

**ICC INTERNATIONAL COURT OF ARBITRATION**

**CASE No. 27732/CPB**

**MESSRS MICHELETTI COMPANY LIMITED**

(Ghana)

**vs/**

**MINISTRY OF YOUTH AND SPORTS**

(Ghana)

This document is the original of the Partial Award rendered in conformity with the Rules of Arbitration of the International Chamber of Commerce and issued as an electronic document pursuant to the parties' agreement.

**IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION  
RULES OF THE INTERNATIONAL CHAMBER OF COMMERCE IN  
FORCE AS OF  
1 JANUARY 2021**

**ICC Case No. 27732/CPB**

**BETWEEN**

**MESSRS MICHELETTI COMPANY LIMITED**

(Ghana)

*Claimant*

**AND**

**MINISTRY OF YOUTH AND SPORTS**

(Ghana)

*Respondent*

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**Partial Award**

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The Arbitral Tribunal

Mr Justin Amenuvor Esq

Mr Shadrack Arhin

Ms Sadaff Habib (President)

8 March 2024

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## A. INTRODUCTION

1. This Partial Award for ICC Case 27732/CPB is issued under the Arbitration Rules of the International Chamber of Commerce in force as of 1 January 2021 ICC Rules (the "ICC Rules" or the "Rules"). The Partial Award determines two issues (i) the issue of the Tribunal's jurisdiction and (ii) the issue as to whether the Claimant's claim is statutorily time barred.

## B. THE PARTIES AND THEIR REPRESENTATIVES

2. The Claimant is:

**Messrs Micheletti Company Limited**

PO Box: 669  
Madina, Accra  
Ghana

(hereafter "**Claimant**")

3. The Claimant is represented in these arbitration proceedings by:

**Virgin Investment Consult Ltd**

Mr Farouk Nuhhu Billa  
PO Box: WJ815 Weija  
Accra  
Ghana

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4. The Respondent is:

**Ministry of Youth and Sports**

PO Box: M252  
Ministries- Accra  
Ghana

E.: [info@moys.gov.gh](mailto:info@moys.gov.gh)

(hereafter "**Respondent**")

5. The Respondent is represented in these proceedings by:

**Office of the Attorney General and Ministry of Justice**

Mr Godfred Yeboah Dame

Mrs Helen Akpene Awo Ziwu

Mrs Patience Admua-Lartey

Mrs Juliana Addo-Yobo

Ms Jasmin Armah

Mr Reginald Nii Odoi

Ms Anne-Marie Ayanru

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6. The Claimant and the Respondent are jointly referred to as the “**Parties**” and individually as a “**Party.**”

**C. THE ARBITRATION AGREEMENT**

7. The dispute referred to in this arbitration has arisen in connection with an EPC/Turnkey Construction Contract for the rehabilitation of the Ohene Djan Sports stadium in Accra, Ghana, to meet the Confederation of African Football (CAF) specifications for the hosting of the African Cup of Nations (CAN) 2008 football tournament sometime in 2006<sup>1</sup> (the “**Agreement**”). The Agreement incorporates the FIDIC General Conditions of Contract for EPC/ Turnkey Projects 1999 (“**GC**”) with amendments in the Conditions of Particular Application (“**PC**”).
8. The arbitration agreement is found at GC 20.6 of the Agreement (the “**Arbitration Agreement**”) and states:

*“Unless settled amicably, any dispute in respect of which the DAB’s decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:*

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<sup>1</sup> In its Procedural Order No. 2, the Tribunal requested that the Parties clarify to the Tribunal the date of entering into the Agreement. The Claimant in its Further Submissions explained that the first contractor of the Project was terminated on 1 August 2006 and that on the same date the Parties entered into a contract. This date is not disputed by the Respondent.

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,*
- (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and*
- (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 (Law and Language).*

*The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of (or on behalf of) the Employer, and any decision of the DAB, relevant to the dispute.*

*Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reason for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.*

*Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.*

#### **D. ARBITRAL TRIBUNAL**

9. The Arbitration Agreement provides for the appointment of a three-member tribunal in accordance with the Rules of Arbitration of the ICC.
10. On 27 June 2023, the Claimant nominated Mr Justin Amenuvor Esq as its co-arbitrator.
11. On 17 July 2023, the Respondent nominated Mr Shadrack Arhin Esq as its co-arbitrator.
12. On 9 August 2023, the ICC Secretary General confirmed the appointment of Mr Justin Amenuvor and Mr Shadrack Arhin as co-arbitrators.
13. On 14 September 2023, the International Court of Arbitration of the ICC (the "**ICC Court**") directly appointed Ms Sadaff Habib as president of the Arbitral Tribunal, in accordance with Article 13(4)(a) of the Rules.
14. The contact details of the Arbitral Tribunal are as follows:

**Mr Justin Amenuvor Esq**  
Amenuvor & Associates  
No. 8 Nii Odartey Osro Street  
Kuku Hill  
Frontline Capital Advisors Building  
Osu-Accra  
Ghana  
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**Mr Shadrack Arhin Esq**  
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No.10 Adomi Link  
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Accra  
Ghana  
E.: [shadrack.arhin@corporatetelegalconcepts.law](mailto:shadrack.arhin@corporatetelegalconcepts.law)

**Ms Sadaff Habib**  
Equanimity Arbitration  
Abu Hail  
Dubai  
United Arab Emirates  
E.: [sadaff@equanimityarb.com](mailto:sadaff@equanimityarb.com)

#### **E. ARBITRAL INSTITUTION AND CASE MANAGEMENT**

15. The present arbitration is administered by the Secretariat of the ICC Court (the “**ICC Secretariat**”) under the ICC Rules. The contact details of the ICC Secretariat are as follows:

**Secretariat of the ICC Court**

Ms Colleen Parker Bacquet, Counsel	(T: +33 1 49 53 28 36)
Mr Benjamin Ng'eno, Deputy Counsel	(T: +33 1 49 53 28 84)
Ms Laragh Lee, Deputy Counsel	(T: +33 1 49 53 29 88)
Ms Erica Medina, Assistant	(T: +33 1 49 53 28 12)
Ms Caroline Taquin, Assistant	(T: +33 1 49 53 28 59)

33-43 Avenue du Président Wilson  
75116 Paris, France  
E: [ica4@iccwbo.org](mailto:ica4@iccwbo.org)

#### **F. PROCEDURAL MATTERS**

16. **Place (“Seat”) of the Arbitration:** The Arbitration Agreement did not specify the seat of arbitration. Failing the Parties’ agreement as to the seat, on 22 June 2023, the ICC Court, in accordance with Article 18(1) of the Rules, fixed Nairobi, Kenya as the seat of the arbitration.

17. **Language of the Arbitration:** Under the Arbitration Agreement and PC 1.4 of the Agreement the Parties agreed that the English language should be the language of the contract and the language for communications in any arbitration, therefore the Arbitration Agreement, provides for English as the language of the arbitration.
18. **Applicable substantive law:** PC 1.4 of the Agreement provides that the governing law of the Agreement shall be the laws of the Republic of Ghana.

