adequate remedy at law. Accordingly, the tribunal granted Cardno's request to rescind the acquisition of Caminosca. The tribunal further awarded Cardno its legal, expert, and administrative fees incurred in prosecuting the arbitration. In sum, in its first award, the tribunal ordered the Caminosca Shareholders to return to Cardno:

(1) $11,903,856 in cash payments; and

(2) the nearly 900,000 Cardno shares that Cardno had transferred as part of the deal (or the cash value thereof at the time the Caminosca Shareholders received them).

(1st Partial Arb. Award at 122; ECF No. 16-2, 47.) At the same time, the tribunal ordered Cardno to return to the Caminosca Shareholders:

(1) all Caminosca shares and property;

(2) operational and management control of Caminosca; and

(3) all net benefits Cardno had received to be offset by amounts owed by the Caminosca Shareholders to Cardno (with the amount of the net benefits to be determined in the tribunal's final award).

(*Id.* at 122–23; ECF No. 16-2, 47–48.) In its final award, the tribunal further awarded to Cardno:

(1) $4,327,138.31 (for attorneys' fees, costs, and witness and expert expenses); and

(2) $290,987.21 (for arbitration related expenses).

The final award also calculated that the $1,692,738.26 Cardno received in interest and dividend payments should be set off against the $11,903,856 Cardno was awarded in the first partial award. Altogether then, under the tribunal's award, Cardno is due $14,829,243.26 in cash (plus interest) in additional to the nearly 900,000 shares of Cardno stock (or their value) Cardno transferred to the Caminosca Shareholders. Conversely, the Caminosca Shareholders are due back all of the Caminosca shares and property along with operational and management control of Caminosca.

2. Applicable Law and Legal Standard

The parties do not dispute that the arbitration at issue here is governed by the Inter–American Convention on International Commercial Arbitration (opened for signature Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245) (referred to interchangeably as both the "Panama Convention" and the "Inter-American Convention"). *See* 9 U.S.C. §§ 301–307 (implementing the Convention).[2] "Because the Final Arbitration Award was made in a nation that is a signatory of the Inter–American Convention, the Final Arbitration Award is entitled to be recognized and enforced, unless an appropriate exception for non-recognition applies." *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1372 (S.D. Fla. 2003) (Marra, J.) (citing 9 U.S.C. § 304). "In 9 U.S.C. § 301, section 207 of the FAA is incorporated by reference and applied to Panama Convention awards." *Empresa De Telecommunicaciones De Bogota S.A. E.S.P. v. Mercury Telco Grp., Inc.*, 670 F. Supp. 2d 1357, 1361 (S.D. Fla. 2009) (Marra, J.). Section 207 provides that confirmation of an arbitral award falling under the Convention is mandatory "unless [a court] finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. The Convention also contains a residual clause which provides that Chapter 1 of the FAA applies to actions brought

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[2] The parties agree that, with respect to enforcement matters and interpretation, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (effective for the United States on Dec. 29, 1970), reprinted in 9 U.S.C. §§ 201–208, and the Panama Convention are substantially identical. Thus the case law interpreting provisions of the New York Convention are largely applicable to the Panama Convention and vice versa. *See Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion*, 962 F. Supp. 2d 642, 653 (S.D.N.Y. 2013), *aff'd*, 832 F.3d 92 (2d Cir. 2016) ("The Panama Convention and . . . the []New York Convention[] are largely similar, and so precedents under one are generally applicable to the other.") (citing *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994) ("The legislative history of the [Panama] Convention's implementing statute . . . clearly demonstrates that Congress intended the [Panama] Convention to reach the same results as those reached under the New York Convention" such that "courts in the United States would achieve a general uniformity of results under the two conventions.").

under the Convention, so long as it does not conflict with the Convention or its implementing legislation. 9 U.S.C. § 208.

