UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Arbitration between Raymond L. Loewen, 7629 Burris Street Burnaby, British Columbia Canada, V5G 3S8 Petitioner, and The United States of America, Respondent.	C CASE NUMBER 1:04CV02151 Ju JUDGE: Richard W. Roberts DECK TYPE: General Civil DATE STAMP: 12/[redacted]/2004

NOTICE OF PETITION TO VACATE

TO:

Mark A. Clodfelter
Jennifer Toole
U.S. DEPARTMENT OF STATE
Office of the Legal Adviser
2201 C Street, N.W.
Suite 5519
Washington, D.C. 20520

Joseph Hunt
Vincent M. Gravey
Ronald J. Wiltsie, II
Neysun Mahboubi
U.S. DEPARTMENT OF JUSTICE
Civil Division
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530

United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Roscoe C. Howard, Jr.
U.S. Attorney- District of Columbia
Judiciary Center Building
555 4th Street, N.W.
Washington, D.C. 20001

Please take notice that on December 13, 2004 a petition to vacate the arbitration award in the above-cited case was filed at the U.S. District Court for the District of Columbia. All pleadings and motions and other subsequent filings must be filed at the U.S. District Court for the District of Columbia with the Judge's initials and the case number.

I hereby certify that on this 13th day of December, 2004, I caused a true and correct copy of the foregoing Petition to Vacate Arbitration Award to be served upon:

Mark A. Clodfelter
Jennifer Toole
U.S. DEPARTMENT OF STATE
Office of the Legal Adviser
2201 C Street, N.W.
Suite 5519
Washington, D.C. 20520

Joseph Hunt
Vincent M. Gravey
Ronald J. Wiltsie, II
Neysun Mahboubi
U.S. DEPARTMENT OF JUSTICE
Civil Division
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530

United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Roscoe C. Howard, Jr.
U.S. Attorney- District of Columbia
Judiciary Center Building
555 4th Street, N.W.
Washington, D.C. 20001

Christopher Dugan /MSD

Christopher F. Dugan (D.C. Bar # 359266)
Matthew S. Dunne (D.C. Bar membership pending)
PAUL, HASTINGS, JANOFSKY &
WALKER LLP
1299 Pennsylvania Ave., N.W.
10th Floor
Washington, D.C. 20004
(202) 508-9500

Counsel for Petitioner Raymond L. Loewen

WDC/294467.1 09071.00001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Arbitration between Raymond L. Loewen, 7629 Burris Street, Burnaby, British Columbia, Canada, V5G 3S8 Petitioner, and The United States of America, Respondent.	CASE NUMBER 1:04CV02151 JUDGE: Richard W. Roberts DECK TYPE: General Civil DATE STAMP: 12/[redacted]/2004

PETITION TO VACATE ARBITRATION AWARD

I. INTRODUCTION

Pursuant to Section 12 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 12, please take notice that on January 21, 2005, at the U.S. District Court for the District of Columbia, or on another date to be set by the Court, Petitioner Raymond Loewen will file a "Motion for Summary Judgment Vacating the Arbitration Award" ("the Motion"). In the Motion, Petitioner will move for an order vacating and setting aside the award made in the above-entitled matter on September 13, 2004.

The Motion will argue that under well-established principles of U.S. arbitration law, this Court should vacate and set aside the award because the arbitrators: engaged in misconduct in effectively refusing to hear and consider evidence pertinent and material to the controversy; engaged in misbehavior by which the rights of the Petitioner have been prejudiced; exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made; and acted in manifest disregard of the law. The Motion will also be made

on the grounds that the award lacks a rational basis and that the Petitioner has been injured by the arbitrators' conduct and acts.

The Motion will be based, *inter alia*, on the arbitrators' failure to decide one of the Petitioner's specific treaty claims; the arbitrators' manifest disregard of the law it deemed controlling on a critical issue; the arbitrators' disregard and refusal to consider uncontested record evidence on the "central question" concerning a critical issue; and other arbitral acts.

The Motion will be based on this Petition, the decisions of the arbitrators, and the pleadings and papers to be filed in this action.

II. BACKGROUND

Petitioner Raymond Loewen founded the Loewen Group Inc. ("TLGI") in 1969. Based in Vancouver, it became one of the largest funeral home operators in North America. As it grew, it expanded into the U.S. market, purchasing funeral homes, cemeteries, and related funeral insurance businesses.

In 1991, TLGI bought a small funeral home in Jackson, Mississippi that had entered into funeral insurance contracts with Jeremiah O'Keefe, a local competitor. A dispute arose over those contracts, which were worth only approximately $3-6 million. O'Keefe sued TLGI in Mississippi state court, and later hired a Florida lawyer named Willie Gary to represent him and his companies. The jury ultimately rendered a verdict against TLGI in the amount of $500 million, including $74 million for emotional distress and $400 million in punitive damages. It was then the largest damages award in Mississippi court history.

