Exhibit 1

ICC International Court of Arbitration®

Award

International Chamber of Commerce (ICC)
Secretariat of ICC International Court of Arbitration
Paris Office

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75116 Paris, France
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ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 26290/AYZ/ELU

CARDNO ME LIMITED

(United Arab Emirates)

vs/

CENTRAL BANK OF IRAQ

(Iraq)

This document is a certified true copy of the original of the Final Award rendered in conformity with the Rules of Arbitration of the International Chamber of Commerce.

INTERNATIONAL CHAMBER OF COMMERCE

INTERNATIONAL COURT OF ARBITRATION

ICC CASE No. 26290/AYZ/ELU

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FINAL AWARD

in the Arbitration between

CARDNO ME LIMITED (UAE)
Claimant

v.

CENTRAL BANK OF IRAQ (IRAQ)
Respondent

Sole Arbitrator

Mr. Bassam Mirza

LIST OF ABBREVIATIONS

CME or **Claimant**	Cardno ME Limited
CBI or **Respondent**	Central Bank of Iraq
Party	Claimant or Respondent
Parties	Claimant and Respondent collectively
ICC Court	International Court of Arbitration of the International Chamber of Commerce
Tribunal or Arbitral tribunal or Sole Arbitrator	Sole arbitrator appointed in this arbitration as described in Section II herein
ICC Rules	ICC Rules of Arbitration in force as from 1 January 2021
Project	The construction of Respondent's new headquarters in Baghdad as designed by Zaha Hadid Architects
Consultancy Agreement	The consultancy agreement dated 8 May 2016 signed among others by the Parties
RfA	Claimant's Request for Arbitration dated 2 June 2021
The ICC Secretariat	The Secretariat of the International Court of Arbitration of the International Chamber of Commerce
Answer	The Answer to the Request for Arbitration
CMC	Case Management Conference
Application against ENBD	Claimant's Emergency Application for Interim Relief directed against Emirates NBD Bank dated 21 September 2021
New Request for Interim relief	Claimant's request for Interim Relief directed against Respondent dated 22 September 2022
Statement of Claim or **SoC**	Claimant's Statement of Claim dated 6 January 2022
Tribunal's Questions	The Tribunal's Questions dated 11 April 2022
Claimant's Answers or **CsA**	Claimant's Answers dated 31 May 2022 to the Tribunal's Questions dated 11 April 2022
Submission on Quantum or **SoQ**	Claimant's Submission on Quantum dated 17 August 2022
Claimant's Opening presentation or **CsOP**	Claimant's Opening Presentation at the Hearing dated 8 September 2022
CE Decision	The French *Conseil d'Etat* ruling dated 22 September 2022 which annulled article 750-1 of the FCCP
FCCP	French Code of Civil Procedure
Submission on the impact of the CE Decision or **CsCED**	Claimant's Submission dated 4 November 2022 on the impact of the CE Decision
Respondent's Application or Application	Respondent's Application dated 1 January 2023 submitted after the closing of the proceedings on 13 December 2022 and after the draft arbitral award was sent to the ICC Court for scrutiny on 16 December 2022
Petition	The petition submitted on 20 December 2019 by six representative bodies of lawyers in France to the *Conseil d'Etat* to annul the Decree No. 2019-1333 dated 11 December 2019
Decree	The decree No. 2019-1333 dated 11 December 2019
ENBD Counter-Guarantee	The counter-guarantee issued by the Emirates NBD Bank in favor of the Trade Bank of Iraq
TBI Guarantee	The guarantee issued by the Trade Bank of Iraq in favor of Respondent

I. THE PARTIES AND THEIR REPRESENTATIVES

A. Claimant and its representatives

1. The Claimant, Cardno ME Limited ("**CME**" or the "**Claimant**") is a corporation incorporated in Abu Dhabi, U.A.E, with registered address at Incubator Building, Masdar City, P.O. Box 145530, Abu Dhabi, U.A.E.

2. Claimant was represented in the proceedings until 9 March 2022 by its counsel from Baker & Mckenzie Habib Al Mulla:

Mr. Andrew Mackenzie (andrew.mackenzie@bakermckenzie.com)
Mr. Andrew Massey (andrew.massey@bakermckenzie.com)
Mr.Youssef Nassar (youssef.nassar@bakermckenzie.com)
Ms. Naira Chughtai (naira.chughtai@bakermckenzie.com)
Ms. Jahnvi Jhaveri (jahnvi.jhaveri@bakermckenzie.com)

Baker & Mckenzie Habib Al Mulla
Level 14, 014 Tower
Al Abraj Street
P.O. Box 2268
Dubai, United Arab Emirates
Tel: + 971 4 4230000

3. Claimant is represented - following the move of Claimant's team of lawyers from Baker & Mckenzie Habib Al Mulla to DLA Piper Middle East LLP - by its counsel from DLA Piper Middle East LLP which replaced Baker & Mckenzie Habib Al Mulla:

Mr. Andrew Mackenzie (andrew.mackenzie@dlapiper.com)
Mr. Andrew Massey (andrew.massey@dlapiper.com)
Ms. Jahnvi Jhaveri (jahnvi.jhaveri@dlapiper.com)
Ms. Naira Chughtai (naira.chughtai@dlapiper.com)

DLA Piper Middle East LLP
Level 9, Standard Chartered Tower
Downtown
PO Box 121662
Dubai, United Arab Emirates
Tel: + 971 4 4386100

4. Claimant is also represented by Professor Georges Affaki as co-counsel:

Prof. Georges Affaki (georges.affaki@affaki.fr)

AFFAKI
10 avenue Hoche
75008 Paris
France
Tel: + 33 1 55 73 74 78

B. Respondent and its representatives

5. The Respondent, the Central Bank of Iraq ("**CBI**" or the "**Respondent**") is incorporated in Iraq with registered address at Al-Rasheed Street, Baghdad, Iraq.

6. The contact details of Respondent are:

Mrs. Weam Abdulazeez Hasan
General Director of Legal Directorate

Mr. Ali Mousa
Director of Contracts Department – Legal Office

Central Bank of Iraq
Al Rasheed Street, Baghdad, Iraq
Email: contracts@cbi.iq
newbuilding@cbi.iq
Tel: +964 7809 171 659

7. On 11 January 2023, Cleary Gottlieb Steen & Hamilton LLP informed the Tribunal that it was newly appointed to represent Respondent as counsel in these proceedings, it being noted that Respondent did not participate to the proceedings until it submitted its letter dated 1 January 2023 (*i.e.* after the closing of the proceedings which occurred on 13 December 2022)[1].

8. The contact details of Cleary Gottlieb Steen & Hamilton are as follows:

Mr. Andrew A. Bernstein (abernstein@cgsh.com)
Ms. Laurie Achtouk- Spivak (lachtoukspivak@cgsh.com)
Ms Zeïneb Bouraoui (zbouraoui@cgsh.com)

Cleary Gottlieb Steen & Hamilton LLP
12 rue de Tislit
75008, Paris
France
Tel: + 33 1 40 74 68 00

9. Claimant and Respondent are hereinafter referred to as the "**Parties**" collectively and the "**Party**" individually.

II. THE ARBITRAL TRIBUNAL

10. The Tribunal is composed of one arbitrator.

11. On 19 August 2021, the International Court of Arbitration (the "**ICC Court**") directly appointed Mr. Bassam Mirza who is French, Lebanese and Greek as sole arbitrator (the "**Tribunal**" or the "**Arbitral Tribunal**" or the "**Sole Arbitrator**")

[1] See paras, 140-150 below.

pursuant to Article 13(4)(a) of the ICC Arbitration Rules in force as from 1 January 2021 (the "**ICC Rules**"):

Mr. Bassam Mirza
PKM Avocats
3ème étage
20, rue des Pyramides
75001 Paris
France
Tel: + 33 1 85 09 01 54 // +33 6 07 80 37 47
Email: bassam.mirza@pkm-avocats.com

III. SUMMARY OF THE DISPUTE

12. Claimant is a multi-disciplinary construction management and engineering consulting firm. Services offered by Claimant cover project planning, risk management, program management, construction management, cost management and contractual support.[2]

13. The dispute is related to the construction of Respondent's new headquarters in Baghdad (Iraq) situated on the banks of the Tigris River and designed by Zaha Hadid Architects (the "**Project**")[3].

14. On 8 May 2016, Claimant and Respondent entered into a consultancy agreement by virtue of which Claimant as "*Lead Consultant*", was to "*provide certain consulting services namely: Supervision on Building the New Headquarter of Central Bank of Iraq, Jadiriyah, Baghdad*" (the "**Consultancy Agreement**") (Exhibit C-1, p. 1). The Consultancy Agreement was also signed by Meinhardt Singapore Pte Limited (Dubai Branch), as "*Sub Consultant*" (Exhibit C-1, pages 1 and 2) but this company "*ultimately never performed any work on the Project in accordance with the Sub-Consultant Agreement*"[4] which was concluded, according to Claimant, between the latter and Meinhardt Singapore Pte Limited.[5]

15. The Consultancy Agreement is based upon the FIDIC Client/Consultant Model Services Agreement 4th Edition 2006 as amended by the contracting parties (Exhibit C-1, p. 1).

16. On 10 January 2018, Respondent (as the Employer) appointed Daax Construction (as the Contractor) to construct the Project.[6]

17. The problems arose between the Parties in the fourth quarter of 2020 when, according to Claimant, Respondent "*decided to not pay CME's outstanding invoices*"[7] for services it rendered on the Project which led Claimant to ultimately "*demobilise as a direct consequence of CBI's persistent breaches of its payment obligations under Clause 5 of the Consultancy Agreement for the period between September 2020 and March 2021.*"[8]

18. Claimant is thus claiming in the present arbitration proceedings: i) the payment of the outstanding invoices between September 2020 and March 2021[9] (see Section VIII(B)(1) below), ii) the payment of the "*remaining value of the Consultancy Agreement*" for the services which were supposed to be performed "*post April 2021 until the end of the Consultancy Agreement*"[10] (see Section VIII(B)(2) below) and interest on the outstanding amounts due under the Consultancy Agreement[11] (see Section VIII(B)(3)).

19. In addition, Claimant is requesting the Tribunal to issue an order directing Respondent to return to Claimant the performance bond that the latter had furnished under the Consultancy Agreement as well as payment of the legal costs associated with dealing with the attachment application of the performance bond before the Dubai Courts[12] (see Section VIII(B)(4) below).

20. Claimant's above claims are summarized and dealt with in Section VIII(B) below. However, before tackling Claimant's claims, the Tribunal examines in Section VII below whether it has jurisdiction in accordance with article 6.3 of the ICC Rules and in Section VIII(A) below whether Claimant's claims are admissible in light of the multi-tiered dispute resolution clause contained at clause 8 of the Consultancy Agreement.[13]

IV. PROCEDURAL HISTORY

A. Commencement of proceedings, constitution of the Arbitral Tribunal and the decision on the validity of the notification of the proceedings to Respondent

21. On 2 June 2021, Claimant initiated the present arbitration by submitting a Request for Arbitration dated 2 June 2021 (the "**RfA**"), together with Exhibits C-1 to C-7, which was received by the ICC Secretariat by email on the same day.[14]

22. On 2 June 2021, the Deputy Secretary General of the ICC Court informed Claimant of the case reference of this arbitration and stated that Claimant would be informed

[2] SoC, para. 2.
[3] SoC, paras. 3-4.
[4] SoC, para. 5(2).
[5] SoC, para. 5(2).
[6] SoC, para. 5(3) and footnote n°3 of the SoC (https://www.daaxconstruction.com/about-daax).
[7] SoC, para. 8.
[8] SoC, para. 77.
[9] SoC, paras 36-74.
[10] SoC, paras 75-81.
[11] SoC, paras 82-85.
[12] SoC, paras 86-95.
[13] See the reproduction of the multi-tiered dispute resolution clause at Section VI(A) below.
[14] In its SoC, Claimant produced Exhibits C-1 to C-31. Exhibits C-1, C-4, C-5 and C-7 which were attached to the RfA became respectively C-1, C-23, C-27 and C-28 in the SoC whereas C-2, C-3 and C-6 which were attached to the RfA were not re-produced with the SoC. Therefore, there are two different Exhibits bearing the same number C-2 (the one attached to the RfA and the one attached to SoC), two different Exhibits bearing the same number C-3 (the one attached to the RfA and the one attached to SoC), two different Exhibits bearing the same number C-4 (the one attached the RfA and the one attached to the SoC), two different Exhibits bearing the same number C-5 (the one attached to the RfA and the one attached to SoC), two different Exhibits bearing the same number C-6 (the one attached to the RfA and the one attached to SoC) and two different Exhibits bearing the same number C-7 (the one attached to the RfA and the one attached to SoC). If a reference is made to Exhibits C-2 to C-7 in the present Award, this should be understood as a reference to the Exhibits produced with the SoC unless the Tribunal expressly indicates that the reference is made to Exhibits C-2 to C-7 of the RfA.

upon receipt of the filing fee. The Deputy Secretary General of the ICC also indicated that the RfA would be notified to Respondent by email pursuant to Article 4 of the ICC Rules upon receipt of the filing fee.

23. On 14 June 2021, the Secretariat of the ICC Court (the "**ICC Secretariat**") notified the RfA by email to Respondent on the email address provided by Claimant in the RfA which is contracts@cbi.iq. The ICC Secretariat indicated that Respondent's Answer to the RfA (the "**Answer**") was due within 30 days from the receipt of its correspondence pursuant to Article 5(1) of the ICC Rules. The ICC Secretariat noted that Claimant did not comment on the number of arbitrators and invited the latter to provide such comments by 21 June 2021. Respondent was also invited to comment on the number of arbitrators in the Answer or any request for an extension of time for submitting the Answer. Moreover, the ICC Secretariat noted that the Arabic executed version of the arbitration clause as translated to English provided in relevant parts that "*the venue of arbitration shall be at the International Court of Arbitration located in Paris-France*" whereas the English executed version of the arbitration clause was silent on the place of arbitration. Since Claimant submitted in the RfA that "*Paris is the uncontested seat of arbitration*", the ICC Secretariat invited Respondent to comment on the place of arbitration in the Answer or in any request for an extension of time for submitting the Answer. Further, the ICC Secretariat indicated that the Arabic executed version of the arbitration clause provides for English as language of arbitration. Finally, the ICC Secretariat invited Respondent to clarify whether it was subject to VAT in its country of establishment within 30 days and indicated that should the information not been provided, the ICC Secretariat might charge and invoice the VAT.

24. On 21 June 2021, Claimant confirmed that a sole arbitrator should be appointed in this arbitration and proposed for nomination Mr. Richard Harding QC.

25. On 24 June 2021, the ICC Secretariat acknowledged receipt of Claimant's correspondence dated 21 June 2021 and invited Respondent to comment on Claimant's suggestion in the Answer or in any request for an extension of time for submitting the Answer. Further, the ICC Secretariat informed the Parties that the Secretary General of the ICC Court fixed a provisional advance of USD 60,000 to cover the costs of arbitration until the Terms of reference are established (Article 37(1) of the ICC Rules) based on an amount in dispute partially quantified at USD 18,883,710 and one arbitrator. The ICC Secretariat then invited Claimant to make a payment of USD 55,000 by 23 July 2021 representing the balance of the provisional advance on costs (USD 60,000 – USD 5,000 of filing fee).

26. On 26 July 2021, the ICC Secretariat acknowledged receipt of USD 55,000 from Claimant. It noted that the ICC Secretariat notified to Respondent the RfA on 14 June 2021 and that, according to the email's delivery receipt, the RfA was received by Respondent on 14 June 2021. The ICC Secretariat noted, therefore, that the 30-day time limit for submitting the Answer expired on 14 July 2021 pursuant to Article 5(1) of the ICC rules without an Answer having been submitted. The ICC Secretariat indicated that, notwithstanding such failure, the arbitration should proceed pursuant to Articles 6(3) and 6(8) of the ICC Rules. Further, the ICC Secretariat noted that Respondent did not comment on Claimant's proposal to have one arbitrator and since the Parties had not agreed, "*the ICC Court will appoint the sole arbitrator*" pursuant to Article 12(3) of the ICC Rules. Finally, the ICC Secretariat noted that Respondent

did not comment on the place of arbitration and as the Parties had not agreed, the ICC Court will fix the place of arbitration pursuant to Article 18(1) of the ICC Rules.

27. On the same day, the ICC Secretariat reminded the Parties that "*the Court will appoint the sole arbitrator*" pursuant to Article 12(3) of the ICC Rules and informed them that it would soon be in a position to invite the ICC Court to take steps towards the constitution of the arbitral tribunal. The ICC Secretariat added that "*unless we are informed otherwise by 31 July 2021, we will proceed with the constitution of the arbitral tribunal.*"

28. On 27 July 2021, the ICC Secretariat wrote to the Parties to inform them that "*with reference to the two pieces of correspondence dated 26 July 2021, please note that we have mistakenly indicated that "the Court will appoint the sole arbitrator". Both correspondences should state instead that as the parties have not agreed, "the Court will determine the number of arbitrators" (Article 12(2))*".

29. On 6 August 2021, the ICC Secretariat informed the Parties that the ICC Court, at its session dated 5 August 2021, i) decided to submit the arbitration to one arbitrator (Article 12(2) of the ICC Rules), ii) fixed Paris, France as the place of arbitration (Article 18(1) of the ICC Rules) and iii) fixed the advance on costs at USD 230,000, subject to later readjustments (Article 37(2) of the ICC Rules).

30. On 20 August 2021, the ICC Secretariat informed the Parties that the ICC Court, at its session of 19 August 2021, directly appointed Mr. Bassam Mirza as sole arbitrator pursuant to Article 13(4)(a) of the ICC Rules. The ICC Secretariat enclosed the Statement of Acceptance, Availability, Impartiality, and Independence, as well as the curriculum vitae of Mr. Bassam Mirza. Further, the ICC Secretariat indicated that since the provisional advance had been fully paid, it would transmit the file to the Tribunal on the same day (Article 16 of the ICC Rules). Finally, the ICC Secretariat submitted the updated financial table wherein Claimant was invited to pay USD 55, 000 (*i.e.* USD 115,000 – USD 60,000 already paid) and Respondent to pay USD 115, 000 in addition to VAT on the ICC administrative expenses in the amount of USD 7, 304 by 20 September 2021.

31. On the same day, the ICC Secretariat transmitted the file to the Tribunal.

32. On 24 August 2021, the Tribunal indicated to the Parties by email that the Terms of Reference should, in principle, be signed within 30 days from the transmission of the file, *i.e* by 20 September 2021 pursuant to Articles 23 and 3(4) of the ICC Rules. However, before establishing the Terms of Reference, the Tribunal invited Respondent to clarify, by 30 August 2021, whether the latter would be participating to these proceedings. The Tribunal reminded Respondent of Article 6(8) of the ICC Rules according to which "*if any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure*". In its email dated 24 August 2021, the Tribunal used the Respondent's email address communicated by Claimant in its RfA (contracts@cbi.iq) and which was also used by the ICC Secretariat for the notification of the RfA and subsequent correspondences to Respondent. According to the email's delivery receipt, the Tribunal's email dated 24 August 2021 was delivered to Respondent the same day.

33. Respondent did not answer the Tribunal's email dated 24 August 2021 by the time limit of 30 August 2021.

34. On 31 August 2021, the Tribunal sent to the Parties an email whereby it requested them to take position by 8 September 2021 on whether Respondent had been properly notified of the RfA and subsequent correspondences under the applicable rules including Articles 3 and 4 of the ICC Rules, the contractual provisions (notably section 1.8 of the Consultancy Agreement's General Conditions and section 1.8 of the Consultancy Agreement's Particular Conditions) and any rule and/or case law rendered at the seat of arbitration on such matter. Claimant was also requested to clarify, within the same time limit, why it communicated to the ICC Secretariat the Respondent's email address (contracts@cbi.iq) for purposes of notification and not the email address indicated at Section 1.8 entitled "Notices" of the Consultancy Agreement's Particular Conditions (newbuilding@cbi.iq) or any other email address. Further, clarifications were sought from Claimant as to why it elected Mrs. Weam Abdulazeed Hasan and Mr. Ali Mousa as Respondent's contact persons and whether the exact name of Ms. Hasan is Weam Abdulazee**d** Hasan or Weam Abdulazee**z** Hasan. Finally, Respondent was invited to inform the Tribunal, by 8 September 2021, whether it would be represented by outside counsel in these arbitration proceedings.

35. On 8 September 2021, Claimant requested a short extension of time until 9 September 2021 to answer the Tribunal's queries.

36. On the same date, the Tribunal extended the time limit until 9 September 2021 for both Parties to answer its queries.

37. On 9 September 2021, Claimant submitted that the notification of the RfA to Respondent was validly made in accordance with Articles 3(2) and 4 of the ICC Rules as well as French law at Respondent's email address *i.e.* contracts@cbi.iq on 14 June 2021. Claimant added that, for the sake of good order, it notified Respondent again of the RfA at the following known addresses of Respondent *i.e.* contracts@cbi.iq and newbuilding@cbi.iq on 7 September 2021 and enclosed the email delivery receipts confirming that both emails were active. Claimant clarified Ms. Hasan's and Mr Mousa's positions within the CBI and indicated that Claimant regularly dealt with these individuals in correspondence. Finally, Claimant confirmed that the exact full name of Ms. Hasan is Mrs. Weam Abdulaz**eez** Hasan. Respondent did not answer the Tribunal's queries contained in the latter's email dated 31 August 2021.

38. On 13 September 2021, the Tribunal considered that the notification of the RfA was validly made on 14 June 2021 at Respondent's email address *i.e.* contracts@cbi.iq in accordance with Articles 3(2), 3(3) and 4 of the ICC Rules, which govern the proceedings as per the Parties' agreement and are the applicable rules to notification in the context of an ICC arbitration involving, in addition to the Parties, the ICC Secretariat and the Tribunal, as opposed to a notification clause contained in the Consultancy Agreement, which might govern the notifications between the Parties themselves during the performance of the Consultancy Agreement outside of any arbitration proceedings. However, for the sake of good order, the Tribunal invited Claimant to use also the following Respondent's email address *i.e.* newbuilding@cbi.iq and clarified, for the avoidance of doubt, that the use of this additional email should not call into question the validity of the notification of the

RfA made by the ICC Secretariat on 14 June 2021 at contracts@cbi.iq and all subsequent correspondences. For the sake of good order as well, the Tribunal informed the Parties that it will send a hard copy of the entire file to Respondent by DHL and enclosed the cover letter of the DHL's package. The Tribunal clarified, for the avoidance of doubt, that the use of DHL should not call into question the validity of the notification of the RfA made by the ICC Secretariat on 14 June 2021 at contract@cbi.iq and all subsequent correspondences, irrespective of whether the DHL's package ultimately reaches Respondent or not, it being noted that all upcoming communications will be made by email only. Also, the Tribunal sent to the Parties the draft Terms of References and the draft Procedural Order N°1 and invited them to comment on these documents by 27 September 2021. The Parties were also requested to provide within the same time limit a summary of their respective positions and relief sought for inclusion in the Terms of Reference. The Parties were further asked to provide the Tribunal with a joint-agreed proposal for the Procedural Timetable or a separate proposal in case of disagreement. Finally, the Tribunal suggested to hold a Case Management Conference ("**CMC**") by video conference on either 5 or 6 October 2021 and the Parties were invited to confirm as soon as possible and in any event by 27 September 2021 their availabilities for such conference.

39. On 16 September 2021, the ICC Court extended the time limit for establishing the Terms of Reference until 29 October 2021 pursuant to Article 23(2) of the ICC Rules.

40. On 21 September 2021, the Sole Arbitrator received an email in French from DHL with regard the DHL's package which was sent to Respondent on 13 September 2021 whereby DHL stated that « *je vous informe que votre expédition est actuellement en attente de livraison par nos soins. En effet, votre destinataire a refusé la livraison à la Banque Centrale en Irak. Le chauffeur s'est présenté 20 septembre mais le colis a été refusé à la réception de la banque.* ». The English free translation can be read as follows: *"I inform you that your shipment is currently awaiting delivery. Indeed, your recipient has refused delivery at the Central Bank in Iraq. The driver arrived on September 20, but the package was refused at the bank reception."*

B. Procedural Orders N°1 and N°2 on Claimant's two requests for interim relief

41. On 21 September 2021, Claimant filed an Emergency Application for Interim Relief ("**Application against ENBD**") whereby Claimant sought "*an emergency award from the Tribunal directing* [Emirates NBD Bank] *to suspend any payment under the* [Performance Bond] *pending the resolution of the issues in dispute between the parties in this Arbitration. If the Tribunal is minded that it, and the ICC, cannot issue an award within the next 24 hours, the Claimant respectfully requests the Tribunal to issue an order in the same terms.*"

42. On the same day, the Tribunal granted Respondent until 2 pm Paris time, 22 September 2021 to take position on the Application against ENBD. However, Respondent did not take position thereof.

43. On 22 September 2021, the Tribunal issued Procedural Order N°1 whereby the Application against ENBD was dismissed as directed against a third party to the proceedings.

44. On the same day, Claimant sought a new emergency order "*directing the Respondent to withdraw its call of the* [Performance Bond]" which "*would maintain the status quo between the parties pending the determination of the issues in dispute in this arbitration*" (the "**New Request for Interim Relief**").

45. On 23 September 2021, the Tribunal granted Respondent until 26 September 2021 to take position on the New Request for Interim Relief. On the same day, Claimant requested the Tribunal to only grant Respondent until midday of 23 September 2021 to take position on the New Request for Interim Relief. Such request was denied by the Tribunal which maintained its position to grant Respondent until 26 September 2021.

46. On 26 September 2021, Claimant requested the Tribunal to grant it an extension of time until 30 September 2021 to answer the Tribunal's queries contained in the latter's email dated 13 September 2021. On the same day, the Tribunal granted such an extension of time to both Parties.