"A district court's review of a foreign arbitration award is quite circumscribed" and "there is a general pro-enforcement bias manifested in the Convention." *Four Seasons Hotels & Resorts B.V. v. Consorcio Barr, S.A.*, 613 F. Supp. 2d 1362, 1366, 1367 (S.D. Fla. 2009) (Moore, J.) (quotations and alterations omitted). Ultimately, "[o]btaining vacatur of an arbitration award . . . is a high hurdle because it is not enough to show that the arbitrators committed an error—or even a serious error." *S. Mills, Inc. v. Nunes*, 586 F. App'x 702, 704 (11th Cir. 2014) (quoting *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671, (2010) (quotation marks and alterations omitted). It is really "only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable." *S. Mills*, 586 F. App'x at 704 (quoting *Stolt–Nielsen,* 559 U.S. at 671 (quotations marks omitted).

3. Discussion

A. The Defendants are not time barred from seeking vacatur.

As an initial matter, Cardno argues the Defendants are time barred from challenging the arbitral award. The Court disagrees.

The FAA provides "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. Cardno submits the tribunal finally decided the merits of the arbitration in November 2016, when it issued its 120-page "First Partial Arbitration Award." Accordingly, says Cardno, the Defendants' motion to vacate, filed in December 2017, is clearly untimely.

The Court, however, agrees with the Defendants that the tribunal's November 2016 was not, in fact, a final award. While the tribunal's first award certainly determined the bulk of the issues before it, the award still left open a substantial issue: the actual amount of money the Caminosca Shareholders would have to pay to Cardno in order to fully dispose of Cardno's claim for rescission. This was a significant issue and required determination before the arbitral award could be considered final. *See, e.g., Schatt v. Aventura Limousine & Transportation Serv., Inc.*, 603 F. App'x 881, 887 (11th Cir. 2015) ("The calculation of damages, to be set for a separate hearing, was necessary to render the arbitral result final."); citing *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg, Pa.*, 748 F.3d 708, 719 (6th Cir.2014) ("Here, the arbitration panel issued an interim award resolving only the matter of liability; the panel retained jurisdiction to compute [claimant's] damages. Under these circumstances, the arbitration was not complete because there

was no 'final' award."). The cases relied upon by Cardno to support its contention that the first award was final are unavailing. *Schatt* at 887–88 (noting that these three cases (*In re Rollins, Inc.*, 552 F. Supp. 2d 1318, 1324 (M.D. Fla.2004); *Cont'l Cas. Co. v. Staffing Concepts, Inc.*, No. 8:09–CV–02036–T–23, 2011 WL 7459781, at *4 (M.D. Fla. Dec. 20, 2011) *rep. and rec. adopted*, No. 8:09–CV–2036–T–23AEP, 2012 WL 715652 (M.D. Fla. Mar. 5, 2012); and *Nu–Best Franchising, Inc. v. Motion Dynamics, Inc.*, No. 805CV507T27TGW, 2006 WL 1428319, at *4 (M.D. Fla. May 17, 2006)) required only the further determination of attorneys' fees and nothing more and therefore could be considered final).

The Court agrees with the Defendants that the award issued on October 26, 2017, titled "Final Arbitration Award," was indeed the final award. And, because the Defendants' petition was filed within three months of the issuance of that award, it is therefore timely.

B. The Defendants have not established that the arbitral tribunal exceeded its authority under § 10(a)(4) of the FAA.[3]

The Defendants insist the arbitration tribunal "exceeded its authority by awarding rescission of the [stock-market transactions] on the Guayaquil Stock Exchange because such relief creates obligations on non-parties to the Arbitration." (Defs.' Pet. at 13–14.)

The Court certainly agrees with the Defendants that, generally, "[a]rbitrators exceed their powers when they determine the rights and obligations of non-parties to an arbitration." *Hendricks v. Feldman Law Firm LLP*, No. CV 14-826-RGA, 2015 WL 5671741, at *4 (D. Del. Sept. 25, 2015). The Defendants, however, have not convinced the Court that the tribunal in this case actually made such a determination.