When TLGI sought to appeal, it was stymied by the state's appeal bond requirement. A Mississippi court could not normally issue a stay of execution pending appeal unless the judgment debtor posted a bond equal to 125% of the verdict appealed as security for payment of the judgment. The Mississippi Supreme Court ultimately refused to relax the 125% requirement, and

gave TLGI seven days to post a $625 million bond. TLGI was unable to raise the money, and since O'Keefe threatened immediate seizure of the company's assets, TLGI ended the litigation through a $175 million settlement with O'Keefe.

In 1998, TLGI and Ray Loewen jointly filed an investment arbitration claim against the United States under Chapter 11 of the North American Free Trade Agreement ("NAFTA"), and selected the ICSID Additional Facility rules to govern the proceedings. TLGI and Mr. Loewen claimed that the United States had violated a number of substantive provisions of NAFTA designed to protect foreign investors such as TLGI and Mr. Loewen. This was the first claim against the United States under NAFTA.

The Tribunal was originally composed of: Sir Anthony Mason, former chief justice of the Australian High Court (chairman); Abner Mikva, a former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit (appointed by the United States); and Yves Fortier, Canada's former representative to the United Nations and now a prominent arbitration practitioner (TLGI and Mr. Loewen's appointee). Before the hearing on the merits, Mr. Fortier withdrew from the case due to potential conflicts of interest that were "thrust" upon him by a law firm merger; he was replaced by Lord Michael Mustill, a retired Law Lord from England.

In the aftermath of the O'Keefe settlement, TLGI experienced serious financial difficulties, and it eventually filed for bankruptcy. At the beginning of 2002, TLGI adopted a bankruptcy reorganization plan pursuant to which the parent corporation emerged as a U.S. entity, the Alderwoods Group. The United States then submitted a jurisdictional objection to the NAFTA Tribunal, asserting that because of this change in nationality TLGI was no longer an "investor of a Party" within the meaning of NAFTA. The U.S. argued that under customary international law, a claimant before an international tribunal must maintain appropriate nationality until the date an

award is rendered, and it therefore requested that the Tribunal dismiss the case. The United States did not challenge the Tribunal's jurisdiction as it related to Petitioner Raymond Loewen.

The Tribunal issued three substantive decisions. On January 5, 2001, it rejected some of the United States' jurisdictional objections and joined others to the merits (the "2001 Award"). On June 26, 2003, the Tribunal issued its main award, dismissing all the claims, on jurisdictional grounds (the "2003 Award") (Exhibit A). On August 11, 2003, the United States filed a "Request for Supplementary Decision," seeking clarification as to one of Petitioner's treaty claims that was overlooked by the Tribunal. On September 13, 2004, the Tribunal issued a decision on that request (the "2004 Award") (Exhibit B). The 2004 Award was the final award in the arbitration.

III. GOVERNING LAW

A. Notice of Motion to Vacate

Section 12 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 12, requires Petitioner to serve "notice of a motion to vacate, modify, or correct an award . . . upon the adverse party or his attorney within three months after the award is filed or delivered." The statute requires notice of a motion to vacate, and not the actual motion to vacate itself, to be served within three months. *See Karuth v Prescott, Ball & Turben, Inc.*, 1990 WL 91579 at *2 (D.D.C. June 19, 1990) ("[A] party to an arbitration may not move to vacate or modify an award unless it has given notice within three months after the award."); *DeAngelis v Shumway*, 1987 WL 18453 at *1 (S.D.N.Y. Oct. 2, 1987) ("On August 22, 1986, DeAngelis caused service of a notice of motion to vacate the award [dated May 23, 1986] to be served upon Shumway at the latter's office in Iowa. DeAngelis accordingly complied with 9 U.S.C. § 12, which requires that a notice of motion to vacate, modify or correct the award must be served within three months after the award is filed or delivered. DeAngelis filed his motion [to vacate] in this Court on September 29, 1986.").

This Petition constitutes "notice of a motion to vacate the arbitration award." In *Western Employers Ins. Co. v Jefferies & Co, Inc*, the Ninth Circuit held that a "Petition to Vacate the Award" filed within the three-month deadline "met the other requirements of Fed. R. Civ. P. 7(b)(1)— it stated with particularity the grounds for the petition and set forth the relief sought— and that it satisfied the purposes of 9 U.S.C. § 12." 958 F.2d 258, 261 (9th Cir. 1992). This Petition states with particularity the grounds for the petition and sets forth the relief sought, and thus satisfies the purposes of Section 12 of the FAA.

B. Grounds for Vacating the Award

Section 10 of the FAA, 9 U.S.C. § 10, sets out the statutory grounds for vacating an arbitration award. At a minimum, the following grounds of the FAA are relevant here:

> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

FAA caselaw also recognizes that an award may be vacated if the arbitrators act in "manifest disregard of the law." The "manifest disregard of the law" concept, while not set forth in the FAA, is widely accepted as a ground for vacating arbitration awards. *See, e.g., Brabham v A.G. Edwards & Sons Inc.*, 376 F.3d 377, 381 (5th Cir. 2004) ("[M]anifest disregard is an accepted nonstatutory ground for vacatur."); *Montes v Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1460 (11th Cir. 1997) ("[E]very other circuit . . . has expressly recognized that 'manifest disregard of the law' is an appropriate reason to review and vacate an arbitration panel's decision.").

