16-16163-FF

United States Court Of Appeals
for the
Eleventh Circuit

BAMBERGER ROSENHEIM LTD.,

Petitioner/Appellant,

v.

OA DEVELOPMENT, INC.,

Respondent/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION
HONORABLE ELEANOR L. ROSS
CIVIL ACTION NO. 1:15-CV-04460-ELR

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BAMBERGER ROSENHEIM, LTD., Appellant, v. OA DEVELOPMENT, INC., Appellee.	CASE NO. 16-16163-FF

APPELLEE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, counsel for Appellee hereby certifies that the following persons or entities have or may have an interest in the outcome of this case.

Bamberger Rosenheim Ltd. – Petitioner/Appellant

Berman, Steve – Principal for Respondent/Appellee

Bloom, Simon H. – Counsel for Respondent/Appellee

Bloom Sugarman, LLP – Counsel for Respondent/Appellee

Covington, Troy R. – Counsel for Respondent/Appellee

Eric Singer & Associates, Inc. – Affiliate Respondent/Appellee principal, Eric Singer

Granath, Brian – Principal for Respondent/Appellee

Harbin, Ryan – Counsel for Respondent/Appellee

Hecht, Gregory K. – Counsel for Petitioner/Appellant

Hecht, Walker, P.C. – Counsel for Petitioner/Appellant

Jordan, Jon W. – Counsel for Petitioner/Appellant

Kendrick, Nesbitt (Ken) – Arbitrator

LMRG, Inc. – Affiliate of Respondent/Appellee principal Brian Granath

Minkin, David – Counsel for Respondent/Appellee

Profimex, Inc. – Affiliate of Petitioner/Appellant

Profimex, Ltd. – Affiliate of Petitioner/Appellant

Rosenheim, Asaf – Principal of Affiliate for Petitioner/Appellant

Rosenheim, Elchanan – Principal for Petitioner/Appellant

Ross, Eleanor L. – Judge, U.S. District Court, Northern District of Georgia

OA Development, Inc. – Respondent/Appellee

OA Management, Inc. – Affiliate of Respondent/Appellee

Steber, Inc. – Affiliate of Respondent/Appellee principal Steve Berman

Walker, Mark C. – Counsel for Petitioner/Appellant

Zion, Ariel – Counsel for Respondent/Appellee

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee certifies that there is no parent corporation that owns 10 percent of its stock and that there is no publicly held corporation that owns 10 percent or more of it.

Respectfully submitted this 19th day of January, 2017.

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Statement Regarding Oral Argument

Appellee OA Development, Inc. ("OAD") hereby requests that the Court hear oral argument. This case is an appeal of the District Court's order confirming an arbitration award in favor of OAD made under the rules of the International Chamber of Commerce. The District Court correctly rejected Appellant Bamberger Rosenheim Ltd.'s ("Profimex") challenges to enforcement of the award under both the Federal Arbitration Act ("FAA") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

Profimex argues that the District Court erroneously refused to vacate OAD's arbitration award on the ground that arbitration of OAD's defamation counterclaim in Atlanta, Georgia was not in accordance with the venue provision contained in the parties' arbitration agreement. Four other circuit courts of appeals have held that venue is a procedural issue to be decided by the arbitrator, but this Court has not directly addressed that issue. Oral argument would aid the Court's decisional process in evaluating the issue of venue and the level of deference that the Court should afford the arbitrator's decision on the issue, given the relative lack of authority in this Circuit.

Oral argument will also aid the Court's decisional process because of the relatively small number of reported cases in this Circuit addressing international

arbitration under the New York Convention. While this Court has discussed and applied the standards under the FAA on many occasions, oral argument would assist the Court in resolving issues in this case under the New York Convention, including whether the arbitrator's reliance on certain third-party deposition testimony could have denied Profimex the opportunity to be heard at a meaningful time and in a meaningful manner.

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INTRODUCTION

This case is an appeal of the District Court's order confirming an arbitration award. Judicial review of arbitration decisions is among the narrowest known to the law, and federal courts do not sit as appellate bodies to review the merits of arbitrators' work. The heavy presumption in favor of confirming arbitration awards means a court's confirmation of an arbitration award is usually routine or summary. Federal courts must defer to an arbitrator's decision whenever possible.

Despite these well-known standards, Bamberger-Rosenheim Ltd. ("Profimex") has brought a challenge to OA Development, Inc.'s ("OAD") arbitration award that seeks just the sort of *de novo* review of the arbitrator's procedural and substantive rulings that the law prohibits. Profimex picked up a list of the limited reasons for vacating an arbitration award and attempted to shoehorn supposed errors by the arbitrator into the available defenses, but they do not fit.

Profimex and OAD voluntarily contracted that their disputes would be arbitrated to a binding resolution by the International Chamber of Commerce ("ICC"). After several years of a productive relationship, the parties had a dispute, and Profimex filed a demand for arbitration in Atlanta. OAD filed a counterclaim, as it had the right to do under the parties' agreement and the ICC arbitration rules. Profimex moved the arbitrator to dismiss the counterclaim on the grounds that it was not properly in the arbitration, but he correctly refused.

The parties then conducted almost six months of discovery, including more than thirty depositions of the parties and numerous non-parties, and the production of thousands of pages of documents. Following the close of discovery, the arbitrator conducted a week-long trial and received voluminous pre and post-hearing briefing on every issue in the case. The arbitrator thereafter entered a 64-page order that made awards in favor of each party on its respective claims.

Despite having agreed to waive any review of the award under both the arbitration agreement and the ICC rules, Profimex then filed a challenge in the District Court seeking a do-over on the merits of the arbitration. Remarkably, Profimex argued that it was denied a fundamentally fair hearing despite the parties' chosen arbitrator (the "Arbitrator") bending over backward to allow them to do whatever they deemed necessary to present their case. Profimex agreed to an arbitration procedure that this Court has held can be summary in nature and does not include the protections of the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and full constitutional due process. Nonetheless, Profimex received a proceeding almost equivalent in nature to what it could have received in federal court, including a hearing in which it was allowed to introduce any evidence it wanted, with no evidentiary rules or formalities.

The District Court correctly recognized that it is not permitted to conduct a full appellate review of the Arbitrator's legal conclusions, factual determinations,

and procedural rulings under the limited, deferential review established by arbitration law. The District Court therefore properly rejected Profimex's motions to vacate or modify the arbitration award to OAD and confirmed it instead. This Court should affirm the District Court's order, because Profimex's challenges to the award fail to meet any of the exceedingly-narrow defenses to its enforcement.

STATEMENT OF THE ISSUES

(1) Whether the District Court correctly refused to vacate OAD's arbitration award on the ground that arbitration of OAD's defamation counterclaim in Atlanta was not in accordance with the agreement of the parties under Article V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

(2) Whether the District Court correctly refused to vacate OAD's arbitration award on the ground that arbitration of OAD's defamation counterclaim in Atlanta exceeded the Arbitrator's powers under 9 U.S.C. § 10(a)(4).

(3) Whether the District Court correctly refused to vacate OAD's arbitration award on the ground that the Arbitrator's partial reliance on testimony from third-party witness Itay Goren constituted misconduct under 9 U.S.C. § 10(a)(3) or rendered enforcement of the award contrary to the public policy of the United States under Article V(2)(b) of the New York Convention.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

Profimex initiated this matter by filing its Petition to Vacate or Modify Arbitration Award and Application to Confirm Award Against OAD on December 23, 2015. [Doc. 1.] OAD filed its Motion to Confirm Arbitration Award on February 2, 2016.[1] [Doc. 28.] Pursuant to scheduling orders entered by the District Court, Profimex filed motions to vacate or modify the arbitration award [Docs. 9-11], and OAD responded in opposition to the motions. [Docs. 15-18.] The parties also briefed OAD's Motion to Confirm Arbitration Award. [Docs. 24 and 27.]

The District Court held an oral hearing on all the parties' motions on August 9, 2016. [Doc. 50.] On August 24, 2016, the District Court entered an Order denying Profimex's motion to vacate the defamation award to OAD and granting OAD's motion to confirm it, with limited modifications. [Doc. 36.]

On August 25, 2016, the Clerk of Court entered Judgment confirming the arbitration award except as specified in the August 24 Order and entering a modified award to OAD on its defamation claim. [Doc. 37.] Profimex timely filed its Notice of Appeal on September 20, 2016. [Doc. 42.]

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[1] This motion was originally filed in the matter styled *OA Development, Inc. v. Bamberger Rosenheim, Ltd.*, Case No. 1:16-CV-0314-ELR. The District Court consolidated this matter with the case now pending on appeal on March 16, 2016. [Doc. 19.]