47. Respondent did not take position on the New Request for Interim Relief, and, on 27 September 2021, the Tribunal issued Procedural Order N°2 whereby the New Request for Interim Relief was denied for failing to meet the burden and standards of proof. The Tribunal clarified that the draft Procedural Order N°1 pertaining to procedural matters communicated to the Parties on 13 September 2021 would be renumbered draft Procedural Order N°3 given that the Tribunal already issued Procedural Order N°1 on the Application against ENBD and Procedural Order N°2 on the New Request for Interim Relief.

C. The Terms of Reference, the Procedural Order N°3 and the Procedural Timetable

48. On 30 September 2021, Claimant i) commented on the draft Procedural Order N°3 (previously draft Procedural Order N°1), ii) commented on the draft Terms of Reference, iii) provided the Tribunal with a summary of its position and relief sought, iv) indicated that it would not be available to attend the CMC on 5 or 6 October 2021 and suggested to hold the CMC between 25 and 28 October 2021 subject to the Tribunal's availability and v) indicated that it is finalizing a Procedural Timetable which could be circulated in advance of the CMC. Respondent i) did not comment on either the draft Procedural Order N°3 (previously draft Procedural Order N°1) or the draft Terms of Reference, ii) did not provide the Tribunal with either its proposed Procedural Timetable or a summary of its position and relief sought, and iii) did not confirm or deny its availability for the CMC.

49. On 1 October 2021, the Sole Arbitrator indicated that it would not be available to hold the CMC between 25 and 28 October 2021 given that he will be travelling to Canada for the "All Saints" holidays between 21 October and 2 November 2021 and suggested to hold the CMC on 4 November or 8 November 2021. The Tribunal invited the Parties to confirm their availabilities to attend the CMC at the suggested dates by 4 October 2021 and invited them to provide the Tribunal by 2 November at the latest with a joint-agreed proposal for the Procedural Timetable or a separate proposal in case of disagreement. The Tribunal further indicated that the aim of the CMC was to finalize the Procedural Timetable and the draft Procedural Order N°3 but the Terms of Reference should not be delayed and should be finalized by the next week. Therefore, the Tribunal provided the Parties with an updated version of the

draft Terms of Reference in clean and mark-up form to which were integrated Claimant's comments and its position/relief sought as well as the Tribunal's latest additions. Finally, the Tribunal invited the Parties to confirm by 4 October 2021 whether they would have any further comments on the draft Terms of Reference and reminded them of Article 23(3) of the ICC Rules according to which "*If any of the parties refuses to take part in the drawing up of the Terms of Reference or to sign the same, they shall be submitted to the Court for approval.*"

50. On 4 October 2021, Claimant made further (minor) edits to the draft Terms of Reference and confirmed its availability for the CMC to be held on 4 November 2021. On the same day, the Tribunal integrated Claimant's further comments to the draft Terms of Reference and gave Respondent a last deadline expiring on 5 October 2021 at 6 pm Paris time to make any comments on the draft Terms of Reference. The Tribunal indicated that, in the absence of any response from Respondent before 5 October 2021 at 6 pm Paris time, the latter would be considered as refusing to sign the Terms of Reference and the Tribunal would follow the process set forth under article 23(3) of the ICC Rules. Further, the Tribunal instructed Claimant, in case Respondent does not react within the deadline, to send by email the scanned signed version of the signature page of the Terms of Reference by 6 October 2021 and to hand over two originals of the signature page to an express courier service by 7 October 2021.

51. On the same day, the ICC Secretariat acknowledged receipt of USD 55,000 from Claimant and granted Respondent additional time until 11 October 2021 to pay its share of the advance on costs amounting to USD 115,000 in addition to VAT on the ICC administrative expenses in the amount of USD 7,304. The ICC Secretariat indicated that if such payment is not received, it might request Claimant to pay the balance of the advance on costs on behalf of Respondent.

52. On 5 October 2021, in the absence of any reaction from Respondent, the Tribunal requested Claimant to proceed with the signature process as per the steps and time limits described in the Tribunal's email of 4 October 2021. The Tribunal further circulated the final version of the Terms of Reference for the signature process, confirmed that the CMC would be held on 4 November 2021 at 3pm Paris Time through Microsoft Teams and indicated that the CMC would be recorded. Furthermore, the Tribunal invited the Parties to submit a joint-agreed proposal for the Procedural Timetable or separate proposal as the case might be by 2 November 2021. Finally, Respondent was expressly invited to participate to the CMC along with Claimant.

53. On 6 October 2021, Claimant indicated that "*due to unforeseen issues*", it has not been able to sign the Terms of Reference and requested a one-week extension until 13 October 2021 to sign the same.

54. On the same day, the Tribunal granted Claimant the extension of time requested provided that the two originals reach the Paris office of the Sole Arbitrator by 19 October 2021 at the latest.

55. On 12 October 2021, the ICC Secretariat indicated that it did not receive Respondent's share of the advance on costs and invited Claimant to substitute for Respondent by paying USD 122,304 by 26 October 2021.

56. On 14 October 2021, the Tribunal invited Claimant to inform it about the status of the Terms of Reference's signature which was supposed to occur on 13 October 2021. On the same day, Claimant indicated that "*in particular due to travel restrictions and issues pertaining to authority*" the signature process "*is taking longer than expected*" and requested an additional three-week extension until 3 November 2021 to sign the Terms of Reference.

57. On 15 October 2021, the Tribunal invited Claimant to specify, by 18 October 2021, who will be the signatory of the Terms of Reference (counsel for Claimant or Claimant directly) and to clarify the issues in relation to travel restrictions and authority which are, according to Claimant, postponing the signature of the Terms of Reference.

58. On 18 October 2021, Claimant indicated that its counsel would sign the Terms of Reference and that it attempted to issue a notarized power of attorney in the UAE to allow such counsel to sign the Terms of Reference but failed to do so. Claimant added that the issue in relation to the UAE power of attorney was unlikely to be resolved within the next couple of weeks. Thus, in the interest of time, Claimant indicated that it was arranging for a power of attorney to be notarized in Australia where Claimant's director resides and requested, therefore, an extension of time until 3 November 2021 to sign the Terms of Reference.

59. On the same day, the Tribunal granted the extension of time requested by Claimant for the signature of the Terms of Reference.

60. At its session of 28 October 2021, the ICC Court extended the time limit for establishing the Terms of Reference until 31 November 2021 pursuant to Article 23(2) of the ICC Rules.

61. On 31 October 2021, Claimant circulated the scanned signature page of the Terms of Reference after its signature by Claimant's counsel and indicated that the two signed originals were expected to arrive at the Sole Arbitrator's office by 3 November 2021.

62. On 1 November 2021, the Tribunal circulated the Microsoft Teams' link for the CMC together with the agenda of this virtual meeting.

63. On 2 November 2021, Claimant sent its proposed Procedural Timetable. Claimant indicated that it shared this document with Respondent earlier this day and attached Claimant's email to Respondent as well as the delivery receipt of such email.

64. On 3 November 2021, the Tribunal acknowledged receipt of the two signed originals of the signature pages of the Terms of Reference.

65. On the same day, the Sole Arbitrator signed the Terms of Reference and requested its approval by the ICC Court pursuant to Article 23(3) of the ICC Rules since Respondent did not sign it.

66. On 4 November 2021, the CMC was held by videoconference through Microsoft Teams at 3 pm Paris time. Claimant participated to the CMC whereas Respondent did not participate although duly invited to do so. During the CMC, the Procedural Order N°3 and the Procedural Timetable were discussed and finalized.

67. On the same date, the Tribunal communicated the finalized versions of the Procedural Order N°3 and the Procedural Timetable together with the recording of the CMC and invited the Parties to confirm, by 9 November 2021, whether they had any further comments on the two procedural documents. Claimant was also invited to circulate a copy of the power of attorney issued in favor of its counsel within the same time limit.

68. On 9 November 2021, Claimant confirmed that it had no further comments on the Procedural Order N°3 or the Procedural Timetable and attached a copy of the power of attorney to its correspondence. Further, Claimant indicated that it failed to access the recording of the CMC and requested the Tribunal to extend the access to the SharePoint directory of the recording. Finally, Claimant requested that two additional emails of Claimant be added to the list of emails in all future correspondence (info@cardno.me and info@cme.consulting). Respondent did not react and therefore did not comment on either the Procedural Order N°3 or the Procedural Timetable as communicated to the Parties on 4 November 2021 following the CMC.

69. On 10 November 2021, the Tribunal communicated the executed versions of the Procedural Order N°3 and the Procedural Timetable and informed the Parties that it extended the access to the SharePoint directory of the CMC's recording. The Parties were invited to inform the Tribunal in case they face any problem in accessing the recording. Finally, the Tribunal added Claimant's two additional emails to the list of emails.

70. On 19 November 2021, the ICC Secretariat informed the Parties and the Tribunal that the ICC Court approved, on 18 November 2021, the Terms of Reference pursuant to Article 23(3) of the ICC Rules. Further, the ICC Secretariat sent the approved Terms of Reference by email and DHL to Respondent and invited the latter to sign it within 15 days. In addition, the ICC Secretariat acknowledged receipt from Claimant Respondent's share on the advance on costs (USD 115,000 in addition to VAT) and stated that the advance on costs fixed by the Court at USD 230,000, subject to later readjustments, has been entirely paid by Claimant. Finally, the ICC Secretariat informed the Parties and the Tribunal that the ICC Court fixed the deadline for rendering the Final Award to six months from the date of 19 November 2021, *i.e.* the date on which the notification to the Tribunal of the ICC Court's approval of the Terms of Reference was made.

D. The non-submission by Respondent of its Statement of Defense, the Tribunal's Questions dated 11 April 2022 and the Procedural Timetable N°2

71. On 6 January 2022, Claimant submitted its Statement of Claim together with Exhibits C-1 to C-31 (the "**Statement of Claim**" or "**SoC**").[15]

[15] In its SoC, Claimant produced Exhibits C-1 to C-31. Exhibits C-1, C-4, C-5 and C-7 which were attached to the RfA became respectively C-1, C-23, C-27 and C-28 in the SoC whereas C-2, C-3 and C-6 which were attached to the RfA were not re-produced with the SoC. Therefore, there are two different Exhibits bearing the same number C-2 (the one attached to the RfA and the one attached to SoC), two different Exhibits bearing the same number C-3 (the one attached to the RfA and the one attached to SoC), two different Exhibits bearing the same number C-4 (the one attached the RfA and the one attached to the SoC), two different Exhibits bearing the same number C-5 (the one attached to the RfA and the one attached to SoC), two different Exhibits bearing the same number C-6 (the one attached to the RfA and the one attached to SoC) and two different Exhibits bearing the same number C-7 (the one attached to the RfA and the one attached to SoC). If a reference is made to Exhibits C-2 to C-7 in the

72. On the same day, the Tribunal acknowledged receipt of the Statement of Claim together with its Exhibits and indicated that the next step is for Respondent to submit its Statement of Defense by 8 March 2022 as per the Procedural Timetable.

73. On 7 January 2022, Claimant asked the Tribunal to "*confirm if* [it] *require*[s]*a hard copy of the Statement of Claim*".

74. On the same day, the Sole Arbitrator confirmed that he required a hard copy of the Statement of Claim together with its Exhibits to be sent to his office in Paris. The Tribunal added that the same should be sent to Respondent by express courier that provides a record of the sending thereof pursuant to Article 1.1 of the Procedural Order N°3.

75. On 9 March 2022, the Tribunal noted that Respondent did not submit a Statement of Defense by 8 March 2022 as provided for in the Procedural Timetable. The Tribunal granted a further opportunity to Respondent to submit its Statement of Defense by 13 March 2022, failing which the Track 1 of the Procedural Timetable would be followed and the next step would be for the Tribunal to ask its questions on 11 April 2022. For the sake of good order, the Tribunal communicated to the Parties i) the DHL's delivery receipt of the approved Terms of Reference which establishes that Respondent received, on 23 November 2021, the ICC Secretariat's correspondence dated 19 November 2021 containing the Terms of Reference and ii) the exchanges of emails between the Sole Arbitrator and DHL which establish that Respondent refused several times to receive the DHL package sent by the Tribunal to it on 13 September 2021. Further, the Tribunal reminded again Respondent of Article 6(8) of the ICC Rules and its consequences, in particular, that the Hearing will be held, and the Final Award rendered despite Respondent's lack of participation to the proceedings.

76. On the same day, the Tribunal received an email from Ms. Jahnvi Jhaveri whereby it was informed that Claimant has changed counsel in this matter. Ms Jhaveri indicated that Claimant is now represented by DLA Piper Middle East and that Claimant's Counsel new contact details were: Andrew Mackenzie (andrew.mackenzie@dlapiper.com), Jahnvi Jhaveri (jahnvi.jhaveri@dlapiper.com), and Naira Chughtai (naira.chughtai@dlapiper.com). Ms Jhaveri added that "*We are currently in the process of transitioning the full file from Baker McKenzie to DLA Piper, which should be complete this week. In the meantime, however, we would appreciate if any recent correspondence to which the Respondent, the ICC or the Tribunal seek our input on could be re-issued to us in the meantime to avoid any unnecessary delay.*"

77. On 9 March 2022, the Tribunal acknowledged receipt of Ms. Jhaveri's email and stated that its understanding was that i) Claimant is now represented by DLA Piper Middle East and not anymore by Baker Mckenzie, ii) Claimant is not anymore represented by Mr. Andrew Massey and Mr. Nassar Youssef who are still at Baker Mckenzie and iii) Claimant is still represented by Mr. Andrew Mackenzie, Ms. Jahnvi Jhaveri and Ms. Naira Chughtai who left Baker Mckenzie and joined DLA Piper Middle East. The Tribunal added that it was looking forward to receiving, as

present Award, this should be understood as a reference to the Exhibits produced with the SoC unless the Tribunal expressly indicates that the reference is made to Exhibits C-2 to C-7 of the RfA.

soon as possible, a new power of attorney and any other relevant document reflecting the changes in Claimant's representation in the current proceedings. Further, the Tribunal indicated that "*in the meantime, and until the changes above are formalized by Claimant, the Tribunal and all involved shall continue to copy Mr. Andrew Massey and Mr. Youssef Nasser (from Baker & Mckenzie) unless they indicate otherwise.*"

78. On 10 March 2022, Ms. Jhaveri confirmed that Claimant will provide the Tribunal with a new power of attorney as soon as possible.

79. On the same day, the Tribunal requested Ms. Jhaveri to indicate when the new power of attorney could be expected and added that it was important that this situation be clarified quickly. Further, the Tribunal invited Mr. Massey and Mr. Nasser to confirm that Baker Mckenzie no longer represent Claimant so that they could be removed from the emailing list going forward.

80. On 10 March 2022, Mr. Massey confirmed that "*Baker Mckenzie no longer act for the Claimant*" and Ms. Jhaveri stated that "*with respect to your below query on the Power of Attorney, we confirm this is under process. We will revert to you on when we can provide the same as soon as we are able to.*"

81. On the same day, the Tribunal indicated that in light of Mr. Massey's confirmation the latter as well as Mr. Nassar would be removed from the emailing list going forward and requested the ICC Secretariat to update its record accordingly and to use Claimant's counsel new email addresses as follows: Andrew Mackenzie (andrew.mackenzie@dlapiper.com), Naira Chughtai (naira.chughtai@dlapiper.com) and Jahnvi Jhaveri (jahnvi.jhaveri@dlapiper.com).

82. On 14 March 2022, the Tribunal noted that Respondent did not submit its Statement of Defense by the extended time limit (*i.e.* 13 March 2022) and therefore informed the Parties that the next step would be for the Tribunal to ask its questions on 11 April 2022 as per the Procedural Timetable.

83. On 1 April 2022, Claimant provided the Tribunal with a new power of attorney reflecting the change in the counsel for Claimant.

84. On 11 April 2022, the Tribunal submitted its questions (the "**Tribunal's Questions**") and invited Claimant to answer them by 11 May 2022 as per the Procedural Timetable (see the content of the Tribunal's Questions at Section I below). The Tribunal reminded the Parties that upon filing by Claimant of its answers to the Tribunal's Questions, Respondent will be invited to submit, by 12 June 2012 as per the Procedural Timetable, its responses to the Tribunal's Questions and its comments on Claimant's answers. The Parties were also reminded that they were allowed to submit additional documentary evidence in addressing the Tribunal's Questions as per the Procedural Timetable.

85. On 3 May 2022, the ICC Secretariat informed the Parties and the Tribunal that the ICC Court extended, on 28 April 2022, the time limit for rendering the final award until 28 February 2023 pursuant to Article 31(2) of the ICC Rules.

86. On 10 May 2022, Claimant submitted a reasoned request for an extension of time of 3 weeks to submit its answers to the Tribunal's Question and informed the Tribunal

that it had instructed Prof. Georges Affaki of the French law firm AFFAKI as co-counsel in this arbitration to assist Claimant in addressing the Tribunal's Questions.

87. On the same day, the Tribunal invited Respondent to take position on Claimant's email dated 10 May 2022 by the next day.

88. On 12 May 2022, the Tribunal noted that Respondent did not take position on Claimant's email dated 10 May 2022 and granted Claimant until 31 May 2022 to submit its answers to the Tribunal's Questions which were originally due on 11 May 2022. Consequently, Respondent's next submission, namely its responses to the Tribunal's Questions and its comments on Claimant's answers, originally due on 12 June 2022, was postponed until 20 July 2022. The Tribunal reminded the Parties of Article 3.7 of the Procedural Order N°3 (the need to translate the non-English Exhibits including the legal authorities) in order to prevent any further extension of time. The Tribunal added that the Pre-Hearing conference originally scheduled on 12 July by videoconference should also be postponed since Respondent's submission was due, following the change in the dates, after the original date of such conference. The Tribunal suggested two alternative dates for the Pre-Hearing conference and invited the Parties to confirm their availabilities by 18 May 2022. The Tribunal indicated that it would communicate to the Parties an updated Procedural Timetable once the date of the Pre-Hearing conference is confirmed. Further, the Tribunal confirmed that it has nothing to disclose with regard to the addition of Prof. Georges Affaki as co-counsel. Finally, the Tribunal noted that Mr. Andrew Massey (who moved from Baker Mckenzie to DLA Piper) was added to DLA Piper's team and stated that Mr. Massey's email address (andrew.massey@dlapiper.com) would be added to the emailing list going forward unless otherwise indicated.

89. On 18 May 2022, Claimant confirmed its availability for the Pre-Hearing conference to be held on 28 July 2022 at 10 am Paris time. Respondent did not react.

90. On 19 May 2022, Tribunal decided that the Pre-Hearing conference will be held on 28 July 2022 at 10 am Paris time and communicated to the Parties the Procedural Timetable N°2. Respondent was invited to participate to the Pre-Hearing Conference along with Claimant.

91. On 31 May 2022, Claimant submitted its submission "Claimant's Answers to the Tribunal's Questions" together with Exhibits C-32 to C-45 and CL-1 to CL-100 (the "**Claimant's Answers**" or "**CsA**"). Claimant indicated that its submission included English translations of the Exhibits' key extracts and that the translations of the French and Arabic Exhibits "*will follow as soon as possible*."

92. On 1 June 2022, the Tribunal acknowledged receipt of Claimant's submission and Exhibits and reminded it that hard copies of the same should be sent to Respondent by express courier pursuant to Article 1.1 of the Procedural Order N°3. The Tribunal noted that Claimant's submission included English translation of key extracts of the Exhibits and invited Claimant to provide the translations of the French and Arabic Exhibits by 13 June 2022 at the latest. The Tribunal added that the next step is for Respondent to submit its responses to the Tribunal's Questions and comments on Claimant's Answers by 20 July 2022 unless a reasoned request for an extension of time was submitted by Respondent and granted by the Tribunal on the ground that

Claimant did not submit a full translation of the French and Arabic Exhibits with its submission.

93. On 9 June 2022, Prof. Georges Affaki wrote to the Tribunal on behalf of Claimant. First, Prof. Affaki produced a power of attorney from Claimant to his favor and requested to be copied directly in further correspondence. Second, Prof. Affaki informed the Tribunal that Claimant added to each non-English Exhibit produced on 31 May 2022 a cover page translating into English the relevant excerpt relied upon by Claimant and that a link to the revised submitted evidence has been sent to the Tribunal and Respondent by separate email of the same day. Third, Prof. Affaki requested in the interest of costs-effectiveness (*inter alia*) that the translation of the non-English Exhibits be limited to the relevant excerpt relied upon by Claimant as opposed to the translation of the entirety of the Exhibits' texts and submitted Exhibits CL-101 to CL-103 in support of Claimant's request.

94. On the same day, the Tribunal acknowledged receipt of the power of attorney in favor of Prof. Affaki and indicated that Prof. Affaki will be added to the emailing list going forward. Further, the Tribunal acknowledged receipt of the revised submitted evidence adding to the non-English Exhibits a cover page translating into English the relevant excerpt relied upon by Claimant. Finally, the Tribunal invited Respondent to take position by 12 June 2022 on Claimant's request. Respondent did not react.

95. On 13 June 2022, the Tribunal granted, in the interest of cost-effectiveness, Claimant's request that the translation of its non-English Exhibits be limited to the relevant excerpt and consequently released Claimant from the translation of the entirety of the Exhibits' texts. The Tribunal clarified that, likewise, Respondent might limit the translation of its non-English Exhibits (if any) to the relevant excerpt it would rely upon. Finally, the Tribunal indicated that notwithstanding its decision to limit the translation of the non-English Exhibits to the relevant excerpts, a Party might require that a specific Exhibit be translated in full by the producing Party on the basis of a reasoned request submitted to the Tribunal.

E. Preparation of the Hearing, Claimant's application dated 27 July 2022 and Claimant's submission dated 17 August 2022

96. On 29 June 2022, Claimant suggested that the Hearing be held on 8 September 2022 and to leave 9 September 2022 as a day in reserve in the unlikely event it becomes necessary. Further, Claimant expressed its preference for an in-person Hearing in Paris and added that it was open to the possibility of a hybrid Hearing if necessary.

97. On the same day, the Tribunal granted Respondent until 3 July 2022 to comment on Claimant's suggestions regarding the practical aspects of the Hearing.

98. On 4 July 2022 and in the absence of any reaction from Respondent, the Tribunal directed that the Hearing will take place in-person in Paris on 8 September 2022 (with 9 September 2022 in reserve in the unlikely event it becomes necessary). Respondent was invited to participate to the Hearing along with Claimant. The Tribunal added that the outstanding logistical points will be discussed during the Pre-Hearing conference which will be held by videoconference on 28 July 2022 at 10 am Paris time and which will be recorded. Respondent was again invited to participate to the Pre-Hearing conference the link of which was sent to the Parties. Further, the

Tribunal invited the Parties to submit their respective separate proposals regarding i) the venue of the Hearing in Paris, ii) the modalities of the transcript of the Hearing, iii) the agenda/timetable of the Hearing and iv) any other logistical aspect of the Hearing by 26 July 2022.

99. On 26 July 2022, Claimant submitted its proposal concerning the logistical aspects of the Hearing together with its proposed agenda/timetable for the Hearing.

100. On 27 July 2022, the Tribunal noted that Respondent did not submit neither its responses to the Tribunal's Questions and comments on Claimant's Answers by 20 July 2022 as per the Procedural Timetable N°2 nor its proposal with regard to the practical aspects of the Hearing by 26 July 2022 as per the Tribunal's instructions dated 4 July 2022. Further, the Tribunal invited Claimant to submit ahead of the Pre-Hearing conference a new agenda/timetable for the Hearing which should include two tracks: track 1 in case Respondent participates in the Hearing and track 2 in case Respondent does not participate in the Hearing.

101. On 27 July 2022, Claimant submitted its modified agenda/timetable for the Hearing which included the two tracks. By separate email of the same day, Claimant filed an application whereby it requested leave to submit by 26 August 2022 a witness statement, an amended SoC and additional supporting documentation aiming to clarify and/or update, in terms of quantum, its head of damages as formulated at para. 112 (b) of its SoC, namely its request for relief of "*USD 5,190,572 for damages and lost profit with respect to the remaining value of the Consultancy Agreement*".

102. On the same day, the Tribunal granted Respondent until 2 August 2022 to take position on Claimant's application dated 27 July 2022. Respondent did not react.

103. On 28 July 2022, the Pre-Hearing conference took place at 10 am Paris time by videoconference through Microsoft Teams to which Respondent did not participate although invited to do so. The logistical aspects of the Hearing were discussed and agreed upon except for the agenda/timetable for the Hearing which was put on hold until the Tribunal's decision on Claimant's application dated 27 July 2022 is rendered.

104. On the same day, the Tribunal circulated to the Parties the recording of the Pre-Hearing conference.

105. On 3 August 2022, Claimant's request to submit a witness statement after the end of the pre-Hearing written submissions phase and ahead of the Hearing was denied given that i) pursuant to Articles 2.1, 2.2, 2.3, 3.6, 5.2 and 7.1 of the Procedural Order N°3 and the Procedural Timetable, witness statements and/or expert reports were to be submitted with the Parties' written submissions, ii) and Claimant was granted an opportunity to file additional documentary evidence including witness statements and/or expert reports after the Tribunal submitted its questions dated 11 April 2022 whereby the Tribunal explicitly invited the Parties under question n° 4.3 to substantiate their figures. However, Claimant had chosen not to submit any additional documentary evidence in relation thereto with its CsA dated 31 May 2022. Claimant's request to file a modified SoC was denied as well since the original SoC was already on the record and the filing of a modified SoC would return the proceedings back to square zero with the potential of a completely new case and

would create confusion as to the legal value of the original SoC. However, Claimant was authorized to file by 17 August 2022 documentary evidence (but excluding witness statements and expert reports) strictly aiming to clarify and/or update its claim with respect to the remaining value of the Consultancy Agreement in terms of quantum. Further, in order to avoid taking Respondent by surprise at the Hearing with regard the narrative about the new documentary evidence, Claimant was invited to file at the same occasion, by 17 August 2022, a submission (*i.e.* counsel's submission) of 8 pages maximum strictly limited to the narrative about the new documentary evidence aiming to clarify and/or update its claim with respect to the remaining value of the Consultancy Agreement in terms of quantum. Respondent was authorized to file a responsive submission with responsive documentary evidence by 31 August 2022. Further, the Tribunal submitted the agenda/timetable for the 8 September 2022 Hearing with the two tracks which took into consideration Claimant's proposal submitted ahead of the Pre-Hearing conference and the situation at the time of the Tribunal's decision on Claimant's application dated 27 July 2022. The Tribunal added that in case it did not hear back from the Parties about the agenda/timetable by 8 August 2022 the latter would be the one to be followed at the Hearing. Finally, the Tribunal indicated that the other logistical aspects of the Hearing were to be implemented as discussed and agreed upon during the Pre-Hearing conference the recording of which was sent to the Parties on 28 July 2022.