#### G. PROCEDURAL HISTORY

19. On 20 April 2023, the ICC Secretariat acknowledged receipt of the Claimant's Request for Arbitration dated 5 April 2023, together with its annexures (the "Request").
20. On 5 May 2023, the ICC Secretariat notified the Respondent of the Claimant's Request and invited the Respondent to comment on the Claimant's suggestion to have one arbitrator instead of three arbitrators as set out in the Arbitration Agreement. As the Arbitration Agreement does not provide for the place of arbitration, the ICC Secretariat invited the Claimant to comment on the place of arbitration by 11 May 2023, and invited the Respondent to comment on the place of arbitration in its Answer.
21. On 6 May 2023 the Claimant wrote to the ICC Secretariat proposing France as the place of arbitration.
22. On 17 May 2023, the Respondent wrote to the ICC Secretariat requesting for an extension to file its Answer to the Request and to nominate a co-arbitrator. The Respondent also submitted Accra, Ghana as the place of arbitration.
23. On 26 May 2023, the ICC Secretariat informed the Parties that:
  - (i) In accordance with Article 2 of Appendix VI of the Rules, the matter of the number of arbitrators will be submitted to the Court in due course; and,
  - (ii) As the Arbitration Agreement does not provide a place of arbitration and as the Parties have not agreed on the place of arbitration, the Court will fix the place of arbitration in accordance with Article 18 (1) of the Rules.



24. On 17 June 2023, the Respondent filed its Answer to the Request for Arbitration (the "Answer") where it raised its jurisdictional objection. On 19 June 2023, the Claimant submitted a Reply to the Answer responding to the Respondent's jurisdictional objection.
25. On 20 June 2023, the ICC Secretariat acknowledged receipt of the Respondent's Answer and confirmed that:
  - (i) there will be three arbitrators pursuant to the Arbitration Agreement and granted the Claimant 15 days to nominate a co-arbitrator;
  - (ii) Respondent's jurisdictional objection will be decided directly by the arbitral tribunal, after providing the parties with an opportunity to comment (Article 6(3)), and
  - (iii) the Provisional Advance on Costs had been fully paid.
26. On 22 June 2023, the ICC Court fixed Nairobi, Kenya as the place of arbitration and fixed the advance on costs at USD 45,000.
27. On 30 June 2023, the ICC Secretariat informed Mr Amenuvor of his nomination by the Claimant as co-arbitrator.
28. On 18 July 2023, the ICC Secretariat informed Mr Shadrack Arhin that he has been nominated by the Respondent as co-arbitrator.
29. On 9 August 2023, the ICC Court's Secretary General confirmed the appointment of Mr Justin Amenuvor and Mr Shadrack Arhin and that unless the Parties agree otherwise of an alternative method to select the president of the tribunal, the ICC Court will appoint the president.
30. On 14 August 2023, the Claimant informed the ICC Secretariat that it does not agree to the Respondent's proposal of a president of the tribunal and reverted to the ICC Court to appoint the president of the tribunal.
31. On 15 September 2023, the ICC Secretariat confirmed that:
  - (i) The ICC Court directly appointed Ms Sadaff Habib as president of the arbitral tribunal;
  - (ii) It received USD 22,500 each from the Claimant and the Respondent (USD 45,000) towards the global advance on costs;
  - (iii) The advance on costs was re-adjusted and increased to USD 100,000 and a further payment of USD 27,500 was requested from each Party; and
  - (iv) It transmitted the case file to the arbitral tribunal.

32. On 17 September 2023, the Tribunal wrote to the Parties to discuss some procedural matters, and:
- (i) Noted that the Respondent challenges the jurisdiction on the basis that the Claimant has not satisfied the dispute resolution provision in GC20.2 of the Agreement (Section III of the Answer);
  - (ii) Invited the Parties to provide their views of whether the matter should be determined on a preliminary basis;
  - (iii) Requested the Parties to provide a summary of their claims for purposes of the Terms of Reference; and
  - (iv) Invited the Parties to a case management conference on 26 September 2022.
33. On 20 September 2023, the Claimant submitted a summary of its case and relief sought to be incorporated into the Terms of Reference.
34. On 22 September 2023, the Respondent submitted a summary of its case and relief sought to be incorporated into the Terms of Reference.
35. On 26 September 2023, the first case management conference was held on the Microsoft Teams platform and was attended to by both Parties. During the case management conference, the Respondent agreed to the date of submission of its Jurisdictional Objection and to the bifurcation of the proceedings to allow the Tribunal to first render an award on jurisdiction. Due to technical issues, the Claimant's Representative was unable to attend the duration of the case management conference. By email on the same day, the Tribunal requested the Claimant to confirm (i) the date of its submission of the Reply to the Jurisdictional Objection, and (ii) whether it agrees to the bifurcation of the proceedings. By letter on the same date, the Claimant confirmed that it will submit its Reply to the Jurisdiction on 7 November 2023 and agreed to the bifurcation of the proceedings to allow the Tribunal to decide on the Respondent's jurisdictional challenge before delving into the merits of the case.
36. On 30 September 2023, the Tribunal circulated a draft Terms of Reference and a proposed Procedural Order No. 1 and invited the Parties for their comments by 9 October 2023.
37. On 2 October 2023, the Claimant confirmed its agreement to the draft Terms of Reference and the proposed Procedural Order No. 1.
38. On 9 October 2023, the Respondent confirmed its agreement to the draft Terms of Reference and the proposed Procedural Order No. 1.

39. On 10 October 2023, the Tribunal issued Procedural Order No. 1 and circulated the draft Terms of Reference for the Parties' signing.
40. On 12 October 2023, the Parties' Representatives signed the Terms of Reference.
41. The Tribunal signed the Terms of Reference on 13 October 2023 and circulated the fully executed version of the Terms of Reference to the Parties and the ICC Secretariat. In accordance with Article 31 (1) of the ICC Rules, the time limit within which the Tribunal must render its final award is six months and such time limit starts to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference. As the Tribunal signed the Terms of Reference on 13 October 2023, the time limit to render the final award is 13 April 2024.
42. On 18 October 2023, the ICC Secretariat acknowledged receipt of the electronic copy of the signed Terms of Reference. The ICC Secretariat further invited the Parties to pay the balance of the advance on costs as requested on 15 September 2023.
43. On 19 October 2023, the ICC Secretariat requested that the balance of the advance on costs should be paid by 2 November 2023.
44. On 24 October 2023, the Respondent submitted its Jurisdictional Objection and submitted its legal authorities relied upon in its submission on 25 October 2023 (the "**Respondent's Jurisdictional Objection**").
45. By email of 31 October 2023, the Tribunal requested the Respondent to provide copies of legal authorities that it relies on and documents that it refers to in its Jurisdictional Objection that were not submitted with its legal authority exhibits. The Respondent submitted these on 1 November 2023.
46. On 3 November 2023, the Claimant submitted its Reply to the Respondent's Jurisdictional Objection with its exhibits ("**Claimant's Reply**").
47. On 7 November 2023, the ICC Secretariat acknowledged receipt of the additional advance on costs of USD 27,500 from the Claimant, and confirmed that, a total USD 50,000 had been received from the Claimant. The ICC Secretariat granted the Respondent additional time until 22 November 2023 to pay its share of the additional advance on costs of USD 27,500.