II. Statement of the Facts

A. OAD and Profimex's Business Relationship

OAD is in the business of real estate acquisition, development, and management in the United States. [Doc. 1-27 – Pg 5.] Profimex is a "capital aggregator" which solicits individuals in Israel to invest in real estate and related businesses in countries around the world, including the United States. [*Id.*] On or about March 31, 2008, OAD and Profimex entered a Solicitation Agreement, under which OAD appointed Profimex as its exclusive placement agent to secure investors in Israel to invest in real estate projects which OAD would acquire and develop in the United States. [*Id.* at Pg 6.] The Solicitation Agreement contains an arbitration provision:

> This agreement shall be construed in accordance with the laws of the State of New York without giving effect to choice of law principles. Any disputes with respect to this Agreement or the performance of the parties hereunder shall be submitted to binding arbitration proceedings conducted in accordance with the rules of the International Chamber of Commerce. Any such proceedings shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex.

[Doc. 1-1 – Pg 6 (emphasis added).]

Under the Solicitation Agreement, OAD would present a property it wished to purchase to Profimex with a business plan showing the potential for investment. [Doc. 1-27 – Pg 6.] Profimex would have the option of providing, through its investor network in Israel, a portion of the capital necessary to acquire and

maintain the property. [*Id.*] OAD and Profimex intended to produce income from the acquired projects through leasing and sale at a later date. [*Id.*] Both OAD and Profimex were entitled to various fees for services rendered in connection with the purchase, maintenance, leasing, and sale of the property. [*Id.*]

The Solicitation Agreement anticipated that a limited liability company would be formed to purchase each investment and that either OAD or an entity organized by OAD would serve as the general partner of each project entity, and either an entity formed by investors solicited by Profimex or those investors themselves would own some of the limited partner interests in the Project Entity. [*Id.*] Between March 31, 2008 and March 31, 2013, the date the parties terminated the Solicitation Agreement, the parties participated in eight real estate projects together. [*Id.* at Pgs 7-8.]

B. Profimex Begins Attacks on OAD.

In mid-2012, the relationship between OAD and Profimex began to deteriorate. During that period, investments began to mature and produce results ranging from very successful to very unsuccessful. [*Id.* at Pg 9.] In early March 2013, Profimex hired New York counsel, which issued a letter to OAD questioning the use of funds disclosed in a loan request for one of the projects and directing that all communications regarding the matter be directed to counsel. [*Id.* at Pg 10.] The letter resembled an indictment and included a "litigation hold" notice

instructing OAD to engage in document preservation and made reference to a "neutral arbitrator," suggesting that litigation was imminent. [*Id.* at Pgs. 10-11.]

In 2013, Profimex commissioned accounting firm Prager Metis CPAs, LLC ("Prager Metis") to conduct forensic examinations of the books and records of OAD regarding two real estate projects in which OAD partnered with Profimex. [*Id.* at Pg 37.] The Prager Metis reports made no findings of any misuse of funds, fraud, theft or deceit by OAD. Nevertheless, Profimex used these reports to make a number of false and defamatory statements regarding OAD to OAD's investors on various real estate projects, including calling OAD's principals "crooks," "liars," and "thieves." [*Id.* at Pg 40.]

In February 2014, the OAD-Profimex project known as Bluegrass Lakes sold for a healthy profit. [*Id.* at Pg 11.] The sale of this property led Profimex to seek payment from OAD of two fees it claimed were due under the Solicitation Agreement and the Bluegrass Lakes limited partnership agreement. [*Id.*] To attempt to resolve the conflict caused by the false statements made by Profimex, OAD proposed that the parties sign a mutual release of all claims prior to OAD making any payment to Profimex on the Bluegrass Lakes deal. [Doc. 28-3 – Pg 17 and Ex. 6.) Profimex refused to sign the proposed release. [Doc. 28-3 – Pg 17.]

On March 28, 2014, OAD's counsel sent a letter to Profimex detailing Profimex's many defamatory acts and demanding that Profimex retract its

damaging and false statements. [Doc. 28-3 – Pg 18 and Ex. 8.] OAD further demanded that Profimex refrain from any further defamation directed toward OAD. [*Id.*] Profimex did not respond to this letter or alter its behavior toward OAD. [Doc. 28-3 – Pg 18.]

C. The Arbitration

Profimex then submitted a Request for Arbitration dated April 18, 2014, to the ICC. [Doc. 1-2.] Profimex sought two fees it claimed were due from OAD as a result of the Bluegrass Lakes sale. [Doc. 1-2 – Pgs 16-18.] On June 13, 2014, OAD submitted its Answer to Request for Arbitration and Counterclaim. [Doc. 28-3.] OAD's Counterclaim set out a claim for defamation under New York law based on false statements made by Profimex to third parties regarding OAD's performance under the Solicitation Agreement. [Doc. 28-3 - Pgs 20-22.]

Profimex submitted a Reply to Respondent's Counterclaim, objecting to the venue of OAD's counterclaim being in Atlanta and asserting that Section 9(a) of the Solicitation Agreement required OAD to bring the counterclaim in Tel Aviv, Israel. [Doc. 1-4 – Pg 2.] The Arbitrator thereafter conducted a telephonic hearing, during which counsel for each of the parties stipulated that the Arbitrator had jurisdiction to determine the arbitrability of OAD's counterclaim. [Doc. 28-4 – Pg 2.] Following the submission of letter briefing by the parties, the Arbitrator concluded that venue over the counterclaim was proper in Atlanta. [Doc. 1-7.]

Following extensive discovery, the Arbitrator conducted a week-long trial, during which the parties presented testimony from seven live witnesses including the parties' principals. [Doc. 1-27 – Pg 3.] The parties also tendered into evidence the deposition testimony of twenty-three additional witnesses, the affidavit testimony of four witnesses, and the supplemental deposition testimony of principals of the parties. [*Id.*] The parties also submitted both pre-hearing briefs and post-hearing briefs based on the trial record. [*Id.*] Based on this voluminous record, the Arbitrator found in favor of OAD on its defamation claim and awarded OAD general damages, punitive damages, and attorney's fees.[2] [*Id.* at Pg 63.]

III. Standard of Review

This Court reviews the District Court's confirmation of an arbitration award and its denial of a motion to vacate the award *de novo*. *White Springs Agric. Chems., Inc. v. Glawson Inv. Corp.*, 660 F.3d 1277, 1280 (11th Cir. 2011). This Court reviews the district court's factual findings for clear error. *Id.*

SUMMARY OF THE ARGUMENT

The Court's review of the international arbitration at the center of this appeal is governed by the New York Convention and the FAA. Review under both the New York Convention and the FAA is very limited to promote arbitration's goals of settling disputes efficiently and avoiding long and expensive litigation.

[2] The Arbitrator offset the awards made to Profimex on its Bluegrass Lakes claims against the amount he awarded to OAD. [Doc. 1-27 – Pg 64.]

Arbitration of OAD's defamation counterclaim in Atlanta did not exceed the Arbitrator's powers under Section 10(a)(4) of the FAA. Interpretation of the venue provision of the parties' arbitration agreement was a procedural determination for the Arbitrator which is not to be disturbed by the courts. The international nature of the arbitration does not change the venue decision to one for the court to make because venue provisions are important in all arbitration agreements, and there is no significant difference in international arbitrations that would convert the venue issue to a question of arbitrability.

The Arbitrator construed the venue provision of the parties' agreement and determined that OAD's counterclaim could be heard in the Atlanta arbitration. That is where the Court's inquiry ends under Section 10(a)(4) of the FAA, which does not permit the vacatur of arbitration awards for legal errors. Because the Arbitrator engaged with the contract's language and construed it in reaching his conclusion, that construction must hold, whether the Court agrees with that construction or not. The text of the Arbitrator's decision does not support Profimex's arguments that the Arbitrator based his construction on his own policy preferences rather than the language of the agreement and the rules of the arbitration. Finally, the parties specifically stipulated that the Arbitrator was empowered to resolve Profimex's objection to venue of OAD's counterclaim in Atlanta, and Profimex cannot now have the Court second-guess the Arbitrator.

Further, arbitration of OAD's counterclaim in Atlanta was in accord with the parties' arbitration agreement and did not violate Article V(1)(d) of the New York Convention. The Arbitrator properly construed the venue provision, and the Court must defer to his construction. The venue provision states that if Profimex initiates a dispute, it is to be arbitrated in Atlanta. Profimex clearly submitted the dispute, and the Arbitrator determined that the venue provision allows OAD's counterclaims to be arbitrated in the same proceeding. At the time Profimex filed its arbitration request, the parties were involved in a far-reaching dispute that included both Profimex's claims for payment of fees and OAD's defamation claims. The Arbitrator correctly determined that the entire dispute should be arbitrated in Atlanta.

The Arbitrator's partial reliance on testimony from a third-party witness named Itay Goren did not constitute misconduct under Section 10(a)(3) of the FAA. Arbitrators have wide latitude to conduct arbitrations and are not constrained by formal rules of procedure. Even if an arbitrator were to make an erroneous evidentiary or discovery ruling, this would only constitute misconduct if it deprived a party of a fundamentally fair hearing.