106. On 17 August 2022, Claimant filed its submission pursuant to the Tribunal's decision dated 3 August 2022 (the **"Submission on Quantum"** or "**SoQ**") together with an excel spreadsheet (Exhibit C-46 containing hyperlinks to the support documents) and the supporting documents (folders 1, 2,3,5 and 6).

107. On 18 August 2022, the Tribunal acknowledged receipt of Claimant's submission and indicated that the next step would be for Respondent to submit a responsive submission with responsive documentary evidence by 31 August 2022 as per the Tribunal's directions dated 3 August 2022. By separate email of the same, the Tribunal indicated that "*it seems that folder 4 (support documents for Salaries Period 1) is missing*" and invited Claimant to circulate the missing folder (if any) as soon as possible and in any event by the next day at the latest.

108. On 19 August 2022, Claimant circulated the missing folder 4 together with an updated excel spreadsheet (Exhibit C-46) containing additional hyperlink to the supporting documents of folder 4.

109. On 30 August 2022, the Tribunal invited each Party to submit by 5 September 2022, in accordance with Article 8.3 of the Procedural Order N°3, a complete attendance list containing the names of the persons attending on its behalf the Hearing which will take place on 8 September 2022 in DLA Piper's premises in Paris starting at 9:15 am Paris time. The Tribunal added that in case there would be passive participants attending the Hearing remotely on behalf of a Party, the latter should indicate the place of connection of such participants in its list of attendees. Further, the Tribunal reminded the Parties that in case they would like to use a PowerPoint presentation (or any other support) for their oral pleadings, they should circulate such presentation ahead of the Hearing by 8 September 2022 at 9 am Paris time at the latest. Finally, the Tribunal invited, once again, Respondent to participate in the Hearing along with Claimant.

110. On 6 September 2022, the Tribunal noted that neither Claimant nor Respondent submitted their respective list of attendees by 5 September 2022 pursuant to the Tribunal's instructions dated 30 August 2022. The Tribunal thus invited Claimant and Respondent to comply with the Tribunal's instruction regarding the list of attendees by close of business of the same day.

111. On the same day, Claimant submitted its list of attendees whereby it indicated the names of the active participants to the Hearing as well as the names and the place of connection of the passive remote participants. Respondent did not submit a list of attendees.

112. On 6 September 2022, Claimant circulated a link to the electronic bundle containing the pleadings, the factual Exhibits, the legal Exhibits, the chronological factual Exhibits, as well as the delivery receipts which were put together by Claimant to evidence delivery to Respondent of the elements of the procedure including delivery receipts of the SoC, the CsA and the SoQ.

113. On 7 September 2022, Claimant circulated an overview on how to connect during the Hearing i) to the videoconference put in place by Llyod Michaux (a virtual services provider) for passive participants and ii) to the real time transcript conducted remotely by Llyod Michaux as well. Claimant indicated that Llyod Michaux will be circulating links to the videoconference and the real time transcript.

114. On 8 September 2022, Llyod Michaux circulated the links to the videoconference and the real time transcript ahead of the Hearing without copying Respondent. The Tribunal immediately forwarded Llyod Michaux's email to Respondent and instructed Llyod Michaux to copy Respondent in any email to be sent in the context of the Hearing.

115. On 8 September 2022, at 8:47 am Paris time, Claimant circulated its opening presentation ("**Claimant's Opening Presentation**" or "**CsOP**").

F. The Hearing, the Procedural Timetable N°3 and the Procedural Timetable N°4 following the CE Decision dated 22 September 2022

116. The Hearing took place in-person in Paris on 8 September 2022 at DLA Piper's premises. Respondent did not participate to the Hearing. During the Hearing, Claimant presented its oral pleadings and answered the Tribunal's questions.

117. On 8 September 2022, Claimant circulated the internet links to access the Human Rights Council's "*Opinions adopted by the Working Group on Arbitrary Detention at its 92nd session*" and in particular the "*Opinion No. 70/2021concerning Robert Pether and Khalid Radwan*" to be included on the record as Exhibit C-47. Claimant recalled that, during the Hearing, the Tribunal granted Claimant's request to include the new Exhibit C-47 (a hard copy of which was presented to the Tribunal at the Hearing) on the record of the proceedings since it is on the public record readily available on the internet.

118. On 9 September 2022, the Tribunal communicated to the Parties the Procedural Timetable N°3 which reflected the post-Hearing procedural steps as agreed upon and decided at the end of the Hearing, among which the possibility for Respondent to

submit its comments on the Hearing by 29 September 2022. Further, the Tribunal communicated to Claimant and Respondent the transcript, the video recording and the audio recording of the Hearing which were sent earlier by Llyod Michaux to all involved including Respondent.

119. On 15 September 2022, Claimant sent to Llyod Michaux its corrections to the transcript in accordance with the Procedural Timetable N°3 whereas Respondent did not send any comments to Llyod Michaux.

120. On 16 September 2022, Claimant requested confirmation whether the Tribunal would like, in terms of the Parties' submissions on costs, to receive all underlying invoices or whether a declaration confirming the veracity of all costs paid will suffice.

121. On 17 September 2022, the Tribunal directed that a declaration confirming the veracity of all arbitration costs is sufficient save for the lawyers' fees for which the underlying invoices (redacted if necessary to preserve confidentiality) are to be produced.

122. On 19 September 2022, Claimant informed the Tribunal that Llyod Michaux were unable to incorporate Claimant's corrections to the transcript by that day as per the Procedural Timetable N°3. Claimant indicated that Llyod Michaux confirmed that they would expect to be able to provide a final transcript by 23 September 2022.

123. On the same day, the Tribunal indicated that it was looking forward to receiving the final/corrected transcript by 23 September 2022.

124. On 23 September 2022, Llyod Michaux circulated to all involved, including Respondent, the final/corrected transcript which was also forwarded by the Tribunal to Respondent the same day. In its cover email, the Tribunal reminded Respondent that it could submit its comments on the Hearing by 29 September 2022 as per the Procedural Timetable N°3.

125. On the same day, the Tribunal corrected an omission in its previous email to Respondent whereby it indicated that "*you did submit your corrections to the transcript by 15 September 2022* […]. The Tribunal clarified, for the sake of the record, that Respondent did not submit its corrections to the transcript and therefore the omission should be corrected as follows: "*you did not submit your corrections to the transcript by 15 September 2022* […]."

126. On 30 September 2022, the Tribunal noted that Respondent did not submit its comments on the Hearing by 29 September 2022. It further indicated that the French State Council (*Conseil d'Etat*) rendered a recent ruling dated 22 September 2022 ("**CE Decision**") which annulled article 750-1 of the French Code of Civil Procedure ("**FCCP**"). The Tribunal attached the CE Decision to its email. Considering this recent development and in light of the fact that Claimant is relying on article 750-1 of the FCCP in its reasoning with regard to the issue of non-compliance with a pre-arbitral step, the Tribunal invited Claimant to file a submission by 13 October 2022 dealing with the impact of the CE Decision on Claimant's position/reasoning (Claimant's "**Submission on the impact of the CE Decision**" or "**CsCED**"). Claimant was also invited to submit, at the same occasion, an English translation of

at least all the excerpts of the CE Decision dealing with the annulment of article 750-1 of the FCCP. Claimant was authorized to submit new legal authorities but strictly aiming to tackle the Tribunal's queries. Respondent was authorized to file a responsive submission together with responsive legal authorities by 26 October 2022.

127. On 1 October 2022, Claimant requested an extension of time until 4 November 2022 to file its submission on the impact of the CE Decision due to counsel's prior schedule conflict that could not have been foreseen given the recent handing down of the CE Decision. Claimant added that its submission would be accompanied by the translation of the relevant excerpts of the CE Decision and by any supporting authorities translated in relevant parts as well.

128. On 3 October 2022, the Tribunal granted Claimant's request for an extension of time unless reasonably objected by Respondent by 4 October 2022. The Tribunal thus indicated that Claimant's Submission was to be due by 4 November 2022 and Respondent's responsive submission by 4 December 2022. Claimant was reminded that it should file with its submission a translation of all the excerpts of CE Decision relating to the annulment of article 750-1 of the FCCP and not only the excerpts relating to such annulment that Claimant would consider relevant or would rely upon in its submission. The Tribunal then confirmed that only the relevant part of the legal authorities needed translation as per the Tribunal's decision dated 13 June 2022. Further, the Tribunal postponed the due date of the submissions on costs to 8 December 2022 and the due date of the Parties' comments on the other Party's submission on costs to 12 December 2022.

129. On 6 October 2022 and in the absence of any reaction from Respondent, the Tribunal circulated the Procedural Timetable N°4 reflecting the above modifications to the procedure.

130. On 4 November 2022, Claimant filed its Submission on the impact of the CE Decision together with Exhibits CL-104[16] to CL-124.

131. On the same day, the Tribunal acknowledged receipt of Claimant's Submission on the impact of the CE Decision and noted that the French legal authorities filed by Claimant do not contain the required translations, except for CL-106. Claimant was thus invited to submit the missing translations by 7 November 2022 and was reminded of the Tribunal's directions dated 3 October 2022 with regard to translations.

132. On 5 November 2022, Claimant clarified that "*we did provide in our submission exhaustive translations of all the extracts of the authorities that we had exhibited and on which we relied. While providing further translations with each attached authority will entail a certain degree of duplication, we do understand the wisdom behind the Tribunal's request and will of course comply with it*".

133. On the same say, Claimant submitted the translation of the CE Decision in its parts dealing with the annulment of article 750-1 of the FCCP as well as the additional

[16] Exhibit C-104 being the CE Decision dated 22 September 2022.

translations of the legal authorities' excerpts relied upon by Claimant in its submission of 4 November 2022.[17]

134. Respondent did not file by 4 December 2022 a responsive submission to Claimant's Submission on the impact of the CE Decision.

135. On 8 December 2022, Claimant submitted its submission on costs together with its supporting documents.

136. On 9 December 2022, the Tribunal acknowledged receipt of Claimant's submission on costs and noted that Respondent did not submit its submission on costs. Respondent was reminded that it was allowed to comment on Claimant's submission on costs by 12 December 2022 as per the Procedural Timetable N°4.

137. Respondent did not submit any comments on Claimant's submission on costs by 12 December 2022.

G. The closing of the proceedings, Respondent's Application dated 1st January 2023 and the Procedural Order N°4

138. On 13 December 2022, following the non-submission by Respondent of its comments on Claimant's submission on costs, the Tribunal declared the proceedings closed in accordance with Article 27 of the ICC Rules and indicated that it expected to send the draft Final Award to the ICC Court pursuant to Article 34 of the ICC Rules by no later than 20 December 2022.

139. On 19 December 2022, the ICC Secretariat informed the Parties that it has received, on 16 December 2022, a draft award submitted by the Tribunal and indicated that the ICC Court will scrutinize the draft award at one of its next sessions.

140. On the 1st of January 2023, Respondent submitted a letter to the Tribunal (the "**Respondent's Application**" or the "**Application**") whereby Respondent, which till that date was not participating to the proceedings, made submissions and allegations for the first time in these proceedings. In the Application, Respondent mainly alleged that i) "*there is no valid arbitration agreement by reason of Claimant's Cardno ME's fraudulent misrepresentation with respect to the consultancy agreement (and the mediation/arbitration clause/agreement therein). By operation of governing Iraqi law, such fraud by Cardno ME Limited renders the entire contract (including the incorporated mediation/arbitration clause/agreement therein) null and void ab initio and it has been repudiated by CBI*" and that ii) "*Cardno ME representatives Mr. Pether (a director of Claimant Cardno ME) and Mr. Zoghlool a Project Manager (Cardno ME's representative) have confessed to such fraud in the criminal*

[17] Claimant attached to its legal authorities in French a translation to English of the relevant excerpts, except for Exhibits CL-120 and CL-121 which were left without any translation. In its list of Exhibits submitted with its translations on 5 November 2022, Claimant indicated that the description of Exhibits CL-120 and CL-121 (nature of the document and its date) was "*intentionally left blank*". Upon review of the Claimant's Submission dated 4 November 2022 on the impact of the CE Decision, it seems that Claimant did not rely on Exhibits CL-120 and CL-121 in support of any specific allegation. Therefore, it seems that this is the reason why no specific passages of Exhibits CL-120 and CL-121 were translated. That being said, in any event, the Tribunal did not take into consideration Exhibits CL-120 and CL-121 in its decision-making process with regard the admissibility of Claimant's claims.

prosecution of each of them before the Iraqi Court of Misdemeanors Al Karradah District (the "Criminal Court"), and have been found guilty of such fraud in the following Ruling of the Criminal Court: Ruling No 779/M/2021 dated 25 August 2021".

141. Respondent further submitted in the Application that "*given the seriousness of the fraud on the Court and on the Arbitral Tribunal, and also on CBI*", it "*urges the Tribunal and the Court to i) Immediately hold in abeyance any decision on the Award in this arbitration; ii) Accept and consider CBI's forthcoming submission (expected to be made by not later that 20th January 2023) of the evidence of Cardno ME's fraud in the inducement (including the aforementioned decisions of the Iraqi Criminal Courts that are conclusive on the issue of such fraud); and of the governing law that, by its operation, results in the consultancy agreement and the included mediation/arbitration clause agreement being null and void ab initio and repudiated; and iii) Upon the Arbitral Tribunal's and the Court's consideration of CBI's submission and the supporting evidence, dismiss Cardno ME's claim and this arbitration for want of jurisdiction*".

142. Respondent produced with the Application i) an Iraqi judgment dated 25 August 2021 in Arabic and its English translation (1.PDF), ii) the English translation of another Iraqi judgment dated 25 August 2021 without the original Arabic version being produced (2.PDF) and iii) a letter from Respondent to Claimant dated 29 December 2022 which subject matter is "*Central Bank of Iraq Contract of Consultancy No. 1/2016: Notification of Repudiation/Nullification of Contract Ab initio by Operation of Iraqi Law (Iraqi Civil Code (Law No50 of 1951) Articles 137, 138 and 141*" (3.PDF).

143. On 3 January 2023, the Tribunal noted that Respondent, for the first time in these proceedings, made submissions and allegations on the 1st of January 2023, *i.e.* i) after the closing of the proceedings (article 27 of the ICC rules) which occurred on 13 December 2022 (see the Tribunal's email dated 13 December 2022) and ii) after the draft award was sent to the ICC Court for scrutiny (article 34 of the ICC rules) on 16 December 2022 (see the ICC Secretariat's correspondence dated 19 December 2022).

144. In its email dated 3 January 2023, the Tribunal invited Claimant to take position, by 10 January 2023, on the admissibility of Respondent's submissions and allegations. Claimant was also invited, within the same time limit, to comment on Respondent's requests to i) "*immediately hold in abeyance any decision on the Award in this arbitration*" and to ii) "*accept and consider CBI's forthcoming submission (expected to be made by no later than 20 January 2023)*". In its email, the Tribunal further indicated that Respondent was refrained from submitting its "*forthcoming submission*" unless prior leave was granted by the Tribunal.

145. On 10 January 2023, Claimant submitted a correspondence whereby it "*strongly objects to the Respondent's exceptionally late Application*" and requested the Tribunal to "*reject Respondent's request for further submissions and disregard the Respondent's belated, unjustified decision to engage in the proceedings. Not to do so would prejudice the Claimant significantly and reward the Respondent's bad faith. This is neither the spirit nor the intention of the Rules or the standard approach to procedural fairness in arbitral proceedings*". Claimant mainly argued that "*there has*

been no new evidence relevant to the case that it has been uncovered since the Article 27 Order or any other valid reason that would justify the timing of Respondent's request". Claimant added that it "*has waited for over one and a half years for a resolution to the dispute. The Respondent's tardy engagement is clearly nothing more but an attempt to throw a 'procedural grenade' into the proceedings seeking to halt and/or delay the issuance of the Final Award. The fact that it has waited until the very last minute to communicate with the Tribunal makes its motivation clear*".

146. On 10 January 2023, the Tribunal acknowledged receipt of Claimant's correspondence of the same date and invited the Parties to refrain from further commenting unless otherwise directed by the Tribunal.

147. On 11 January 2023, Cleary Gottlieb Steen & Hamilton (Paris office) informed all involved that it was newly retained as Respondent's counsel in these proceedings and sought "*leave to respond to CME's letter of January 10, 2023 whereby CME requested the Tribunal to reject CBI's request for further submissions in this arbitration*".

148. On 11 January 2023, the Tribunal rejected Respondent's request to be granted leave to respond to Claimant's correspondence dated 10 January 2023 given that no new factual element has been put forward by Respondent in its correspondence dated 11 January 2023 (as compared to the facts relied upon by Respondent in its Application dated 1 January 2023) which is of a nature to justify such leave. As for Respondent's request made in its correspondence dated 11 January 2023 to be allowed to "*introduce evidence on the issue of fraudulent misrepresentation and its legal consequences*" which "*should occur no earlier than the end of February 2023*", the Tribunal indicated that it will be ruling on such request in its upcoming decision on Respondent's Application, since Respondent already requested in its Application the Tribunal to "*Accept and consider CBI's forthcoming submission (…) of the evidence of Cardno ME's fraud in the inducement (including the aforementioned decisions of the Iraqi Criminal Courts that are conclusive on the issue of such fraud); and of the governing law that, by its operation, results in the consultancy agreement and the included mediation/arbitration clause agreement being null and void ab initio and repudiated*". The Tribunal ordered the Parties to refrain from making any further submission pending the Tribunal's upcoming decision on Respondent's Application. The Tribunal added that any submission made in violation of the Tribunal's order to refrain from making any further submission pending its upcoming decision will be declared inadmissible.

149. On 17 January 2023, the ICC Secretariat acknowledged receipt of Respondent's correspondence dated 11 January 2023. The ICC Secretariat noted that Respondent is now represented by Cleary Gottlieb Steen and Hamilton LLP. As to the request of Respondent's counsel that "*all prior correspondence and submissions as well as all supporting documentation in this arbitration be transferred*" to them, the ICC Secretariat informed Respondent's counsel that "*Respondent has received all correspondence in this arbitration on the following email addresses: contracts@cbi.iq and newbuilding@cbi.iq. Accordingly, we invite Respondent's counsel to request from their client to provide them directly with a copy of the requested correspondence and submissions together with all supporting documentation*".

150. On 18 January 2023, the Tribunal issued Procedural Order N°4. In the Procedural Order N°4, the Tribunal, after having reminded the above (paras. 140-148), decided as follows[18]:

"7. The Tribunal has carefully considered the situation at stake and the Parties' respective positions.

8. Article 27 of the ICC Rules provides that:

"As soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters, whichever is later, the arbitral tribunal shall:
a) declare the proceedings closed with respect to the matters to be decided in the award; and
b) inform the Secretariat and the parties of the date by which it expects to submit its draft award to the Court for approval pursuant to Article 34.
After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorized by the arbitral tribunal."

9. And article 11.1 of the Procedural Order N°3 provides that:

"The Arbitral Tribunal shall in due course declare the proceedings closed pursuant to Article 27 of ICC Rules."

10. In accordance with article 27 of the ICC Rules, the unsolicited submissions/arguments made by Respondent in the Application on the alleged "fraudulent misrepresentation" and its alleged legal consequences, without being previously authorized by the Tribunal, are hereby declared inadmissible as being filed after the closing of the proceedings[19]. The evidence produced with Respondent's Application (1. PDF, 2.PDF and 3.PDF) are declared inadmissible as well on the same ground.

11. Respondent has not put forward any change in circumstances - independent of Respondent's will - which would have occurred after the closing of the proceedings on 13 December 2022 and which might justify the reopening of such proceedings[20]. The Iraqi judgements relied upon by Respondent to allege "fraudulent misrepresentation" are dated 25 August 2021 (1.PDF and 2.PDF). i.e right after the appointment of the Sole Arbitrator on 19 August 2021 (see, the ICC Secretariat's correspondence dated 20 August 2021) in these proceedings and around 16 months before the closing of the proceedings on 13 December 2022. As to Respondent's letter to Claimant dated 29 December 2022 (3.PDF), Respondent has not provided any justification for why this action was taken at this point in time while the Iraqi judgments relied upon by Respondent are dated 25 August 2021. Finally, and as to Respondent's decision to retain external counsel after the closing of the proceedings (see Cleary Gottlieb Steen & Hamilton's correspondence dated 11 January 2022) -which, in any event, does not justify the reopening of the proceedings since Respondent's external counsel cannot disregard Respondent's previous conduct- Respondent could have retained external counsel since the beginning of the proceedings, it being noted that, on 31 August 2021, Respondent was expressly invited to inform the Tribunal, by 8 September 2021, "whether it would be represented by outside counsel in these arbitration proceedings" (see, the Tribunal's email dated 31 August 2022 and the Terms of Reference, para. 33).

12. Respondent, although i) was notified of the proceedings since their beginning[21], ii) was constantly invited to participate, iii) was granted every opportunity to reply and take positions on Claimant's submissions throughout the proceedings, iv) was reminded of the consequences of its non-participation in these proceedings with regard article 6(8) of the ICC Rules, choose not to participate to the proceedings until it submitted the Application filed after the closing of the proceedings and after the draft award was sent to the ICC Court for scrutiny.

13. In particular, Respondent i) did not submit its Answer to the Request for Arbitration, ii) did not participate to the establishment of the Terms of Reference, the Procedural Order N°3 and the Procedural Timetable, iii) did not participate to the CMC, iv) did not sign the Terms of Reference, v) did not submit its Statement of Defence, vi) did not submit its Responses to the Tribunal's Questions and Comments on Claimant's Responses, vii) did not participate to the pre-Hearing conference, viii) did not submit its Responsive Submission on Damages ix) did not participate to the Hearing, x) did not submit its corrections to the Hearing transcript, xi) did not submit its comments on the Hearing, xii) did not submit its Responsive Submission on the impact of the French State Council's decision xii) did not submit its submission on costs and xiii) did not submit its comments on Claimant's submission on costs (for a summary of all the procedural steps, see the Procedural Timetable N°4. See also Procedural Timetables N°1, N°2 and N°3).

14. Following the lapse of the last procedural step (Respondent's comments on Claimant's submission on costs which Respondent did not submit) that was scheduled on 12 December 2022 (see, the Procedural Timetable N°4 and the Tribunal's email dated 8 December 2022), the Tribunal, after being satisfied that each party had a reasonable opportunity to present its case (article 22(4) of the ICC Rules), declared the proceedings closed on 13 December 2022 and added that it expected to submit its draft award to the ICC Court for approval by no later than 20 December 2022 in accordance with articles 27 and 34 of the ICC Rules.

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[18] Footnotes n°19 to 23 below are an integrated part of the Procedural Order N°4 (footnotes n°1 to 5 of the Procedural Order N°4).

[19] *See, The Secretariat's Guide to ICC Arbitration, 2012, para. 3-1031, "**Unsolicited submissions**. There may be times when a party makes an unsolicited submission or files additional evidence after the proceedings have been declared closed, thereby breaching Article 27. An arbitral tribunal will normally disallow and ignore such submissions".*

[20] *See, The Secretariat's Guide to ICC Arbitration, 2012, para. 3-1030, "Sometimes parties request authorization to make additional submissions. Arbitral tribunals normally accept such request only if the desired submission is clearly relevant to resolving the dispute and could not have been made earlier." (Emphasis added).*

[21] *See, in particular, the Tribunal's decision dated 13 September 2021 on the validity of the notification of the Request for Arbitration done by the ICC Secretariat on 14 June 2021 to Respondent's email address contracts@cbi.ig which is i) the same email's address used by Respondent to submit the Application and ii) the same email's address used by the ICC Secretariat, the Tribunal and Claimant throughout the entire proceedings in order to notify to Respondent all correspondence, submissions and documentation in this arbitration. In addition, see the Tribunal's email dated 9 March 2022 whereby the Tribunal communicated to the Parties, inter alia, the DHL's delivery receipt of the approved Terms of Reference which establishes that Respondent received, on 23 November 2021, the ICC Secretariat's correspondence dated 19 November 2021 enclosing the Terms of Reference. See, also, paras. 19 to 48 of the Terms of Reference.*

15. Given Respondent's lack of participation during the normal course of these proceedings despite being constantly invited to participate, the Tribunal does not understand Respondent's statement in the Application according to which "to the surprise of Respondent Central Bank of Iraq ("CBI"), CBI has received the arbitrator's notice dated 13 December 2022 that the Tribunal expects to send the draft Final Award to the ICC Court pursuant to Article 34 of the ICC Rules by no later than 20 December 2022 (...)". Respondent has not provided any reason as to its lack of participation during the normal course of these proceedings and why it decided to make such belated submissions and allegations for the first time after the closing of the proceedings and at a point in time where the draft arbitral award was sent to the ICC Court for scrutiny.