48. On 8 November 2023, the Tribunal wrote to the Parties with its observations from the Parties' submissions on jurisdiction and requested the Parties to provide further written submissions. On the same date, the Claimant responded to the Tribunal's questions.
49. On 9 November 2023, a second case management conference was held with the Parties to discuss the Tribunal's request for further written submissions.
50. On 10 November 2023, the Tribunal issued Procedural Order No. 2:
  - (i) ordering the Parties to submit their further written submissions by 17 November 2023 and for these submission to (i) address whether or not the Tribunal has jurisdiction under the law of the seat of arbitration and (ii) whether or not the Respondent's challenge that the Claimant's claim is time barred is a matter of jurisdiction of the Tribunal or admissibility of the Claimant's claim;
  - (ii) setting out the Parties' agreement during the second case management conference to dispense with an oral hearing on jurisdiction and on the issue of whether the Claimant's claim is admissible or time barred and to proceed based on documents only;
  - (iii) ordering the Parties to provide the Tribunal with the date of the Parties' Agreement and to confirm that the complete copy of the Agreement is in evidence.
51. On 17 November 2023, the Parties made their additional submissions (referred to as the **"Claimant's Further Submissions"** and the **"Respondent's Further Submissions"**) respectively.
52. On 23 November 2023, the Respondent submitted (i) a revised version of its Further Submissions to include a re-numbering of its exhibits which were omitted in its version of 17 November 2023, (ii) its legal authorities as relied on in the Respondent's Further Submissions and (iii) a complete copy of the contract documents executed between the main contractor (Waterville Holdings BVI), the Claimant and the Respondent.
53. On 18 December 2023, the ICC Secretariat acknowledged receipt of the USD 27,500 from the Claimant in substitution for the Respondent and confirmed that the advance on costs of USD 100,000 fixed by the Court (subject to later readjustments) had been entirely paid by the Parties and that the Case will move forward.
54. In accordance with Article 27 of the ICC Rules, the Tribunal closed the proceedings on 8 February 2024 with respect to the issues to be decided in this Partial Award, that is the issue of the Respondent's jurisdictional challenge and the Respondent's challenge that the Claimant's

claim is time barred and advised the Parties that it will submit a revised draft of the Partial Award to the ICC Court by 10 February 2024.

## H. THE RESPONDENT'S OBJECTION TO THE TRIBUNAL'S JURISDICTION

### The Respondent's Position

55. The Respondent's jurisdictional objection pleaded in its Answer, in Respondent's Jurisdictional Objection, and Respondent's Further Submissions, is as follows.
56. The Respondent contends that the Claimant has not exhausted the dispute resolution mechanism set out in the Agreement. The Respondent argues that before a dispute may be referred to an arbitral tribunal it must first be determined by a Dispute Adjudication Board ("DAB") pursuant to GC 20.2 and GC 20.4 of the Agreement.<sup>2</sup> The Respondent argues that the Agreement requires that an aggrieved party first submit its dispute to a DAB, attempt amicable settlement and thereafter arbitration.
57. The Respondent argues that the language of GC 20.2 is compulsory and on interpretation in its plain, ordinary meaning illustrates the mandatory role of the DAB.<sup>3</sup> Therefore, the referral of a dispute to a DAB is a requirement rather than an option for the Parties. The Respondent relies on Section 42 of Ghana's Interpretation Act, 2009 (Act 792) which provides that the word "shall" is to be construed as imperative and mandatory. The Respondent submits that the Claimant has failed to properly invoke the jurisdiction of the Tribunal by failing to comply with the prerequisites of obtaining a decision from a DAB before referring the dispute to arbitration.<sup>4</sup>
58. The Respondent further relies on *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*, *Lindy Patterson QC and Nicholas Higgs publication on Dispute Boards, the Swiss Federal Supreme Court case and Peterborough City Council Ltd v Enterprise Managed Services* to argue that the wording of GC 20 suggests that DAB proceedings are to be treated as a mandatory prerequisite to arbitration.<sup>5</sup>
59. According to the Respondent, the Claimant has failed to provide any justification for side-stepping the condition precedent in GC 20.2 and the Claimant cannot unilaterally dispense with the need to obtain a DAB decision before proceeding to arbitration under GC 20.6. The

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<sup>2</sup> Paragraph 8, Jurisdictional Objection

<sup>3</sup> The emphasis in this excerpt is retained as emphasized by the Respondent in paragraph 11 of its Jurisdictional Objection

<sup>4</sup> Paragraph 12, Jurisdictional Objection

<sup>5</sup> Paragraphs 15-17, Jurisdictional Objection

Respondent relies on *Gorman & Gorman v Ansong* and *PY Attah & Sons Ltd v Kingsman Ent. Ltd*.<sup>6</sup>

60. The Respondent argues that under GC 20.8 of the Agreement, a party may proceed directly to arbitration where there is no DAB in place and therefore, it is only in *exceptional circumstances* that Parties can proceed directly with arbitration. The Respondent relies on the FIDIC Contracts Guide Commentary on GC 20.8<sup>7</sup> and argues that where one Party is unwilling to participate in a DAB proceeding, the other Party may exercise the power in GC 20.8, and proceed to arbitration. However, no exceptional circumstances arise for which the Claimant may evade DAB proceedings. The Respondent submits that it has not refused to cooperate nor exhibited any intransigence regarding the constituting of a DAB which would entitle the Claimant to proceed directly to arbitration. In fact, the Claimant has made no strides in constituting a DAB for the resolution of this dispute.<sup>8</sup>
61. The Respondent argues that the Claimant's failure to give notice to the Respondent of its intention to refer the dispute to a DAB is a failure of the Claimant to comply with the provisions of the Agreement as executed by the Parties.<sup>9</sup>
62. The Respondent submits that an arbitration agreement is separate from the rest of the Agreement and that a number of choice of law rules apply in an international arbitration proceeding which include the governing law of the contract, the law of the seat (and in this case the Kenyan Arbitration Act CAP. 49, 2012), the law of the arbitration agreement and the institutional rules applicable to the arbitration.<sup>10</sup>
63. The Respondent relies on *Black-Clawson v Papierwerke and Schriro v Summerlin*. The Respondent further relies on *Sulamerica CIA Nacional de Seguros SA v Enesa Engenharia SA* and submits that the applicable law to the Arbitration Agreement in this arbitration and the law applicable to its challenge of jurisdiction is the governing law of the Agreement, that is Ghana law and not the law of the seat, which is Kenya because the law of Ghana has the *closest and most real connection to the contract* and because the Parties expressly chose Ghana as the applicable substantive law of the Agreement.<sup>11</sup>

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<sup>6</sup> Paragraphs 18-21, Jurisdictional Objection