Here, Profimex received a fundamentally fair hearing. Though there is no right to cross examine witnesses in arbitration, Profimex had the opportunity to depose Mr. Goren and obtained information with which to attack his testimony,

even though he limited the time of his deposition and refused to answer certain questions. Profimex had ample notice of Mr. Goren's testimony and submitted its own evidence in opposition to it. Profimex disagrees with the Arbitrator's decision to give weight to Mr. Goren's testimony, but credibility determinations clearly were the province of the Arbitrator.

Finally, enforcement of the arbitration award would not violate any public policy. Due process under the New York Convention means only adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. Profimex received all of these things as to Mr. Goren. The Arbitrator carefully evaluated all of the circumstances of Mr. Goren's testimony before crediting it, as he had the authority to do, and this did not deprive Profimex of the opportunity to be heard at a meaningful time and in a meaningful manner.

ARGUMENT

I. Judicial Review of Arbitration Awards Under the New York Convention and the Federal Arbitration Act is Very Narrow.

A. Judicial Review Under the New York Convention and FAA.

The New York Convention governs an arbitral award granted against a foreign corporation by an arbitrator sitting in the United States and applying American law. *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998). The New York Convention is incorporated into federal law by the FAA, which mandates its enforcement in American courts. *Id.*

Non-conflicting provisions of the "domestic" FAA apply residually to New York Convention cases. *Bautista v. Star Cruises*, 396 F.3d 1289, 1299 (11th Cir. 2005) (citing 9 U.S.C. § 208). When both an arbitration and the enforcement of an award falling under the New York Convention occur in the United States, there is no conflict between the Convention and the domestic FAA because Article V(1)(e) of the Convention incorporates the domestic FAA and allows awards to be set aside by a competent authority of the country in which the award was made. *Ario v. Underwriting Members of Syndicate 53 at Lloyds for the 1998 Year of Account*, 618 F.3d 277, 292 (3d Cir. 2010). Accordingly, where an arbitration and enforcement of the award both take place in the United States, the Court may apply the standards of the domestic FAA to a motion to vacate. *Id.*

B. Review Under Both the New York Convention and FAA Is Extremely Limited.

International arbitration awards "are subject only to minimal review for basic fairness and consistency with national public policy." *FDIC v. HG Capital, LLC*, 525 Fed. Appx. 904, 905 (11th Cir. 2013) (quoting *Industrial Risk Insurers*, 141 F.3d at 1440). The party challenging the arbitration award has the burden of proving that any of the seven defenses contained in Article V of the New York Convention apply. *Industrial Risk Insurers*, 141 F.3d at 1442. "The burden is a heavy one, as the showing required to avoid summary affirmance is high. Given the strong public policy in favor of international arbitration, review of arbitral

awards under the New York Convention is very limited … in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Encyclopedia Universalis S.A. v. Encyclopedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005) (internal citations and punctuation omitted).

Likewise, the FAA "imposes a heavy presumption in favor of confirming arbitration awards; therefore, a court's confirmation of an arbitration award is usually routine or summary." *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 842 (11th Cir. 2011) (citations and internal quotation marks omitted) (emphasis added). Because of this presumption, "federal courts should defer to an arbitrator's decision whenever possible." *Johnson v. Directory Assistants Inc.*, 797 F.3d 1294, 1299 (11th Cir. 2015) (citation omitted).

Indeed, "judicial review of arbitration decisions is among the narrowest known to the law." *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1001 (11th Cir. 2007) (citation and internal quotation marks omitted) (emphasis added). The review is so narrow because "arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *Cat Charter, LLC*, 646 F.3d at 843 (citation omitted). "The FAA does not allow courts to roam unbridled in their oversight of arbitration awards, but carefully limits judicial intervention to instances where the

arbitration has been tainted in specified ways." *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1190 (11th Cir. 1995) (internal punctuation and citation omitted).

The FAA provides that a district court must grant an order confirming an arbitration award unless the award is vacated, modified, or corrected under one of "the exceedingly narrow grounds" set forth in Sections 10 and 11 of the Act. *S. Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352, 1357 (11th Cir. 2013) (citing 9 U.S.C. § 9). "These sections together give substance to a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 1358 (citation omitted).

II. Arbitration of OAD's Defamation Counterclaim in Atlanta Did Not Exceed The Arbitrator's Powers or Violate the Parties' Agreement.

Profimex argues that the District Court erred in not vacating OAD's arbitration award under Article V(1)(d) of the New York Convention because the adjudication of OAD's counterclaim in Atlanta violated the venue provision contained in the arbitration clause of the parties' Solicitation Agreement. (Br. of Appellant at 9.) Profimex also argues that the Arbitrator exceeded his powers under 9 U.S.C. § 10(a)(4) by adjudicating OAD's counterclaim as part of the Atlanta arbitration for the same reason. (Br. of Appellant at 14.)

However, interpretation of the arbitration agreement's venue provision was for the Arbitrator, and the courts cannot now second-guess it. Further, the Arbitrator correctly construed the venue provision to allow for OAD's

counterclaims to be arbitrated in Atlanta as part of a dispute brought by Profimex. The Arbitrator's adjudication of OAD's counterclaim in Atlanta did not exceed his powers under 9 U.S.C. § 10(a)(4), and the procedure was in accord with the agreement of the parties, such that Profimex has no defense to enforcement under Article V(1)(d) of the New York Convention.

A. The District Court Correctly Determined That Venue is A Procedural Issue to Be Determined By the Arbitrator And Given Deference by the Courts.

Profimex argues that the District Court erroneously determined that its review of the Arbitrator's construction of the venue provision of the arbitration agreement must be deferential. (Br. of Appellant at 15.) Profimex asserts that arbitration venue is a question of arbitrability which is presumptively for the court to decide, but case law does not support Profimex's position.

Whether contracting parties are "bound by a given arbitration clause raises a question of arbitrability for a court to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). However, where an arbitration provision is valid, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator to decide." *Id.* The "relevant question here is what kind of arbitration proceeding the parties agreed to. That question does not concern a state statute or judicial procedures. It concerns contract interpretation and arbitration procedures. Arbitrators are well

situated to answer that question." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (plurality opinion) (citations omitted) (emphasis in original). "Issues of procedural arbitrability are for arbitrators, not courts, to decide," and courts "vacate such decisions by arbitrators only in extremely narrow circumstances." *Grigsby & Assocs., Inc. v. M Secs. Inv.*, 635 Fed. Appx. 728, 732 n.9 (11th Cir. 2015) (citing *Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., Inc.*, 146 F.3d 1309, 1311 (11th Cir. 1998)).

1. The courts of appeals that have spoken on the issue have determined that venue is procedural.

The courts of appeals that have expressly addressed the issue have uniformly held that venue is a procedural issue to be decided by the arbitrator. *See LodgeWorks, L.P. v. C.F. Jordan Constr., LLC*, 506 Fed. Appx. 747, 750 (10th Cir. 2012) (holding that arbitral venue is an issue for the arbitrator); *UBS Fin. Servs., Inc. v. West Va. Univ. Hosps., Inc.*, 660 F.3d 643, 655 (2d Cir. 2011) (holding that venue is a procedural issue that the arbitrators should address in the first instance); *Central West Va. Energy, Inc. v. Bayer Cropscience LP*, 645 F.3d 267, 274 (4th Cir. 2011) (holding that the "duty to give primacy to the parties' intent and to resolve doubts in favor of arbitration reinforces [the] conclusion that the arbitrators, not the courts, should determine this gateway issue" of the proper venue for an arbitration); *Richard C. Young & Co., Ltd. v. Leventhal*, 389 F.3d 1, 4-5 (1st Cir. 2004) (finding that the district court lacked authority to interpret a

forum selection clause).[3] *See also Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1178 & n.3 (10th Cir. 2007) (holding that "venue is a matter that goes to process rather than substantive rights – determining which among various competent tribunals will decide the case"). *Cf. McCullagh v. Dean Witter Reynolds, Inc.*, 177 F.3d 1307, 1310 (11th Cir. 1999) ("The arbitrators would presumably enforce the venue-selection clause in precisely the same way that a court would.").