16. Moreover, the Tribunal finds that Respondent's statement with regard to the "seriousness of the fraud on the Court and on the Tribunal, and also on CBI" is in contradiction with Respondent's conduct as to not raising such allegation during the normal course of the proceedings. This is even more so in light of the fact that Claimant has never hidden that two of its employees were arrested and sentenced to prison in Iraq[22] and produced at the Hearing a report issued by "the Human Rights Council Working Group on Arbitrary Detention (Opinion No. 70/2021 concerning Robert Pether and Khalid Radwan [i.e Mr Zaghloul] (Iraq)"[23] whereby the report raised concerns, inter alia, "with the conduct of the trial" and noted "with grave concern that even during the trial hearing, Messrs. Pether and Radwan [i.e Mr. Zaghloul] did not have clarity around their charges. The charges they had prepared to defend themselves against were dropped during the hearing and replaced with other charges. Along with the failure to provide copies of the decisions immediately to the defence or the consular or diplomatic authorities, that demonstrates a trial replete with grave due process violations" (see, paras. 10 and 11 of the report). Given the importance that Respondent is attaching today in the Application to the Iraqi criminal proceedings, one would have expected a reaction from Respondent to Claimant's allegations (including the allegations made in the Human Rights Council's report) during the normal course of the proceedings. In particular, the Tribunal granted to Respondent, although it did not participate to the Hearing, the additional opportunity to comment on the Hearing by 29 September 2022, and more particularly on the Human Rights Council's report as indicated by the Tribunal at the Hearing (see footnote, n°5). Respondent did not submit its comments on the Hearing by 29 September 2022. It alleged "fraudulent misrepresentation" for the first time on 1 January 2023 after the closing of the proceedings which occurred on 13 December 2022 and after the draft award was sent to the ICC Court for scrutiny on 16 December 2022.

[22] *See, Claimant's Request for Arbitration (para. 21) whereby Claimant alleged that "Respondent made false accusations against the Claimant's managers which resulted in their improper and ongoing detention". See, also, Claimant's Statement of Claim (paras. 8-12) whereby Claimant alleged that "CME is doing all it can in Iraq and, internationally via diplomatic channels, to secure the release Mr Pether and Mr Zaghloul. Their arrests have been the subject of widespread criticism in the international media (C-2, media reports concerning wrongful detention of CME's representatives)".*

[23] *This report has been admitted by the Tribunal at the Hearing held on 8 September 2022 as Exhibit C-47 given that it is a public document and available to everyone on the internet and given that Respondent will be granted "time to comment on the Hearing and in this case respondent will be able to comment on this document" (See, Hearing Transcript, pages 44 to 46 and in particular, p. 46, lines 5-18). By email dated 8 September 2022, Claimant sent to all involved including Respondent the link to access the report and reminded that the report was admitted on the record at the Hearing as Exhibit C-47 given its availability on the internet. On 9 September 2022, the Tribunal communicated to Respondent the Hearing transcript and issued Procedural Timetable N°3 which includes "the possibility for Respondent to submit its comments on the Hearing by 29 September 2022" as pointed out by the Tribunal in its email.*

17. In these circumstances, granting Respondent's request to make submissions of fact and law after the closing of the proceedings would have the effect of starting the evidential process anew for no justified reason (given that Respondent could have raised the alleged "fraudulent misrepresentation" and its alleged legal consequences during the normal course of the proceedings) and to the detriment of Claimant's right to the efficient and cost-effective resolution of the case (article 22(1) of the ICC Rules).

* * *

18. Based on the forgoing, the Tribunal decides as follows:

- *Respondent's submissions/arguments made in the Respondent's Application on the alleged "fraudulent misrepresentation" and its alleged legal consequences are declared inadmissible as being filed after the closing of the proceedings without being previously authorized by the Tribunal in breach of article 27 of the ICC Rules. The evidence produced with the Application are declared inadmissible as well (1.PDF, 2.PDF and 3.PDF) on the same ground;*
- *The reopening of the debate on the alleged "fraudulent misrepresentation" and its alleged legal consequences is denied given that the alleged "fraudulent misrepresentation" and its alleged legal consequences could have been raised by Respondent during the normal course of these proceedings;*
- *Respondent's request to make submissions of fact and law on the alleged "fraudulent misrepresentation" and its alleged legal consequences is denied;*
- *Respondent's request to immediately hold in abeyance any decision on the arbitral award is denied;*
- *The rendering of the arbitral award shall continue its normal course without consideration of the alleged "fraudulent misrepresentation" and its alleged legal consequences;*
- *The Parties are ordered to abide by the present Procedural Order N°4 and no further submission will be admitted in these proceedings".*

151. By email dated 18 January 2023, Respondent submitted unsolicited arguments on why the proceedings should be reopened to file submissions of fact and law on the matter of fraud and requested the Tribunal to urgently reconsider its Procedural Order N°4.

152. On 19 January 2023, the Tribunal declared Respondent's email dated 18 January 2023 inadmissible (and thus it was stricken out from the record) in accordance with para. 18 last bullet point of the Procedural Order N°4 dated 18 January 2023 according to which "*The Parties are ordered to abide by the present Procedural Order N°4 and no further submission will be admitted in these proceedings*".

153. On the same date, Respondent wrote an email to the Sole Arbitrator as follows: "*Respondent is in receipt of the Sole Arbitrator's email of today's date, once again denying Respondent the right to be heard and even attempting to strike from the*

record' Respondent's request for consideration of January 18, 2023. Respondent is disturbed by, and strongly objects to, the Sole Arbitrator's conduct of these proceedings to the detriment of the integrity of these arbitral proceedings, where Respondent is prepared to adduce evidence of fraud".

154. On 19 January 2023, Respondent wrote to the ICC Secretariat, objecting to the Tribunal's decision not to reopen the arbitral proceedings. Respondent requested "*the ICC Court to deny approval of the Draft Award, unless and until Respondent has been granted the right to be heard on the evidentiary basis for, and legal consequences, of fraud in relation to the consultancy agreement at issue*".

155. On 20 January 2023, Claimant wrote to the ICC Secretariat, offering "*sincere apologies for writing to the ICC Court without leave*". Claimant added that it "*however feels compelled to respond to the spurious allegations made in Respondent's Letter. The Claimant considers it outrageous that counsel for Respondent has written to the ICC Court in blatant violation of the Tribunal's clear and repeated directions that the parties should not make further submissions*". Claimant further added that "*as directed by the Tribunal, we await receipt of the Final Arbitral Award, so that this matter can be drawn to an end*".

156. On the same date, the Secretary General of the ICC Court thanked the Parties for setting out their respective positions, of which he took note. He added that "*while the parties may write to the Secretariat at any time, at this juncture I must also note that the proceedings were closed on 13 December 2022 and therefore no further submission or argument may be made with respect to the matters to be decided in the award unless requested or authorized by the sole arbitrator, per Article 27*".

157. On 23 January 2023, Claimant wrote again to the ICC Secretariat indicating that it "*expresses its considerable surprise that the Respondent would seek to rely on an alleged fraud before the ICC Court in circumstances where its supposed evidence is tainted by serious allegations published by the UN itself*".

158. On the same day, the Secretary General of the ICC Court acknowledged receipt of Claimant's correspondence and wrote that "*I can only reiterate what was mentioned in our message of 20 January*".

159. On 24 January 2023, Respondent submitted an unsolicited correspondence whereby it requested again the Tribunal to reopen the proceedings.

160. On 25 January 2023, the Tribunal acknowledged receipt of Respondent's unsolicited correspondence and reiterated to the Parties the content of the Procedural Order N°4 and, in particular, its para. 18 last bullet point according to which the "*Parties are ordered to abide by the present Procedural Order N°4 and no further submission will be admitted in these proceedings*".

161. On 26 January 2023, Claimant submitted an unsolicited correspondence whereby it noted that "*Respondent continues to seek the reopening of the Proceedings, despite very clear directions to the contrary*". It added that "*Respondent's conduct in seeking to re-open the Proceedings is nothing more than a conspicuous attempt to derail the Proceedings and should be dismissed by the ICC. Accordingly, the Claimant*

respectfully submits that given the Respondent's spurious allegations, the ICC Court should move swiftly to bring this matter to a close, and issue the Award".

162. On the same date, the Tribunal acknowledged receipt of Claimant's unsolicited correspondence and reiterated to the Parties the content of the Procedural Order N°4 and, in particular, its para. 18 last bullet point according to which the "*Parties are ordered to abide by the present Procedural Order N°4 and no further submission will be admitted in these proceedings*".

163. On the same date, the ICC Secretariat informed the Parties that it received, on 23 January 2023, an updated version of the draft award submitted by the Tribunal.

164. On 26 January 2023, Respondent submitted an unsolicited correspondence whereby it, once again, requested the Tribunal to reopen the proceedings "*so that a balanced presentation of the evidence can be made*" in light of "*Claimant's efforts to discredit the fraud*".

165. On 27 January 2023, Respondent's counsel wrote to the ICC Secretariat to request again the "*full record of these proceedings, including but not limited to, the terms of reference, all procedural orders or decisions by the Sole Arbitrator, the Sole Arbitrator's statement of acceptance, availability, impartiality and independence, and any subsequent disclosure made*". Respondent's counsel added that "*Respondent is a State entity and its staff is not familiar with the ICC arbitration process or the importance of preservation of all documentation related thereto*".

166. On 30 January 2023, the Tribunal acknowledged receipt of Respondent's unsolicited correspondence dated 26 January 2023 and reiterated to the Parties the content of the Procedural Order N°4 and, in particular, its para. 18 last bullet point according to which the "*Parties are ordered to abide by the present Procedural Order N°4 and no further submission will be admitted in these proceedings*".

167. On 1 February 2023, the ICC Secretariat acknowledged receipt of Respondent's correspondence dated 27 January 2023 and wrote that "*as mentioned in our correspondence dated 17 January 2023, Respondent has received all correspondence and submissions in this arbitration on the following email addresses: contracts@cbi.iq and newbuilding@cbi.iq. However, in order to assist Respondent, we hereby include a link to download courtesy copies of (i) the Request for Arbitration and the documents annexed thereto; (ii) the sole arbitrator's Statement of Acceptance, Availability, Independence and Impartiality; (iii) the Terms of Reference; (iv) the procedural orders; and (v) all correspondence sent to the parties by the Secretariat to date. We are unfortunately not in a position to provide a copy of the full file, as the Secretariat does not retain a compiled copy thereof, including any decisions by the sole arbitrator other than the procedural orders, the submissions and supporting materials, as well as any other correspondence exchanged throughout the proceedings*".

168. On 17 February 2023, the ICC Secretariat informed the Parties and the Tribunal that the ICC Court approved the draft award on the same date and confirmed that all of the Parties' comments in this regard were communicated to the ICC Court. The ICC Secretariat added that it will notify the award to the Parties once it has been finalized and signed by the Tribunal.

H. The Parties' submissions

169. Claimant's submissions were the following:

- Claimant's Request for Arbitration dated 2 June 2021 (the "**RfA**"), filed together with Exhibits C-1 to C-7;
- Claimant's Statement of Claim dated 6 January 2022 (the "**Statement of Claim**" or "**SoC**"), filed together with Exhibits C-1 to C-31[24];
- Claimant's Answers to the Tribunal's Questions dated 31 May 2022 filed together with Exhibits C-32 to C45 and CL-1 to CL-100 (the "**Claimant's Answers**" or "**CsA**").
- Claimant's Submission on Damages dated 17 August 2022 filed together with an excel spreadsheet (C-46) and the documents which support the expenses of the excel document (the "**Submission on Quantum**" or "**SoQ**").
- Claimant's Submission on the impact of the CE Decision dated 4 November 2022 together with Exhibits CL-104 to CL-124 (the "**Submission on the impact of the CE Decision**" or "**CsCED**").
- Claimant's submission on costs dated 8 December 2022 with its supporting documents.

170. Respondent did not file any submission during the normal course of these proceedings (i.e. until the closing of the proceedings which occurred on 13 December 2022)[25]. On the 1st of January 2023, Respondent filed the Application (the "**Respondent's Application**" or the "**Application**") in which, without prior authorization from the Tribunal, it made submissions/arguments and produced documentary evidence (1.PDF, 2.PDF and 3.PDF) on the alleged "fraudulent representation" and its alleged "legal consequences". These submissions/arguments as well as the evidence produced were declared inadmissible as per the Procedural Order N°4 (see, paras. 140-149 above). The content of the Tribunal's Questions dated 11 April 2022

171. Following the non-submission by Respondent of its Statement of Defense, the Tribunal asked the Parties, on 11 April 2022 as per the Procedural Timetable, the following questions:

*"**Questions in relation to the mediation as prior step to arbitration**:*

1.1 *To what extent Claimant's interpretation of clause 8.2.1 of the General Conditions of the Consultancy Agreement according to which the Parties may elect not to nominate a mediator through FIDIC prior to commencing arbitration can be reconciled with clause 8.2.7 of the General Conditions of the Consultancy Agreement? The Parties are expected to provide full legal reasoning in support of their respective positions and to provide legal authorities (case law, arbitral awards, scholar opinions, etc...) concerning the interpretation of clause 8.2.1 (and notably the consequences of the use of the word "may" in this clause) of the General Conditions of the FIDIC Client/Consultant Model Services Agreement (4th Edition 2006) upon which the Consultancy Agreement is based (see, p.1 point 1 of the Consultancy Agreement).*

1.2 *How do you explain the difference between the wording of clause 8.2.7 of the General Conditions of the Consultancy Agreement and the wording of clause 8.2.7 of the General Conditions of FIDIC Client/Consultant Model Services Agreement (4th Edition 2006)? What, if any, are the consequences of such difference? The Parties are expected to provide a full legal reasoning in support of their respective positions.*

1.3 *What is the applicable law to the issue of the mediation as prior step to arbitration? Is it the law of the seat of arbitration (French law) or the law applicable to the Consultancy Agreement (Iraqi law)? The Parties are expected to provide a full legal reasoning and legal authorities (case law, arbitral awards, scholar opinions, etc...) in support of their respective positions.*

1.4 *Under French law, is the violation of the requirement to mediate prior to arbitration considered a question of jurisdiction or a question of admissibility? The Parties are expected to provide French legal authorities (case law, scholar opinions, etc...) in support of their respective positions. Is the position under Iraqi law the same?*

1.5 *Under French law, does the futility of the mediation process (i.e. the absence of any reasonable prospect of success of the mediation) justify the commencement of the arbitration without having exhausted the prior mediation stage? The Parties are expected to provide a full legal reasoning and French legal authorities (case law, scholar opinions, etc...) in support of their respective positions. Is the position under Iraqi law the same?*

Question related to the form of communication between the Parties

2.1 How do clauses 1.8 (non-electronic forms) and 4.3.1 (variation by written agreement) of the Consultancy Agreement have interplay with the obligation, under Iraqi Law, that contracts are performed in good faith (article 150 of the Iraqi Civil Code), notably in circumstances where the Consultancy Agreement provided for invoices to be delivered in hard copy (clause 5.2.1 of the Consultancy Agreement) and Respondent allegedly paid some invoices received in soft copy only without raising an objection (See para. 39 of Claimant's Statement of Claim)? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

[24] In its SoC, Claimant produced Exhibits C-1 to C-31. Exhibits C-1, C-4, C-5 and C-7 which were attached to the RfA became respectively C-1, C-23, C-27 and C-28 in the SoC whereas C-2, C-3 and C-6 which were attached to the RfA were not re-produced with the SoC. Therefore, there are two different Exhibits bearing the same number C-2 (the one attached to the RfA and the one attached to SoC), two different Exhibits bearing the same number C-3 (the one attached to the RfA and the one attached to SoC), two different Exhibits bearing the same number C-4 (the one attached the RfA and the one attached to the SoC), two different Exhibits bearing the same number C-5 (the one attached to the RfA and the one attached to SoC), two different Exhibits bearing the same number C-6 (the one attached to the RfA and the one attached to SoC) and two different Exhibits bearing the same number C-7 (the one attached to the RfA and the one attached to SoC). If a reference is made to Exhibits C-2 to C-7 in the present Award, this should be understood as a reference to the Exhibits produced with the SoC unless the Tribunal expressly indicates that the reference is made to Exhibits C-2 to C-7 of the RfA.

[25] Respondent i) did not submit its Answer to the Request for Arbitration, ii) did not participate to the establishment of the Terms of Reference, the Procedural Order N°3 and the Procedural Timetable, iii) did not participate to the CMC, iv) did not sign the Terms of Reference, v) did not submit its Statement of Defence, vi) did not submit its Responses to the Tribunal's Questions and Comments on Claimant's Responses, vii) did not participate to the pre-Hearing conference, viii) did not submit its Responsive Submission on Damages ix) did not participate to the Hearing, x) did not submit its corrections to the Hearing transcript, xi) did not submit its comments on the Hearing, xii) did not submit its Responsive Submission on the impact of the French State Council's decision xii) did not submit its submission on costs and xiii) did not submit its comments on Claimant's submission on costs (for a summary of all the procedural steps, see the Procedural Timetable N°4. See also Procedural Timetables N°1, N°2 and N°3).

Questions related to demobilization:

3.1 Under Iraqi Law and the contractual provisions, does Respondent's alleged failure to pay Claimant's invoices justify Claimant's demobilization (see, paras 75-77 and para. 81 of Claimant's Statement of Claim) or does it only permit Claimant (subject to various conditions) to suspend the performance of its obligations? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

3.2 Was the Consultancy Agreement terminated? Specifically, is Claimant's demobilization tantamount to a termination of the Consultancy Agreement by Claimant? In the affirmative, is such termination lawful under Iraqi Law (notably under articles 177 and 178 of the Iraqi Civil Code) and the contractual provisions (notably under clause 4.6.3 of the Consultancy Agreement)? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

Questions related to the alleged damages:

4.1 Under Iraqi, is it possible to claim the profits that would have been generated by the contract (i.e the loss of profit) in case the contract was not previously terminated? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

4.2 Under Iraqi law, is the recoverable loss of profit equal to the income that would have been generated had the contract been performed normally or is the recoverable loss of profit equal to the income that would have been generated minus the costs/expenses that would have been incurred to generate such income? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

4.3 Assuming that the contract continued to be performed normally, would Claimant have incurred costs/expenses in order to earn the remaining/outstanding value of the Consultancy Agreement (USD 5,190,572 as alleged by Claimant)? In the affirmative, what would be the amount of such costs/expenses? Should such costs be deducted from the alleged USD 5,190,572 remaining/outstanding value of the Consultancy Agreement? The Parties are expected to substantiate their figures.

4.4 To what extent could Claimant seek legal costs incurred before local courts (the alleged USD 14,406 incurred by Claimant when dealing with the attachment application in the Dubai Courts) in the context of the present arbitration? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

Questions related to the performance bond:

5.1 Who is the beneficiary of the letter of guarantee issued by the Trade Bank of Iraq?

5.2 Who is the beneficiary of the counter guarantee issued by Emirates NBD Bank in Dubai? Is it Respondent or the Trade Bank of Iraq?

5.3 In addressing questions 5.1 and 5.2 above, Claimant is invited to produce a copy of the letter of guarantee issued by the Trade Bank of Iraq and a copy of the counter guarantee issued by the Emirates NBD Bank in Dubai. Claimant is also invited to clarify/specify whether in its request to direct Respondent to return the "PB" to Claimant, the word "PB" precisely means the letter of guarantee issued by the Trade Bank of Iraq or the counter guarantee issued by the Emirates NBD Bank in Dubai? Finally, Claimant is invited to reproduce the document (email from Emirates NBD Bank in Dubai to Claimant) attached to its email dated 21 September 2021 (submitted in the context of Claimant's Emergency Application for Interim Relief) in a way that allows the Tribunal to see the document's date.

5.4 If the word "PB" means the counter guarantee issued by the Emirates NBD Bank in Dubai and assuming that the beneficiary of such counter guarantee is the Trade Bank of Iraq (not Respondent),

would it be possible for the Tribunal to order Respondent to return to Claimant the counter guarantee issued by the Emirates NBD Bank in Dubai? The Parties are expected to provide a full legal reasoning.

5.5 What is the applicable law governing Claimant's request to direct Respondent to return the "PB" to Claimant. Is it the law applicable to the letter of guarantee issued by the Trade Bank of Iraq? Is it the law applicable to the counter guarantee issued by the Emirates NBD Bank in Dubai? Is it the law applicable to the underlying contract i.e the Consultancy Agreement? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

5.6 Does the applicable law allow the Tribunal to direct the beneficiary of a first demand guarantee to return it? In the affirmative, under which conditions and to whom? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

5.7 To what extent clauses 6.4.1 and 5.1.5 of the Consultancy Agreement quoted by Claimant in its Statement of Claim at paras. 93 and 94 are relevant or irrelevant to Claimant's claim in relation to the performance bond? The Parties are expected to provide a full legal reasoning in support of their respective positions.

5.8 The Tribunal's understanding is that the counter guarantee issued by the Emirates NBD Bank in Dubai was the subject matter of an attachment order issued by the Dubai Courts (C-22). According to Claimant, "the attachment will remain in place until such time as CBI [Respondent] successfully challenges the order" (Claimant's Statement of Claim, para. 92). What is the basis of such assertion? In case the challenge of the attachment order was not successful, would the Dubai Courts order the Emirates NBD Bank to release the counter guarantee?

5.9 What is the current status of the letter of guarantee issued by the Trade Bank of Iraq?."

V. THE PARTIES' PRAYERS FOR RELIEF

A. Claimant

172. In the Terms of Reference, Claimant submitted the following prayer for relief:

"*The Claimant seeks the following relief:*

a) A declaration that the Respondent is in breach of its obligations under the Agreement.

b) An Order directing the Respondent to pay to the Claimant the following:

i. USD 6,728,678 for outstanding invoices;

ii. USD 1,670,000 in respect of the Performance Bond;

iii. USD 4,309,424 for the remaining value of the Project; and

iv. USD 6,175,608 for the remaining value associated with the extension of the Agreement.[26]

[26] This claim with respect to the remaining value associated with the extension of the Consultancy Agreement was not included in Claimant's Statement of Claim and Claimant's subsequent submissions. At the Hearing, Claimant confirmed that "*Sir, yes, we are not running that claim anymore*" (Hearing Transcript, p. 139, lines 7-14).

c) *Further or alternatively, damages in an amount to be assessed.*

d) *Pre-award and post award interest.*

e) *Costs.*

f) *Such other relief as the Arbitral Tribunal deems just and appropriate under the circumstances.*

g) *The Claimant reserves the right to amend and/or supplement, elaborate upon, and/or vary any of the claims made herein, and/or heads of relief set out above, and to provide additional evidence for their claims during the course of this arbitration."*

173. In its SoC, Claimant submitted the following prayers for relief:

"112. CME [Claimant] *respectively requests the following relief:*

a) *A declaration that CBI is in breach of its obligations under the Consultancy Agreement.*

b) *An order directing CBI to pay to CME the following:*

i. *USD 5,847,530 for outstanding invoices;*

ii. *USD 5,190,572 for damages and lost profit with respect to the remaining value of the Consultancy Agreement.*

c) *An order directing CBI to return the PB to CME as well as payment of the legal costs associated with dealing with the attachment application in the Dubai Courts in the amount of USD 14,506.*

d) *Further or alternatively, damages in an amount to be assessed.*

e) *Pre-award and post award interest.*

f) *Costs (including the costs of the arbitration, including legal costs).*

g) *Such other relief as the Arbitral Tribunal considers just and appropriate."*

174. In its Submission on Quantum, Claimant indicated at para. 1.3 that it "*seeks to amend the amount of its claim as stated in paragraph 112(b)(ii) of the SOC. The amended claims amount to USD 5,190,572 and, in the alternative, USD 4,342,924.15.*"

175. In its Opening Presentation (slide 71), Claimant submitted the following prayers for relief:

"Relief sought by the Claimant

a) *A declaration that the Respondent is in breach.*

b) *An Order directing the Respondent to pay to the Claimant the following:*

i. *USD 5,847,530 for outstanding invoices;*

ii. *USD 5,190,572 for the outstanding value of the Consultancy Agreement under Article 150 of the Iraqi Civil Code,* ***or***

iii. *In the alternative to (b)(ii), USD 4,342,924.15 for damages and lost profit under Articles 168-169 of the Iraqi Civil Code.*

c) *A declaration that CBI's demand under the bank guarantee (the performance bond) was wrongful.*

d) *An order directing CBI to return to CME the original performance bond as well as payment of the legal costs associated with dealing with the attachment application in the Dubai Courts in the amount of USD 14,506.*

e) *In the alternative to (d), Claimant requests the Tribunal to award CBI to compensate CME the total value of the performance bond in the amount of USD 1,666,000.00.*

f) *Pre-award and post award interest at the rate of 5% starting from 2 June 2021 on the total amount that the Tribunal may determine is due to CME.*

g) *Costs (including the costs of arbitration and Claimant's legal costs).*

h) *Such other relief as the Tribunal considers just and appropriate."*

B. Respondent

176. Respondent did not file any submission during the normal course of these proceedings (i.e. until the closing of the proceedings which occurred on 13 December 2022)[27]. On the 1st of January 2023, Respondent filed the Application, in which, without being previously authorized by the Tribunal, it made submissions/arguments and produced documentary evidence (1.PDF, 2.PDF and 3.PDF) on the alleged "*fraudulent representation*" and its alleged "*legal consequences*". These

[27] Respondent i) did not submit its Answer to the Request for Arbitration, ii) did not participate to the establishment of the Terms of Reference, the Procedural Order N°3 and the Procedural Timetable, iii) did not participate to the CMC, iv) did not sign the Terms of Reference, v) did not submit its Statement of Defence, vi) did not submit its Responses to the Tribunal's Questions and Comments on Claimant's Responses, vii) did not participate to the pre-Hearing conference, viii) did not submit its Responsive Submission on Damages ix) did not participate to the Hearing, x) did not submit its corrections to the Hearing transcript, xi) did not submit its comments on the Hearing, xii) did not submit its Responsive Submission on the impact of the French State Council's decision xii) did not submit its submission on costs and xiii) did not submit its comments on Claimant's submission on costs (for a summary of all the procedural steps, see the Procedural Timetable N°4. See also Procedural Timetables N°1, N°2 and N°3).

submissions/arguments as well as the evidence produced were declared inadmissible as per the Procedural Order N°4 (see, paras. 140-150 above).

VI. PROCEDURAL MATTERS

A. The arbitration clause

177. This arbitration has been brought pursuant to the arbitration clause contained at clause 8.3.2 of the Consultancy Agreement (Exhibit C-1) signed by the Parties and Meinhardt Singapore Pte Limited.