<sup>7</sup> Paragraph 23, Jurisdictional Objection

<sup>8</sup> Paragraph 24, Jurisdictional Objection

<sup>9</sup> Paragraph 29-33, Jurisdictional Objection

<sup>10</sup> Paragraph 9, Respondent's Further Submission

<sup>11</sup> Paragraphs 10-16, Respondent's Further Submission

### The Claimant's Reply

64. The Claimant relies on its letter dated 20 March 2023<sup>12</sup> and argues that it referred to GC 20.5 and GC 20.6 in its letter and proposed Gamey and Gamey to settle the dispute within 28 days but the Respondent failed to respond to the Claimant's notice and therefore, the Claimant filed this arbitration. The Claimant argues that as the Respondent did not reply, the Respondent waived its rights to amicable settlement.
65. The Claimant relies on Section 27 of the ADR Act 2010, ACT 798 of Ghana and argues that the Respondent has not complied with the Arbitration Agreement and therefore the Respondent has waived its right to raise a jurisdictional objection. The Claimant submits that the Tribunal has jurisdiction to hear the dispute.<sup>13</sup>
66. The Claimant further relies on Section 25 of the ADR Act 2010, ACT 798 of Ghana and argues that the Respondent did not raise any concern on the dispute resolution mechanism in response to the Claimant's letter of 20 March 2023, and that the Respondent acknowledged receipt of the letter.<sup>14</sup>
67. The Claimant relies on Section 24 of the ADR Act 2010, ACT 798 of Ghana to argue that the Arbitration Agreement is valid. The Claimant cites the *Kompetenz-Kompetenz* principle and submits that the Tribunal has the authority to decide on its own jurisdiction.<sup>15</sup>
68. Following the Tribunal's questions to the Parties in its Procedural Order No. 2, the Claimant, in Claimant's Further Submissions requests the Tribunal to disregard the Claimant's previous submissions under the ADR Act 2010 of Ghana because the Claimant recognizes that the seat of arbitration is Nairobi, Kenya.<sup>16</sup> The Claimant submits that the Parties agreed to the ICC Court as the arbitration institution which decided the seat of arbitration as Nairobi, Kenya.<sup>17</sup> The Claimant relies on Section 17 of the Kenya Arbitration Act Chapter 49.<sup>18</sup>

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<sup>12</sup> Exhibit C-1

<sup>13</sup> Paragraph 7, Claimant's Reply

<sup>14</sup> Paragraph 8, Claimant's Reply

<sup>15</sup> Paragraph 11-13, Claimant's Reply

<sup>16</sup> Page 1-2, Claimant's Further Submission

<sup>17</sup> Paragraph 1, Claimant's Submission on 8 November

<sup>18</sup> Paragraphs 4, 5, Claimant's Submission on 8 November

## I. THE RESPONDENT'S ARGUMENT THAT THE CLAIMANT'S CLAIM IS TIME BARRED

### The Respondent's Position

69. Without prejudice to the Respondent's objection to the Tribunal's jurisdiction to hear the dispute as set out above, the Respondent submits that, under Section 4 of the Limitation Act, 1972 (NRCD 54) of Ghana, the Claimant's claim is time barred and cannot be heard by the Tribunal.<sup>19</sup>
70. The Respondent submits that the amount alleged and claimed by the Claimant was certified as due to the Claimant in the consultant's certificate dated 26 February 2009. The Respondent argues that the Claimant's right to initiate any dispute resolution mechanism accrued on 19 May 2009 (the date when the Respondent wrote to the Office of the President requesting for the approval of the release of the USD 400,000 to pay the Claimant) and expired on the six-year period.<sup>20</sup> The Respondent asserts that any action to recover the alleged debt cannot be commenced after the expiry of the statutory six-year period.<sup>21</sup> The current arbitration proceeding commenced on 13 April 2023, that is fourteen years after the Claimant's cause of action accrued and therefore the claim is statute-barred under Ghanaian law and the proceedings should not be entertained.
71. The Respondent relies on *Nimonat Limited v The Attorney-General's Dept. and Ministry of Finance*; *Simon Nelson Kwasi Tette v Ghana Revenue Authority*; *Fiaga v Ghana Cocoa Board*; *Ghana Commercial Bank Ltd v Commission on Human Rights and Administrative Justice* and *Bogoso Gold Limited v Ntrakwa* to argue that the Claimant is out of time to recover any debt (if any debt was actually due to the Claimant).<sup>22</sup>
72. The Respondent requests the Tribunal to:<sup>23</sup>
- (a) dismiss all of the Claimant's claims and reliefs on the ground that the Arbitral Tribunal lacks jurisdiction with respect to the dispute between the Claimant and the Respondent;
  - (b) dismiss the Claimant's claims and relief in its entirety;
  - (c) order the Claimant to reimburse the Respondent for the full amount of their costs related to this Arbitration, including the costs of representation and other related costs; and
  - (d) order any further and/or additional relief as the Tribunal may deem appropriate.

<sup>19</sup> Paragraph 35, Jurisdictional Objection

<sup>20</sup> Paragraph 37, Jurisdictional Objection

<sup>21</sup> Paragraphs 37 and 38, Jurisdictional Objection

<sup>22</sup> Paragraphs 41-47, Jurisdictional Objection

<sup>23</sup> Paragraph 52, Jurisdictional Objection



73. In response to the Tribunal's questions to the Respondent's objection as to the admissibility of the Claimant's claim, the Respondent submits that the Claimant's claim is an issue of admissibility and therefore, the applicable law to determine whether or not the Claimant's claim is time barred is the substantive law of Ghana.<sup>24</sup>

#### **The Claimant's Reply**

74. The Claimant relies on Sub-Clause 14.8 GC to argue that the Claimant is entitled to payment without formal notice and without prejudice to any other right or remedy.<sup>25</sup> The Claimant argues that Section 4 of the Limitation Act, 1972 (NRCD 54) of Ghana does not apply because of Sub-Clause 14.8 GC of the Agreement. The Claimant also relies on the Respondent's letter dated 12 April 2023 to argue that the Respondent *admitted liability and did not act upon it*.<sup>26</sup>
75. The Claimant argues that under the Kenya Arbitration Act, the Claimant's claim is not time barred.

#### **J. THE TRIBUNAL'S REASONING AND AWARD**

76. The Tribunal is to determine:
- a. Whether the Tribunal has jurisdiction to hear the Claimant's claim in this arbitration; and
  - b. If the Tribunal finds that it has jurisdiction in this arbitration proceeding, whether the Claimant's claim is statutorily time barred and therefore inadmissible.

77. The Tribunal sets out its reasoning and award in relation to each issue in the following paragraphs.

#### **ISSUE 1: The Respondent's challenge to the Tribunal's jurisdiction on the basis that the Claimant did not first refer this dispute to a DAB under the Agreement**

78. Prior to the Tribunal's determination of the Respondent's jurisdictional challenge, it is important to determine which law is applicable to the Arbitration Agreement.
79. Following the Respondent's Jurisdictional Objection and the Claimant's Reply, the Tribunal, noted that the Parties made their submissions under the law of Ghana, that is the substantive

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<sup>24</sup> Paragraphs 20-37, Respondent's Further Submission

<sup>25</sup> Paragraph 17-18, Claimant's Reply, Paragraph iii, Page 3, Claimant's Further Submission

<sup>26</sup> Paragraph b I, Page 2, Claimant's Further Submission

law of the Agreement (PC 1.4 of the Agreement) whereas the ICC Court had decided, after hearing from the Parties on the seat of arbitration, that the law of the seat of arbitration is Nairobi, Kenya (ICC letter of 22 June 2023). Noting the Parties' submissions under the law of Ghana notwithstanding the ICC Court's decision, in Procedural Order No.2, the Tribunal requested the Parties to make further submissions under the law of the seat of arbitration, that is, Nairobi, Kenya, and to explain to the Tribunal the relevance of the Parties' authorities in their respective submissions. In the Respondent's Further Submissions, the Respondent maintained that the law of the arbitration agreement ought to be Ghana (that is, the governing law of the Agreement) whereas the Claimant submitted in the Claimant's Further Submissions that because the Parties agreed to the ICC Court as the arbitration institution, which in turn decided Nairobi, Kenya to be the seat of arbitration, that the relevant law applicable to determine the Tribunal's jurisdiction is that of Nairobi, Kenya.