Profimex argues that an arbitrator's determination of his own jurisdiction is not entitled to deference and is a question of arbitrability for the court. (Br. of Appellant at 15-16.) However, the issue raised by Profimex on appeal is not whether the parties agreed to arbitrate OAD's counterclaim at all; it is where the parties agreed that OAD's counterclaim should be arbitrated. As such, the question of the proper venue of the counterclaim is not a "gateway dispute about

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[3] Profimex argues that the Ninth Circuit "has determined venue to be an issue for the court and has applied *de novo* review to an arbitrator's venue determination. (Br. of Appellant at 16-17.) That court did vacate an arbitration award based on its conclusion that the arbitrator misapplied a venue provision. *See Polimaster Ltd. v. RAE Sys.*, 623 F.3d 832 (9th Cir. 2010). However, the court in that case did not squarely address the proper level of review to be applied to an arbitrator's interpretation of a venue provision, and the court further only addressed the New York Convention, with no discussion of the FAA's provisions. Additionally, the Ninth Circuit earlier held that where a venue provision is ambiguous, the parties agree to the arbitrator's interpretation of the provision under the applicable arbitral rules, and the arbitrator's interpretation controls. *See China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc.*, 379 F.3d 796, 801-02 (9th Cir. 2004). Therefore, the Ninth Circuit has not clearly held that arbitration venue is an issue for the court.

whether the parties are bound by a given arbitration clause" that raises a question of arbitrability for the court to decide. *See Howsam*, 537 U.S. at 84. Rather, the issue of where OAD's claim should be heard is a "procedural" question which grows out of the parties' dispute and bears on its final disposition and is presumptively not for a judge, but for an arbitrator to decide.[4] *See id.* (citation omitted).

2. This Court has not held that arbitration venue is a question of arbitrability.

Profimex argues that this Court in *Sterling Fin. Inv. Group, Inc. v. Hammer*, 393 F.3d 1223 (11th Cir. 2004) determined that venue is a question for courts to resolve independently, rather than arbitrators. (Br. of Appellant at 16.) That case, rather, involved an arbitration clause that unambiguously placed venue for an NASD arbitration in Boca Raton, Florida, but the claimant filed the matter in Houston, Texas. 393 F.3d at 1224. The NASD refused to transfer the arbitration to Florida, and the respondent filed a motion in the district court seeking to stay the

[4] Profimex cites *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 226 (4th Cir. 1994), which held that if arbitrators "could somehow have interpreted the contract to determine how they should be selected … their interpretation would not be entitled to deference because it would have involved a determination of their own jurisdiction." Profimex also cites *Int'l Assoc. of Machinists & Aerospace Workers, Progressive Lodge No. 1000 v. General Elec. Co.*, 865 F.2d 902, 904 (7th Cir. 1989), which stands merely for the proposition that employers are not required to arbitrate grievances that are not within the scope of an arbitration clause, and whether they are included or not is an issue to be decided by the court. This is a classic question of arbitrability and does not show that the interpretation of a venue clause should be afforded the same treatment.

arbitration in Texas and compel arbitration in Florida. The district court granted the motion, and this Court affirmed. *Id.* at 1224-25. The Court held that a federal district court "has jurisdiction to enforce a forum selection clause in a valid arbitration agreement that has been disregarded by the arbitrators." *Id.* at 1225.

The Court relied in part on *Bear, Stearns & Co. v. Bennett*, 938 F.2d 31 (2d Cir. 1991), which was subsequently abrogated by *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). *See UBS Fin. Servs. Inc. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643, 655 n.8 (2d Cir. 2011) ("To the extent that arbitrators, not courts, presumptively have jurisdiction to adjudicate disputes over the enforceability of forum selection clauses, our holding to the contrary in *Bear, Stearns* was abrogated by *Howsam*, as clarified by *Green Tree*." As the District Court implicitly recognized, the abrogation of *Bear, Stearns* by the Supreme Court calls into question the continued vitality of any holding in *Sterling* that forum selection clause disputes primarily are for courts and not arbitrators. [Doc. 36 – Pgs. 13-14.]

The import of *Sterling*, then, is only that a court can enjoin arbitration in the wrong venue that was clearly and undisputedly in contradiction to the arbitration agreement. *Drago v. Holiday Isle, L.L.C.*, 537 F. Supp.2d 1219, 1222 (S.D. Ala. 2007). Notably, the *Sterling* court did not discuss at all whether venue is a decision for the arbitrator in reaching this common-sense result. 393 F.3d at 1225.

Additionally, this Court has interpreted *Howsam* to be controlling on the issue of the responsibilities of courts and arbitrators and to mean that "unless an arbitration agreement otherwise stipulates, a court is empowered only to determine the 'substantive' issue of arbitrability – that is, whether a particular dispute falls within the scope of an arbitration clause – and the necessary threshold question of whether the clause is enforceable." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1107, 1109 (11th Cir. 2004). "Gateway arbitrability issues other than these (which the *Howsam* Court seems to have designated 'procedural' arbitrability issues) are generally for the arbitrators themselves to resolve. Generally speaking, courts are empowered to resolve disputes that solely involve whether a particular claim should be resolved in court or arbitration." *Id.* (emphasis added). Because the question of arbitration venue does not fit into that category and is "within the scope of the arbitration clause," it is for the arbitrator to decide. *Id.* at 1110.

The District Court correctly determined that the Arbitrator "did not disregard an arbitration provision; rather, he interpreted the provision and reached a legal conclusion based on that interpretation." [Doc. 36 – Pg 13 n.4.] "Accordingly, the facts of this case are much more analogous to *Green Tree* because the venue dispute is, in essence, a dispute over contract interpretation, not whether the given issue is subject to arbitration in the first place." [*Id.*]

3. The international flavor of this arbitration does not change the nature of the venue decision.

Profimex asserts that none of the cases holding venue to be a procedural issue to be decided by the arbitrator involved international arbitration. (Br. of Appellant at 17.) Profimex posits that while venue provisions in domestic arbitration agreements may be procedural matters because they bear on the convenience of the parties, venue provisions in international agreements determine the country where the arbitration will take place and therefore the procedural law to apply to the arbitration. (*Id.*) According to Profimex, this makes venue in the international context a question of arbitrability, not a procedural one. (*Id.*)

While the importance of venue provisions in international agreements is well-established, Profimex disregards the fact that a forum selection clause in any arbitration agreement is a vital part of the agreement that must be enforced. *See Luckie v. Smith Barney, Harris Upham & Co.*, 999 F.2d 509, 513 (11th Cir. 1993) ("A forum selection clause in an arbitration agreement, just like any other contract provision, is entitled to complete enforcement absent evidence that the contract was procured through fraud or excessive economic power."). Parties to all arbitration agreements doubtless consider their forum selection clauses to be "strategic, substantive, outcome determinative bargained for agreements," and Profimex offers no authority to support its argument that venue provisions in

international arbitration agreements should be treated as questions of arbitrability, when all other venue provisions are treated as procedural issues.

Moreover, Profimex ignores the fact that the way domestic venue provisions are interpreted can have an effect on what courts review arbitration awards and the substantive law that applies to the review. For example, if a domestic venue provision is interpreted to require arbitration to take place in Charlotte, then the Fourth Circuit's holding that manifest disregard of the law continues to exist as a ground for vacatur of an arbitration award would apply. *Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012). But, if the same venue provision is interpreted to require the arbitration to take place in Atlanta, then manifest disregard of the law would not be an available basis for vacating any award. *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010).

In either the domestic or international context, the interpretation of a venue provision has an impact on the review of any arbitration award. Profimex has not pointed to sufficient reason to treat venue provisions in the international context as questions of arbitrability for the court, when domestic venue provisions are treated as procedural matters that are resolved by the arbitrator.

B. Section 10(a)(4) of the FAA Does Not Permit Vacatur for Legal Errors.

A party seeking to have an arbitration award vacated under 9 U.S.C. § 10(a)(4) "bears a heavy burden. It is not enough to show that the arbitrator

committed an error – or even a serious error." *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (internal punctuation and citation omitted). "Because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits." *Id.* (internal quotation marks and citation omitted). "Only if the arbitrator acts outside the scope of his contractually delegated authority – issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract – may a court overturn his determination." *Id.* (internal punctuation and citation omitted). Thus, the sole question is "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Id.*; *see also White Springs Agric. Chems., Inc. v. Glawson Inv. Corp.*, 660 F.3d 1277, 1280 (11th Cir. 2011) (holding that an arbitrator's "incorrect legal conclusion is not grounds for vacating or modifying the award").

1. The Arbitrator construed the venue provision of the parties' arbitration agreement and did not exceed his powers in doing so.

Under the Court's limited inquiry as set forth above, the Arbitrator clearly interpreted the parties' contract as to the dispute venue provision. The Arbitrator evaluated the arbitration clause of the Solicitation Agreement and stated that the "dispute" before him was "submitted by" Profimex for arbitration in Atlanta.