The Tribunal's decision should be set aside and vacated on all of these statutory and nonstatutory grounds.

IV. THE TRIBUNAL'S FINDINGS THAT ARE GROUNDS FOR SETTING ASIDE THE AWARDS

The Tribunal's central conclusion in its 2003 Award was that the Mississippi trial and $500 million verdict were a gross miscarriage of justice:

> 54. Having read the transcript and having considered the submissions of the parties with respect to the conduct of the trial, we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law.
>
> . . . .
>
> 119. By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.
>
> . . . .
>
> 137. In the light of the conclusions reached in paras. 119-123 (inclusive) and 136, the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.

Despite its finding that the Mississippi trial was a "manifest injustice" and a "disgrace," the Tribunal refused in the 2003 Award to grant any relief to either claimant, for two reasons. First, TLGI had, during the course of its bankruptcy reorganization, changed its nationality from Canadian to U.S., thus destroying the continuing diversity of nationality that the Tribunal concluded was a jurisdictional requirement. Second, the Tribunal held that Mr. Loewen did not control TLGI when the arbitral claim was filed, and thus the Tribunal lacked jurisdiction over either of his claims. These were the only actual holdings in the 2003 Award, and it was on these "jurisdictional" bases that the Tribunal dismissed all the claims. In addition, the Tribunal concluded that TLGI had not shown that it had exhausted its local remedies, which the Tribunal concluded was a prerequisite to

international relief. The Tribunal characterized this as a "merits" issue, but because of the jurisdictional decisions, none of the claims were dismissed on this basis. This conclusion was, accordingly, *dicta*.

After the Tribunal issued the 2003 Award, the United States, which had won the case, asked the Tribunal for a supplemental decision pursuant to Article 58 of the ICSID Additional Facility Rules. It is, of course, very unusual for a winning party to ask for any type of supplemental or clarifying decision. Indeed, whenever the winning party to any dispute asks for a clarification, that is compelling evidence that the original decision was deficient in some important respect. Such is the case here.

The Tribunal's 2003 Award was deeply flawed in at least three respects. First, the Tribunal failed to consider or decide one of Mr. Loewen's two treaty claims, his Article 1116 claim as an investor who was damaged by the United States' acts. It was this deficiency that the U.S. asked the Tribunal to correct. Second, after deciding that the appropriate legal standard for the exhaustion issue was an objective standard of "reasonable availability," the Tribunal inexplicably failed to apply that objective standard. Instead, the Tribunal examined whether TLGI subjectively believed it had any reasonably available alternative to settlement. Third, the Tribunal completely failed to consider and thus to hear the uncontested record evidence on what the Tribunal described as the "central question" concerning the exhaustion issue – whether TLGI subjectively believed it had any reasonable alternative to the $175 million settlement. Under well-established principles of U.S. arbitration law, these fundamental deficiencies require that this Court set aside and vacate the arbitration award.

A. The Tribunal's Failure To Decide Petitioner's Article 1116 Claim

In the 2003 Award, the Tribunal either ignored or failed to recognize one of Mr. Loewen's treaty claims. Mr. Loewen had filed two NAFTA claims: a personal claim under Article 1116 as a

Canadian investor who was damaged by the United States' breaches of NAFTA; and a claim under Article 1117 as the controlling shareholder in, and on behalf of, TLGI. In disposing of Mr. Loewen's claims, the entirety of the Tribunal's reasoning and decision is found in the following paragraphs described in this section:

> 9. First Claimant TLGI is a Canadian corporation which carries on business in Canada and the United States. Second Claimant is Raymond Loewen, a Canadian citizen who was the founder of TLGI and its principal shareholder and chief executive officer. TLGI submits claims as "investor of a Party" on its own behalf under NAFTA, Article 1116 and on behalf of LGII under Article 1117. Likewise, Raymond Loewen submits claims as "the investor of a party" on behalf of TLGI under NAFTA, Article 1117.

Exhibit A at 4. As is obvious from the Tribunal's own language, it overlooked Mr. Loewen's NAFTA Article 1116 claim.

With respect to the continuous nationality issue, the Tribunal stated:

> 29. Subsequently, on January 25, 2002 Respondent filed the motion to dismiss Claimants' [sic] NAFTA claims for lack of jurisdiction, based on the reorganization of TLGI under Chapter Eleven of the United States Bankruptcy Code. An element in that reorganization was the assignment by TLGI of its NAFTA claims to a newly created Canadian corporation, Nafcanco, which was owned and controlled by LGII (re-named "Alderwoods, Inc", a United States corporation).