To begin with, the Defendants mischaracterize the tribunal's award. They describe the award as ordering the rescission of the stock-market transactions which effected the exchange of the remaining 76% of the Caminosca shares to Cardno. What the tribunal actually ordered, however, was that Cardno "return" "all Caminosca shares" to the Caminosca Shareholders. (1st Partial Arb. Award at 122; ECF No. 16-2, 47.) The Defendants' argument that the award "created an obligation of the Guayaquil Stock Exchange and the registered broker-dealer involved in those transactions" (Defs.' Pet. At 14) is, therefore, unavailing. The award simply does not, as the Defendants argue, require the

[3] The parties debate whether the grounds for vacating set forth in the FAA are applicable here. Because the Court finds the Defendants' argument under the FAA fails in any event, the Court makes no determination regarding whether such grounds are necessarily implicated in evaluating the kind of award at issue in this case.

stock exchange or the broker who negotiated the original exchange "to void or erase the transactions from their books and records as if it never occurred." (*Id.*)

Similarly, the Defendants have failed to convince the Court that "because the shares of Caminosca are publicly listed on the Guayaquil Stock Exchange, these shares must *exclusively* be traded through Ecuador's stock exchange." (Defs.' Pet. at 14 (emphasis in original).) In support of their argument, the Defendants offer the opinion of their legal expert who contends, based on Ecuadorian law, "the private sale of listed shares" is prohibited and that "any sale or purchase of Caminosca shares must take place through the Guayaquil Stock Exchange." (Defs.' Expert Op.at ¶ 33, Ex. N to Defs.' Pet., ECF No. 16-15, 10.) The expert also opines that in order for the shares to be transferred, the Defendants would need to have a registered broker "issue a purchase order"; Cardo, in turn, would have to "issue a sale order through a third-party broker-dealer"; and the shares would have to be made "available at the specific rescission price indicated in the [award]." (Defs.' Expert Op. at ¶ 29.)

Absent from the Defendants' presentation, however, is any information about limitations on Cardno's power to assign its shares, without consideration, or Cardno's right to even possibly delist or remove the shares from the stock exchange in order to otherwise "return" them to the Caminosca Shareholders. Additionally, the Defendants' complaint that "broker-dealers would by law have to be involved with any transfer of listed shares" is, without more, similarly unavailing—this is no more persuasive than would be an argument that an award ordering the transfer of funds is impermissible because it would require the involvement of banks or other financial institutions to effect the transaction. The Defendants have thus failed to convince that the award necessarily imposes impermissible obligations on third parties.

Lastly, the burden of returning the shares to the Caminosca Shareholders rests with Cardno; not the Defendants. And Cardno itself has not objected to that aspect of the award, affirmatively maintaining "[t]he parties can effectuate the returns of funds and shares that have been ordered" in the award. (Pls.' Resp. and Reply, ECF No. 24, 14.) Presumably the parties can, if they choose, structure their compliance with the award and this Court's order such that no funds or shares will be transferred to Cardno until Cardno is able to guarantee or simultaneously effect the transfer of the Caminosca shares to the Caminosca Shareholders. Or, if one side complies with the award, and the Court's order, and the other doesn't, the complying party can seek further, post-judgment relief.

C. The Court rejects the Defendants' objections to Cardno's request for a money judgment.

Related to the Defendants' concerns about whether Cardno can comply with the award's order that Cardno return all of the Caminosca shares, the Defendants also raise issues regarding the propriety of Cardno's request, among other things, for a money judgment. In particular, the Defendants contend, in an "affirmative defense," "the only *monetary* award granted to [Cardno] was in connection with their request for attorneys' fees and costs[,] expert and witness expenses, and administrative fees and expenses." (Defs.' Resp. at 7 (emphasis added).) The Defendants' argument seems to be that, since the other dollar amounts the award ordered the Caminosca Shareholders to pay were related to the rescission claim, those amounts cannot be reduced to a money judgment—or, at a minimum, they cannot be reduced to a money judgment until Cardno has tendered the Caminosca property and shares it was ordered to return to the Caminosca Shareholders. (Defs.' Reply at 11.) The Defendants have not offered any support—nor can the Court itself find any—for their position that "prior to the entry of any money judgment, Cardno should tender . . . (1) all Caminosca shares and . . . property; (2) operational and management control of Caminosca; and (3) any and all net benefits Cardno has received." (*Id.* at 12.) In any event, this "affirmative defense" is not one of the grounds upon which a court may deny the confirmation of an award.