80. The Respondent recognizes the separability of an arbitration agreement from a contract and submits that a number of choice of law rules apply in an international arbitration, including the law governing the law of the contract, the law of the seat (in this case the Kenya Arbitration Act CAP.49, 2012), the law applicable to the arbitration agreement, and the institutional rules applicable.<sup>27</sup> But the Respondent argues that for the Tribunal "[...] *to determine whether an arbitration agreement is governed by the procedural law of the seat or the substantive law of the main contract, a Tribunal must examine if there is an express or implied choice of the parties, failing which the Tribunal must consider the law which has the 'closest and most real connection' to the arbitration agreement.*"<sup>28</sup> [emphasis added]. In the Respondent's view the law of Ghana, that is the governing law of the Agreement under PC 11.4, is the law applicable to the Arbitration Agreement.
81. The doctrine of separability provides that an arbitration clause found in a contract is an independent agreement from the contract. Examining the Arbitration Agreement as an independent agreement reveals that the Parties did not agree for the substantive law of the Agreement, that is the law of Ghana, to also govern the Arbitration Agreement.
82. It is also evident that the Arbitration Agreement at GC 20.6 of the Agreement does not specify a seat of arbitration. However, the Arbitration Agreement does require that any dispute arising out of the Agreement is to be referred to arbitration under the ICC Rules.
83. The Tribunal further notes that following the filing of this arbitration, the ICC Secretariat, noting that the Parties had not specified a seat of arbitration in their Arbitration Agreement, invited the

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<sup>27</sup> Paragraph 9, Respondent's Further Submissions

<sup>28</sup> Paragraph 12, Respondent's Further Submission

Parties to comment on the seat of arbitration. The Claimant proposed Paris (France) as the place of arbitration whereas the Respondent proposed Accra (Ghana) as the place of arbitration. Given the Parties' disagreement, the issue of fixing the place of arbitration was referred to the ICC Court pursuant to Article 18 (1) of the ICC Rules.<sup>29</sup>

84. Article 18(1) of the ICC Rules provides that, "*The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.*" On 22 June 2023, the ICC Court fixed Nairobi, Kenya as the place of arbitration.
85. While the Parties did not make an express choice of the seat of arbitration in their Arbitration Agreement in the typical manner of amending the General Conditions of the Agreement to specify the seat, the Parties did however, expressly agree, by referring to the ICC Rules in GC 20.6 of the Agreement, that where the Parties are unable to agree upon the seat of arbitration that this decision is to be made by the ICC Court in accordance with Article 18 of the ICC Rules.
86. The Tribunal, therefore, considers that there was evidently an agreement by the Parties to allow the ICC Court to decide the seat of arbitration for them, where they are not able to agree but there was no agreement by the Parties in the Arbitration Agreement that the law of Ghana is to apply to the Arbitration Agreement. It is not enough to say that as the Parties agreed for the law of Ghana to govern their contractual relationship, that they intended, by extension that the law of Ghana apply to their Arbitration Agreement. The Respondent also does not provide any evidence that the Parties, following the Agreement, intended for the law applicable to the Arbitration Agreement to be the law of Ghana.
87. The Tribunal notes that the Respondent does not deny that a number of choice of rules apply to an international arbitration including the institutional rules applicable to the arbitration.<sup>30</sup> In this arbitration, and given that the Parties expressly agreed for disputes under the Agreement to be referred to the ICC, and therefore, agreed for the ICC Rules to apply to any arbitration arising under the Agreement, the Tribunal considers that the procedural law of this arbitration is the law of the seat which is Nairobi, Kenya<sup>31</sup>. The Tribunal finds that the procedural law should be law of the seat (*lex arbitri*) and since the seat is Nairobi, the law of the seat in this arbitration is Nairobi, Kenya. It is not unusual in international arbitration for the law of the seat of arbitration to be different to the governing law of the contract. To the contrary, it may often be the case that even where parties chose a seat of arbitration, they may be inclined to choose a 'neutral' seat and one that has no connection with them or the transaction in question.

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<sup>29</sup> ICC letter to the Parties dated 26 May 2023

<sup>30</sup> Paragraph 9, Respondent's Further Written Submission

<sup>31</sup> Paragraph 16 of this Partial Award, the ICC Court determined the seat of arbitration as Nairobi, Kenya

88. Turning now to the issue of whether the Tribunal has jurisdiction to hear the Claimant's claim under the law of the seat of arbitration, Nairobi, Kenya, the Tribunal notes that both Parties' consider the issue of compliance with the pre-arbitration requirements under the Arbitration Agreement to be a question of jurisdiction, rather than admissibility<sup>32</sup>. The Tribunal has not found the position to be different under the laws of Kenya as the seat of arbitration.
89. The Respondent argues that the Claimant has not exhausted the dispute resolution mechanism procedure in GC 20 of the Agreement and that before a dispute is referred to an arbitral tribunal it ought first to be determined by a Dispute Adjudication Board ("DAB") under GC 20.2 and GC 20.4 which the Respondent submits is the "*first step in the resolution of a dispute as between the Parties*".<sup>33</sup>
90. The Respondent further argues that the use of the word "*shall*" in GC 20.2 "*is to be construed as imperative and mandatory*" pursuant to Section 42 of Ghana's Interpretation Act, 2009 (Act 792).<sup>34</sup> The Claimant rejects the Respondent's arguments and relies on its letter of 20 March 2023 where it proposed Gamey and Gamey to hear the dispute. The Claimant further relies on the Respondent's letter of 12 April 2023 where the Respondent acknowledged receipt of the Claimant's letter of 20 February 2023 to argue that the Respondent had the opportunity, and that the Respondent chose not to raise an issue in its correspondence.<sup>35</sup>
91. The following are the relevant provisions of GC 20 of the Agreement for the Tribunal to consider.

92. GC 20.2 of the Agreement provides:

*"[d]isputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The Parties shall jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4." [Emphasis added]*

93. GC 20.4 of the Agreement provides that,

*"[i]f a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate,*

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<sup>32</sup> Paragraphs 4-33, Respondent's Jurisdictional Objection; Paragraphs 4-14, Claimant's Reply

<sup>33</sup> Paragraph 8, Respondent's Jurisdictional Objection

<sup>34</sup> Paragraph 12, Respondent's Jurisdictional Objection

<sup>35</sup> Paragraphs 5-8, Claimant's Reply

determination, instruction, opinion or valuation of the Employer, then after a DAB has been appointed pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board] and 20.3 [Failure to Agree Dispute Adjudication Board] either Party may refer the dispute in writing to the DAB for its decision with a copy to the other Party. [emphasis added]

94. On 20 March 2023, the Claimant wrote to the Respondent, “[w]e hereby propose GAMMEY & GAMMEY [sic] within 7 days of receipt of this notice to reach them in Tema or choose and acceptable venue to settle this issue amicably.” The Claimant went on to say that, “[i]f this is not adhered to we will have no option than to commerce [sic] Arbitration hearing for both parties to travel to Paris to settle this case at the Tribunal with an award. Let’s avoid wasting of government funds; this government is in too much financial crisis”<sup>36</sup> (“**Claimant’s March Letter**”). It is noted from the Respondent’s stamp on this letter, that the Respondent received this correspondence on 21 March 2023.
95. The Tribunal considers that in the Claimant’s March Letter, the Claimant recognized that before it could refer the dispute to arbitration under the ICC Rules, it was first to attempt adjudication and amicable settlement, in furtherance of the former, the Claimant proposed Gamey and Gamey.
96. The Tribunal notes that on 12 April 2023, the Respondent replied to the Claimant and stated that, “[w]e write with reference to your letter dated 20<sup>th</sup> February 2023 in connection with the rehabilitation of Ohene Djan Sports Stadium, Accra for CAN 2008. The Ministry is currently discussing it at the management level and will revert to you at the appropriate time.”<sup>37</sup>
97. Notably, there is no further correspondence beyond this date from the Respondent.
98. The Tribunal further notes that in its submissions, the Respondent does not engage with the above correspondence between the Parties. Instead, the Respondent argues that the Claimant “cannot unilaterally dispense with the need to obtain a DAB decision before proceeding to arbitration under Sub-Clause 20.6”<sup>38</sup> and “contends that the failure of the Claimant to duly give notice to the Respondent of its intention to refer the dispute of its outstanding payment to a DAB is a deliberate act by the Claimant not to abide by the provisions of the contract executed by the Parties.”<sup>39</sup>