178. There are two executed versions of the Consultancy Agreement: an English version (Exhibit C-1) and an Arabic version (attached to the RfA as Exhibit C-2 together with an English translation).

179. Clause 1.4.2 of the Consultancy Agreement (Exhibit C-1) provides: "[...] *this Agreement has been prepared and agreed in the English language and is being translated to be executed in parallel in the Arabic language and the English language. For the avoidance of doubt in the event of the translation of this Agreement or any part thereof or any such documents prepared pursuant to this Agreement into Arabic or any other language it shall continue to be construed and interpreted according to the English language version which shall prevail in the event of any conflict.*"

180. Clause 8 of the General Conditions of **the executed English version of the Consultancy Agreement** (Exhibit C-1) provides:

"8. Disputes and Arbitration

8.1 Amicable Dispute Resolution

8.1.1 If any dispute arises out of or in connection with this Agreement, representatives of the Parties with authority to settle the dispute will, within 14 days of a written request from one Party to the other, meet in a good faith effort to resolve the dispute. If the dispute is not resolved at that meeting, the Parties will attempt to settle it by mediation in accordance with Clause 8.2.

8.2 Meditation

8.2.1 Unless otherwise agreed between the Parties or stated in the Particular Conditions, the Parties shall attempt to agree upon a neutral mediator from a panel list held by the independent meditation center named in the Particular Conditions. Should the Parties be unable to agree within 14 days of a notice from one Party to the other requesting meditation then either Party may request that a mediator be appointed by the President of FIDIC. The appointment by the President shall be binding on the Parties unless they agree to another named mediator at any time.

8.2.2 When the mediator has been appointed on his terms and conditions of engagement either Party can initiate the mediation by giving the other Party a notice in writing requesting a start to the meditation. The meditation will start not later than 21 days after the date of the notice.

8.2.4 All negotiations or discussions carried out in the meditation shall be conducted in confidence and are not to be referred to in any concurrent or subsequent proceedings, unless they conclude with a written legally binding agreement. If the Parties accept the mediator's recommendations, or otherwise reach agreement on the resolution of the dispute, such agreement shall be recorded in writing and, once signed by the designated representatives, shall be binding on the Parties.

8.2.5 If no agreement is reached, either Party may invite the mediator to provide to both Parties a nonbinding opinion in writing on the dispute. Such opinion shall not be used in evidence in any concurrent or subsequent proceedings, without the prior written consent of both Parties.

8.2.6 The Parties will bear their own costs of preparing and submitting evidence to the mediator. The costs of the meditation and of the mediator's services shall be borne equally between the Parties unless otherwise agreed and recorded in accordance with Clause 8.2.3

8.2.7 No Party may commence an arbitration of any dispute relating to this Agreement until it has attempted to settle the dispute with the other Party by meditation and either the meditation has terminated or the other Party may commence arbitration if the dispute has not been settled within 90 days of the giving of the notice under Clause 8.2.2

8.3 Arbitration

8.3.1 If the meditation fails then the Parties will attempt jointly to make a written record of those matters (if any) relating to the dispute which have been agreed to by them, for submission in any later arbitration. The mediator's role will cease, at the latest, upon the commencement of any arbitration. The mediator will not be available to appear as a witness in the arbitration, not to provide any additional evidence obtained during the meditation.

8.3.2 Unless stated otherwise in the Particular Conditions, any arbitration arising out of or in connection with this Agreement shall be undertaken under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

181. Clause 8.2.3 of the Particular Conditions of **the executed English version of the Consultancy Agreement** (Exhibit C-1) indicates "*CEDR Mediation Procedure*" as "*Mediator Procedures*" and clause 8.3.2 of the same indicates "*International Chamber of Commerce*" as "*Rules of Arbitration.*"

182. Clause 8 of the General Conditions of **the executed Arabic version of the Consultancy Agreement as translated to English** (attached to the RfA as Exhibit C-2) provides:

"8-Disputes & Arbitration

8-1 Amicable Resolution of Disputes

8-1-1 If any disputes arises from or in connection to this Agreement, the representatives of parties shall settle the dispute within 14 days as per a written request presented to the other party, and a meeting to unify efforts to show good faith in the dispute's

resolution. However, in case that no solution is reached to settle the dispute in the meeting, the parties shall try to resolve the same through mediation as per clause 8-2.

8-2 Mediation

8-2-1 Unless it is agreed otherwise between the parties or mentioned in the special conditions, the parties shall try to agree on a neutral mediator from the lists set by the Independent Mediator Center, where their names are mentioned in such special conditions. Moreover, the parties shall be capable of agreement within 14 days in which a notice shall be served by one party to another, requesting the appointment of a mediator, where either party may request to appoint a mediator by the president of the International Federation of Consulting Engineers (FIDIC). Such appointment shall be binding to the parties unless they agree on name of another mediator at any time.

8-2-2 When the mediator is appointed to his conditions and provisions of the Agreement by granting a written notice to the other party, seeking start of mediation, provided that it must not exceed 21 days from date of such notice.

8-2-4 All discussions or negotiations conducted during the mediation shall be under confidentiality, trust and not referring to the same in any concurrent or subsequent procedures unless that is within a legal written agreement. If the parties agree on the recommendations of the mediator or otherwise, or an agreement reached to resolve the dispute, such agreement shall be noted in writing, and must be mandatory once it is signed by the representatives of the parties.

8-2-5 If no agreement is reached, both parties may invite the mediator to provide them with a non-binding opinion in writing about the dispute, and may not be used as evidence in any concurrent or subsequent procedures without obtaining a prior written consent from both parties.

8-2-7 The parties shall bear their own costs incurred by preparation and submission of evidence to the mediator. Moreover, the parties shall also bear the mediator's costs and service fee equally unless otherwise is agreed, according to clause 8-2-3.

8-2-8 Neither party may start arbitration in any dispute connected to such Agreement until the attempt is made to settle the dispute with the other party through the mediator. Once mediation is ended, the First Party may start arbitration if the dispute settlement is not made within 90 days from submission of notice date, according to clause 8-2-2.

8-3 Arbitration

8-3-1 If mediation fails, the parties together shall be bound to attempt register such matters in writing, if any, which are related to dispute and have been agreed upon by them to be presented in any subsequent arbitration, where the mediator's role shall stop to the latest once any arbitration is initiated. Moreover, the mediator shall not be available for appearing as a witness on arbitration, and not to present any additional evidence during arbitration.

8-3-2 The parties shall agree that any dispute or disagreement must be finally resolved through arbitration under the provisions of arbitration of the International Chamber of Commerce (ICC), and that the venue of arbitration shall be at the International Court of Arbitration located in Paris – France, and shall be in English, according to the applicable law of the Republic of Iraq.

8-3-3 Notwithstanding contents of the arbitration procedures, neither party may start legal procedures, seeking to find an obligatory and notifying or warning solution, which shall be necessary to determine or protect the rights of fulfilment of the obligations set out in this Document, awaiting settlement of dispute or disagreement, in accordance with the arbitration procedures."

183. Clause 8.2.3 of the Particular Conditions of **the executed Arabic version of the Consultancy Agreement as translated to English** (attached to the RfA as Exhibit C-2) indicates "*Centre for Effective Dispute Resolution (CEDR)*" as "*Mediator Procedures*" and clause 8.3.2 of the same indicates "*International Chamber of Commerce (ICC)*" as "*Rules of Arbitration.*"

B. The applicable substantive law

184. The English executed version of the Consultancy Agreement (Exhibit C-1) provides at clause 1.4 of the Particular Conditions that the "*Governing Law*" (*i.e.* the law which is to govern the Consultancy Agreement as per clause 1.4 of the General Conditions) "*means legislation, regulations and instructions of the Iraqi and orders issued by any authorized in the Republic of Iraq legal authority.*"

185. The Arabic executed version of the Consultancy Agreement as translated to English (attached to the RfA as Exhibit C-2) provides at clause 1.4 of the Particular Conditions that "*this Agreement shall be subject to and interpreted as per the Law of the Republic of Iraq.*"

186. Accordingly, the governing law of the Consultancy Agreement is the Iraqi law (see paras 69-71 of the Terms of Reference).

C. The procedural rules

187. In accordance with Article 19 of the ICC Rules, the proceedings before the Tribunal shall be governed by the ICC Rules and where the ICC Rules are silent, by any rule which the Parties or, failing them, the Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration (see para. 75 of the Terms of Reference).

D. The place of arbitration

188. The English executed version of the arbitration clause (Exhibit C-1) is silent on the place of arbitration whereas the Arabic executed version of the arbitration clause as translated to English (attached to the RfA as Exhibit C-2) provides at clause 8.3.2 that "*the venue of arbitration shall be the International Court of Arbitration located in Paris-France.*"

189. Claimant submitted in the RfA that "*Paris is the uncontested seat of arbitration*" (para. 15 of the RfA). Respondent did comment on the place of arbitration.

190. On 5 August 2021, the ICC Court fixed Paris, France as the place of arbitration pursuant to Article 18(1) of the ICC Rules (see paras. 65-67 of the Terms of Reference).

E. The language of the proceedings

191. The Arabic executed version of the arbitration clause as translated to English (attached to the RfA as Exhibit C-1) provides at clause 8.3.2 that the arbitration "*shall be in English*" whereas the English executed version of the arbitration clause (Exhibit C-1) is silent on the language of the arbitration.

192. However, the English executed version of the Consultancy Agreement (Exhibit C-1) provides at clause 1.3 of the Particular Conditions that "*English*" is the "*Language for communication.*"

193. Accordingly, English is the language of the arbitration (see paras 72-74 of the Terms of Reference).

VII. JURISDICTION OF THE TRIBUNAL

194. The arbitration clause contained at clause 8.3.2 of the General Conditions of the Consultancy Agreement (Exhibit C-1) provides that:

> "*8.3.2. Unless stated otherwise in the Particular Conditions, any arbitration arising out of or in connection with this Agreement shall be undertaken under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.*"

195. In addition, clause 8.3.2 of the Particular Conditions of the Consultancy Agreement (Exhibit C-2) indicates "*International Chamber of Commerce*" as "*Rules of Arbitration.*"

196. This arbitration clause is contained in the Consultancy Agreement which was signed by Claimant and Respondent. It clearly refers to the "*Rules of Arbitration of the International Chamber of Commerce.*"

197. Claimant's claims (as described under Section VIII.B below) which are the subject matter of the present arbitration arose out of or are in connection with the Consultancy Agreement.

198. In accordance with Article 6(3) of the ICC Rules and given that the Tribunal has decided that the issue with respect to the mediation as a pre-arbitral step raises a question of admissibility and not one of jurisdiction (See, Section VIII. A.6 below), the Tribunal hereby declares that it has jurisdiction to determine Claimant's claims.

VIII. CLAIMANT'S CLAIMS

A. Preliminary issue with respect to the mediation as a pre-arbitral step

199. The Arbitral Tribunal notes as a preliminary matter that the arbitration clause contains a pre-arbitral step. The Tribunal will therefore summarize at Section A.1 below Claimant's position in this regard prior to the Tribunal's Questions dated 11

April 2022. It will then reproduce at Section A.2 below the Tribunal's Questions dated 11 April 2022 in relation to the issue at hand and will summarize at Section A.3 Claimant's responses to the Tribunal's Questions. Further, the Tribunal will reproduce at Section A.4 below its questions dated 30 September 2022 raised following the CE Decision of 22 September 2022 and will summarize at Section A.5 Claimant's Submission thereon before making a determination at Section A.6 on whether Claimant's claims can proceed in the current arbitration.

1. Summary of Claimant's position prior to the Tribunal's Questions

200. First, Claimant contends that the Parties attempted to resolve the dispute amicably in accordance with clause 8.1.1 of the Consultancy Agreement (Exhibit C-1) but failed to do so.[28]

201. Claimant highlights that the Parties held two meetings to discuss and resolve the issues of late payments due in its favor.[29] One was held on 10 March 2021 and another one on 7 April 2021 where the Claimant's Project Manager and General Manager met with the Governor of CBI in Iraq (Exhibits C-19 and C-21).[30]

202. Claimant's representatives were arrested during the meeting of 7 April 2021. Claimant believes that the improper arrest and ongoing detention in Iraq were caused by Respondent's "*false accusation*"[31] and that such arrest "*effectively ended any reasonable prospect of an amicable resolution of the outstanding issues between the parties through negotiation or mediation.*"[32]

203. Second, Claimant explains that it wrote to CBI and notified it of its intention to proceed with mediation in accordance with clause 8.2.1 of the Consultancy Agreement.[33]

204. In this respect, Claimant relies on its "*notice of mediation*" of 4 May 2021, in which it notified CBI that the latter's "*failure to provide a nomination or to meaningfully engage with this notice within 14 days of the date of this letter, that being 18 May 2021, will be considered a confirmation and acknowledgment that (i) CBI does not want to proceeding with mediation, (ii) CBI waives its right to proceed with mediation, and (iii) CBI agrees that the dispute may be referred to arbitration*" (Exhibit C-27).

205. Due to (i) Respondent's lack of answer to such notice, (ii) the absence of any agreement by the Parties on the appointment of a mediator and (iii) the events of 7 April 2021, Claimant "*exercised its option under Section 8.2.1 and choose not to request FIDIC to appoint a mediator*".[34] Indeed, according to Claimant, clause 8.2.1 of the Consultancy Agreement confirms that where the Parties fail to agree on a mediator they "*may*" request the President of FIDIC to appoint a mediator and "*were*

[28] RfA, paras 19 and seq.; SoC, paras. 96 and seq.
[29] SoC, para. 98 and Exhibit C-3 attached to the RfA.
[30] RfA, paras. 20-21; SoC, para. 98.
[31] RfA, para. 21.
[32] SoC, para. 99; see also RfA, para. 32.
[33] SoC, para. 105.
[34] SoC, paras. 108 and 109; see also RfA, para. 29.

the Parties elect not to nominate a mediator through FIDIC, it follows that mediation cannot proceed."[35]

206. Claimant concludes that clause 8.2.7 of the Consultancy Agreement is not engaged.[36] Indeed, "[a]*s the Parties did not appoint and/or elect to appoint a mediator, the mediation was not capable of being terminated in the context of Section 8.2.7*" and the mediation process was "*effectively 'still born'*".[37]

207. Claimant finally adds that Respondent's involvement in the wrongful arrest of Claimant's employees during the meeting of 7 April 2021 in Iraq to discuss settlement effectively put an end "*to any reasonable prospect of the Parties reaching an amicable resolution of the dispute*" and, accordingly, Claimant submits the RfA.[38]

2. The Tribunal's Questions in relation to the mediation as a pre-arbitral step

208. The Tribunal states below its questions (with their original numbering) dated 11 April 2022 in relation to the mediation as a prior step to arbitration:

> *1.1 To what extent Claimant's interpretation of clause 8.2.1 of the General Conditions of the Consultancy Agreement according to which the Parties may elect not to nominate a mediator through FIDIC prior to commencing arbitration can be reconciled with clause 8.2.7 of the General Conditions of the Consultancy Agreement? The Parties are expected to provide full legal reasoning in support of their respective positions and to provide legal authorities (case law, arbitral awards, scholar opinions, etc...) concerning the interpretation of clause 8.2.1 (and notably the consequences of the use of the word "may" in this clause) of the General Conditions of the FIDIC Client/Consultant Model Services Agreement (4th Edition 2006) upon which the Consultancy Agreement is based (see, p.1 point 1 of the Consultancy Agreement).*
>
> *1.2 How do you explain the difference between the wording of clause 8.2.7 of the General Conditions of the Consultancy Agreement and the wording of clause 8.2.7 of the General Conditions of FIDIC Client/Consultant Model Services Agreement (4th Edition 2006)? What, if any, are the consequences of such difference? The Parties are expected to provide a full legal reasoning in support of their respective positions.*
>
> *1.3 What is the applicable law to the issue of the mediation as prior step to arbitration? Is it the law of the seat of arbitration (French law) or the law applicable to the Consultancy Agreement (Iraqi law)? The Parties are expected to provide a full legal reasoning and legal authorities (case law, arbitral awards, scholar opinions, etc...) in support of their respective positions.*
>
> *1.4 Under French law, is the violation of the requirement to mediate prior to arbitration considered a question of jurisdiction or a question of admissibility? The Parties are expected to provide French legal authorities (case law, scholar opinions, etc...) in support of their respective positions. Is the position under Iraqi law the same?*
>
> *1.5 Under French law, does the futility of the mediation process (i.e. the absence of any reasonable prospect of success of the mediation) justify the commencement of the arbitration without having exhausted the prior mediation stage? The Parties are expected to provide a full legal reasoning and French legal authorities (case law, scholar opinions, etc...) in support of their respective positions. Is the position under Iraqi law the same?*

[35] SoC, para. 107.
[36] SoC, para. 111.
[37] SoC, para. 111; see also RfA, para. 31.
[38] RfA, para. 32. See also SoC, para. 12: "*The wrongful arrest of CME's employees at the instigation of CBI destroyed the parties' relationship and, ended any reasonable prospect of an amicable resolution to the issue of CBI's non payment of CME's invoices*".

3. Summary of Claimant's Answers to the Tribunal's Questions

209. As regards question 1.1, Claimant submits that French law is applicable to clause 8 of the Consultancy Agreement and that "*under French law, noncompliance with a multi-tiered dispute resolution clause which provides for a pre-arbitral step such as mediation can be justified if the mediation is determined to be futile based on the specific factual circumstances of the case*".[39]

210. Claimant contends that "*clause 8.2.1 of the Consultancy Agreement uses the word 'may'*" and that it "*did not have to follow the procedure under Clause 8.2.1 to 'request that a mediator be appointed by the President of the FIDIC' because the entire mediation step was futile in the circumstances of the case*".[40]

211. Claimant further argues that should Iraqi law be applicable, "*given the particular circumstances of the case and CBI's reprehensible conduct*", it would not be in breach of clause 8 of the Consultancy Agreement (Exhibit C-1) by not requesting the appointment of a mediator.[41] It considers that "*Iraqi law requires the performance of the contracts, in accordance with theirs terms, and in good faith*" and that "*clause 8.2.1 provides for an option, not an obligation, for either Party to request that a mediator be appointed by the President of FIDIC*".[42]

212. As regards question 1.2, Claimant submits that clause 8.2.7 of the Consultancy Agreement (Exhibit C-1) slightly defers from clause 8.2.7 of the FIDIC Client/Consultant Model Services Agreement (4th Edition 2006) but that there "*are no consequences to be drawn under the applicable law from the differences in the drafting of two versions of clause 8.2.7*".[43]

213. As regards question 1.3, Claimant argues that French law, as the law of the seat, should apply to the issue of mediation as a pre-arbitral step since "*the characterization of preliminary objections to the adjudication of a given claim may fairly be considered a procedural matter*" (Exhibit CL-5).[44]

214. Alternatively, Claimant contends that such issue should be resolved in accordance with the law governing the arbitration agreement.[45]

215. According to Claimant, the law governing the arbitration agreement should apply to the entirety of an integrated multi-tiered clause such as clause 8 of the Consultancy Agreement (Exhibit C-1). It considers that the dispute resolution mechanism should be considered holistically and that "*mediation, as contemplated in clause 8.2, is accessory to arbitration in clause 8.3*".[46] Claimant concludes that it "*would be more*

[39] CsA, paras. 6 and 7.
[40] CsA, paras. 8 and 9.
[41] CsA, para. 10.
[42] CsA, paras. 18 and 19.
[43] CsA, paras. 23 and 25.
[44] CsA, para. 34 and 35.
[45] CsA, paras. 36 and seq.
[46] CsA, paras. 37 and 38.

efficient, and logical, to apply the same law, to wit, the law applicable to the arbitration agreement as a whole to the mediation as a pre-arbitral mediation step".[47]

216. Moreover, Claimant argues that French law governs the arbitration agreement whether directly applied, as substantive rules, or through a conflict of law approach.[48] Claimant relies on multiple judgements and authorities (Exhibits CL-10, CL-11, CL-12, CL-13) to invite the Arbitral Tribunal, being seated in France, to apply French law "*as directly-applicable substantives rules, to all the questions relating to the validity, interpretation, scope and enforcement of the pre-arbitral step contained in the arbitration agreement*".[49] In the alternative, and should the Arbitral Tribunal decide to follow a conflict of law approach to determine the law applicable to the dispute resolution mechanism, Claimant contends that the law of the seat should apply and that no other law could claim a stronger connection factor to the arbitration agreement than French law.[50] Finally, Claimant insists on the fact that pursuant to the separability principle, Iraqi law should not apply to the arbitration agreement and more generally to the dispute resolution mechanism.[51]

217. As regards question 1.4, Claimant submits that "[p]*ursuant to a long-standing and constant case law, largely supported by French scholarship*", the violation of a pre-arbitral step raises a question of admissibility of the claims and not a question of jurisdiction of the arbitral tribunal.[52]

218. As regards question 1.5, Claimant acknowledges that "*no futility exception has been specifically developed in French case law as concerns the case of a prior mediation step before the commencement of arbitration*".[53] Yet, Claimant argues that French law, international arbitration and other civil law jurisdictions recognize that non-compliance with a pre-arbitral step can be justified by specific factual circumstances.

219. First, relying on Article 750-1 of the FCCP (Exhibit CL-62)[54] and a ruling of the Court of Appeal of Montpellier of 10 February 2022 (Exhibit CL-63), Claimant is of the opinion that "*where the circumstances of the case so warrant, French law permits to hold that preliminary tiers preceding litigation or arbitration may be eschewed. This is notably the case where there is a* motif légitime *pursuant to which it would be impossible to comply with the pre-litigation step because of the circumstances of the case*".[55] Claimant thus submits that the Tribunal "*should apply, by analogy, the solution directed in Article 750-1 of the Code of Civil Procedure*".[56]

220. Second, citing numerous scholars and cases[57], Claimant considers that there "*is a consensus in international arbitration scholarship as well as in commercial and investor-state arbitration awards that compliance with a pre-arbitral step can be excused on the grounds of futility where the circumstances of the case so warrant*".[58]

221. Third, Claimant refers to several rulings of the Swiss Federal Tribunal (Exhibits CL-85, CL-86) and German scholars commenting German decisions (Exhibit CL-78) to show that "*in certain circumstances, pre-arbitration requirements can be disregarded if they are not useful or are pointless*".[59]

222. In the present case, Claimant considers that in light of Respondent's refusal to respond to Claimant's legal notice until it was provided with counsel for Claimant's power of attorney (Exhibits C-24 and C-26), its lack of response to Claimant's notice of mediation of 4 May 2021 (Exhibit C-27) and its involvement in the arrest and imprisonment of Claimant's representative "*resorting to the mediation step in clause 8.2 would have been futile and in vain*".[60]

4. The Tribunal's further questions following the CE Decision dated 22 September 2022

223. On 30 September 2022, the Arbitral Tribunal raised the fact that the French State Council (*Conseil d'Etat*) rendered the CE Decision dated 22 September 2022 which annulled article 750-1 of the FCCP. Considering this recent development and given that Claimant is relying on article 750-1 of the FCCP in its reasoning with regard to the pre-arbitral step issue, the Arbitral Tribunal invited Claimant to file a submission dealing with the following:

1. The impact of the CE Decision on Claimant's position/reasoning at paras. 80 to 97 and paras. 115 to 116 of its CsA;

2. The impact of the CE Decision on the existence of an alleged futility exception under French law.

5. Summary of Claimant's Submission on the impact of the CE Decision

224. In its Submission on the impact of the CE Decision dated 4 November 2022, Claimant first argues that the annulment by the CE Decision of article 750-1 of the FCCP has no impact on the fact that non-compliance with a pre-arbitral step can be excused where a "*legitimate reason relating to the circumstances of the case*" so warrants.[61]

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[47] CsA, para. 41.
[48] CsA, paras 42 and seq.
[49] CsA, para. 45.
[50] CsA, paras. 46 and seq.
[51] CsA, paras. 49 and seq.
[52] CsA, paras. 64 and seq.
[53] CsA, para. 80.
[54] Article 750-1 of the FCCP requires the parties in cases where the amount in dispute is below 5.000 euros to submit their claims, before resorting to national courts, to an attempt of conciliation conducted by a court conciliator, to an attempt of mediation or to an attempt of a participatory procedure. The parties "*are exempted*" from such obligation according to Article 750-1 of the FCCP "*if the absence of recourse to one of the methods of amicable resolution mentioned in the first paragraph is justified by a legitimate reason relating either to the obvious urgency or the circumstances of the case making impossible such an attempt or requiring that a decision be given without adversarial debate, or to the unavailability of judicial conciliators delaying the organisation of the first meeting of conciliation in a manifestly excessive manner with regard to the nature and the stakes of the dispute*".
[55] CsA, para. 91.
[56] CsA, para. 116.
[57] CsA, paras. 99 and seq.; see also Exhibits CL-75, CL-76, CL-78, CL-79, CL-80, CL-82, CL-84.
[58] CsA, para. 98.
[59] CsA, paras. 108 and seq.
[60] CsA, para. 104, see also paras. 92-93 and para. 96.
[61] CsCED, para. 6.1.