[Doc. 1-7 – Pg 9.] As the Arbitrator pointed out, the arbitration clause "does not affirmatively negate the right of a party to assert a counterclaim in a matter submitted for arbitration." [*Id.*] The parties also agreed to have disputes arbitrated under the ICC rules, which "specifically permit and provide for adjudication of counterclaims submitted by a Respondent." [Doc. 1-7 – Pg 10.] Given these factors, the Arbitrator concluded that venue was proper as to OAD's counterclaim in the dispute submitted by Profimex in Atlanta. [*Id.*]

Clearly, the Arbitrator evaluated the language of the arbitration provision regarding venue and made an interpretation of the same. This is where the Court's inquiry ends under Section 10(a)(4). *See Oxford Health Plans LLC*, 133 S. Ct. at 2068. This case is thus similar to *S. Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352 (11th Cir. 2013), in which the issue was whether the parties' arbitration agreement permitted class arbitration or not. There, the arbitrator construed the text of the parties' agreement and applied the chosen arbitration rules and Georgia contract construction law to determine that the intent of the parties was not to bar class arbitration. *Id.* at 1359-60. "Engaging as he did with the contract's language and the parties' intent, the arbitrator did not stray from his delegated task of interpreting a contract, for he was arguably construing the contract." *Id.* at 1360 (citation and punctuation omitted). "It is not for [the Court] to opine on whether or not that task was done badly, for it is the arbitrator's construction of the contract

which was bargained for[.] The arbitrator's construction holds, however good, bad, or ugly."[5] *Id.* (citation and punctuation omitted).

Likewise in this case, the Arbitrator construed the parties' arbitration agreement and determined that it permitted OAD to bring a counterclaim in Atlanta as part of the dispute submitted by Profimex. As the District Court found, it is abundantly clear that "the Arbitrator engaged with the contract's language and at least arguably construed the contract in reaching his conclusion." [Doc. 36 – Pg 17.] The Arbitrator's construction must hold, whether the District Court or this Court would have answered the same question in the first instance. *See S. Commc'ns Servs., Inc.*, 720 F.3d at 1360. *See also Oxford Health Plans, LLC*, 133 S. Ct. at 2070 (holding that where the arbitrator construed the contract to permit

[5] Profimex unsuccessfully attempts to distinguish *Thomas* on the basis that the case was decided because of a "national policy favoring arbitration in relation to class arbitration, as announced by the Supreme Court in *Oxford Health Plans*." (Br. of Appellant at 22 n.7.) What was actually dispositive in both *Oxford Health* and *Thomas* is that in each case, the parties "bargained for the arbitrator's construction of their agreement," making an arbitral decision "even arguably construing or applying the contract" stand. 720 F.3d at 1358 & n.6. This Court affirmed the arbitrator's construction of the contract based on his performance of the assigned task of construing the contract before him, not because of any national policy regarding class arbitration. *Id.* at 1360. Further, the Arbitrator here identified the governing substantive law and procedural rules for the venue issue just as the arbitrator in *Thomas* identified the law governing whether class arbitration would be allowed in that case. [Doc. 1-7 – Pgs 9-10.] Finally, the Arbitrator's decision to allow OAD's counterclaim to proceed in Atlanta did not contradict any "expressed provision of the parties' agreement," because that is the entire issue that was before the Arbitrator to resolve. He answered that question based on the language of the arbitration provision and the applicable rules and did not ignore any explicit provision to the contrary.

class arbitration, overturning his decision would have to rely on a determination that he misapprehended the parties' intent, which Section 10(a)(4) does not permit); *Johnson v. Directory Assistants, Inc.*, 797 F.3d 1294, 1302 (11th Cir. 2015) (vacating the district court's grant of a motion to vacate an arbitration award where the arbitrator's rulings were derived from the contract, and the district court's disagreement with those rulings did not justify vacatur under Section 10(a)(4)). As the Supreme Court has emphasized, parties that choose arbitration must live with that choice and do not get to rerun issues with the court which they have agreed to have an arbitrator determine, simply because that determination goes against them. *Oxford Health Plans, LLC*, 133 S. Ct. at 2071.

2. The Arbitrator based his construction on the parties' agreement and not on his own policy preferences.

Profimex argues that instead of "interpreting the parties' agreement, the Arbitrator determined at the outset that counterclaims must be permitted in arbitration and attempted to justify his personal public policy view by reference" to the ICC rule allowing counterclaims to be filed. (Br. of Appellant at 21.) Profimex further asserts that the Arbitrator "could not have interpreted the parties' agreement when his inferred decision to permit OAD's counterclaim in Atlanta directly contradicted the parties' expressed forum selection provision." (*Id.* at 22.)

Contrary to Profimex's arguments, the Arbitrator did not start with the premise that counterclaims must be allowed in arbitration and then seek to justify

his personal policy view. Instead, the Arbitrator started with the language of the arbitration agreement's venue provision: "Any such proceedings shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex." [Doc 1-7 – Pg 9.] The Arbitrator then noted that the dispute was "submitted by" Profimex for arbitration in Atlanta and that the arbitration provision "does not affirmatively negate the right of a party to assert a counterclaim in a matter submitted for arbitration." [*Id.*] In the absence of an express prohibition on counterclaims in the parties' agreement, the Arbitrator then looked to the parties' chosen ICC rules, which specifically allow for counterclaims and require any counterclaims to be filed at the time the responding party files its answer.[6] [*Id.* at 10.] The Arbitrator therefore concluded that venue was proper as to the OAD counterclaim in the dispute submitted by Profimex in Atlanta. [*Id.*]

Clearly, the Arbitrator did not infer based on his views a decision that was not grounded in the language of the venue provision. He interpreted the venue provision using the plain language of the agreement and the parties' chosen arbitration rules. The Arbitrator's decision does not contradict the parties'

[6] Profimex's assertion that ICC Article 5 "merely provides a timing mechanism for the assertion of any counterclaims if any are asserted" is simply wrong. The rule provides that "any counterclaims made by the respondent shall be submitted with the Answer…" ICC Article 5(5) (emphasis added). The rule thus makes it mandatory to file any counterclaim that the respondent may have at the time the respondent answers the arbitration demand.

expressed forum selection clause and does not use the ICC rules to create a right that conflicts with the forum selection clause.[7] Finally, the Arbitrator made no reference to "his own notions for industrial justice and efficiency" in his ruling that the OAD counterclaim was properly brought in Atlanta. The Arbitrator construed the language of the parties' agreement in light of their chosen arbitral procedural rules. The Arbitrator's personal beliefs about justice, efficiency, or anything else are not discussed in his decision and did not play a role.

3. The parties specifically agreed that the Arbitrator would resolve Profimex's objection to the venue of OAD's counterclaim.

The parties specifically agreed that the Arbitrator should resolve Profimex's objection to the venue of OAD's counterclaim in Atlanta. [Doc. 28-4 – Pg 2.] Profimex agreed that the Arbitrator would decide the issue of the venue of OAD's counterclaim, and it cannot now seek a do-over from this Court just because it does not like the Arbitrator's decision.[8] *See Oxford Health Plans LLC*, 133 S. Ct. at 2068 n.2 (where party conceded that it submitted an issue to the arbitrator for

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[7] Obviously, Profimex disagrees with the Arbitrator's interpretation of the forum selection clause to allow OAD's counterclaim in Atlanta, but whether the OAD counterclaim was proper in Atlanta or not was the crux of the parties' disagreement over the provision decided by the Arbitrator. The Arbitrator's interpretation answered the question based on the language of the venue provision, not in contradiction to it.

[8] Additionally, ICC Rule 18(1) provides that the place of the arbitration shall be determined by the ICC, unless agreed upon by the parties. Since the parties could not agree on the proper venue for the arbitration of OAD's counterclaim, it was for the Arbitrator to decide under the rules upon which the parties selected.

decision, the courts could not review *de novo* whether the arbitrator determined that issue correctly or not). *See also Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1146 (11th Cir. 2015) ("[P]arties may agree to commit even threshold determinations to an arbitrator, such as whether an arbitration agreement is enforceable."). Because Profimex "gave the question" of whether venue for the counterclaim was proper in Atlanta to the Arbitrator and then made no objection to his decision in any court until after the Arbitrator had rendered the Final Award, the Court cannot now decide that the venue of the counterclaim is a question of arbitrability and second-guess the Arbitrator as Profimex requests. *See S. Commc'ns Servs., Inc.*, 720 F.3d at 1358 n.6.

C. Arbitration of OAD's Counterclaim in Atlanta Was In Accord With The Parties' Agreement And Did Not Violate Article V(1)(d) Of the New York Convention.

Article V(1)(d) of the New York Convention permits a court to refuse to enforce an arbitration award where "the arbitral procedure was not in accordance with the agreement of the parties." Profimex's argument that the arbitration of OAD's counterclaim in Atlanta violated the parties' agreement fails because the Arbitrator properly construed the venue provision, and the Court must give that construction deference.

To determine whether an arbitration procedure was contrary to the parties' agreed arbitral procedure, the Court must begin with the language of the parties'

arbitration agreement. *Calbex Mineral Ltd. v. ACC Res. Co.*, 90 F. Supp. 3d 442, 463 (W.D. Pa. 2015). Under the New York Convention, courts are to afford "considerable deference" to the arbitrator's interpretation and application of the parties' contract. *Enron Nigeria Power Holding, Ltd. v. Fed. Republic of Nigeria*, --- F.3d ---, No. 15-7121, 2016 WL 7439009, at *6 (D.C. Cir. Dec. 27, 2016) (citing *B.G. Grp. PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1210 (2014)). *See also CEEG (Shanghai) Solar Science & Tech. Co., Ltd. v. LUMOS LLC*, 829 F.3d 1201, 1206 (10th Cir. 2016) (holding that courts afford "maximum deference" to the arbitrator's decision and are "not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract").