Exhibit A at 7. Again, the Tribunal overlooked the impact and consequence of Mr. Loewen's two discrete NAFTA claims, for neither of them was affected by the United States' objection as to lack of continuous nationality.

In its final conclusions and legal holding in the 2003 Award, the Tribunal stated:

> 239. Raymond Loewen argues that his claims [sic] under NAFTA survive the reorganization. Respondent originally objected to Raymond Loewen's claims [sic] on the ground that he no longer had control over his stock at the commencement of the proceeding. The Tribunal allowed Raymond Loewen to continue in the proceeding to determine whether he in fact continued any stock holding in the company. No evidence was adduced to establish his

interest and he certainly was not a party in interest at the time of the reorganization of TLGI.

Exhibit A at 69. The Tribunal again missed Mr. Loewen's 1116 claim, which had nothing to do with whether he was a controlling shareholder.

In the legally operative part of its 2003 Award, the Tribunal stated:

> ORDERS
>
> For the foregoing reasons the Tribunal unanimously decides -
>
> (1) That it lacks jurisdiction to determine TLGI's claims under NAFTA concerning the decisions of United States courts in consequence of TLGI's assignment of those claims to a Canadian corporation owned and controlled by a United States corporation.
>
> (2) That it **lacks jurisdiction to determine Raymond L. Loewen's claims [sic]** under NAFTA concerning decisions of the United States courts on the ground that it was not shown that he owned or controlled directly or indirectly TLGI when the claims were submitted to arbitration or after TLGI was reorganized under Chapter 11 of the United States Bankruptcy Code.
>
> (3) TLGI's claims and Raymond L. Loewen's are hereby dismissed in their entirety.

Exhibit A at 69-70. Yet again, the Tribunal overlooked Mr. Loewen's Article 1116 claim. It dismissed his claims – both of them – only on jurisdictional grounds and for a reason – lack of control – that was relevant only to Mr. Loewen's Article 1117 claim.

The fact that the Tribunal ignored or failed to recognize Mr. Loewen's Article 1116 claim is reinforced by what the Tribunal said at the start of its decision, where it distinguished between its "jurisdictional" holdings on continuous nationality and its "merits" conclusion on the exhaustion issue.

> Introduction
>
> 1. This is an important and extremely difficult case. **Ultimately it turns on a question of jurisdiction** arising from (a) the NAFTA requirement of diversity of nationality as between a claimant and the respondent government, and (b) the assignment by

> the Loewen Group, Inc. of its NAFTA claims to a Canadian corporation owned and controlled by a United States corporation. **This question was raised by Respondent's motion to dismiss for lack of jurisdiction filed after the oral hearing on the merits. In this Award we uphold the motion and dismiss Claimants' NAFTA claims.**

Exhibit A at 2 (emphasis added). Thus, the Tribunal again describes its "ultimate" holding as jurisdictional in nature, and dismisses **all** the claims before it – "Claimants' NAFTA claims" – on the jurisdictional grounds.

The Tribunal then goes on to describe what it views as the "merits" issue, *i.e*, the exhaustion of local remedies.

> 2. As our consideration of the merits of the case was well advanced when Respondent filed this motion to dismiss and as we reached the conclusion that Claimants' NAFTA claims should be dismissed on the merits, we include in this Award our reasons for this conclusion. As will appear, the conclusion rests on the Claimants' failure to show that Loewen had no reasonably available and adequate remedy under United States municipal law in respect of the matters of which it complains, being matters alleged to be violations of NAFTA.

Exhibit A at 2.

Because the Tribunal had already disposed of all of "Claimants NAFTA claims" on jurisdictional grounds, at this stage in the proceeding it clearly viewed its "merits" conclusion as *dicta*. This dichotomy is also apparent from the operative legal language at the end of the Award, the Tribunal "Orders." These holdings are limited to its disposition of TLGI's claims on the continuous nationality issue and the disposition of Mr. Loewen's claims on the control issue. There is no mention of Mr. Loewen's Article 1116 claim, which, because the U.S. had no jurisdictional objection to it, could only be disposed of on exhaustion grounds. The Tribunal's silence in its "Orders" as to the "merits" issues reinforces the conclusion that it viewed its findings on that issue as *dicta*, and not as dispositive of any of the claims. In particular, the Tribunal did not state or even vaguely imply that it had actually decided Mr. Loewen's Article 1116 claim on exhaustion grounds.

It is thus apparent from the repeated statements and the express holding and Orders of the 2003 Award that the Tribunal completely overlooked Mr. Loewen's Article 1116 claim. It did not consider or discuss why his Article 1116 claim was deficient; indeed, it never mentioned or discussed in any manner his status as an investor who had lost over $100 million as a result of the Mississippi "disgrace." Instead, it discussed a single fact that was relevant only to Mr. Loewen's Article 1117 claim— whether Mr. Loewen controlled TLGI at the time that the NAFTA claim was filed.