225. Claimant contends that the petition (the "**Petition**") submitted on 20 December 2019 by six representative bodies of lawyers in France to the *Conseil d'Etat* to annul the Decree No. 2019-1333 dated 11 December 2019 Reforming French Civil Procedure (the "**Decree**") focuses only on the following section of article 750-1 (which is article 4 of the impugned Decree): "*If the absence of recourse to one of the methods of amicable resolution mentioned in the first paragraph is justified by a legitimate reason relating either to the obvious urgency or to the circumstances of the case making impossible such an attempt or requiring that a decision be given without adversarial debate or to the unavailability of judicial conciliators delaying the organization of the first meeting of conciliation in a period of time that is manifestly excessive manner [sic] with regard to the nature and the stakes of the disputes*".[62]

226. Claimant highlights that "*the Conseil d'Etat agreed with the petitioners that Article 750-1 did not define with sufficient precision 'the manifestly excessive period given the nature and the stake of the case' of the unavailability of justice conciliators following which a petitioner is permitted to commence legal proceedings*"[63]. Therefore, the Conseil d'Etat ordered the annulment of article 750-1, as drafted in the Decree "*given that it does not sufficiently provide precisions of the modalities according to which the unavailability should be deemed established*" (Exhibit CL-104, para. 43).[64]

227. By contrast, Claimant argues that the Petition did not specifically criticize the stance where non-compliance with an amicable dispute resolution method is justified by a legitimate reason under the circumstances of the case which is the only application of article 750-1 of the FCCP invoked by Claimant in this arbitration.[65]

228. Claimant notes that the public reporter whose pleadings were followed by the *Conseil d'Etat* in the CE Decision considered that the rest of the terms of article 750-1 of the FCCP (other than the determination of the unavailability of the conciliators) were "*clear and exempt from manifest error*" (Exhibit CL-105).[66] Claimant thus concludes that "*neither the Petition, nor the CE Decision, criticized, let alone annulled, Article 750-1 CPC on the ground of permitting a petitioner to commence legal proceedings without first resorting to mediation where the circumstances of the case so warrant*"[67].

229. Second, Claimant submits that the annulment of article 750-1 of the FCCP carries no retroactive effect and therefore "*carries no dramatic consequences in general, and specifically in this arbitration*"[68]. Claimant relies on paragraph 69 of the CE Decision that states: "[h]*aving regard to the manifestly excessive consequences on the functioning of the public service of justice which would result from the retroactive annulment* […] *of Article 750-1 of the Code of Civil Procedure in its wording resulting from Article 4 of the contested decree* […], *it is necessary, subject to litigation initiated on the date of the present decision, to derogate from the principle of the retroactive effect of contentious annulment. Consequently, the effects produced*

[62] CsCED, para. 12. Exhibit CL-106.
[63] CsCED, para. 17.
[64] CsCED, para. 17.
[65] CsCED, para. 14.
[66] CsCED, para. 18.
[67] CsCED, para. 20.
[68] CsCED, para. 21.

by Article 750-1 before its annulment should be considered definitive" (Exhibit CL-104).

230. Claimant explains that, to protect legal certainty, the *Conseil d'Etat* "*chose to apply the annulment only to legal situations that arise after the date of the decision* [of] *22 September 2022*". Thus, according to Claimant, "*the commencement by the Claimant of arbitral proceedings on 2 June 2021* […] *has given rise to a legal situation that cannot be deprived of effect as a result of the CE Decision*"[69]. Indeed, Claimant notes that in three decisions rendered after the CE Decision, the French Courts applied article 750-1 of the FCCP to legal situations that arose prior to the CE Decision (Exhibits CL-122, CL-123 and CL-124).[70]

231. Third, it is Claimant's position that the annulment of article 750-1 of the FCCP does not call into question the law on which the Decree is based, nor the other compelling authorities quoted by Claimant in its submissions.

232. According to Claimant, the legislative history of the Decree justifies the limited impact of the annulment of part of its provisions. Claimant describes 6 successive steps and contends that the CE Decision "*did not, and could not, put into question the law on which the Decree is based*"[71]. Claimant points out that since 2016, French law in all its successive versions "*systematically provided for an excuse not to resort to a mandatory mediation before initiating court action in the case of a legitimate reason*".[72] Claimant concludes that such principle remains enshrined in French law as the annulment of certain provisions of the Decree does not affect the Law No. 2019-222 of 23 March 2019 that remains in force.[73]

233. Furthermore, Claimant argues that the annulment of article 750-1 of the FCCP has no impact on the other authorities it invoked to evidence the consensus in international arbitration as well as in the national law of other civil law countries such as Germany and Switzerland that non-compliance with a pre-arbitral step can be excused on the grounds of futility where the circumstances of the case so warrant.[74]

6. <u>The Tribunal's determination</u>

234. First, the Arbitral Tribunal must proceed with the interpretation of clause 8.2 of the Consultancy Agreement (Section A.6.a.) and decide which law should apply to the pre-arbitral step (Section A.6.b.). The Arbitral Tribunal will then have to rule on the sanction for non-compliance with a pre-arbitral step (Section A.6.c.) and whether it can be excused on the grounds of futility (Section A.6.d.).

a. *The interpretation of clause 8.2 of the Consultancy Agreement*

235. The Arbitral Tribunal recalls that clause 8.2 of the Consultancy Agreement (Exhibit C-1) provides:

[69] CsCED, para. 24.
[70] CsCED, para. 25.
[71] CsCED, para. 33.
[72] CsCED, para. 33.
[73] CsCED, paras 31, 34 and 35.
[74] CsCED, para. 37.

"8.2 Meditation [sic]

8.2.1 Unless otherwise agreed between the Parties or stated in the Particular Conditions, the Parties shall attempt to agree upon a neutral mediator from a panel list held by the independent meditation center named in the Particular Conditions. ***Should the Parties be unable to agree within 14 days of a notice from one Party to the other requesting meditation [sic] then either Party may request that a mediator be appointed by the President of FIDIC****. The appointment by the President shall be binding on the Parties unless they agree to another named mediator at any time.*

8.2.2 ***When the mediator has been appointed on his terms and conditions of engagement either Party can initiate the mediation by giving the other Party a notice in writing requesting a start to the meditation*** *[sic]. The meditation [sic] will start not later than 21 days after the date of the notice.*

8.2.4 All negotiations or discussions carried out in the meditation [sic] shall be conducted in confidence and are not to be referred to in any concurrent or subsequent proceedings, unless they conclude with a written legally binding agreement. If the Parties accept the mediator's recommendations, or otherwise reach agreement on the resolution of the dispute, such agreement shall be recorded in writing and, once signed by the designated representatives, shall be binding on the Parties.

8.2.5 If no agreement is reached, either Party may invite the mediator to provide to both Parties a nonbinding opinion in writing on the dispute. Such opinion shall not be used in evidence in any concurrent or subsequent proceedings, without the prior written consent of both Parties.

8.2.6 The Parties will bear their own costs of preparing and submitting evidence to the mediator. The costs of the meditation [sic] and of the mediator's services shall be borne equally between the Parties unless otherwise agreed and recorded in accordance with Clause 8.2.3

8.2.7 No Party may commence an arbitration of any dispute relating to this Agreement ***until it has attempted to settle the dispute with the other Party by meditation*** *[sic]* ***and either the meditation*** *[sic]* ***has terminated or the other Party may commence arbitration if the dispute has not been settled within 90 days of the giving of the notice under Clause 8.2.2****"* (emphasis added)

236. According to Claimant, the use of the wording "may" in clause 8.2.1 of the Consultancy Agreement (Exhibit C-1) grants an option to the Parties to request that the mediator be appointed by the President of FIDIC "*Should the Parties be unable to agree*" within the time limit provided under said clause. The Arbitral Tribunal understands that Claimant elected not to request such appointment notably due to Respondent's lack of answer to its notice of mediation of 4 May 2021 and in light of the events of 7 April 2021.

237. Through its question 1.1 and 1.2, the Arbitral Tribunal invited the Parties to clarify their interpretation of clause 8.2.1 and 8.2.7 of the Consultancy Agreement (Exhibit C-1).

238. Claimant argued that Article 157 of the Iraqi Civil Code[75] and Article 1192 of the French Civil Code (Exhibit CL-95) both ban the judicial interpretation of clear terms of contracts.[76] However, Claimant did not provide the Arbitral Tribunal with any scholars' opinion nor any case law on the use of the verb "may" in clause 8.2.1 or the interpretation of clause 8.2.7, notably in light of the difference with the wording of the General Conditions of FIDIC Client/Consultant Model Services Agreement (4th Edition 2006).

239. Contrary to Claimant's assertion, the Arbitral Tribunal considers that the use of the wording "may" in clause 8.2.1 is not clear and necessitates interpretation when compared to clause 8.2.7 of the Consultancy Agreement which is the specific provision dealing with the mediation as a pre-arbitral step.

240. Indeed, all the clauses of a contract must be interpreted in relation to one another, giving each a meaning that is consistent with the whole. As a consequence, clauses 8.2.1, 8.2.2 and 8.2.7 of the Consultancy Agreement (Exhibit C-1) must be interpreted in light of one another so as to reconcile them and allow their concurrent application.

241. Clause 8.2.1 specifies that "*Should the Parties be unable to agree within* ***14 days of a notice*** *from one Party to the other* ***requesting meditation*** *then either Party* ***may*** *request that a mediator be appointed by the President of FIDIC*". (emphasis added)

242. The Arbitral Tribunal considers that use of the verb "may" means that if the Parties fail to agree on the appointment of the mediator, the claimant has two options: it can either abandon its claims or, if it wishes to continue the litigation process, it can request that the mediator be appointed by the FIDIC President.

243. The Arbitral Tribunal is of the view that the use of the word "may" does not make resorting to mediation optional as this would be irreconcilable with clause 8.2.7 of the Consultancy Agreement (Exhibit C-1), which specifically tackles the issue of whether arbitration proceedings could be launched without resorting to mediation. Indeed, clause 8.2.7 stipulates that: "***No Party may commence an arbitration*** *of any dispute relating to this Agreement until it has attempted to settle the dispute with the other Party by meditation and* ***either the meditation has terminated or*** *the other Party may commence arbitration* ***if the dispute has not been settled within 90 days of the giving of the notice under Clause 8.2.2****"*. (emphasis added)

244. In the Arbitral Tribunal's opinion, this clause envisages only two situations in which recourse to arbitration is possible: either the mediation is terminated or the mediation process did not allow the parties to reach a settlement within 90 days from the notice provided for in clause 8.2.2 of the Consultancy Agreement (Exhibit C-1). The Arbitral Tribunal stresses that clause 8.2.7 of the Consultancy Agreement (Exhibit C-1) refers to the notice of clause 8.2.2 of the same by which a party requests the commencement of the mediation once the mediator has been appointed, and not the notice of clause 8.2.1 of the Consultancy Agreement (Exhibit C-1) by which a party indicates that it wishes to have recourse to mediation and requests the joint appointment of a mediator.

[75] Article 157 of the Iraqi Civil Code provides that: "*Implication is disregarded vis-à-vis a declaration*".
[76] CsA, paras. 19 and 20.

245. Therefore, arbitration can be initiated only after the appointment of a mediator and the implementation of mediation, and once the mediation process was either terminated or the parties did not reach a settlement within 90 days of the giving of the notice under clause 8.2.2 of the Consultancy Agreement. Clause 8.2.7 of the Consultancy Agreement (Exhibit C-1) does not grant the possibility of initiating arbitration before completing the contractually agreed mediation process.

246. By starting arbitration despite the fact that (i) a mediator had never been appointed (absent any agreement between the Parties on a neutral mediator and having decided not to request its appointment by the President of FIDIC), (ii) the notice requesting the start of the mediation process to Respondent was never sent (since no mediator was appointed) and (iii) the mediation process never terminated (since it never started) and the time limit of 90 days to reach a settlement never started to run (since the notice of clause 8.2.2 was never sent), Claimant did not comply with clause 8.2.7 of the Consultancy Agreement.

247. Since the prerequisite of mediation was not complied with by Claimant, the Arbitral Tribunal must decide to what extent Claimant was entitled to start the arbitral proceedings on 2 June 2021.

b. *The applicable law to the pre-arbitral step*

248. The Arbitral Tribunal recalls the two theories put forward by Claimant as to the law applicable to the pre-arbitral mediation step.

249. On the one hand, the issue could be considered a procedural issue as one needs to consider the procedural effect on arbitral proceedings of non-compliance with a pre-arbitral step. As such, the most relevant law to determine such procedural effect would be the law of the seat of arbitration (Exhibit CL-5[77]) which is French law in the present case.

250. On the other hand, the mediation prerequisite could be considered to be an accessory to the arbitration and should be governed by the law applicable to the arbitration clause.[78] In such instance, both the French substantive rules and the conflict of law method lead to French law being applicable.

251. The Arbitral Tribunal notes that when the seat of the arbitration is in France, French courts have consistently applied a directly-applicable substantive rule ("*une règle matérielle du droit de l'arbitrage international*") to the validity and effect of the arbitration clause irrespective of the law applicable to the contract containing the arbitration clause and without the need to go through a conflict of law reasoning (Exhibits CL-10, CL-11, CL-12, CL-13).

252. That being said, arbitral tribunals that choose a conflict of law approach to determine the law applicable to the arbitration agreement generally uphold the law of the seat.

[77] Fabio Santacroce supports that "*the characterization of preliminary objections to the adjudication of a given claim may fairly be considered a procedural matter. As a result, there may good sense, for arbitral tribunals to fall back on domestic standards contemplated by the law of the seat*" (F. Santacroce, "*Navigating the troubled waters between jurisdiction and admissibility: an analysis of which law should govern the characterization of preliminary issues in international arbitration*", Arbitration International, 2017, pages 557-558.

[78] CsA, para. 38.

253. Professor Seraglini and Mr Ortscheidt observe, indeed, that: "*it should be kept in mind that questions relating to the validity or effects of an international arbitration agreement will most often be examined first by the arbitrators, in particular because of the principle of Competence-Competence. There is a risk that the arbitrators will not blindly follow the solutions of French law and will reason more classically according to a conflict-of-law approach, and, in particular, will attach great importance to the law of the seat for the regime of the arbitration agreement*" (Exhibit CL-10).[79] Similarly, article V(1)(a) and V(1)(d) of the New York Convention (ratified by both Iraq and France) territorially link the arbitration agreement to the law of the seat (French law in the present case) when the parties did not subject the arbitration clause specifically to a given national law (Exhibit CL-26).

254. In the case at hand, the Consultancy Agreement is governed by Iraqi law. However, the Parties did not choose a specific law to be applicable to the arbitration clause. Indeed, no reference to a specific national law can be found in clause 8 of the Consultancy Agreement. France being the seat in the present arbitration, in the case of a conflict of law reasoning, French law should govern the arbitration clause.

255. The Arbitral Tribunal therefore finds that regardless of the applicable conflict of law rule (law of the seat or law applicable to the arbitration clause) or the method used (substantive rules method or conflict of laws method), French law applies to the issue of a pre-arbitral mediation step and the consequences of non-compliance with it.

c. *The consequences of non-compliance with a pre-arbitral step under the applicable law*

256. The Arbitral Tribunal considers that under French law, in accordance with a long standing case law supported by scholars (Exhibits CL-46, CL-47, CL-48 and CL-49), the issue of non-compliance with a prior mediation or conciliation step raises a question of admissibility and not one of jurisdiction.

257. Indeed, in a ruling of 4 March 2004, the Court of Appeal of Paris decided that: "[c]*onsidering that the grounds based on a pre-arbitral conciliation clause or on the necessity of a joint request do not constitute a jurisdiction objection but, as admitted by NIHON PLAST, a question relating to the admissibility of the claims which does not fall into the grounds set out in Article 1502 of the Code of Civil Procedure*" (Exhibit CL-36).[80]

258. Similarly, in a judgment of 12 December 2014, the *Cour de cassation* held that: "*whereas the situation giving rise to a* fin de non-recevoir *based on the failure to comply with a contractual clause which institutes a compulsory procedure prior to*

[79] Claimant's free translation of the following excerpt of CL-10: "*il ne faut pas perdre de vue que les questions relatives à la validité ou aux effets d'une convention d'arbitrage international seront le plus souvent examinées en premier lieu par les arbitres, notamment par l'effet du principe de Compétence-Compétence. Or ceux-ci risquent de ne pas suivre aveuglément les solutions de droit français et de raisonner plus classiquement selon une démarche conflictuelle, et notamment d'attacher une grande importance au droit du siège pour le régime de la convention d'arbitrage*".

[80] Claimant's free translation of the following excerpt of CL-36: "[c]*onsidérant que les moyens tirés d'une clause préalable de conciliation ou de la nécessité d'une requête conjointe ne constituent pas une exception d'incompétence mais, ainsi que le reconnait Nihon Plast, une question relative à la recevabilité des demandes qui n'entre pas dans les cas d'ouverture prévus par l'article 1502 du NCPC*".

referral to the court […] *cannot be rectified by the implementation of the contractual provision during the course of the court proceedings*" (Exhibit CL-37).[81]

259. More recently, on 29 January 2019, the Paris Court of Appeal reiterated that: "*the plea based on a conciliation clause does not constitute a plea of lack of jurisdiction but a question relating to the admissibility of claims, which does not fall within the grounds for the initiation of an action for annulment listed in Article 1520 of the Code of Civil Procedure*" (Exhibit CL-41).[82]

260. As a consequence, the Arbitral Tribunal's decision on the issue of non-compliance with a pre-arbitral mediation step is a question of admissibility of claims and will not be open for review by the French judge in the context of annulment proceedings (Exhibit CL41, CL-43, CL-44, CL-45).

d. *The futility exception under the applicable law*

261. Having decided that French law applies and that the issue of non-compliance with a pre-arbitral step is a question of admissibility of claims, the Arbitral Tribunal must establish whether such non-compliance can be excused on the grounds of futility.

(i) The existence of the futility exception under French law

262. Claimant argues that "*although no futility exception has been specifically developed in French case law as concerns the case of a prior mediation step before the commencement of arbitration, French law does provide in its civil procedure law a rule which implies that noncompliance with a pre-arbitral step can be justified by specific factual circumstances*".[83]

263. Specifically, Claimant relies on article 750-1 of the FCCP which requires the parties in cases where the amount in dispute is below 5.000 euros to submit their claims, before resorting to national courts, to an attempt of conciliation conducted by a court conciliator, to an attempt of mediation or to an attempt of a participatory procedure (Exhibit CL-62). Claimant adds that the parties can be excused from such obligation where the circumstances of the case so warrant since, according to Article 750-1 of the FCCP, the parties "*are exempted*" to attempt to amicably settle their dispute "*if the absence of recourse to one of the methods of amicable resolution mentioned in the first paragraph is justified by a legitimate reason relating either to the obvious urgency or the circumstances of the case making impossible such an attempt or requiring that a decision be given without adversarial debate, or to the unavailability of judicial conciliators delaying the organisation of the first meeting of conciliation*

[81] Claimant's free translation of the following excerpt of CL-37: "*que la situation donnant lieu à la fin de non-recevoir tirée du défaut de mise en œuvre d'une clause contractuelle qui institue une procédure, obligatoire et préalable à la saisine du juge* […] *n'est pas susceptible d'etre régularisée par la mise en œuvre de la clause en cours d'instance*".

[82] Claimant's free translation of the following excerpt of CL-41: "[l]*e moyen tiré d'une clause préalable de conciliation ne constitue pas une exception d'incompétence mais une question relative à la recevabilité des demandes, qui n'entre pas dans les cas d'ouverture du recours en annulation énumérés par l'article 1520 du code de procédure civile*".

[83] CsA, para. 80.

in a manifestly excessive manner with regard to the nature and the stakes of the dispute".[84]

264. The Arbitral Tribunal agrees with Claimant that it can apply by analogy the solution directed by Article 750-1 of the FCCP. This is because litigation as a way of resolving disputes is comparable to arbitration for purposes of establishing to what extent a prior mediation step should be complied with before resorting to a court or an arbitral tribunal. The Tribunal finds, in this regard, particularly enlightening the judgment of the Court of Appeal of Montpellier dated 10 February 2022 (Exhibit CL-63), which considers the practical impossibility to have recourse to one of the amicable methods of resolving the dispute referred to in Article 750-1 as a legitimate excuse for not complying with a preliminary compulsory conciliation procedure:

> "*an exchange of correspondence by mail and email between July and November 2020 took place between the parties either directly or through interposed counsel to try to find an amicable solution to the dispute, a videoconference has even been organised for this purpose and because each of the parties remained on its positions, no amicable solution could not be found. In view of these prior amicable attempts at conciliation, which ended in failure and a deadlock in the situation, despite several months of negotiations* […] *the respondents have a legitimate reason relating to the circumstances that makes it impossible to have recourse to one of the amicable methods of resolving the dispute referred to in Article 750-1, which exempts them from this obligation*" (Exhibit CL-63).[85]

265. The Arbitral Tribunal considers that the CE Decision that annulled article 750-1 of the FCCP does not affect the validity of such reasoning by analogy. Indeed, the Tribunal acknowledges that the CE Decision carries no retroactive effect as expressly mentioned at para. 69 of such decision (Exhibit CL-104), it being noted that the French Courts continued to apply article 750-1 of the FCCP, even after the CE Decision, to legal situations that arose prior to the date of the CE Decision (Exhibits CL-122, CL-123 and CL-124).[86]

266. Therefore, the CE Decision does not affect the present proceedings that were initiated by Claimant on 2 June 2021 which predate such CE Decision.

267. Moreover, the Arbitral Tribunal recognizes that the CE Decision focused on the ground of the "*unavailability of judicial conciliators*" to excuse the absence of

[84] CsA, paras. 81 and 82, and free translation of the following excerpt of CL-62: "*si l'absence de recours à l'un des méthodes de résolution amiable mentionnées au premier alinéa est justifiée par un motif légitime tenant soit à l'urgence manifeste soit aux circonstances de l'espèce rendant impossible une telle tentative ou nécessitant qu'une décision soit rendue non contradictoirement, soit à l'indisponibilité de conciliateurs de justice entraînant l'organisation de de la première réunion de conciliation dans un délai manifestement excessif au regard de la nature et des enjeux du litige*".

[85] Claimant's free translation of the following excerpt of CL-63: "*un échange de correspondances par courriers et par mail entre juillet et novembre 2020 a eu lieu entre les parties soit directement soit par les conseils interposes pour tenter de rechercher une solution amiable au litige, une visioconférence ay ant même été organisée à cette fin et que chacune des parties restant sur ses positions, aucune solution amiable n'a pu être trouvée. Compe tenu de ces tentatives amiables préalables de conciliation qui se sont soldées par un échec et par un blocage de la situation, malgré plusieurs mois de négociations et* […] *il est justifié par les intimés d'un motif légitime tenant à des circonstances rendant impossible le recours à l'un des modes de résolution amiable du litige visés par l'article 750-1 et les dispensant de cette obligation*". See also CsOP, slide 68.

[86] Paris Court of Appeal's decision dated 19 October 2022, Paris Court of Appeal's decision dated 21 October 2022 and Reims Court of Appeal's decision dated 25 October 2022.

recourse to one of the methods of the amicable resolution to commence legal proceedings (Exhibit CL-104). By contrast, the CE Decision does not expressly rule on non-compliance with an amicable dispute resolution method due to a legitimate reason under the circumstances of the case.

268. The Arbitral Tribunal further notes that despite the annulment of article 750-1 of the FCCP, the Law No. 2019.222 of 23 March 2019 remains in force. Therefore, the principle according to which non-compliance with a pre-arbitral step can be excused on the grounds of futility where the circumstances of the case so warrant remains enshrined in French law.

269. In any event, in a ruling of 3 June 2014, the French *Cour de Cassation* dismissed, on the basis of the good faith principle (article 1134 of the French Civil Code) and not of the now annulled article 750-1 of the FCCP, an argument of inadmissibility where a party had not complied with the pre-litigation step when the other party had not responded to several requests for payment.

270. The *Cour de Cassation* held: "*Whereas the company DM Parfums complains that* […] *the Court of Appeal* […] ***violated article 1134 of the Civil Code***; but *whereas after having noted that the company Sek Holding had invited by letters of 6 March and 15 May 2006, then by letter of 19 July 2009, the company DM Parfums to answer the requests for payment which it had addressed to it and that the company DM parfums did not believe that it had to follow up on these complaints,* ***the judgment holds that this company, which had to answer the letters and to engage in a dialogue in order to arrive at an amicable settlement of the dispute, showed by its silence its lack of eagerness to respect the clause of which it asks for compliance****, that in the state of these findings and sovereign appreciations from which it results that the company Sek Holding sought, in accordance with the preliminary of amicable and obligatory settlement contractually envisaged, an amicable solution to the dispute which arose between the parties, and that the step was faced with the culpable refusal of the co-contractor to engage in a preliminary conciliation, the court of appeal legally justified its decision*" (Exhibit CL-67) (emphasis added).[87] It stems from such judgment that a party who fails to respond to the other party's requests and does not engage in a dialogue in order to reach an amicable settlement will have its bad faith sanctioned under French law.

271. It follows that French law recognises that non-compliance with mandatory mediation can be excused for reasons related to the circumstances of the case. This is notably the case where i) one party does not respond to several requests for payment made by the other party, ii) one party does not respond to the attempt of settlement made by the other party and iii) there is no prospect that a settlement can be reached.

272. The Tribunal notes that French law does not depart from other jurisdictions which clearly established a futility exception.

273. Indeed, many civil law courts decided that pre-arbitral requirements can be disregarded should they be futile in the circumstances of the case. It was so decided in a ruling of 6 June 2007 by the Swiss Federal Tribunal: "[t]*hese unsuccessful attempts to resolve the dispute amicably demonstrate that there was already little hope of reconciling the parties, even with the intervention of a third party, when these proceedings were initiated (…). It is thus doubtful that the intention, alleged today by the appellant, to have the firm intention, at the end of 2005, to settle the dispute amicably was in the interest of the parties*".[88] German courts also recognize that "*pre-arbitration requirements are only relevant, provided that they serve a useful purpose*" (Exhibit CL-78).

274. Also, by way of illustration, various commercial and investor-state arbitration awards decided that non-compliance with a pre-arbitral step can be excused on the grounds of futility where the circumstances of the case so warrant. In an ICC Case No 8445, the arbitral tribunal, seated in Zurich, held that "*a clause calling for attempts to settle a dispute amicably are primarily expression of intention, and must be viewed in the light of the circumstances. They should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute*" (Exhibit CL-77). Similarly, in *Ambiente Ufficio v The Argentine Republic*, the ICSID tribunal held that recourse to local courts would not have offered the claimants "*a reasonable possibility to obtain effective redress from local courts and would have accordingly been futile*" (Exhibit CL-79).