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<sup>36</sup> Exhibit C-1, Claimant’s Reply

<sup>37</sup> Exhibit C-4, Claimant’s Reply

<sup>38</sup> Paragraph 18, Respondent’s Jurisdiction Objection

<sup>39</sup> Paragraph 33, Respondent’s Jurisdictional Objection

99. The question for the Tribunal therefore is whether the Claimant's March Letter was notice to the Respondent of the Claimant's intention to refer its dispute to a DAB under the Agreement.
100. GC 20.2 of the Agreement requires the Parties to jointly appoint a DAB within 28 days of a Party notifying the other of its intention to refer its dispute to the DAB. The obligation to appoint the DAB is on both Parties whereas the obligation to notify is on the party who wishes to refer its dispute to the DAB.
101. The Tribunal notes that in paragraph 4 of the Claimant's March Letter, the Claimant proposed, that "[w]e hereby propose GAMMEY & GAMMEY within 7 days of receipt of this notice to reach them in Tema or choose and [sic] acceptable venue to settle this issue amicably". While the Tribunal notes that the March Letter does not expressly state an intention to refer a dispute to a DAB in accordance with GC 20.4, the Tribunal determines that the overall reading of the March Letter is sufficient notice, under GC 20.2 of the Agreement, to the Respondent of the Claimant's intention to refer its dispute to a DAB, in the form of Gammey & Gammey. The Tribunal therefore, finds that the Claimant's March Letter, communicated to the Respondent that (i) the Claimant has a dispute against the Respondent, (ii) the Claimant recognizes that before going to arbitration it needs to refer the dispute to a DAB and to amicable settlement, and (iii) the Claimant therefore proposes Gamey and Gamey to decide on the dispute or asks that the Respondent propose a venue for amicable settlement.
102. Thereafter, according to GC 20.2 of the Agreement it was the joint obligation of the Parties, that is the Claimant and the Respondent, to appoint a DAB within 28 days. This did not happen. Instead, the Respondent replied to the Claimant acknowledging the Claimant's letter of 20 February 2023<sup>40</sup> (where the Claimant requested payment of the USD 400,000 within 30 days) and advising that the issue is being discussed by its management. The Respondent does not appear to respond to the Claimant's March Letter or to comment on the Claimant's nomination of Gamey and Gamey in its March Letter, even though the Respondent's stamp on the March Letter shows that the letter was received by the Respondent on 21 March 2023. Certainly, the Respondent does not dispute the receipt of this letter in this arbitration.
103. According to GC 20.3 of the Agreement, where the Parties fail to agree upon the nomination of the DAB, "[...] then the appointing entity or official named in the Particular Conditions shall, upon the request of either or both of the Parties and after due consultation with both Parties appoint this member of the DAB..." The Particular Conditions are silent as to an appointing entity.

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<sup>40</sup> Page 8, Claimant's Annexure to its Reply to the Answer

104. GC 20.8 of the Agreement provides that in a situation such as this, where there is no DAB in place, the dispute may be referred directly to arbitration under GC 20.6 of the Agreement.

*"[i]f a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:*

*(a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and*

*(b) The dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].*

105. The Tribunal notes that the Respondent refers to GC 20.8 and submits that [...] *it is only under exceptional circumstances that Parties may circumvent the DAB procedure in order to proceed straight to arbitration.*"<sup>41</sup> The Respondent relies on the FIDIC Contracts Guide Commentary on this provision which provides, *"that there may be 'no DAB in place' because of a Party's intransigence, or because the DAB's appointment has expired in accordance with the last paragraph of sub-clause 20.2. If a dispute arises thereafter, either Party can initiate arbitration immediately... without having to reconvene a DAB for a decision and without attempting amicable settlement..."*<sup>42</sup> [emphasis added] The Respondent submits that no exceptional circumstances have arisen and neither has the Respondent refused to cooperate nor exhibited intransigence regarding the constituting of a DAB.<sup>43</sup>

106. The Respondent may not have outrightly refused the formation of the DAB, but there is nothing in evidence to show that the Respondent agreed to, or otherwise cooperated in the formation of a DAB. The Respondent's letter of 13 April 2023 simply stated that, *"[t]he Ministry is currently discussing it [sic] at the management level and will recort to you at the appropriate time."*<sup>44</sup> GC 20.2 of the Agreement requires both Parties to jointly appoint a DAB, whereas the correspondence in evidence shows that such cooperation to appoint a DAB was not forthcoming from the Respondent.

107. The Tribunal finds that the Claimant satisfied the requirement to notify the Respondent of its intention to refer its dispute to a DAB under GC 20.2 of the Agreement, and that the Respondent did not adequately respond to the Claimant's notice following which and in accordance with GC 20.8 (b) of the Agreement the Claimant referred the dispute to arbitration under GC 20.6 of the Agreement.

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<sup>41</sup> Paragraph 23, Respondent's Jurisdictional Objection

<sup>42</sup> Paragraph 23, Respondent's Jurisdictional Objection

<sup>43</sup> Paragraph 23, 24, Respondent's Jurisdictional Objection

<sup>44</sup> Exhibit C-4, Claimant's Reply

108. There is nothing in evidence before the Tribunal to show that the Arbitration Agreement is otherwise invalid under the laws of Kenya (the relevant law of the seat of arbitration).

109. Therefore, the Tribunal finds that this arbitration has been properly commenced by the Claimant under GC 20 of the Agreement, and that the Tribunal has jurisdiction to hear this dispute.

**ISSUE 2: The Respondent's objection that the Claimant's claim is statutorily time barred**

110. Prior to determining whether the Claimant's claim is time barred, it is important that the Tribunal considers whether the Respondent's objection that the Claimant's claim is time barred under the Limitation Act of Ghana is an objection to the Tribunal's jurisdiction or if it is an issue of admissibility of the Claimant's claim.