D. The Court rejects the Defendants' objection regarding net benefits Cardno may have received after August 17, 2017.

The Defendants ask the Court to determine whether Cardno has received additional benefits after August 17, 2017 and, if so, to set off those amounts against any final money judgment the Court enters. The Defendants offer no support, nor has the Court found any, that would justify the Court's embarking on this undertaking. Additionally, the Defendants themselves even concede they "have no knowledge whether Cardno has received additional net benefits on or after August 17, 2017." (Defs.' Resp. at 8.) Without more, this "affirmative defense," like the one addressed above in section C., is not one of the grounds upon which a court may deny the confirmation of an award.

E. The Defendants have not shown that the tribunal decided issues outside the scope of the parties' arbitration agreement under article V of the Panama Convention.

The two prongs of the Defendants' next argument are difficult to reconcile. On the one hand, the Defendants submit the Court lacks jurisdiction to confirm the award, based on case law requiring courts to "assure themselves

of their jurisdiction by deciding whether the agreement-in-writing requirement has been met." *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1291 (11th Cir. 2004). At the same time, however, the Defendants rely on one of the affirmative defenses articulated in article V of the Convention to support its jurisdictional claim. The Court finds the Defendants have conflated these two issues and in doing so have failed to show either (1) a lack of jurisdiction or (2) the applicability of any of the article V affirmative defenses.

To begin with, "the burden of proving . . . affirmative defenses [under article V of the Convention] rests on the defendant, while the burden of establishing the jurisdictional prerequisites rests on the proponent of the award." *Czarina*, 358 F.3d at 1292 (citations omitted). The Defendants rely on *Czarina* and *Four Seasons*, 613 F. Supp. 2d 1362, for the proposition that the presence of an arbitration provision in writing is a prerequisite to an action to confirm an arbitration award. The Court finds Cardno has carried its burden of presenting a written arbitration agreement to the Court. Attached to its petition to confirm the award is the SPA, entered into by Cardno and the Caminosca Shareholders. (ECF No. 1-3, 2–7.) The SPA, in turn, contains the parties' unambiguous agreement to submit "[a]ny claim or dispute arising out of or related to [the SPA]" to "binding arbitration." (SPA ¶ 12.11.)

The Defendants provide no support for their contention that this arbitration provision does not satisfy the Convention's jurisdictional requirements. To that end, their reliance on *Czarina* is misplaced. 358 F.3d 1286. In that case, the Eleventh Circuit affirmed the finding of the district court that it lacked subject-matter jurisdiction where the only writing the proponent of an arbitration award could produce was an unsigned document containing sample wording regarding arbitration. After an evidentiary hearing, the district court concluded the award proponent had "failed to establish that [the parties] had agreed to arbitrate." *Czarina*, 358 F.3d at 1293. Here, however, the Defendants do not, like the defendants in *Czarina*, deny the existence of *any* arbitration agreement. (*See, e.g.*, Defs.' Resp. ¶ 7.) Instead, here, the Defendants quarrel over whether the arbitration agreement at issue covers the subject matter of the entirety of the parties' dispute. Such an argument does not implicate the Court's subject-matter jurisdiction.

Four Seasons is equally unavailing. 613 F. Supp. 2d 1362. In that case, the parties' disagreement centered on two separate agreements: a management agreement and a later-dated loan agreement. The management agreement included an arbitration clause; the loan agreement did not. *Id.* at 1368. The court there concluded that, because the loan agreement explicitly stated that it "supersede[d] all prior agreements," it was severed from the management agreement and, by extension, the management agreement's arbitration clause.