It is, of course, extraordinary for a tribunal to miss and thus fail to consider one of only four claims before it. It was because of this deficiency that the United States, knowing full well that the fault was so serious that the 2003 Award would be set aside, asked the Tribunal for a supplemental decision to clarify the 2003 Award.

In its 2004 Award, however, the Tribunal, rather than admitting its mistake, asserted that it had, in fact, considered the Article 1116 claim and resolved it on the merits:

> 16. Respondent contends that, although the Award explicitly stated that all claims (including Raymond Loewen's claims) were dismissed on the merits, it did not state expressly that his art. 1116 claims were dismissed on the merits. Respondent concedes that the Award was not "silent" as to the question but argues that further explication would resolve a minor ambiguity and that art. 58(1) extends to such a case.
>
> 17. Raymond Loewen contends that the Tribunal omitted to decide his art. 1116 claim in the Award and that it is obligated to render a supplementary decision under art. 58. Raymond Loewen submits that the Tribunal overlooked the claim and that, in the course of determining it now, the Tribunal should consider whether its "obiter dicta" as to the merits require correction, as Raymond Loewen argues.
>
> 19. We agree that, apart from the dismissal in the Award of June 26, 2003 of all the claims "in their entirety", there is no distinct reference in the Award to a discussion of Raymond Loewen's claim under art. 1116. We agree also that, as there was no jurisdictional objection to his claim under art. 1116, that claim fell to be determined by the decision on the merits.

> 20. But the dismissal of all the claims "in their entirety" following the examination of the merits was necessarily a resolution of the art. 1116 claim. That dismissal was a consequence of the reasoning expressed in paras 213-216. We therefore reject the argument that the Award did not deal with the art. 1116 claim.
>
> 21. It follows that Respondent is correct when it argues that Raymond Loewen is asking the Tribunal to reconsider its decision to dismiss that claim and to reconsider the reasoning (described by Raymond Loewen as "obiter dicta") which led the Tribunal to dismiss the claim. In the context of the dismissal of Loewen's claims, that reasoning was not merely "obiter dicta." It was the reasoning on which that part of the Award was based and it is not open to the Tribunal to reconsider it. There is no logical basis on which the Tribunal can draw a distinction between the relationship of that reasoning to the dismissal of the Loewen claims on the one hand and to the Raymond Loewen claim under art. 1116 on the other hand.

Exhibit B at 4-5.

With all due respect to the distinguished Tribunal, its *ex post facto* rationalization cannot withstand scrutiny: it quite evidently did not consider Mr. Loewen's Article 1116 claim in the 2003 Award. Again, the first paragraph of the 2003 Award dismissed "Claimants NAFTA claims" on jurisdictional grounds, and the operative portion of the 2003 Award – the "Orders" – makes clear that both of Mr. Loewen's claims were dismissed on jurisdictional grounds, and not "on the merits." Thus, the Tribunal's claim in ¶ 19 of the 2004 Award is simply not true.

As a result of its failure to consider or decide Petitioner's Article 1116 claim in the 2003 or 2004 Awards, the Tribunal is guilty of misbehavior by which the rights of the Petitioner have been prejudiced. In failing to carry out its duties to consider and decide this claim, the Tribunal acted in manifest disregard of the law and exceeded its powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made. *See Smart v. International Broth. of Elec. Workers, Local 702*, 315 F.3d 721, 725 (7th Cir. 2002) (holding that the purpose of the "imperfectly executed" ground "is merely to render unenforceable an arbitration award that is either incomplete in the sense that the arbitrators did not complete their assignment

(though they thought they had) or so badly drafted that the party against whom the award runs doesn't know how to comply with it"); *IDS Life Ins. Co. v Royal Alliance Associates, Inc.*, 266 F.3d 645, 651 (7th Cir. 2001) (clarifying that arbitrators have "imperfectly executed" their powers where "the award itself, in the sense of judgment, order, bottom line, is incomplete in the sense of having left unresolved a portion of the parties' dispute"); *ComTech Development Co. v University of Connecticut Educ.*, 102 F.3d 677, 686 (2d Cir. 1996) ("An award is mutual, definite and final if it 'resolve[s] all issues submitted to arbitration, and determine[s] each issue fully so that no further litigation is necessary to finalize the obligations of the parties.'"); *Michaels v Mariforum Shipping, S. A.*, 624 F.2d 411, 413-14 (2d Cir. 1980) (same).

B. The Tribunal's Manifest Disregard of the Objective Standard for "Reasonably Available" Local Remedies

In its 2003 Award, the Tribunal concluded that TLGI was required to exhaust local remedies before obtaining international relief, so long as such remedies were "reasonably available." First, the Tribunal stated the legal standard it would apply:

> 169. Availability is not a standard to be determined or applied in the abstract. It means reasonably available to the complainant in the light of its situation, including its financial and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy.