111. In the Respondent's Further Submissions, the Respondent argued that the Respondent's challenge that the Claimant's claim is time barred is an admissibility issue because it concerns whether the claim is capable of being determined.<sup>45</sup> In the Claimant's Reply to the Respondent's Jurisdictional Objection, the Claimant argued that the Tribunal has the jurisdiction to hear the dispute and the claim is not time barred.<sup>46</sup>

112. After considering both Parties' submissions carefully, the Tribunal agrees with the Respondent that the question of whether the Claimant's claim is time barred is a question of admissibility rather than jurisdiction. The Tribunal agrees with the Respondent that, '*Jurisdiction*' is commonly defined to refer to the power of the Tribunal to hear and decide case, whereas admissibility refers to whether the claim is capable of being determined at that time, and the legal right of a party to bring that claim. And that, "*Matters on whether a claim is statute-barred or prohibited until some condition precedent is fulfilled, is a challenge to admissibility. This relates to some defect or procedural impropriety of the claim, and not the powers of the Tribunal to determine the claim, as with jurisdiction.*"<sup>47</sup> Therefore, the Tribunal considers that the Respondent's objection to the Claimant's claim in this arbitration touches upon the claim as opposed to the Arbitration Agreement, the Tribunal or the constitution thereof. Admissibility in international arbitration refers to the power of a tribunal to decide a case at a particular point in time, having regard to a possible defect (whether temporary or permanent) within the claim. In this case, the Respondent pleads that the Claimant's claim is time barred, that is, it is defective on account of the time limit within which to bring such claims has expired. Further, the relevant

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<sup>45</sup> Paragraph 20, Respondent's Further Submission

<sup>46</sup> Paragraph 15, Claimant's Reply

<sup>47</sup> Paragraph 20, Respondent's Further Submission



law for the Tribunal to apply in considering whether the Claimant's claim is statute barred is the substantive law of the Agreement which according to PC 1.4 of the Agreement is the Laws of the Republic of Ghana. The issue of admissibility is a substantive law issue because it touches and concerns the Claimant's claim which is the subject of the arbitration and therefore, the substantive law of the Agreement is applicable in the determination of this issue.

113. Having found that the Tribunal has jurisdiction to hear this dispute, the Tribunal has jurisdiction to hear the merits of the Claimant's claims which would include determining questions as to the admissibility of the Claimant's claims. The Tribunal clarifies that it is not deciding on the merits of the Claimant's claim, but rather on the issue of time bar (as a question of admissibility under the substantive law of Ghana), as pleaded by the Parties in accordance with Procedural Order No. 2.

114. The Claimant raises the following claims in this arbitration:<sup>48</sup>

- (a) *Recovery of the sum of \$400,000 Dollars being it outstanding due for executing the Rehabilitation of Ohene Djan Sports Stadium in Accra and,*
- (b) *Interest on the said sum from the date of default 27<sup>th</sup> February 2009 for 14 years as at now at the current Bank of Ghana Forex rate plus 3% point until the date of final payment.*

115. The Respondent relies on Section 4 (1) (b) of the Ghana Limitation Act 1972 (NRCD 54) (the "**Limitation Act**") and argues that the time limit to bring a claim under a contract is "*six years after the accrual of the rights of the aggrieved party*".<sup>49</sup>

116. The Respondent refers to its letter of 19 May 2009<sup>50</sup> to the Office of the President requesting for the release of the USD 400,000 to pay to the Claimant and argues that the Claimant's right to bring its claims (if any) against the Respondent accrued on 19 May 2009 and could only be brought within six years of this date.<sup>51</sup> The Respondent argues that the current proceedings have commenced fourteen years after the Claimant's cause of action accrued and is therefore statute barred under the laws of Ghana.<sup>52</sup> The Claimant denies that its claim is time barred because according to the Claimant the Respondent in its letter of 12 April 2023 "*admitted*

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<sup>48</sup> Page 6, Request. The Tribunal notes that the Claimant with its response to the Respondent's Answer submitted a report computing the interest up to 2023 at USD 209,407.42

<sup>49</sup> Paragraphs 34-36 of the Respondent's Jurisdictional Objection

<sup>50</sup> Page 6, Claimant's annexure to its Reply to the Respondent's Answer

<sup>51</sup> Paragraph 38, Respondent's Jurisdictional Objection

<sup>52</sup> Paragraph 40, Respondent's Jurisdictional Objection

*liability and did not act upon it*.<sup>53</sup> The Claimant further relies on GC 14.8 of the Agreement to argue that the wording of this provision shows that its claim is not time barred.<sup>54</sup>

117. The relevant provisions of the Limitation Act for the Tribunal to consider are as follows.

118. Section 4 (1) of the Limitation Act which states that,

*(1) A person shall not bring an action after the expiration of six years from the date on which the cause of action accrued, in the case of (b) an action founded on simple contract.*

119. Section 17 of the Limitation Act further states that,

*1) For the purposes of this Act, the right of action accrued on, and not before, the date of the acknowledgement,*  
*(a) where a right of action has accrued to recover a debt and the person liable for the debt has acknowledged the debt; or [emphasis added]*

120. The Tribunal also considers the wording of GC14.8 of the Agreement which provides:

*If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Timing of Payments], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay.*

*Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency of payment, and shall be paid in such currency.*

*The Contractor shall be entitled to this payment without formal notice, and without prejudice to any other right or remedy.*

121. In order to decide whether or not the Claimant's claim is time barred, the Tribunal is to consider the date when the Claimant's *cause of action accrued* under the Limitation Act of Ghana.

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<sup>53</sup> Paragraph 2 (b) (i), Claimant's Further Submission

<sup>54</sup> Paragraph (iii), Claimant's Further Submission, Paragraph 17-18, Claimant's Reply. The Tribunal notes that the Claimant refers to GC 14.7 but quotes GC 14.8 and from the Claimant's submissions, the Tribunal discerns it was the Claimant's intention to refer to GC14.8 and it erroneously refers to GC 14.7.

122. The Tribunal notes that the Project consultant issued a certificate on 27 February 2009 certifying an amount of USD 400,000 in favour of the Claimant.<sup>55</sup> Technically, the Claimant's cause of action would have accrued on this date.

123. However, on 19 May 2009, the Respondent wrote to the Chief of Staff, Office of the President requesting for approval of the release of USD 400,000 to pay the Claimant.<sup>56</sup> The Respondent considers that the Claimant's cause of action accrued on this date and the Claimant had six years under the Limitation Act of Ghana to bring its claim.

"[w]e should be grateful if approval could be granted for the release of an amount of Four Hundred Thousand Dollars (\$400,000) to this Ministry to enable us pay the contractor, Messrs Micheletti Company Limited for the work done." [emphasis added]

124. Whether the cause of action accrued on 19 May 2009, or 27 February 2009, the end result remains unchanged: the claim is deemed time-barred under the Limitation Act. In either scenario, the specific date seems immaterial, as the key factor is that the six-year time limit for filing the claim has lapsed.

125. The third relevant correspondence for the Tribunal to consider is the Respondent's letter of 12 April 2023, which the Claimant considers "*an admission*"<sup>57</sup>. In this letter the Respondent states that,<sup>58</sup>

*"[w]e write with reference to your letter dated 20<sup>th</sup> of February, 2023 in connection with the rehabilitation of Ohene Djan Sports Stadium, Accra for CAN 2008. The Ministry is currently discussion [sic] it at the management level and will revert to you at the appropriate time."*

126. There is an undeniable difference between the language of the Respondent's letter of 19 May 2009 and the Respondent's more recent letter of 23 April 2023. In the former correspondence, the Respondent requests the release of the amount of USD 400,000, admitting that this amount is due to the Claimant. But in its later letter in April 2023 the Respondent advises the Claimant that it has received the Claimant's letter of 20 February 2023 and that it will be discussed with management. The Respondent neither admits, nor acknowledges the amount outstanding to the Claimant in its letter of 23 April 2023 or refers to any action that it will take to pay the Claimant.