275. Finally, scholars in international arbitration also recognize such futility exception. Gary Born explains that "*Parties frequently argue that their obligations to negotiate or mediate were either fulfilled, or did not need to be fulfilled, because negotiations or mediation efforts were or would have been futile. Among other things, parties may claim that negotiations could not be pursued because neither party would have altered its position meaningfully or that, even if negotiations had been pursued, no agreement would have been reached*" (Exhibit CL-75).

(ii) The futility exception under the circumstances of the case

276. Between 20 January 2021 and 1 April 2021, Claimant made several payment demands for outstanding invoices (Exhibits C-5, C-6, C-8, C-9, C-11, C-14, C-15, C-16, C-17, C-18).

277. After a first meeting held in Baghdad on 27 January 2021 (Exhibit C-7 and CsOP slide 40) and another one in Dubai on 10 March 2021 (Exhibit C-19) to discuss the payment of the outstanding invoices, Claimant's Project Manager and General

[87] Claimant's free translation of the following excerpt of CL-67: "*Attendu que la société DM parfums fait grief à l'arrêt d'avoir* […] ***violé*** […] ***l'article 1134 du code civil***. *Mais attendu qu'après avoir relevé que la société Sek Holding avait invité par lettres des 6 mars et 15 mai 2006, puis par lettre du 19 juillet 209, la société DM parfums à répondre aux demandes de paiement qu'elle lui avait adressées et que la société DM parfums n'a pas cru devoir donner suite à ces réclamations, l'arrêt retient que* ***cette société, qui se devait de répondre aux courriers et d'engager un dialogue afin de parvenir à un règlement amiable du litige, a manifesté par son silence son peu d'empressement à respecter la clause dont elle demande le bénéfice*** *; qu'en l'état de ces constatations et appréciations souveraines desquelles il résulte que la société SEK Holding a recherché, conformément au préalable de règlement amiable et obligatoire contractuellement prévu, une solution amiable au différend survenu entre les parties, et que sa démarche s'est heurtée au refus fautif de son cocontractant d'engager une conciliation préalable, la cour d'appel a légalement justifié sa décision*". See also, CsOP, slide 69.

[88] Claimant's free translation of the following excerpt of CL-85: "[c]*es vaines tentatives de résoudre le différend à l'amiable, démontrent, si besoin est, qu'il n'y avait déjà plus guère d'espoir de concilier les parties, même avec l'intervention d'un tiers, à l'époque où cette procédure avait été introduite (…). Il est ainsi douteux que la volonté, alléguée aujourd'hui par la recourante, d'avoir eu la ferme intention, à fin 2005, de régler le différend à l'amiable répondît à un intérêt digne de protection*".

Manager attended a meeting in Iraq with the Governor of the CBI on 7 April 2021 (Exhibits C-19 and C-21).[89] Both employees of Claimant (Messrs. Pether and Radwan) were arrested at that meeting and then sentenced to five years of imprisonment[90].

278. On 27 April 2021, CME's legal counsel sent a final legal notice to CBI (Exhibit C-23) which failed to meaningfully engage (Exhibit C-24).

279. It stems from the opinions adopted by the Working Group on Arbitrary Detention of the Human Rights Council at its ninety-second session of 15-22 November 2021 that "*the detention of Messrs. Pether and Radwan is being used to exercise leverage in a commercial transaction, in violation of international law*" (Exhibit C-47[91], para. 88). The "*Working Group conclude*[d] *that Messrs. Pether and Radwan are arbitrarily detained on discriminatory grounds, based on their employment with CME Consulting*" (Exhibit C-47, paras. 115 and 117).

280. Irrespective of whether the conclusions of the Working Group on Arbitrary Detention of the Human Rights Council are true or not, the arrest and detention of Claimant's employees on the basis of CBI's complaint is of a nature to destroy any prospect of resolving this dispute amicably.

281. Despite the arrest of its employees, Claimant made an additional effort by sending a mediation notice in accordance with clause 8.2.1 of the Consultancy Agreement on 4 May 2021 (Exhibit C-27). It was confronted with Respondent's silence and unwillingness to settle their dispute as Respondent did not reply to such notice.

282. The Arbitral Tribunal is of the view that Claimant rightly considered that initiating a mediation procedure in the circumstances described above would have been futile as the chances of success were close to none. The Arbitral Tribunal holds that under the futility exception Claimant was allowed to start the arbitration proceedings without further awaiting.

283. For the abovementioned reasons, the Arbitral Tribunal decides that Claimant's claims are admissible.

B. Claimant's claims arising from Respondent's breaches of the Consultancy Agreement

284. Having decided that Claimant's claims are admissible, the Arbitral Tribunal must rule on Claimant's claims arising from Respondent's alleged breaches of the

[89] See also CsOP, slide 40.
[90] SoC, paras. 9-12. See also (Exhibits C-2 and C-47).
[91] This report has been admitted by the Tribunal at the Hearing held on 8 September 2022 as Exhibit C-47 given that it is a public document and available to everyone on the internet and given that Respondent will be granted "*time to comment on the Hearing and in this case respondent will be able to comment on this document*" (See, Hearing Transcript, pages 44 to 46 and in particular, p. 46, lines 5-18). By email dated 8 September 2022, Claimant sent to all involved including Respondent the link to access the report and reminded that the report was admitted on the record at the Hearing as Exhibit C-47 given its availability on the internet. On 9 September 2022, the Tribunal communicated to Respondent the Hearing transcript and issued Procedural Timetable N°3 which includes "*the possibility for Respondent to submit its comments on the Hearing by 29 September 2022*" as pointed out by the Tribunal in its email. See also Procedural Order N°4 dated 18 January 2023, footnote n°5.

Consultancy Agreement and more specifically in relation to i) the outstanding invoices between September 2020 and March 2021 (Section B.1.), ii) the outstanding value of the Consultancy Agreement (Section B.2.), iii) the interest on the outstanding amounts due under the Consultancy Agreement (Section B.3) and iv) the performance bond (Section B.4).

1. Claimant's claims for outstanding invoices between September 2020 and March 2021

285. The Arbitral Tribunal will first summarize Claimant's position on its claim for outstanding invoices between September 2020 and March 2021 (Section B.1.a.) before recalling the Arbitral Tribunal's Questions on this issue (Section B.1.b.) and Claimant's subsequent responses (Section B.1.c.). The Arbitral Tribunal will then rule on Claimant's claim on the matter (Section B.1.d.).

a. Summary of Claimant's position prior to the Tribunal's Questions

286. Claimant explains that the Consultancy Agreement confirms that the Project comprises two stages namely the Tendering Stage and the Construction Stage. The Tendring Stage of the Project was for a fixed lump sum price of USD 376,200. This stage involved assisting CBI in preparation of tender documents for the Construction Stage and Appendix 4 of the Consultancy Agreement (Exhibit C-1) confirms that the Tender Stage "*shall be 1 to 3 months*".[92] Claimant further explains that the Construction Stage is related to the supervision of the construction of the Project (*i.e* CME's role as the Engineer). The Construction Stage is stated to be for a lump sum price of USD 32,936,576 (Clause 2.1 of Appendix 3 of the Consultancy Agreement) and appendix 4 confirms that the Construction Stage "*shall be 48 months*".[93]

287. Claimant contends that, in accordance with "*the Fees and Staff Utilization During Construction* Stage" included at Appendix 4 of the Consultancy Agreement[94] and clause 5 of the Consultancy Agreement (Exhibit C-1), it issued 7 invoices (numbered 33 to 39) for the work it performed from September 2020 to March 2021 but that Respondent, in breach of its obligations, failed to pay them for a total of USD 5.847.530 (Exhibit C-3).[95]

288. According to Claimant, it sent numerous letters between January 2021 and April 2021 to Respondent, which failed to provide any valid justification for its failure to pay the outstanding invoices nor did it notify its intention to withhold payment with reasons in accordance with clauses 5.2.2 and 5.5.1 of the Consultancy Agreement (Exhibits C-1, C-5, C-29, C-6, C-8, C-9, C-10, C-15, C-16, C-17 and C-18).[96] Claimant highlights that no specific objection with reasons was ever made in relation to a specific item of the invoices but that CBI made "*broad, unsubstantiated, and contradictory allegations concerning CME's performance*" (Exhibit C-11).[97]

[92] SoC, para. 15.
[93] SoC, para. 16.
[94] SoC, paras. 17-19.
[95] RfA, para. 47; SoC, para. 37.
[96] RfA, paras. 49-51; SoC, paras. 43-44.
[97] SoC, para. 57.

289. Claimant considers that, in any case, Respondent failed to issue a valid notice to withhold payment within the delay specified by clause 5.2.2 of the Consultancy Agreement (Exhibit C-1).[98] According to Claimant, the "*30 day payment period for each invoice and the 'final date for payment' for invoices 33 to 37 had expired by the time CBI issues its letter on 21 February 2021*".[99] Claimant explains that in CBI's letter dated 21 February 2021 (Exhibit C-10), the latter alleged that invoices 33 to 37 were only received in CBI's management office on 30 January 2021 and that CBI's management team cannot process not original copies of invoices.[100] Claimant adds that by alleging that it only received the invoices on 30 January 2021, and that it could only process original copies of the invoices, it appears that CBI was implying that it was not in breach of the 30 day payment requirement set out in clause 5.2.1 of the Consultancy Agreement.[101] Claimant, thus, argues that there is no basis for CBI to allege that it only received the invoices on 30 January 2021 and explains that, in its reply letter to CBI dated 22 February 2021 (Exhibit C-11), CME confirmed that each month the invoices were delivered by email (Exhibit C-12) comprising the covering letter, invoice document and all certificates and supporting documentation required, all of which were stamped and signed in accordance with CBI's requirement.[102]

290. Claimant further argues that Respondent's allegations that it could not process soft-copy version of the invoices are untrue.[103] Claimant insists on the fact that invoices 27 to 32 were lodged electronically (Exhibit C-12) but Respondent did not object to having received only a soft copy thereof, it accepted and paid them.[104]

291. Claimant alleges that the reason behind Respondent's non-payment is its frustration with CME's objection (Exhibit C-29) to the draft addendum sent by CBI in October 2021 (Exhibit C-4) which planned to extend the duration of the Consultancy Agreement by 3 months while maintaining the contract price and redistributing its fixed cost over the proposed longer period (Exhibit C-10).[105] Claimant explains that it refused such addendum as it corresponded to a 6% discount (Exhibit C-29).[106] Claimant adds that it was also concerned that if it agreed to a three month period extension without cost, it would set a precedent and CBI would demand additional extensions without cost, thereby further diluting CME's fixed cost price.[107]

b. The Tribunal's Questions in relation to the issue at stake

292. The Tribunal states below its question (with its original numbering) dated 11 April 2022 in relation to the outstanding invoices between September 2020 and March 2021:

2.1 How do clauses 1.8 (non-electronic forms) and 4.3.1 (variation by written agreement) of the Consultancy Agreement have interplay with the obligation, under Iraqi Law, that contracts are performed in good faith (article 150 of the Iraqi Civil Code), notably in circumstances where the Consultancy Agreement provided for invoices to be delivered in hard copy (clause 5.2.1 of the Consultancy Agreement) and Respondent allegedly paid some invoices received in soft copy only without raising an objection (See para. 39 of Claimant's Statement of Claim)? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

[98] SoC, para. 73.
[99] SoC, para. 55.
[100] SoC, para. 48.
[101] SoC, para. 49.
[102] SoC, para. 50.
[103] SoC, paras. 50-51 and para. 73.
[104] SoC, paras. 38, 50-51.
[105] SoC, paras 39-40 and para. 59.
[106] SoC, paras. 39-40 and para. 59.
[107] SoC, para. 59.

c. Summary of Claimant's response

293. Claimant considers that pursuant to Article 164 of the Iraqi Civil Code[108], an established course of conduct between parties should be binding.[109]

294. Moreover, in accordance with Article 150.1 of the Iraqi Civil Code[110] and the rule of estoppel, which is a cardinal rule of Shari'a, Respondent should be estopped from denying "*the legal effect of its previous conduct in having approved and paid invoices received in soft copy only without raising an objection*".[111]

295. Claimant explains that the Shari'a estoppel rule according to which "*he who attempted to contradict his act shall not benefit from his attempt*" is relied upon by the Iraqi Courts (CL-97).[112]

d. The Tribunal's determination

296. The Arbitral Tribunal notes that invoices 33 to 39 were not paid by CBI. Claimant alleges that pursuant to the contractual provisions, it has an enforceable contractual right for the payment of the invoices since Respondent did not contest them as per the mechanism agreed upon in the Consultancy Agreement.

297. In order to assess Claimant's allegation, the Arbitral Tribunal i) first, will recall the relevant payment provisions of section 5 of the Consultancy Agreement (Exhibit C-1), ii) second, will rule on the validity of the dispatch of invoices in soft copy only and iii) third, will decide whether Respondent validly contested payment of invoices 33 to 39.

298. First, clause 5.2.1 of the Consultancy Agreement (Exhibit C-1) stipulates the timeframe within which CBI must pay CME for the services rendered: "[t]*he Client shall pay the Consultant the amounts due to the Consultant prior to the final date for payment, which shall be 30 days from the date of the Client's receipt of Consultant invoice. The Client shall confirm to the Consultant the date of receipt of each hard copy original invoice on the first working day*".

299. Pursuant to clause 5.2.2 of the Consultancy Agreement (Exhibit C-1), "[t]*he client shall not withhold payment of any fee properly due to the Consultant without giving the Consultant notice of his intention to withhold payment, with reasons, no later*

[108] Article 164 of the Iraqi Civil Code provides that: "*(1) Usage, whether general or specific, is a rule. (2) Usage common among people is proof which must be observed*".
[109] CsA, paras. 119-120.
[110] Article 150.1 of the Iraqi Civil Code provides that: "*The contract must be performed according to its contents and in a manner which conforms to the norms (requirements) of good faith*".
[111] CsA, para. 121.
[112] SoC, para. 122.

than four days prior to the final date for payment. If no such notice of an intention to withhold payment is given then the consultants hall [sic] have an enforceable Contractual right to such payment".

300. In accordance with clause 5.5.1 of the Consultancy Agreement (Exhibit C-1), "[i]*f any items or part of an item in an invoice submitted by the Consultant is contested by the Client, the Client shall give notice of his intention to withhold payment with reasons and shall not delay payment of the remainder of the invoice. Clause 5.2.2 shall apply to all contested amounts which are finally determined to have been payable to the Consultant*".

301. It stems from the abovementioned provisions that the Parties have strictly framed the terms of payment. Respondent is under the obligation to pay within 30 days of receipt of Claimant's invoice. If it intends to withhold payment of an invoice in part or in total, Respondent must send a notice, no later than 4 days before the deadline, stating the reasons for withholding payment and identifying precisely the items concerned for each invoice. Respondent shall not delay payment of the uncontested remainder of the invoice.

302. Second, concerning the validity of the dispatch of invoices in soft copy only, the Arbitral Tribunal notes that clause 5.2.1 of the Consultancy Agreement (Exhibit C-1) requires the original invoices to be dispatched in hard copy.[113]

303. However, the Arbitral Tribunal acknowledges that, in accordance with Article 150.1 of the Iraqi Civil Code[114], a contract must be performed in good faith. Article 164 of the Iraqi Civil Code[115] also imposes a binding effect to an established course of conduct between parties.

304. Therefore, pursuant to the rule of estoppel which is a cardinal rule of Shari'a, enshrined in Iraqi law (Exhibit CL-92: "*he who attempted to contradict his act shall not benefit from his attempt*"), one party must be estopped from contradicting itself to the detriment of the other party.

305. Respondent alleges in its 21 February 2021 letter that it only received the disputed invoices on 30 January 2021 and that "*CBI management cannot process not-original copies of invoices*" (Exhibit C-10). It appears that CBI was implying that it was not in breach of the 30 days payment requirement set out in clause 5.2.1 of the Consultancy Agreement since the only date to be taken into consideration is the date of receipt of the hard copy original.

306. Claimant contends that Respondent "*paid invoices 27-32 and raised no objection about the fact that the invoices were received in soft copy only*",[116] Claimant adds

[113] Clause 5.2.1 of the Consultancy Agreement stipulates that: "*The client shall pay the consultant the amount due to the Consultant prior to the final date of payment, which shall be 30 days from the date of the client's receipt of the consultant invoice. The client shall confirm to the Consultant the date of receipt* ***of each hard copy original invoice*** *on the first working day*". (Emphasis added).
[114] Article 150.1 of the Iraqi Civil Code provides that: "*The contract must be performed according to its contents and in a manner which conforms to the norms (requirements) of good faith*".
[115] Article 164 of the Iraqi Civil Code provides that: "*(1) Usage, whether general or specific, is a rule. (2) Usage common among people is proof which must be observed*".
[116] SoC, para. 38.

that CBI's allegation that it could not process invoices 33 to 39 in soft copy only is therefore "*completely untrue*".[117]

307. In the present case, Respondent proceeded with the payment of invoices 27 to 32, which were sent in soft copy only, and raised no objection in this regard (Exhibits C-12 and C-46). By refusing to pay the disputed invoices on the grounds that they were dispatched in soft copy, Respondent is contradicting itself to Claimant's detriment and should be estopped from doing so.

308. The Arbitral Tribunal therefore considers valid the dispatch of the invoices by soft copy, in accordance with the principles of good faith and estoppel.

309. Third, the Arbitral Tribunal must decide whether Respondent validly contested payment of invoices 33 to 39.

310. Pursuant to clause 5.2.2 and 5.5.1 of the Consultancy Agreement (Exhibit C-1), the contestation of any invoice should be done with reasons "*no later than four days prior to the final date for payment*".[118] Since the Arbitral Tribunal decided that the dispatch of the invoices by soft copy is valid, the 30 days time limit for payment should run from the receipt of the invoice in soft copy.

311. The Arbitral Tribunal highlights that if no such notice of contest is given within the abovementioned time limit, Claimant shall have an enforceable contractual right to the payment of its invoice.[119]

312. As evidenced in Claimant's Exhibits C-3 and C-18, invoices 33 to 39 were submitted on the following dates:[120]

[117] SoC, para. 51
[118] Clause 5.2.2 of the Consultancy Agreement reads as follows: "[t]*he client shall not withhold payment of any fee properly due to the Consultant without giving the Consultant notice of his intention to withhold payment, with reasons, no later than four days prior to the final date for payment. If no such notice of an intention to withhold payment is given then the consultants hall [sic] have an enforceable Contractual right to such payment*".
[119] Clause 5.2.2 of the Consultancy Agreement reads as follows: "[t]*he client shall not withhold payment of any fee properly due to the Consultant without giving the Consultant notice of his intention to withhold payment, with reasons, no later than four days prior to the final date for payment. If no such notice of an intention to withhold payment is given then the consultants hall [sic] have an enforceable Contractual right to such payment*"
[120] SoC, para. 52

	Invoice no.	For the month of	Submitted on	Due date	Overdue days
1	Invoice 33 CME-CBI-CS-INV-033	Sep 20	02 Oct 2020	01 Nov 2020	151 days
2	Invoice 34 CME-CBI-CS-INV-034	Oct 20	05 Nov 2020	05 Dec 2020	117 days
3	Invoice 35 CME-CBI-CS-INV-035	Nov 20	01 Dec 2020	31 Dec 2020	91 days
4	Invoice 36 CME-CBI-CS-INV-036	Dec 20	17 Jan 2021	16 Feb 2021	44 days
5	Invoice 37 CME-CBI-CS-INV-037	Jan-21	31 Jan 2021	02 Mar 2021	30 days
6	Invoice 38 CME-CBI-CS-INV-038	Feb 21	28 Feb 2021	30 Mar 2021	2 days
7	Invoice 39 CME-CBI-CS-INV-039	Mar 21	28 Mar 2021	27 April 2021	-

313. Concerning invoices 33 to 36, Respondent did not file any notice of its intention to withhold payment within 26 days (*i.e.* no later than 4 days prior to the 30 days payment requirement under clause 5.2.2 of the Consultancy Agreement) of receipt each of these invoices. Therefore, the time limit had lapsed by 21 February 2021 when Respondent allegedly contested such invoices (Exhibit C-10). The Arbitral Tribunal considers that on 21 February 2021, Claimant already had an enforceable contractual right to such payment pursuant to clause 5.2.2 of the Consultancy Agreement (Exhibit C-1).

314. Invoice 37 was sent by Claimant on 31 January 2021 (Exhibit C-3). Respondent's letter of 21 February 2021 was therefore within the abovementioned time limit (Exhibit C-10).

315. Yet, pursuant to clause 5.5.1 of the Consultancy Agreement (Exhibit C-1), Respondent should have (i) identified specifically which items of invoice 37 it was contesting, (ii) stated the reasons for such contestations, and (iii) paid the remainder of the invoice which was not contested.[121] In its letter dated 21 February 2021 (Exhibit C-10), Respondent did not separately identify any "*item or part of an item*" in invoice 37 and did not particularise the reasons why it contested any specific "*item or part of an item*" in invoice 37. The Arbitral Tribunal therefore considers that Respondent failed to contest invoice 37 in accordance with the conditions set out in clause 5.5.1 of the Consultancy Agreement (Exhibit C-1) and that Claimant has an enforceable contractual right to such payment pursuant to clause 5.2.2 of the same.

316. Invoices 38 and 39 were dispatched by Claimant on 28 February 2021 and 28 March 2021 respectively (Exhibits C-15 and C-18). There is no evidence on record that shows that Respondent contested, with reasons and within the time limit, part or all of these invoices in accordance with section 5 of the Consultancy Agreement (Exhibit C-1).

317. For the reasons stated above, the Arbitral Tribunal decides that by refusing to pay within 30 days of receipt of the invoices while failing to contest in accordance with

[121] The Arbitral Tribunal recalls that clause 5.5.1 of the Consultancy Agreement stipulates: "[i]*f any items or part of an item in an invoice submitted by the Consultant is contested by the Client, the Client shall give notice of his intention to withhold payment with reasons and shall not delay payment of the remainder of the invoice. Clause 5.2.2 shall apply to all contested amounts which are finally determined to have been payable to the Consultant*".

the time limit and mechanism of section 5 of the Consultancy Agreement (Exhibit C-1), Respondent breached its payment obligation. As a consequence, Claimant has a contractual right to the payment of invoices 33 to 39.

318. In any event, irrespective of the contractual mechanism of section 5 of the Consultancy Agreement and whether Respondent timely contested the invoices or not, Respondent gives contradictory and unclear reasons for its default of payment.

319. Respondent argued in its 21 February 2021 letter that it "*was waiting for the redistribution of CME fee and staff utilization during the Construction stage*" to proceed with the payment of invoice 33 and that the invoices 34 to 37 had only been received by its management on 30 January 2021 which could not process them as they were not original copies (Exhibit C-10). Respondent further contended that the amounts claimed by CME were not proportional to the Project's progress and that CME had breached some of its obligations. CBI concluded that its team "*would proceed with payment process for invoice (33, 34, 35, 36 and 37); However, the amounts requested will be reduced with hold in accordance with abovementioned notes according to the item 5.2 and item 5.5 of the contract*" (Exhibit C-10).

320. Respondent's two pages long letter dated 21 February 2021 is broadly drafted (Exhibit C-10). It does not substantiate or specifically particularise Claimant's alleged failures[122].

321. Further, the Arbitral Tribunal notes that, on 23 February 2021 (only 2 days after the issuance of the letter dated 21 February 2021), Respondent praised Claimant for its work and confirmed that it will honor the payment duties (Exhibit C-28).[123] On 25 February 2021, CBI issued instructions for the partial payment of invoices 33 to 37 in the amount of USD 1,704,549 (Exhibit C-13)[124] but Claimant did not receive any payment (Exhibit C-20).[125] CBI provided no specific reasons why it was withholding the full amount under each invoice.

322. The Arbitral Tribunal considers, based on the evidence on record, that Respondent had no valid reasons for non-payment of the invoices 33 to 39 which are determined to have been due.

323. Consequently, the Arbitral Tribunal orders Respondent to pay Claimant the amount of USD 5,847,530 for the outstanding invoices 33 to 39 (Exhibits C-3 and C-46).

2. Claimant's claim with respect to the remaining value of the Consultancy Agreement

324. The Arbitral Tribunal will first summarize Claimant's position on its claim with respect to the remaining value of the Consultancy Agreement (Section B.2.a.) before

[122] For example, CBI stated that "*some of the consultant obligations has not been performed according to the contract such as the following: some delays happened dealing with Cost claims and extension of time claims, delays happened in responding the RFI's and the submittals of the client and the contractor, the online document control system is not fully operational yet* […]". (Emphasis added).

[123] Exhibit C-28, p.2: "*the CBI commends the efforts you have expended in this project, demonstrating our continued commitment to the execution of the terms of the contract and the release of your payments as soon as possible*".

[124] See also CsOP, slides 28 and 29.