Id. at 1368–69. Thus, the *Four Seasons* court found, to the extent the arbitration decision awarded damages specifically under the loan agreement, the Court was deprived of jurisdiction to confirm the award. *Id.* at 1369. Here, in contrast, there is no second agreement explicitly severing the stock-exchange transactions from the SPA. Without more, the Court finds Cardno has indeed satisfied the agreement-in-writing prerequisite of establishing subject-matter jurisdiction.

Nor have the Defendants succeeded in carrying their burden of establishing any affirmative defenses under article V of the Convention. Under article V, seven grounds are listed under which a court may refuse to confirm an arbitration decision. According to the Defendants, the Court should refuse to confirm by virtue of provision (1)(c) of article V. Under this provision, a court may refuse recognition of an award where an arbitral "decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration." Panama Convention, art. V(1)(c). According to the Defendants, the stock-exchange transactions of the remaining 76% of the Caminosca shares were not covered by the SPA and therefore, by extension, its arbitration clause. The Court is not convinced.

Once again, the parties expansively agreed to submit "any claim or dispute arising out of or related to [the SPA], or the interpretation, making, performance, breach or termination thereof" to "binding arbitration." (SPA ¶ 12.11.) Prior to any amendments, the SPA contemplated the private sale of 100% of the Caminosca shares. When this became unworkable because one of Caminosca's state-owned clients, the Ministry of Transportation and Public Infrastructure, would not consent to the sale, the parties agreed to amend the SPA to allow for the private sale of only 24% of the shares and the public sale, via the Guayaquil stock exchange, of the remaining 76%. Under Amendment No. 4, the parties bifurcated the sale into the two parts, allowing for Cardno to immediately receive 24% of the shares while the remaining 76% would be put into escrow for a later closing date. (Am. No. 4, ECF No. 16-3, 81–88.) Through Amendment 4 the parties explicitly "ratif[ied] all the terms and conditions of the Share Purchase Agreement that ha[d] not been amended or waived by this Amendment." (Am. No. 4., art. 3.) This amendment neither amended nor waived the SPA's arbitration clause. Amendment No. 5 represented the parties' agreement to finalize the transfer of the remaining 76% of the shares through the stock exchange and at the same time released the remaining consideration due to the Caminosca Shareholders ($5,770,490 in cash and Cardno stock valued at $4,428,516). (Am. No. 5, ECF No. 16-3, 89–94.) Amendment No. 5 contained the same ratification provision as Amendment No. 4 and also neither amended nor waived the SPA's arbitration clause. (Am. 5, art. 3.) The Court

thus finds, by the plain terms of the SPA and Amendment Nos. 4 and 5, the dispute over the transactions contemplated by these amendments, including the stock-exchange transactions, certainly either "aris[es] out of or" is "related to" "the interpretation, making, performance, breach or termination" of the SPA.

In their attempt to avoid this result, the Defendants argue that "[u]nder applicable Ecuadorian law, [the] stock exchange transactions constitute separate and independent contractual agreements between the parties" and that these new "agreements" "did not include an arbitration provision or in any way reference or incorporate the arbitration provision of the SPA." (Defs.' Mot. at 17.) But even if the Court were to accept the Defendants' contention, that the stock-exchange shares were transacted through additional contracts, apart from the SPA, they have not explained why these "contracts" should not still be considered to have arisen out of, or to be related to, the SPA as found by the arbitral tribunal. Further, the Defendants have not suggested that these separate contracts displaced or in any way superseded any of the terms of the SPA. *Cf. Four Seasons*, 613 F. Supp. 2d. at 1368–69 (finding the parties' second agreement was not subject to the arbitration provision of their first agreement because the second agreement pointedly severed itself from the first and explicitly "supersede[d] all prior agreements"). After extensive analysis, the tribunal determined the SPA to govern the stock transactions and the Defendants have not persuaded the Court that there is any reason to overturn that conclusion. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."); *see also, Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 298–99 (2010) ("where . . . parties concede that they have agreed to arbitrate *some* matters pursuant to an arbitration clause, the law's permissive policies in respect to arbitration counsel that any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration") (quotations and citations omitted).