1. *Polimaster* is legally and factually distinguishable.

Profimex relies heavily on *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832 (9th Cir. 2010) for its argument that the Arbitrator misconstrued the venue provision of the parties' arbitration agreement. In that case, Polimaster, a company from Belarus, entered a contract with RAE, a company based in California. *Id.* at 834. The contract contained an arbitration provision stating: "In case of failure to settle … disputes by means of negotiations they should be settled by means of arbitration at the defendant's side." *Id.* The parties agreed that "defendant's side" meant "defendant's site," that is, the geographical location of the defendant's

principal place of business. *Id.* Polimaster submitted a demand for arbitration in California, and RAE submitted an answer and counterclaims. *Id.* at 835. Polimaster asked the arbitrator to dismiss RAE's counterclaims on the basis that any claims by RAE against it were required to be brought at the "defendant's site," that is, Polimaster's site in Belarus. The arbitrator refused to dismiss RAE's counterclaims and later entered an award on them in favor of RAE. *Id.* Polimaster moved to vacate the award, but the district court confirmed the award. *Id.*

On appeal, a split panel of the Ninth Circuit reversed, holding that the arbitration agreement required that all requests for affirmative relief, whether called claims or counterclaims, be arbitrated at the defendant's site. *Id.* at 837. The court determined that the arbitration agreement required that any "dispute" be arbitrated at the defendant's site and that the term "dispute" encompasses both claims and counterclaims. *Id.* According to the court, "a party is a 'defendant' as to any dispute where another party seeks damages or some other form of relief against him. Therefore, Polimaster was clearly the 'defendant' as to RAE's 'counterclaims.' The 'dispute' embodied in those claims should not have been arbitrated at RAE's site in California." *Id.*

The first important difference between that case and this one is that Polimaster originally filed an action against RAE in district court; the parties then negotiated to submit Polimaster's claims to arbitration in California with JAMS.

Id. at 834. In doing so, Polimaster made a reservation that no counterclaims could be filed in the matter based on the parties' agreement that all claims be filed in the location of the party against whom the claims are brought, which for it would be Belarus. *Id.* at 835. Despite Polimaster's reservation, RAE filed counterclaims against Polimaster in the California arbitration anyway. *Id.* In contrast, there was no negotiated submission of the claims to arbitration in this matter and no reservation of rights by any party regarding the viability of filing counterclaims.

Second, the language of the arbitration clause at issue in *Polimaster* was fundamentally different than the language of the arbitration clause in the Solicitation Agreement. In *Polimaster*, the place of the arbitration was to be the defendant's home site. In the instant case, on the other hand, the site of the arbitration is determined by the party that submits a dispute. The Solicitation Agreement creates a situation in which the party who files does so in the home country of the other party. The focus is on the filing of a dispute, not whom is a "defendant" as in *Polimaster*. [Doc. 1-1 – Pg 6.]

Third, the arbitration clause at issue in *Polimaster* did not provide for a choice of law or a choice of procedural rules. 623 F.3d at 839. The arbitrator therefore relied upon the Federal Rules of Civil Procedure, the California Rules of Civil Procedure, and the arbitration forum's rules regarding bringing counterclaims in a single proceeding. *Id.* at 838. The Ninth Circuit pointed out that the parties

did not incorporate those rules into their agreement and that the assumption that counterclaims could be brought into a pending proceeding went against the parties' contractual language. *Id.*

Here, on the other hand, OAD and Profimex specifically agreed that the ICC's arbitration rules would govern any arbitration proceedings. The ICC rules include a mandatory counterclaim rule: "Any counterclaims made by the respondent shall be submitted with the Answer…" ICC Article 5(5) (emphasis added). The rule is clear both that counterclaims are permitted and that they must be filed along with an answer by the party asserting them. *See id.* There is simply no support in the rule for Profimex's argument that the Arbitrator "rewrote the parties' forum selection clause by adding a right to counterclaims in the parties' arbitration agreement, which he inferred from generally applicable rules of procedure." (Br. of Appellant at 12-13.) As the Arbitrator pointed out, nothing in the arbitration agreement "affirmatively negate[s]" the right of a party to assert a counterclaim, and the ICC rules specifically provide for them. [Doc. 1-27 – Pgs 9-10.] Accordingly, OAD both had the right and obligation to bring its claims against Profimex in Atlanta under the ICC rules or risk losing them.

This interpretation is consistent with the Ninth Circuit's determination that "dispute" includes both claims and counterclaims.[9] *Polimaster*, 623 F.3d at 837. The dispute in this case was submitted by Profimex. The arbitration clause requires that disputes submitted by Profimex, including any counterclaims filed by OAD, be arbitrated in Atlanta. That is precisely what the Arbitrator concluded. As noted above, the Arbitrator in no way based his decision on "his own concerns of judicial efficiency," as Profimex incorrectly asserts. (Br. of Appellant at 13.) The Arbitrator's decision, rather, was based on the language of the parties' agreement as applied under the ICC rules the parties agreed would govern any arbitration under the agreement. [Doc. 1-7 – Pgs 9-10.]

2. The parties were engaged in a large dispute at the time that Profimex filed the arbitration.

As set out in detail in the facts above, the parties were involved in a dispute that encompassed both Profimex's claim for some fees due to it and OAD's claim for defamation arising out of the false statements made about it by Profimex. By the time of the sale of the Bluegrass Lakes project, Profimex had already hired New York litigation counsel to threaten OAD and commissioned the Prager Metis forensic examinations of two other projects, which it was claiming to investors showed OAD had engaged in improprieties. After the Bluegrass Lakes sale closed,

[9] This is further consistent with the general definition of dispute, meaning a "conflict or controversy, esp. one that has given rise to a particular lawsuit." Black's Law Dictionary (9th ed. 2009).

OAD proposed that the parties execute a release to put these issues behind them, but Profimex refused. OAD further demanded that Profimex cease defaming it, but Profimex refused that as well. After Profimex filed its demand for arbitration in Atlanta, OAD filed its counterclaim to resolve all of the issues between the parties that comprised the then-existing overall dispute between them.

As the Arbitrator recognized, OAD's assertion of its counterclaim was within the language of the parties' arbitration clause. The arbitration clause does not use the terms "claim" or "cause of action." The parties easily could have agreed to language stating that any separate claim or cause of action had to be brought against the defendant of that claim or cause of action on its home turf. The agreement does not say this, however, and its use of the term "dispute" is clearly meant to be broader. Once a "dispute" was submitted, the arbitration agreement allows for that entire dispute, including claims, counterclaims, and defenses, to be resolved in the city in which the dispute was submitted. [Doc. 1-7 – Pgs 9-10.]

Given the deference owed to the Arbitrator's interpretation and application of the parties' contract, Profimex has not carried its heavy burden to show that the Arbitrator's construction of the venue provision was improper. *See Enron Nigeria Power Holding, Ltd.*, 2016 WL 7439009 at *6; *Industrial Risk Insurers*, 141 F.3d at 1442. This Court should affirm the District Court's confirmation of OAD's arbitration award.

III. The Arbitrator's Partial Reliance on Testimony from Itay Goren Did Not Constitute Misconduct or Violate United States Public Policy.

Profimex argues that the Arbitrator engaged in misconduct under 9 U.S.C. § 10(a)(3) by relying on testimony from Itay Goren, where Profimex could not depose Mr. Goren as long as it wanted and where it did not cross-examine him at trial.[10] (Br. of Appellant at 23.) Profimex further argues that the arbitrator's reliance on this testimony denied it fundamental due process under Article V(2)(b) of the New York Convention. (*Id.*) Importantly, as the District Court noted, at "no point in the arbitration did the Arbitrator preclude Profimex from cross-examining Mr. Goren. Profimex did, in fact, receive an opportunity to cross-examine the witness" in a deposition, but he was uncooperative. [Doc. 36 – Pgs 20-21.]

Profimex's argument fails because parties to an arbitration have no absolute right to cross examine adverse witnesses, and Profimex was able to cross examine Mr. Goren. Profimex's argument further fails because the Arbitrator gave Profimex a fundamentally fair hearing and more than ample opportunity to present its evidence and make its arguments.

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[10] Mr. Goren was a former principal with Profimex whose employment ended in October 2011. [Doc. 1-27 – Pg 5.] Mr. Goren testified that Profimex's defamation of OAD "poisoned the well" in the Israeli investment community and that he would therefore not attempt to solicit Israeli investors for future OAD projects. [Doc. 1-27 – Pg. 58.] The Arbitrator found "Mr. Goren's testimony regarding the market effect of the Profimex statements made to Israeli investors to be consistent with what would be a reasonably foreseeable consequence of statements of the type found to be defamatory and therefore credible." [Doc. 1-27 – Pgs 58-59.]