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<sup>55</sup> Page 54, Additional documents submitted by Respondent with the Respondent's Jurisdictional Objection

<sup>56</sup> Page 6, Claimant's annexure to its Response to the Answer

<sup>57</sup> Page 4, Claimant's Further Submission

<sup>58</sup> Page 7, Claimant's annexure to its Response to the Answer

127. The wording of the 23 April 2023 letter is clear-cut; nothing suggests that the letter constitutes a fresh acknowledgement from the Respondent of a debt due to the Claimant. Therefore, the Claimant's defence and reliance on this letter as the Respondent's admission of debt fails.
128. The Claimant further argues that GC 14.8 of the Agreement entitles the Claimant to payment regardless of whether the Claimant issues a formal notice to the Respondent or whether the Claimant files an arbitration.<sup>59</sup> The Claimant seems to argue that GC 14.8 trumps statutory time bars and provides the Claimant with an open-ended time frame within which to bring its claim for outstanding payment against the Respondent. Notably, the Claimant does not submit any legal authorities to support any of its contentions.
129. The Tribunal does not agree with the Claimant's interpretation or application of GC 14.8 of the Agreement, which is fundamentally flawed.
130. GC 14.8 of the Agreement entitles the Claimant to claim "*financing charges*" for the period of delay in payment. And the Claimant is "[...] *entitled to this payment without formal notice and without prejudice to any other right or remedy.*" It is in relation to a claim for finance charges, where claimed, that the Claimant is not obliged to notify the Respondent. The effect of the provision is not to exempt the Claimant from statutory time bars applicable to its claim for outstanding payment for work done under the Agreement (the amount of USD 400,000 which it claims in this arbitration).
131. The Tribunal further observes that as part of its request for relief the Claimant claims interest from 27 February 2009 which the Claimant refers to as the "date of default".<sup>60</sup> By its own admission, the Claimant acknowledges that the Claimant's cause of action accrued before the date of the Respondent's letter of 23 April 2023.
132. The Tribunal is further persuaded by the following case law submitted by the Respondent in this arbitration and which the Tribunal considers relevant to its determination as to when the cause of action accrued and whether the Claimant's claim is time barred.
133. In the *Nimonat Limited vs The Attorney-General's Dept. and Ministry of Finance* case (which the Respondent submits in evidence)<sup>61</sup> the judge found that,

*The fact that the plaintiff seeks to recover interest at the prevailing commercial bank rate from April 2007 to the date of final payment is enough testimony that the plaintiff's cause of action*

<sup>59</sup> Paragraph 18, Claimant's Reply on Jurisdiction

<sup>60</sup> Paragraph G, Request

<sup>61</sup> Exhibit R9, Respondent's Jurisdictional Objection

accrued to it in the year 2007 and so the plaintiff's writ should have been sued out latest by the end of March 2013. It follows therefore that the writ of summons and statement of claim filed by the plaintiff on the 20 December 2016 is way out of time and caught by the statute of limitation as quoted above. The plaintiff's action is therefore statute barred.<sup>62</sup> [Emphasis added]

134. Further, in the case *Simon Nelson Kwasi Tette vs Ghana Revenue Authority*<sup>63</sup> the Court found that letters exchanged between the parties to that case did not evidence the defendant's intention to make further payments to the plaintiff.

*In the opinion of the court, whilst the Plaintiff tendered the letters exchanged between the Defendant and the PSC as documentary proof of the PSC's directive to the Defendant there is no indication that the Defendant demonstrated that it was willing to negotiate with the Plaintiff or the PSC in satisfaction of the Plaintiff. Indeed there is nothere [sic] is nothing from those letters to show that the Defendant submitted and agreed to the PSC's request to make further payments to the Plaintiff for same to be used as the reason for the delay in instituting the action.*<sup>64</sup> [emphasis added]

135. In paragraph 58 of the judgment, the Judge highlights the importance and purpose of the statute of limitation in preventing "tardy" claims being brought against defendants.

*It is important to remind ourselves that the statute of limitation is intended to keep a tardy Plaintiff out of court and to offer a Defendant protection from a litigation which should have started earlier because the law always helps the vigilant and not the indolent. The court therefore holds that at the time that the Plaintiff instituted the present action against the Defendant herein, the cause of action opened to the Plaintiff had long been barred by the Limitation Action Act of 1972, NRCD 54. It implies therefore that the Plaintiff cannot maintain the present action against the within named Defendant.* [emphasis added]

136. In *Fiaga v Ghana Cocoa Board*<sup>65</sup> the Court found that:

*However, the plaintiff did not tender any correspondence or document to show that the defendants had admitted liability.*

<sup>62</sup> Exhibit R9, page 181 Respondent's Jurisdictional Objection

<sup>63</sup> Exhibit R10, page 183, Respondent's Jurisdictional Objection

<sup>64</sup> Exhibit R10, paragraph 55, Respondent's Jurisdictional Objection

<sup>65</sup> Exhibit R11, Respondent's Jurisdictional Objection

*Held, upholding the preliminary objection: where parties embarked on negotiations and eventually agreed on the issue of liability, a defendant, when sued out of time, could not plead a statute of limitation as a bar to the action.*

*Where, however, there had not been an agreement, as in the present case; where no evidence to the effect that the defendants had accepted liability was tendered, the plaintiff could not be heard to say that he was negotiating with the defendant and accordingly should be allowed to commence his action outside the limitation period. [Emphasis added]*

137. Other than the Claimant's reliance on the Kenya Arbitration Act, which the Tribunal finds takes the Claimant nowhere, the Claimant does not submit any legal authorities in support of its defence to the Respondent's objection that the Claimant's claim is time barred.
138. Having considered all the facts and evidence submitted by the Parties in this arbitration, the Tribunal determines that there exists no evidence to demonstrate that the cause of action accrued on a date later than 19 May 2009. Therefore, the time limit for the Claimant to bring its claims under the Agreement against the Respondent, in accordance with Section 4(1) of the Limitation Act of Ghana expired on 19 May 2015. The Tribunal finds that the Claimant's claim of USD 400,000 is, by operation of statute, time barred. Given that the Claimant's primary claim is time barred, the Claimant's claim for interest and all other claims raised by the Claimant are similarly time barred.

#### **K. OPERATIVE PART**


139. For the reasons set out above in this Partial Award, the Tribunal having duly considered all the submissions and evidence put before it, and after deliberation, decides as follows:
- (i) The Tribunal DECLARES that the Claimant satisfied the requirements of referring its dispute to arbitration under Clause 20 of the Agreement and that the Tribunal has jurisdiction in the arbitration proceedings; and,
  - (ii) The Tribunal DECLARES that the Claimant's claims are time barred under Section 4 (1) of the Limitation Act, 1972 (NRCD 54) Ghana and therefore, all the Claimant's claims and relief sought in this arbitration are rendered not admissible, hence, are dismissed.


140. All other claims, defences and relief sought are dismissed save for any decision as to costs, which is reserved.

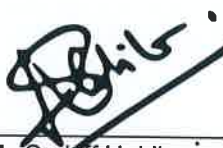
PLACE OF ARBITRATION ("SEAT"): NAIROBI, KENYA

DATE: 8 MARCH 2024

SIGNATURE:

  
Mr Justin Amenuvor (Co-arbitrator)  
Date: 8/3/24

  
Mr Shadrack Arhin (Co-arbitrator)  
Date: 8/03/2024

  
Ms Saclaff Habib  
(President)  
Date: 08.03.2024