The Defendants have therefore not carried their burden in establishing that section (1)(c) of article V is applicable. That is, the Defendants have not shown that the arbitral decision concerns a dispute not envisaged by the parties' arbitration agreement. The tribunal's determination regarding the shares of Caminosca sold on the Guayaquil stock exchange falls squarely within the parties' agreement to arbitrate.

F. Defendant Rafael Alberto Jacome Varela

One of the four Defendants in this case, Defendant Rafael Alberto Jacome Varela, died on August 24, 2017, prior to Cardno's filing of this case. In their response to Cardno's petition, the three served Defendants contend that, although Cardno "purports to have served Mr. Alberto Jacome Varela," it is their position that, "as a result of [his] death, service has not been properly effectuated." (Defs.' Resp. at 1, n. 1.) Cardno, on the other hand maintains, in its reply, that somehow, despite his death, Alberto Jacome was nonetheless effectively served, in accordance with the requirements of Federal Rule of Civil Procedure 4(f). (Pls.' Reply at 11–12.)

Under Rule 4(f)(2)(C)(ii), the service of a summons and complaint may be accomplished by "using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt." Cardno is under the misimpression that because the summons and petition were successfully delivered, on December 8, 2017, to Alberto Jacome's last known address in Quito, Ecuador, and signed for by someone at that address, it successfully served him. It did not. Since everyone agrees that Alberto Jacome died in August 2017, it would be impossible to serve him over three months later. Nothing was actually sent to "the individual" referenced in the rule because that individual no longer existed at the time of Cardno's purported service.

The Court thus **vacates** the Clerk's entry of default against Defendant Rafael Alberto Jacome Varela. (**ECF No 30.**) Further, the Court concludes a dead person is a nonexistent entity and cannot, therefore be a party to a law suit. *In re Engle Cases*, No. 3:09-CV-10000-J-32, 2013 WL 8115442, at *2 (M.D. Fla. Jan. 22, 2013), *aff'd*, 767 F.3d 1082 (11th Cir. 2014) (quotation omitted). Logically, a proceeding initiated against a nonexistent entity is void *ab initio* and cannot therefore invoke the Court's jurisdiction. *Engle*, 2013 WL 8115442, at *2 (citation omitted); *see also Xtra Super Food Ctr. v. Carmona*, 516 So. 2d 300, 301 (Fla. 1st DCA 1987) ("deceased persons cannot be parties to a judicial . . . proceeding"); *Adelsberger v. United States*, 58 Fed. Cl. 616, 618 (Ct. Cl. 2003) ("a party must have a legal existence as a prerequisite to having the capacity to sue or be sued"). Defendant Alberto Jacome is therefore **dismissed** from this case. As a result then, the Court also **denies as moot** Cardno's motion for default judgment against Defendant Alberto Jacome. (**ECF No. 31.**)

4. Conclusion

Cardno has petitioned the Court to confirm the arbitration award at issue in this case. Finding no applicable ground for refusal or deferral of recognition and enforcement of the award, the Court must confirm the award with respect to the three Defendants who have been served: Carlos Diego

Fernando Jacome Merino, Eduardo Jacome Merino, and Galo Enrique Recalde Maldonado. The Court thus **grants in part and denies in part** (with respect to Alberto Jacome) Cardno's petition to confirm (**ECF No. 1**). Conversely, the Defendants have failed to carry their burden in urging the Court to vacate the award and therefore the Court **denies** their petition (**ECF No. 16**).

For the reasons set forth in the preceding section, the Court **vacates** the Clerk's default (**ECF No. 30**) and **denies as moot** Cardno's motion for default judgment against Alberto Jacome (**ECF No. 31**). Defendant Alberto Jacome is **dismissed** from this case.

The parties are ordered to submit to the Court, consistent with this order, an agreed upon form of judgment, or in the alternative, forms of judgment and supporting memoranda from each of them, on or before **May 31, 2018.**

In the meantime, the Clerk is directed to administratively **close** this case.

Done and ordered at Miami, Florida on May 22, 2018.

Robert N. Scola, Jr.
United States District Judge