Exhibit A at 49. It stated further:

> 214. Respondent argues that, because entry into the settlement agreement was a matter of business judgment, Loewen voluntarily decided not to pursue its local remedies. That submission does not dispose of the point. **The question is whether the remedies in question were reasonably available and adequate. If they were not, it is not to the point that Loewen entered into the settlement, even as a matter of business judgment.** It may be that the business judgment was inevitable or the natural outcome of adverse consequences generated by the impugned court decision.

Exhibit A at 61.

Thus, the Tribunal recognized and concluded that the controlling law concerning exhaustion was a standard of "reasonable availability." Any standard based on reasonable availability is normally an objective standard.[1] However, the Tribunal then disregarded that legal standard, refusing to consider the extensive expert testimony provided by Professor Laurence Tribe and Professor Charles Fried, former Solicitor General of the United States, that TLGI did not have a reasonably available alternative to settlement. *See* Expert Witness Statements of Laurence Tribe and Charles Fried. Instead, the Tribunal disposed of the exhaustion issue on a different legal principle: whether TLGI subjectively believed it had any reasonable alternative to settlement. Furthermore, as discussed below, it improperly applied that standard by overlooking all the evidence of TLGI's state of mind. But more importantly, it manifestly disregarded the law that it had deemed controlling: whether there was, objectively, a reasonably available alternative.

As a result of its failure to apply the proper legal standard, the Tribunal engaged in misbehavior by which the rights of the Petitioner have been prejudiced. In failing to carry out its duties and apply the proper legal standard, the Tribunal acted in manifest disregard of the law and exceeded its powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made. *See Montes v Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1460 (11th Cir.1997) ("To manifestly disregard the law, one must be conscious of the law and deliberately ignore it."); *Jeffrey M. Brown Assocs., Inc. v Allstar Drywall & Acoustics, Inc.*, 195 F. Supp. 2d 681, 84-685 (E.D. Pa. 2002) ("'Manifest disregard of the law' encompasses situations in which it is evident from the record that the arbitrator recognized the applicable law, yet chose to ignore it.").

---

[1] *See, e.g., Department of Justice v Federal Labor Relations Authority*, 991 F.2d 285, 291 (5th Cir. 1993) (describing reasonable availability as an objective standard); *Brehm v Eisner*, 746 A.2d 244, 260 (Del. 2000) (referring to the "objective test[] of reasonable availability").

C. The Tribunal's Failure to Hear and Consider the Evidence on Why Petitioner Settled

The third signal failure of the Tribunal in the 2003 Award was that it completely overlooked all the evidence relevant to whether TLGI believed it had exhausted its local remedies. In considering TLGI's subjective belief, the Tribunal stated the following:

> 215. **Here we encounter the central difficulty in Loewen's case. Loewen failed to present evidence** disclosing its reasons for entering into the settlement agreement in preference to pursuing other options, in particular the Supreme Court option which it had under active consideration and preparation until the settlement agreement was reached. It is a matter on which the onus of proof rested with Loewen. It is, however, not just a matter of onus of proof. **If, in all the circumstances, entry into the settlement agreement was the only course which Loewen could reasonably be expected to take, that would be enough to justify an inference or conclusion that Loewen had no reasonably available and adequate remedy.** (Emphasis added.)
>
> 216. Although entry into the settlement agreement may well have been a reasonable course for Loewen to take, **we are simply left to speculate on the reasons which led to the decision to adopt that course rather than to pursue other options.** It is not a case in which it can be said that it was the only course which Loewen could reasonably be expected to take. (Emphasis added.)
>
> 217. Accordingly, our conclusion is that Loewen failed to pursue its domestic remedies, notably the Supreme Court option and that, in consequence, Loewen has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible.

Exhibit A at 61.

The Tribunal was simply wrong. Claimants had submitted clear, uncontradicted, uncontested, comprehensive, and corroborated evidence why Loewen had settled the case. The Tribunal missed all of this evidence, a deeply embarrassing omission for so distinguished a panel.

TLGI's reasons for settling were addressed in two declarations filed with the Tribunal in 2000, long before the 2003 Award. The first was the declaration of Wynne S. Carvill, the American attorney in charge of all post-verdict proceedings. It was supported by the equally clear declaration

of a director of TLGI, John Napier Turner, the former Prime Minister of Canada. *See* Declaration of Wynne S. Carvill (May 24, 2000) (Exhibit C) and Declaration of Rt. Hon. John N. Turner, P.C., C.C., Q.C. (May 25, 2000) (Exhibit D). The U.S. never questioned, challenged, or cross-examined either of these declarations, nor did it put in counter-declarations rebutting this evidence.