A. The Arbitrator Did Not Engage in Misconduct Because He Met the Requirement of Providing Profimex With A Fundamentally Fair Hearing.

1. Arbitrators have wide latitude to conduct arbitrations.

Arbitrators are not required to "follow all the niceties observed by federal courts," but need only give the parties a fundamentally fair hearing. *Rosensweig v. Morgan Stanley & Co.*, 494 F.3d 1328, 1333 (11th Cir. 2007). "Arbitrators enjoy wide latitude in conducting an arbitration hearing, and they are not constrained by formal rules of procedure or evidence." *Id.* (citation and internal quotation marks omitted). "An arbitrator need not consider all the evidence the parties seek to introduce but may reject evidence that is cumulative or irrelevant." *Id.* (citation omitted). Moreover, the "arbitrator has great flexibility and the courts should not review the legal adequacy of his evidentiary rulings." *Pochat v. Lynch*, No. 12-22397-CIV, 2013 WL 4496548, at * 10 (S.D. Fla. Aug. 22, 2013) (quoting *Amalgamated Meat Cutters & Butcher Workmen v. Neuhoff Bros.*, 481 F.2d 817, 820 (5th Cir. 1973)) (Rosenbaum, J.).

Further, a "mere difference of opinion between the arbitrators and the moving party as to the correct resolution of a procedural problem will not support vacatur under section 10(a)(3)." *Johnson*, 797 F.3d at 1301 (quoting *Scott*, 141 F.3d at 1016). Even if an arbitrator were to make an erroneous discovery or evidentiary ruling, vacatur under Section 10(a)(3) would only be proper if the

petitioner could show that the arbitrator's handling of these matters "was in bad faith or so gross as to amount to affirmative misconduct, effectively depriving the [petitioner] of a fundamentally fair proceeding." *Pochat*, 2013 WL 4496548, at *10 (citations omitted).

Indeed, this Court has repeatedly emphasized that the "FAA permits arbitration to proceed 'with only a summary hearing and with restricted inquiry into factual issues. … [The arbitrator] need only give each party the opportunity to present its arguments and evidence." *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998), *overruled in part on other grounds*, *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (emphasis in original). *See also CM South East Tex. Houston, LLC v. CareMinders Home Care, Inc.*, --- Fed. Appx. ---, No. 16-11054, 2016 WL 5859695, at *4 (11th Cir. Oct. 7, 2016) (stating that in arbitration, the participants "are entitled to fair proceedings, not perfect ones").

2. There is no right to cross examine adverse witnesses in arbitration.

Courts have regularly held that parties in arbitration do not have an absolute right to cross examination of adverse witnesses. *See Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33, 39 (2d Cir. 1988); *Sunshine Min. Co. v. United Steelworkers of Am.*, 823 F.2d 1289, 1295 (9th Cir. 1987). *See also Vitarroz Corp. v. G. Willi Food Int'l Ltd.*, 637 F. Supp. 2d 238, 250 (D. N.J. 2009); *A.S. Seateam*

v. Texaco Panama, Inc., No. 97 CIV. 0214(MBM), 1997 WL 256949, at *8 (S.D.N.Y. May 16, 1997).

Profimex argues that case law in this circuit "recognizes the vital importance of cross-examination to fundamental fairness and due process even in hearings not bound by statutory rules of evidence." (Br. of Appellant at 26.) Profimex relies on *S. Stevedoring Co. Voris*, 190 F.2d 275 (5th Cir. 1951), in which the former Fifth Circuit addressed a claim for compensation by an injured worker under the Longshoremen's And Harbor Workers' Compensation Act, 33 U.S.C. § 908. 190 F.2d at 276. The court reversed an award based on two ex parte opinion letters from doctors, holding that the commissioner's reliance on them deprived the defendants of the right to cross examination on a crucial issue. *Id.* at 277. According to the court, although "administrative agencies may be relieved from observance of strict common law rules of evidence, their hearings must still be conducted consistently with fundamental principles which inhere in due process of law." *Id.* (emphasis added). This case did not involve arbitration and is inapposite to the case at hand.

Profimex also relies upon *Goldberg v. Kelly*, 397 U.S. 254 (1970) for the proposition that fundamental fairness always requires that parties have the opportunity to confront and cross examine adverse witnesses. Like *Voris*, however, *Goldberg* did not involve arbitration but instead addressed the procedure

required for the termination of welfare benefits by New York City. *Id.* at 270. Both of those cases represent entirely different situations than the instant one because of the presence of state action and the resulting attachment of the requirements of full Constitutional due process.[11] *See Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (holding that private arbitration cases which are arranged by voluntary contractual agreements of the parties do not constitute state action). Whether or not due process requires the ability to cross examine an adverse witness in a situation in which a government agency is adjudicating an individual's right to benefits is simply inapposite to whether private parties who have agreed to arbitrate their disputes enjoy the same right. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (although arbitration procedures "might not be as extensive as in the federal courts, by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration").

3. Profimex had the opportunity to confront Mr. Goren and to rebut his testimony.

As Profimex admits, it had the opportunity to depose Mr. Goren. Mr. Goren did place a time limit on his deposition and did refuse to answer certain questions

[11] Indeed, not even all administrative law hearings require that cross examination always be permitted. *See Bethlehem Steel Corp. v. Clayton*, 578 F.2d 113, 114 (5th Cir. 1978) (holding that because of different statutory provisions, ex parte statements could be admitted under the Social Security Act even though they could not be under the Longshoremen's Act).

posed by Profimex's counsel. However, as the Arbitrator noted in the pre-arbitration hearing, he could have instituted a case procedure prohibiting any depositions. [Doc. 28-39 – Pg 57.] There is simply no right to conduct depositions in the arbitration setting. Stephen V. O'Neal and Cark T. Thiel, 11 Bus. & Com. Litig. Fed. Cts. § 123:25 (3d ed.). *See also Fitigues, Inc. v. Varat Enters., Inc.*, No. 91 C 4894, 1992 WL245553, at *6 (N.D. Ill. Sept. 18, 1992) (holding that a party in arbitration cannot expect to enjoy the same "broad and thorough discovery" that it enjoys in traditional judicial proceedings). Profimex had the opportunity to question Mr. Goren and obtain significant information regarding his position, even if Profimex was not able to conduct the deposition of Mr. Goren which its counsel would have preferred.

Furthermore, Profimex received a report from OAD's expert damages witness noting her reliance on information from Mr. Goren on March 11, 2015. [Doc. 1-21.] Profimex then took Mr. Goren's deposition on April 2, 2015. [Doc. 1-23.] Profimex designated three expert witnesses to rebut the testimony of Mr. Goren and submitted their deposition testimony to the Arbitrator. [Doc. 16-1.]

In other words, Profimex knew about Mr. Goren's testimony and the information he provided for OAD's expert's use well in advance of the trial of the case in July 2015. Profimex then submitted rebuttal expert testimony and argument against the points raised by Mr. Goren's testimony. Profimex was in no

way surprised by Mr. Goren's testimony and was able to submit evidence against it. Accordingly, even if Profimex did have a right to cross examine Mr. Goren beyond what it accomplished through its deposition of him (which it did not), Profimex's inability to do so did not make the arbitration fundamentally unfair. *See Indus. Risk Insurers*, 141 F.3d at 1444 n.11 (rejecting petitioners' argument for vacatur based on last-minute admission of discovery materials, because petitioners were given an opportunity to rebut the documents' contents); *Pochat*, 2013 WL 4496548 at *12 (petitioner was not deprived of a fundamentally fair hearing where he was given "ample opportunity to dispute the content or relevancy" of late-produced documents which the arbitration panel admitted into evidence).

4. The Arbitrator could consider hearsay testimony and make credibility determinations.

Arbitrators are not bound by the rules of evidence, *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997), and may consider hearsay evidence. *See Petroleum Separating Co. v. Interamerican Refining Corp.*, 296 F.2d 124 (2d Cir. 1961) (finding no misconduct where the arbitrators accepted hearsay evidence from both parties, as they were entitled to do); *LJL 33rd St. Assocs., LLC v. Pitcairn Props., Inc.*, No. 11 Civ. 6399(JSR), 2012 WL 613498, at *6 (S.D.N.Y. Feb. 5, 2012) (no need to comply with strict evidentiary rules in arbitration, and arbitrators are allowed to accept hearsay evidence); *Chasser v. Prudential-Bache Secs.*, 703 F. Supp. 78, 80 (S.D. Fla. 1988) (arbitration

proceedings not constrained by formal rules of evidence); *Reichman v. Creative Real Estate Consultants, Inc.*, 476 F. Supp. 1276, 1285 (S.D.N.Y. 1979) (where the parties adopted rules making the arbitrator the judge of relevancy and admissibility of the evidence, the arbitrator's admission of hearsay was not misconduct).