In his declaration, Mr. Carvill, a graduate of Harvard Law School, a law clerk to the U.S. Court of Appeals, a leading counsel and a partner in a distinguished firm, testified to his personal involvement in the assessment of the options identified by Loewen in the face of the Mississippi proceedings. Exhibit C ¶¶ 1, 3. Mr. Carvill and his firm were not involved in the discovery or trial of the *O'Keefe* matter, but he was the principal outside counsel responsible for coordinating a response to the Mississippi developments. Exhibit C ¶¶ 2-3. He assessed the outcome at trial, retained new counsel to assist in post-trial motions and appeals, interviewed and selected a specialist counsel to consider possible appeals to the U.S. Supreme Court, participated in the decision to retain and discharge bankruptcy counsel, coordinated settlement discussions and eventually represented Loewen in the negotiations which resulted in the settlement. Exhibit C ¶ 3. In short, Mr. Carvill was the central professional witness who addressed the very issue of whether a motion to the Supreme Court was considered a reasonably available and adequate remedy open to TLGI.

With respect to the option of an appeal to the Supreme Court of the United States, in his Declaration Mr. Carvill addressed the general issue of consideration of relief in the federal court system and testified that all the options were reviewed and rejected on professional and rational grounds including:

> (a) Collateral attack on the Federal District Court was foreclosed by the commanding *Penzoil* precedent such that an attorney signing the pleadings might have been subject to sanctions for doing so. In any event, they viewed a collateral attack in Federal Court as prejudicing whatever chances existed for relief from the Mississippi Supreme Court which was throughout seen as the best alternative;

> (b) An action based on constitutional grounds was carefully considered, but could only have been raised through an appeal on the merits and not through a collateral attack in the Federal District Court. In particular, there was no evidence on which it could be said that the Mississippi Supreme Court's decision on the bond was infected by anti-Canadian bias which might raise a constitutional issue meriting pursuit;
>
> (c) Very serious consideration was given to the possibility of direct appellate relief, but in the circumstances was concluded to be "an illusory choice";
>
> (d) Supreme Court specialists were retained and advised that the chance of success was "extremely remote";
>
> (e) In particular, the timing was made extremely difficult because the company did not know how much time it would have to seek relief. Indeed, "[c]onceivably, on any court day we could receive an order lifting the stay effective within a matter of days unless the bond were increased to $625 million." Mr. Carvill also carefully identified the company's analysis of bankruptcy considerations.

Exhibit C ¶¶ 6-8, 12-14; *see also* Submissions of the Loewen Group, Inc. concerning the Jurisdictional Objections of the United States, May 26, 2000, ¶¶ 59-62.

Mr. Carvill's declaration was supported and fully corroborated by a declaration filed by John Napier Turner, an outside director of TLGI, a former Prime Minister of Canada, and a distinguished lawyer. In that declaration, Mr. Turner confirmed that a group of senior management and outside advisors including Mr. Carvill simultaneously considered the several options and remedies available after the O'Keefe verdict, including settlement, financing and appeal bond, and pursuing federal court collateral relief or appeal to the U.S. Supreme Court. Mr. Turner declared that:

> The Board was advised by Mr. Carvill that, after consulting with several experts in the area and fully considering all avenues of possible relief in the U.S. federal court system, the possibility of relief from the U.S. Supreme Court was extremely remote and the likelihood of a collateral attack was so remote that the lawyers would run a risk of being sanctioned under U.S. procedural rules for filing such a case. The Board was also advised that any efforts in federal court would greatly prejudice the Company's chances of obtaining bonding and other relief in the Mississippi state courts. Such relief in

> the Mississippi state courts was the primary strategic objective at that time.

Exhibit D ¶ 14.

As noted, the United States elected not to cross-examine either Mr. Carvill or Mr. Turner, and it did not submit any counter-declarations rebutting their testimony. In accordance with the standard set by the Tribunal at paragraphs 159 and 216 of its Award, the uncontradicted and unchallenged evidence of Mr. Carvill and Mr. Turner clearly meets the burden of establishing that TLGI believed that the settlement option, in accordance with TLGI's determination at the time, was indeed "the only reasonable option."

When the Tribunal was confronted with the evidence on the "central question" it completely overlooked in its 2004 Award, its response was:

> 22. While the Cargill [sic] and Turner declarations were relied upon to support a view contrary to that reached in paras 215-216 of the Award, they did not satisfy us, in all the circumstances, that the settlement agreement was the only course for Loewen to take. The declarations did not purport to present a comprehensive record or account of TLGI's Board's consideration of the option which it should pursue. Nor did the declarations record or identify the information presented to the Board on which it arrived at its conclusion that it should pursue the settlement option. The declarations did not ground an inference that the settlement option was the only available alternative or that certiorari petition and the bankruptcy petition were not available remedies.

Exhibit B at 5-6.

This response in the 2004 Award is compelling evidence of arbitral misbehavior and the Tribunal's imperfect execution of its powers. First, the Tribunal statement that the uncontested testimony "did not satisfy us" implies that the Tribunal actually considered the evidence before it issued the 2003 Award. With all due respect, that cannot be a correct statement, for it is indisputable that the Tribunal completely overlooked that evidence in 2003. Recall, again, the language of the 2003 Award: the Tribunal claimed that Loewen "failed to present evidence" and

that the Tribunal was "simply left to speculate on the reasons why the decision was made." Those words could only have been uttered by arbitrators who had, literally, viewed no relevant evidence at the time they made their decision. In its 2004 Award, without honestly admitting it, the Tribunal changed its basis for deciding the merits – it now claimed it was not "satisfied" by the uncontradicted evidence. As the Tribunal itself points out, it was not permissible for it to retroactively change the basis for its decision.

Second, and more important, the Tribunal's belated claim that the uncontested evidence "did not ground an inference that the settlement option was the only available alternative" is preposterous. The Tribunal was undoubtedly deeply embarrassed by its previous oversight, but to pretend that the uncontradicted evidence does not say what it says was a grossly inappropriate response. In all fairness, the only inference to draw from the uncontested, uncontradicted, corroborated, comprehensive and clear testimony of Mr. Carville and Mr. Turner was that TLGI settled because it was the only reasonably available alternative.

Because the Tribunal effectively excluded and failed to hear and consider this critical evidence, it engaged in arbitral misconduct, and it engaged in misbehavior by which the rights of the Petitioner have been prejudiced. *See Hotels Condado Beach v Local 901*, 763 F.2d 34, 40 (1st Cir. 1985) (holding that vacatur is appropriate when the arbitrators' "refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings," or "when the exclusion of relevant evidence 'so affects the rights of a party that it may be said that he was deprived of a fair hearing;'" and holding that an arbitrator's refusal to give any weight to testimony contained in a trial transcript "effectively denied [the appellee] an opportunity to present any evidence in the arbitration proceeding" because "[t]he testimony was unquestionably relevant" to a critical question of fact, and "no other evidence was available" on this issue); *see also Karaha Bodas Co, L.L.C. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 300-01 (5th Cir.

2003) ("It is appropriate to vacate an arbitral award if the exclusion of relevant evidence deprives a party of a fair hearing."). In failing to carry out its duties and accord proper weight to this critical evidence, the Tribunal acted in manifest disregard of the law and exceeded its powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made.[2] *See Smart*, 315 F.3d at 725; *IDS Life Ins.*, 266 F.3d at 651; *CornTech*, 102 F.3d at 686; *Michaels*, 624 F.2d at 413-14.

---

[2] There is additional evidence that the Tribunal acted in manifest disregard of the law and so imperfectly exercised its powers that the award must be set aside and vacated. The Tribunal made two striking mistakes with respect to TLGI's corporate claims – it missed the evidence concerning which entities owned TLGI's NAFTA claim after the bankruptcy reorganization, and it missed TLGI's MFN arguments concerning the continuous nationality issue.

First, during the arbitration proceedings, TLGI explained to the Tribunal that 75% of TLGI's NAFTA claim was transferred to Nafcanco, a Canadian subsidiary of the now-U.S.-based parent, and 25% was transferred to a Canadian trust to be held for the benefit of TLGI's unsecured creditors. *See* Counter-Memorial of the Loewen Group, Inc. on Matters of Jurisdiction and Competence, *The Loewen Group Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3 (Mar. 29, 2002), at 50-79. Nevertheless, in its 2003 Award, the Tribunal overlooked the portion of the NAFTA claim held by the Canadian trust, thus imperfectly executing its powers and prejudicing the rights of TLGI to a fair hearing. *See* Exhibit B at 62, 68-69; *see also Hoteles Condado*, 763 F.2d at 40; *Karaha Bodas*, 364 F.3d at 300-01.

Second, TLGI informed the Tribunal that neither NAFTA nor any of the U.S. bilateral investment treaties ("BITs") in force at that time contained any provisions imposing an obligation to maintain continuous Canadian nationality throughout the arbitration proceedings. *See* Counter-Memorial of the Loewen Group, Inc. on Matters of Jurisdiction and Competence, *The Loewen Group Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3 (Mar. 29, 2002), at 50-79. TLGI further argued that under NAFTA Article 1103, the United States was required to accord most-favored-nation ("MFN") treatment to TLGI – *i.e.*, the most favorable treatment that the U.S. extends to other foreign investors. Given that no other foreign investors were required to maintain "continuous nationality" during investment disputes, no such requirement could be imposed on Canadian entities like TLGI. By ignoring this argument, the Tribunal displayed a manifest disregard of the controlling law. *See Mortes*, 128 F.3d at 1460; *Jeffrey M. Brown*, 195 F. Supp. 2d at 684-685.

V. CONCLUSION

In accordance with Section 12 of the FAA, this Petition constitutes "notice of a motion to vacate the arbitration award." In the Motion, Petitioner will move for an order vacating and setting aside the awards made by the Tribunal, for the reasons set forth above.

Dated: December 13, 2004

Respectfully submitted,

Christopher F. Dugan (D.C. Bar # 359266)
Matthew S. Dunne (D.C. Bar membership pending)
PAUL, HASTINGS, JANOFSKY &
WALKER LLP
1299 Pennsylvania Ave., N.W.
10th Floor
Washington, D.C. 20004
(202) 508-9500

Counsel for Petitioner Raymond L. Loewen