Here, ICC Article 19 gave the Arbitrator the authority to determine the rules governing the arbitration. The Arbitrator clearly articulated to the parties at the pre-arbitration hearing that the rules of evidence at the arbitration would be "significantly relaxed," with the parties allowed to introduce "triple hearsay" and the Arbitrator seeking to avoid excluding any relevant evidence. [Doc. 28-39 – Pg 88.] The Arbitrator consistently overruled hearsay objections from both sides and did not err in admitting Mr. Goren's testimony over Profimex's objections. *See Pochat*, 2013 WL 4496548 at *10. Accordingly, Profimex's complaint after the fact that Mr. Goren's testimony was "second hand" is unavailing. *See LJL 33rd St. Assocs., LLC*, 2012 WL 613498 at *6.

Further, the proper weight to give to evidence from Mr. Goren was entirely within the Arbitrator's discretion. Profimex's view is that Mr. Goren's testimony was "inherently unreliable," (Br. of Appellant at 29), but the Arbitrator reviewed his testimony and all the facts surrounding it and came to a different conclusion. Profimex is not entitled to second-guess that decision after the fact. *See Thames v. Woodmen of World Life Ins. Soc.*, Civil Action No. 13-0063-WS-N, 2013 WL

4162257, at *5 (S.D. Ala. Aug. 13, 2013) (holding that the losing party cannot attack the arbitrator's credibility determinations). That the Arbitrator largely decided to credit Mr. Goren's testimony does not mean that he engaged in affirmative misconduct that deprived Profimex of a fundamentally fair hearing, but simply exercised his discretion appropriately regarding the weight to give the evidence. *See Pochat*, 2013 WL 4496548, at * 10 (citations omitted).

B. Enforcement of the Arbitration Award to OAD Does Not Violate Public Policy.

1. The public policy defense is narrowly construed and rarely successful.

This Court has held that an international arbitration award is unenforceable on public policy grounds only when the award violates some "explicit public policy" that is "well-defined and dominant" and that is "ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests." *Industrial Risk Insurers*, 141 F.3d at 1445 (citation, quotation marks omitted). "In recognition of a presumption favoring upholding international arbitration awards under the [New York Convention]," the public policy defense is construed narrowly. *Ministry of Def. and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1096-97 (9th Cir. 2011). It "applies only when confirmation or enforcement of a foreign arbitration award would violate the forum state's most basic notions of morality and justice."

Id. at 1097. "Although this defense is frequently raised, it has rarely been successful." *Id.* (citation omitted) (emphasis added).

Analysis of a proposed public policy defense begins with the "strong public policy favoring confirmation of [international] arbitration awards" because "[t]he goal of the [New York Convention], and the principal purpose underlying the American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries." *Id.* at 1098. *See also Enron Nigeria Power Holding, Ltd. v. Fed. Republic of Nigeria*, --- F.3d ---, No. 15-7121, 2016 WL 7439009, at *6 (D.C. Cir. Dec. 27, 2016) (stating that the heavy burden to establish the public policy defense is due to the "emphatic federal policy in favor of arbitral dispute resolution … [which] applies with special force in the field of international commerce"). "Typically, the public policy exception is implicated when enforcement of the award compels one of the parties to take action which directly conflicts with public policy." *Brown v. Rasucher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993).

2. Due process under the New York Convention means only the opportunity to be heard.

Courts have held that the New York Convention "essentially sanctions the application of the forum state's standards of due process," which means "the

opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145-46 (2d Cir. 1992) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). This opportunity is one that "meets the minimal requirements of fairness – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator." *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997). But, arbitrators "enjoy wide latitude in conducting an arbitration hearing, and they are not constrained by formal rules of procedure or evidence." *Rosensweig*, 494 F.3d at 1333.

Here, the record reflects that Profimex received a fundamentally fair hearing that met the minimal requirements of fairness as to Mr. Goren – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. *Generica Ltd.*, 125 F.3d at 1130. Even though it had no right to cross examine Mr. Goren, Profimex had sufficient opportunity to do so in the time that it had with him. Profimex was able to obtain testimony that Mr. Goren, its former employee, was involved in litigation with Profimex and is a competitor of Profimex. Profimex gives no examples of what further information it needed to make its case that Mr. Goren was a biased witness.[12]

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[12] Profimex wrongly asserts that because there were email communications between OAD and Mr. Goren during the arbitration, this put the onus on OAD to secure Mr. Goren's agreement to answer all of Profimex's questions about the defamatory statements made by Profimex about OAD. (Br. of Appellant at 29.) First, Profimex does not deny that Mr. Goren was a third party over whom OAD had no

Profimex also was able to obtain the information supporting Mr. Goren's assertion that OAD cannot raise capital in Israel: Profimex told many of its investors that OAD were thieves, liars, and dishonest people. Mr. Goren explained his refusal to supply names of the persons who told him what Profimex had stated about OAD because Profimex would try to start litigation with those persons. Profimex complains that its deposition was useless because "Mr. Goren refused to answer substantive questions regarding his alleged communications with Israeli investors or OAD's inability to raise capital in Israel." (Br. of Appellant at 27.)

Profimex can only speculate that it may have been able to obtain useful information if Mr. Goren had answered every question for as long as Profimex liked, but the fact is that Profimex received an opportunity to question Mr. Goren and to establish the parameters around which it sought to oppose and rebut his testimony. Profimex received more of an opportunity to cross examine Mr. Goren than it had a right to as an arbitration participant, and the Arbitrator gave it a fair hearing based on Mr. Goren's testimony and Profimex's arguments against it. *See Rainier DSC 1, L.LC. v. Rainier Capital Mgmt., L.P.*, 828 F.3d 362, 366 (5th Cir. 2016) ("Parties to voluntary arbitration may not superimpose rigorous procedural

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control, and Profimex can point to no evidence to show that this was not the case. Second, Profimex points to no authority supporting the position that exchanging emails with a third party creates an affirmative obligation to ensure the third party's presence at trial or to force the third party to answer every question posed to it by the opposing party.

limitations on the very process designed to avoid such limitations. … Submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial…").

3. The Arbitrator's consideration and reliance upon Mr. Goren's testimony did not violate U.S. public policy.

A review of the record shows that the Arbitrator made clear that his evaluation of Mr. Goren's testimony was tempered by the realities under which that testimony was given. For example, at the pre-hearing conference, the Arbitrator stated that "the circumstances of Mr. Goren's deposition and his refusal to testify on certain matters would have an impact on his credibility both as a standalone witness and as any foundational basis for" OAD's damages expert's testimony. [Doc. 28-39 – Pg 23.] Further, in the Final Award, the Arbitrator stated that "Mr. Goren's deposition testimony was tendered and admitted over objection, taking into account his unwillingness to answer certain questions about the investors with whom he was dealing after his very adversarial departure from Profimex." [Doc. 1-27 – Pg. 5.] The Arbitrator further noted that both "parties presented witness testimony, either directly or through cross examination, that Mr. Goren, who is currently a capital aggregator in Israel who formerly worked in a management position with Profimex, successfully sued Mr. Rosenheim and Profimex for slander/defamation and termination compensation, that the verdict for

compensation is on appeal and that the verdict for slander/defamation was paid."

[Doc. 1-27 – Pg. 5 n.1.] The Arbitrator later noted:

> Profimex objected to and attempted to exclude the testimony of Mr. Goren based on his refusal to answer certain questions of Profimex counsel during his deposition. The Arbitrator carefully reviewed Mr. Goren's testimony and found his refusal to answer questions that would specifically identify his current clients or details about his current business activities understandable in light of the fact that Mr. Goren has already successfully sued Profimex for defamation in Israel and has [a] claim for severance compensation still pending on appeal.

[Doc. 1-27 – Pg 58 (emphasis added).]

Clearly, the Arbitrator gave weight to Mr. Goren's testimony after carefully evaluating all relevant factors about it. Profimex disagrees with the Arbitrator's decisions to admit Mr. Goren's testimony and to give it credence, but those decisions were the Arbitrator's to make. *Rosensweig*, 494 F.3d at 1333. Enforcement of the OAD award would not compel one of the parties to take action which directly conflicts with public policy. *Brown*, 994 F.2d at 782. Therefore, Profimex has failed to carry its burden to show that the award should not be confirmed under Article V(2)(b) of the New York Convention. *See Industrial Risk Insurers*, 141 F.3d at 1442.

CONCLUSION

For all the foregoing reasons, OAD respectfully requests that this Court affirm the District Court's Order confirming OAD's arbitration award.

Respectfully submitted this 19th day of January, 2017.

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Respectfully submitted this 19th day of January, 2017.

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I hereby certify that on January 19, 2017, I electronically filed the foregoing **Brief of Appellee** using the CM/ECF system which will automatically send email notification of such filing to the following counsel of record:

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