[125] SoC, para. 70.

recalling i) the Tribunal's Questions on this issue (Section B.2.b.), ii) Claimant's subsequent responses (Section B.2.c.) and iii) Claimant's Submission on Quantum dated 17 August 2022 (Section B.2.d.). The Arbitral Tribunal will then rule on Claimant's claim on the matter (Section B.2.e.).

a. Summary of Claimant's position prior to the Tribunal's Questions

325. Claimant explains that in March 2021, CME intimated that it would be forced to demobilize in light of CBI's failure to pay CME's invoices.[126] Claimant adds that on 31 March 2021, it wrote to CBI informing it that it would "*retain its supervision up to 8 April 2021*" (Exhibit C-21) and indicated that it hoped that the meeting scheduled on 7 April 2021 would result in a resolution of CME's outstanding invoices.[127]

326. Claimant insists on the fact that the wrongful arrest of CME's representatives at this meeting ended the prospect of an amiable settlement and Claimant therefore was forced to demobilize its staff as a direct consequence of Respondent's breaches of its payment obligations.[128]

327. Claimant thus contends that pursuant to Article 169(2) of the Iraqi Civil Code[129], it is entitled to claim for damages incurred as a result of the breach.[130] Claimant further explains that according to Article 169(2), direct damages include actual loss and loss of profit[131] to the extent they are a direct result of the breach.[132]

328. According to Claimant, under Iraqi law, damages are recognized to include loss of profit to the extent this is reasonably foreseeable and would definitely be incurred in the future.[133] Claimant thus argues that in circumstances where CBI has unjustifiably breached its payment obligations forcing CME to suspend its performance, "*Iraqi law allows CME to claim the remaining value of the Consultancy Agreement as a loss of profit as this would have been definitely incurred in the future had CBI not breached its obligations and, the implementation of the Consultancy Agreement had continued*".[134] Claimant concludes that, as a consequence of CME's forced demobilization caused by CBI's breaches of the contract, it was wrongly deprived of the outstanding value of USD 5,190,572 under the Consultancy Agreement (Exhibit C-30).[135]

[126] SoC, para. 75.
[127] SoC, para. 76.
[128] SoC, para. 77.
[129] Article 169(2) of the Iraqi Civil Code specifies that: "*the damages* […] *includes [sic] the loss of and the lost profit suffered by the creditor on account of loss of or delay in receiving the right provided that this was a natural result of the failure of or delay by the debtor to perform the obligation*". See also CsOP, slide 56 and Exhibit C-31, para. 4.5.
[130] SoC, para. 78.
[131] Emphasis added by Claimant.
[132] SoC, para. 78.
[133] SoC, paras. 78 and 79.
[134] SoC, para. 79.
[135] SoC, para. 81. See also Exhibit C-46 for an extensive demonstration on how this figure is reached.

b. The Tribunal's Questions in relation to the issue at stake

329. The Tribunal states below its questions (with their original numbering) dated 11 April 2022 in relation to Claimant's claim with respect to the remaining value of the Consultancy Agreement:

3.1 Under Iraqi Law and the contractual provisions, does Respondent's alleged failure to pay Claimant's invoices justify Claimant's demobilization (see, paras 75-77 and para. 81 of Claimant's Statement of Claim) or does it only permit Claimant (subject to various conditions) to suspend the performance of its obligations? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

3.2 Was the Consultancy Agreement terminated? Specifically, is Claimant's demobilization tantamount to a termination of the Consultancy Agreement by Claimant? In the affirmative, is such termination lawful under Iraqi Law (notably under articles 177 and 178 of the Iraqi Civil Code) and the contractual provisions (notably under clause 4.6.3 of the Consultancy Agreement)? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

4.1 Under Iraqi [sic], is it possible to claim the profits that would have been generated by the contract (i.e the loss of profit) in case the contract was not previously terminated? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

4.2 Under Iraqi law, is the recoverable loss of profit equal to the income that would have been generated had the contract been performed normally or is the recoverable loss of profit equal to the income that would have been generated minus the costs/expenses that would have been incurred to generate such income? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

4.3 Assuming that the contract continued to be performed normally, would Claimant have incurred costs/expenses in order to earn the remaining/outstanding value of the Consultancy Agreement (USD 5,190,572 as alleged by Claimant)? In the affirmative, what would be the amount of such costs/expenses? Should such costs be deducted from the alleged USD 5,190,572 remaining/outstanding value of the Consultancy Agreement? The Parties are expected to substantiate their figures.

c. Summary of Claimant's responses

330. As regards question 3.1, Claimant states that pursuant to clause 4.6.3 of the Consultancy Agreement (Exhibit C-1), "[a]*fter giving at least 14 days' notice to the Client, the Consultant may, by a further notice at least 42 days, terminate the agreement, or at his discretion, without prejudice to the right to terminate, may*

suspend or continue suspension of performance of the whole or part of the Services".[136]

331. According to Claimant, by demobilizing on 8 April 2021 after the notices of 7 March 2021 and 31 March 2021 (Exhibits C-44 and C-21), and the arrest of its representatives at the 7 of April 2021 meeting, it exercised its right to suspend its obligation as a direct consequence of Respondent's failure to pay the outstanding invoices in accordance with Article 282 of the Iraqi Civil Code which addresses the issue of withholding performance.[137] Claimant acknowledges that there is no Iraqi law or caselaw addressing the concept of demobilization as "*an independent measure in response to failure to perform an obligation*".[138] Claimant adds that while demobilization is generally accepted to involve the removal of all resources from the project site on completion or termination, there is no provision of Iraqi law which prevents demobilization as a consequence of the contract being suspended.[139]

332. In its answer to question 3.2, Claimant clarifies that the Consultancy Agreement is suspended and not terminated as neither party issued a formal notice of termination in accordance with Article 177 and 178 of Iraqi Civil Code.[140]

333. As regards question 4.1, Claimant asserts that pursuant to Article 169(2) of the Iraqi Civil Code[141], "*it is possible to claim the profits that would have been generated by the contract (i.e., the loss of profit) in case the contract was not previously terminated*".[142]

334. In its answer to question 4.2, Claimant specifies that recoverable loss of profit includes "*all the revenues that the creditor would have earned, the costs that it would have incurred and the costs that it would have avoided*".[143] The purpose of Article 169(2) of the Iraqi Civil Code being to put the creditor in the situation in which it would have been had the debtor performed its obligation under the contract.[144]

335. Finally, as regards question 4.3, "*Claimant confirms that the total remaining value of the Consultancy Agreement is subject to the costs/expenses that the Claimant would have incurred from 1 April 2021 until the completion of the Project on 10 January 2022. Accordingly, the Claimant clarifies and confirms that the costs it expected to incur were USD 832.305,28*".[145]

[136] CsA, para. 124.
[137] CsA, paras. 126 and 127. Article 282 of the Iraqi Civil Code stipulates: "*Every person who has undertaken an obligation to deliver a thing may abstain from performance as long as the creditor has not performed an obligation due from him which arose by reason of and is connected with the debtor's obligations*". See also CsOP, slide 45 and Exhibit C-31, paras 3.1-3.5.
[138] CsA, para. 128.
[139] CsA, para. 128.
[140] CsA, paras. 129-130.
[141] Article 169(2) of the Iraqi Civil Code specifies that: "*the damages* […] *includes [sic] the loss of and the lost profit suffered by the creditor*". See also reference to Exhibit CL-98).
[142] CsA, para. 133.
[143] CsA, para. 134.
[144] CsA, para. 134.
[145] CsA, para. 135.

d. Summary of Claimant's Submission on Quantum dated 17 August 2022

336. In its Submission on Quantum dated 17 August 2022, Claimant clarifies its claim with regard to the remaining value of the Consultancy Agreement in terms of quantum and provides further explanations.

337. As its main claim, Claimant contends that pursuant to Article 150.1 of the Iraqi Civil Code[146], Respondent should have performed the Consultancy Agreement in good faith and in accordance with its terms and that Respondent's breach of contract forced Claimant to demobilize and thus it was wrongly deprived of the outstanding contract value.[147] Claimant explains that the outstanding contract value is calculated as the difference between the total contract value for the Construction Stage (USD 32,936,576) and the total amount invoiced to Respondent (USD 27,746,004).[148] Accordingly, Claimant seeks to recover the amount of USD 5,190,572 under Article 150 of the Iraqi Civil Code.[149]

338. In the alternative to its main claim of USD 5,190,572, Claimant is seeking damages under Articles 168[150] and 169[151] of the Iraqi Civil Code, according to which direct damages include actual losses and loss of profit. Claimant clarifies that the total amount of its claim for damages, including actual losses and loss of profit, under its alternative claim pursuant to Articles 168-169 of the Iraqi Civil Code is USD 4,342,924,15.[152] In this regard, Claimant explains that "*CME's cost and profit associated with the performance of the Consultancy Agreement were proportionally distributed over 48 months as well as its payment from CBI. CME has included some of the incurred cost and profit for the first 39 months in the invoices issued to CBI during Period 1* [before CME's demobilization in April 2021] *including the invoices 33-39 which remain outstanding to date. In the meantime, a part of these costs*

[146] Article 150.1 of the Iraqi Civil Code provides that: "*The contract must be performed according to its contents and in a manner which conforms to the norms (requirements) of good faith*".
[147] SoQ, para. 1.4.
[148] SoQ, para. 2.2. See also Exhibit C-46, it being noted that the total amount invoiced to Respondent (USD 27,746,004) includes the paid invoices amounting to USD 21,898,474 as well as the outstanding invoices 33 to 39 amounting to USD 5,847,530 the amount of which was granted by the Arbitral Tribunal under section VIII.B.1.d. above.
[149] SoQ, para. 2.2.
[150] Article 168 of the Iraqi Civil Code provides that: "*If it is impossible for the oblige of a contract to perform his obligations specifically he will be adjudged to pay damages for non-performance of his obligation unless he establishes that the impossibility of the performance was due to a cause beyond his control; the adjudication will be the same if the oblige has delayed (was late in) the performance of his obligation*". See also CsOP, slide 55
[151] Article 169 (1) of the Iraqi Civil Code provides that: "*if the compensation (damages) has not been estimated in the contract or in a provision of the law it will be assessed by the court*". Article 169(2) of the Iraqi Civil Code specifies that: "*the damages* […] *includes [sic] the loss of and the lost profit suffered by the creditor on account of loss of or delay in receiving the right provided that this was a natural result of the failure of or delay by the debtor to perform the obligation*". See also CsOP, slide 56.
[152] SoQ, para. 1.5. The Tribunal notes that whereas Claimants expressly requests "*damages under Articles 168-169 of the Iraqi Civil Code, according to which direct damages include actual losses and loss of profit*" (SoQ, para.1.5), Claimants thereafter, throughout its SoQ, refers to "*actual losses*" as "*damages*". Claimant further clarified at the Hearing that "*in Article 169 of the Civil Code, we have under a generic heading of 'damages' actual loss and lost [sic] of profit. We thought that we should present to the Tribunal our claim under two headings, actual loss and loss of profit. Both fall under damages. To answer your question, sir, yes we are claiming the aggregate amount of 4 (X) million under the global title of damages pursuant to Article 169(2)*" (Hearing Transcript, p.123, lines 8-15.

effectively incurred by CME remained outstanding as of April 2021, when CME was forced to demobilize [Period 2 after CME's demobilization]. *Accordingly, CME seeks to recover those cost as well as a loss of profit related to months 40-48*".[153]

339. To support its alternative claim, Claimant refers to an Excel spreadsheet (Exhibit C-46) with hyperlinks to supporting documents providing an overview of the costs incurred and "*the expected profits and damages on the Project*".[154] For computation purposes, Claimant divided the contract duration into two periods: Period 1 relates to the period from 10 January 2018 (start of the Construction Stage) to 31 March 2021 (until the breakdown in the relationship between CME and CBI) while Period 2 covers the period from 1 April 2021 to 10 January 2022 (the completion date).[155]

340. CME is therefore claiming, as part of its actual losses (referred to by Claimant as "*damages*"), the proportion of its total incurred costs applicable to Period 2 on a pro-rata basis. In that respect, "*CME has apportioned the costs over Period 1 and Period 2 by reference to the expected revenue for the Project which is an 84.24%*[156] *revenue for Period 1 and a 15.76%*[157] *revenue for Period 2*".[158]

341. Specifically, Claimant seeks to obtain the proportional amount of the Contract Expenses applicable for Period 2, which represents USD 59,693.26.[159] Claimant also considers being entitled to recover the sums paid to the consultants on a pro-rata basis under Period 2 as they were engaged and paid by Claimant at the outset of the Project but still benefitted to Respondent after the suspension of the Consultancy Agreement.[160] Claimant contemplates that the Consultant Expenses for Period 2 amount to USD 1,948,765.08.[161] Claimant also claims for the salaries incurred during Period 2 in the amount of USD 299,260.14.[162] Finally, Claimant seeks to obtain the proportional amount of the other Project related costs applicable for Period 2, which represents USD 52,728.04[163].

342. Thus, Claimant seeks to obtain a sum of USD 2,360,446.52 representing the total actual losses (referred to by Claimant as "*damages*") for Period 2 as follows:[164]

Period 2 (1 April 2021 to 10 January 2022)

Item	*USD*
Contract expenses	*59,693.26*
Consultant expenses	*1,948,765.08*
Salaries Period 2 incurred	*299,260.14*
Other	*52,728.04*
Total damages	***2,360,446.52***

153 SoQ, para. 3.2.
154 SoQ, para. 3.3.
155 SoQ, para. 3.4.
156 84,24% equates to invoices for 39 months of the 48-month duration of the Consultancy Agreement.
157 15,76% equates to invoices for months 40 to 48 of the Consultancy Agreement.
158 SoQ, para. 3.5.
159 SoQ, paras. 3.10 and 3.5.
160 SoQ, paras. 3.12.
161 SoQ, para. 3.5.
162 SoQ, paras. 3.13 and 3.5.
163 SoQ, paras. 3.14 and 3.5.
164 SoQ, para. 3.5.

343. As for the loss of profit[165], Claimant calculates the Project profit margin "*by deducting the Project Construction Stage cost value from the Total Project Construction Stage value and then diving [sic] the resulting amount by the Total Project Construction Stage value again*".[166] The resulting number is multiplied by 100 to obtain a percentage figure.[167]

344. The formula is provided below:

Profit Margin % = (Total Project Construction Phase value – Project Construction Stage cost value) / Total Project Construction Value X 100.

Profit Margin % = (32,936,576.00 – 20,356,840.01) / 32,936,576.00 X 100.

345. According to Claimant, the Project profit margin is therefore 38.19%.[168] Claimant then applied such Project profit margin to the anticipated revenue for Period 2 (*i.e.* USD 5,190,572) to obtain its loss of profit, which amounts, according to Claimant, to USD 1,982,477.64.[169]

346. Claimant concludes that CME's damages claim for actual losses (referred to by Claimant as "*damages*") and loss of profit under Articles 168-169 of the Iraqi Civil Code is as follows:[170]

Loss of Profit and damages for Period 2

Total incurred damages for Period 2 (costs)	*USD 2,360,446.52*
Loss of Profit (38,19%)	*USD 1,982,477.64*
Total Claim	*USD 4,342,924.15*

e. The Tribunal's determination

347. The Arbitral Tribunal shall i) first, decide whether Claimant was deprived of the remaining value of the Consultancy Agreement due to CBI's breaches and if so,

165 SoQ, para. 4.3.
166 SoQ, para. 4.1.
167 SoQ, para. 4.1.
168 SoQ, para. 4.3.
169 SoQ, para. 4.4.
170 SoQ, para. 4.4.

ii) second, assess the quantum of Claimant's claim in relation to the remaining value of the Consultancy Agreement.

348. First, the Arbitral Tribunal recalls that in accordance with Article 282 of the Iraqi Civil Code[171] a creditor of an unperformed obligation can in turn withhold performance of its obligation.

349. On 7 March 2021, Claimant gave notice to Respondent that "*as a direct result of non-payment for a prolonged period of time, CME will be forced to demobilize their site-based team as of 31 March 2021* (Exhibit C-44).

350. Claimant sent a letter to Respondent on 31 March 2021 whereby it accepted to wait until the meeting scheduled with Respondent in Iraq on 7 April 2021 before demobilization. In such letter, Claimant explained that "*in an attempt to resolve the current outstanding issues CME will retain site supervision up to 8 April, 2021*" (Exhibit C-21). Clearly, Claimant was hoping that the meeting of 7 April 2021 would result in a resolution of CME's outstanding invoices.

351. However, the problem with CME's outstanding invoices was not resolved at such meeting. To the contrary, Claimant's Project Manager and General Manager were arrested at that meeting and sentenced to five years of imprisonment (Exhibits C-19, C-21 and C-47).[172] This course of events confirmed to Claimant that CBI will remain in breach of its payment obligation (see section B.1.d. above).

352. Therefore, Claimant was entitled to withhold the performance of its services under the Consultancy Agreement pursuant to Article 282 of the Iraqi Civil Code, the performance of the services being the "*reason of*" and "*connected*" to CBI's payment obligation.

353. Claimant withheld the performance of the services by demobilizing on 8 April 2022, as previously declared to Respondent in its above-mentioned letters dated 7 and 31 March 2021 (Exhibits C-44 and C-21), it being noted that there is no provision of Iraqi law which prevents demobilization as a consequence of the contract being suspended.[173]

354. Based on the forgoing, the Arbitral Tribunal is of the opinion that CME was forced to suspend its obligations/demobilize due to Respondent's continued breach of its payment obligations.

355. Currently, the invoices 33 to 39 are still unpaid more than two years after CBI's default and the original time of completion of Claimant's services under the Consultancy Agreement (*i.e.* 10 January 2022) lapsed. It follows that the Consultancy Agreement is irreparably compromised and Claimant was definitely deprived of the remaining value of the Consultancy Agreement due to Respondent's breach of its payment obligations.

[171] Article 282 of the Iraqi Civil Code stipulates: "*Every person who has undertaken an obligation to deliver a thing may abstain from performance as long as the creditor has not performed an obligation due from him which arose by reason of and is connected with the debtor's obligations*". See also CsOP, slide 45 and Exhibit C-31, paras 3.1-3.5.
[172] See also CsOP, slide 40.
[173] CsA, para. 128.

356. Second, with regard to the quantum of Claimant's claim in relation to the remaining value of the Consultancy Agreement, the Arbitral Tribunal recalls that, as its main claim based on Article 150 of the Iraqi Civil Code, CME contends that it was wrongly deprived of USD 5,190,572 that it calculated by subtracting the total amount invoiced to Respondent (USD 27,746,004) from the total contract value for the Construction Stage (USD 32,936,576).[174]

357. The Arbitral Tribunal rejects Claimant's main claim amounting to USD 5,190,572 which represents the expected revenues from the Consultancy Agreement had the latter continued to be performed normally until 10 January 2022.

358. Indeed, as evidenced from the extract of the treatise of Professor AlHakim (Exhibit CL-98), the purpose of the damages to be granted under Iraqi law is to put the creditor in the situation to which it would have been entitled had the debtor performed its obligations under the contract.[175]

359. Claimant recognizes in its CsA that "*the total remaining value of the Consultancy Agreement is subject to the costs/expenses that the Claimant would have incurred from 1 April 2021 until the completion of the Project on 10 January 2022*".[176]

360. It follows that if the Arbitral Tribunal were to grant Claimant the total remaining value of the Consultancy Agreement without deducting the costs that would have been incurred, Claimant would be put in a situation better than the one to which it would have been entitled had CBI performed its obligations. Article 150 of the Iraqi Civil Code (establishing the good faith principle in performing contracts) is off topic and does not play a role in assessing one's contractual damages.

361. In the alternative, Claimant is seeking "*damages under Articles 168[177] and 169[178] of the Iraqi Civil Code according to which direct damages include actual losses and loss of profit*" in the amount of USD 4,342,924.15.[179]

362. The Arbitral Tribunal recognizes that Article 169 of the Iraqi Civil Code is the relevant provision to assess one's contractual damages. According to Article 169(2), the damages shall include the actual losses and the loss of profit. And according to Article 169(1), "*If the compensation (damages) has not been estimated in the contract or in a provision of the law it will be assessed by the court*".[180] Therefore,

[174] SoQ, para. 2.2. See also Exhibit C-46, it being noted that the total amount invoiced to Respondent (USD 27,746,004) includes the paid invoices amounting to USD 21,898,474 (invoices 1 to 32) as well as the outstanding invoices 33 to 39 amounting to USD 5,847,530 the amount of which was granted by the Arbitral Tribunal under section VIII.B.1.d. above.
[175] CsA, para. 134.
[176] CsA, para. 135.
[177] Article 168 of the Iraqi Civil Code provides that: "*If it is impossible for the oblige of a contract to perform his obligations specifically he will be adjudged to pay damages for non-performance of his obligation unless he establishes that the impossibility of the performance was due to a cause beyond his control; the adjudication will be the same if the oblige has delayed (was late in) the performance of his obligation*". See also CsOP, slide 55
[178] Article 169 (1) of the Iraqi Civil Code provides that: "*if the compensation (damages) has not been estimated in the contract or in a provision of the law it will be assessed by the court*". Article 169(2) of the Iraqi Civil Code specifies that: "*the damages* […] *includes [sic] the loss of and the lost profit suffered by the creditor on account of loss of or delay in receiving the right provided that this was a natural result of the failure of or delay by the debtor to perform the obligation*". See also CsOP, slide 56 and Exhibit C-31, paras. 4.5-4.9.
[179] SoQ, para. 1.5.
[180] See CsOp, slide 56 and Exhibit C-31, para. 4.5.

where the damages are not quantified in the contract, the Arbitral Tribunal has the power and discretion to decide on the damages.

363. To calculate its alternative claim for damages, Claimant has distinguished between the actual losses which amount to USD 2,360,446.52 and the loss of profit which amounts to 1,982,477.64.[181] Thus, Claimant is claiming the total amount of USD 4,342,924.15 as damages.[182]

364. **With regard to actual losses**, Claimant has distinguished between two categories of costs: salaries and other costs (Exhibit C-46).

365. For the salaries, Claimant has thus determined the amount of salaries that should have been incurred in Period 2 (after CME's demobilization) in proportion to the salaries incurred during Period 1 (before CME's demobilization). The Arbitral Tribunal notes that Claimant has added the salary costs incurred during Period 2 (USD 299,260.14)[183] to the salaries saved during Period 2 (USD 847,647.85) for a total of USD 1,146,907.98.[184] Since the incurred salaries during Period 2 (USD 299,260.14) were not recovered due to CME's departure, they were treated as actual losses by Claimant.

366. For the other costs (Contract Expenses, Consultants Expenses and Other), Claimant contends that these costs were incurred in Period 1 but cover the whole Project and should have been recovered during Period 2.[185] Claimant thus calculates the percentage share of revenue for Periods 1 and 2 and then breaks down the costs between Period 1 and Period 2 by applying such percentage to determine what costs would have been recovered in Period 2 had the Consultancy Agreement continued to be performed normally.[186] It follows that Claimant treated the non-recovered other costs as actual losses (USD 59,693.26 for Contract Expenses, USD 1,948,765.08 for Consultant Expenses and 52,728.04 for Other).[187]

367. Thus, the total actual losses (incurred salaries during Period 2 + other non-recovered costs incurred during Period 1) amount, according to Claimant, to USD 2,360,446.52.[188]

368. **For the loss of profit**, Claimant calculates the Project profit margin "*by deducting the Project Construction Stage cost value* [USD 20,356,840.01] *from the Total Project Construction Stage value* [USD 32,936,576.00] *and then diving [sic] the resulting amount by the Total Project Construction Stage value again* [USD 32,936,576.00]".[189] The resulting number is multiplied by 100 to obtain a percentage

[181] SoQ, para. 4.4.
[182] SoQ, para. 4.4.
[183] Claimant explains that even after its demobilization, it continued to pay some of its salaries (SoQ, para. 3.13 and Exhibit C-46).
[184] SoQ, para. 3.13 and Exhibit C-46.
[185] SoQ, para. 3.1 and Exhibit C-46.
[186] SoQ, para. 3.5 and Exhibit C-46.
[187] SoQ, para. 3.5 and Exhibit C-46.
[188] SoQ, para. 3.5 and Exhibit C-46.
[189] SoQ, para. 4.1.

figure of 38,19%[190] as a profit margin for the whole Project.[191] Then, the profit margin of 38,19% is applied to the remaining contract value until completion (*i.e.* USD 5,190,572) and thus Claimant reaches the figure of USD 1,982,477.64 as lost profit.[192]

369. As a consequence, Claimant considers that it suffered actual losses of USD 2,360,446.52 and loss of profit of USD 1,982,477.64, it being noted that both sub-categories (actual losses and loss of profit) fall within the category of damages as per Article 169 of the Iraqi Civil Code. Claimant therefore seeks the payment of USD 4,342,924.15 as compensation for damages (within the meaning of Article 169 of the Iraqi Civil Code) "*with respect to the remaining value of the Consultancy Agreement*".[193]

370. The Arbitral Tribunal has carefully examined Claimant's Submission on Quantum together with the Excel spreadsheet (Exhibit C-46) provided by Claimant and the supporting documents of the Excel spreadsheet. The Arbitral Tribunal considers that the figures provided by Claimant are coherent and supported by evidence. Indeed, every cost on the Excel spreadsheet has a hyperlink to the document which supports the expense.

371. However, the Arbitral Tribunal considers that the method used by Claimant to reach the figure of USD 4,342,924.15, although valid, is i) complex because it distinguishes between actual losses on the one hand and loss of profit on the other hand, although both items fall under the category of damages, the actual losses and the loss of profit being both a sub-category of damages as per Article 169 of the Iraqi Civil Code, and ii) based on the assumption that the costs incurred during Period 1 were not recovered by the total amount of the invoices issued during such period and amounting to USD 27,746,004[194] (Exhibit C-46),

372. Yet, the Arbitral Tribunal is of the opinion that a simpler alternative method of calculation could have been adopted to quantify Claimant's alternative's claim for damages (or compensation) resulting from its deprivation of the remaining value of the Consultancy Agreement. It would have consisted in subtracting the salaries saved during Period 2 (*i.e.* USD 847,647.85)[195] from the remaining value of the Consultancy Agreement (*i.e.* USD 5,190,572). This amounts to USD 4,342,924.15 which is the exact amount claimed and reached by Claimant in applying its above-described method.

373. The alternative method is consistent with the Tribunal's questions 4.2 and 4.3 (see section VIII.B.2.b. above) and with Claimant's response that "*Claimant confirms that the total remaining value of the Consultancy Agreement is subject to the*

[190] To be completely precise, the profit margin is exactly 38,19381829489501%. However, to simplify, the Arbitral Tribunal will adopt, as Claimant did, only two numbers after the coma.
[191] SoQ, para. 4.1.
[192] SoQ, para. 4.4 and Exhibit C-46.
[193] SoQ, paras. 1.2 and 1.3.
[194] Total amount of invoices 1 to 39 which therefore includes the total amount of invoices 33 to 39 granted by the Tribunal at section VIII.B.1.d. above.
[195] See para. 365 above, SoQ, para. 3.13 and Exhibit C-46.

costs/expenses that the Claimant would have incurred from 1 April 2021 until the completion of the Project on 10 January 2022."[196]

374. At the Hearing, upon the Arbitral Tribunal's question as to whether there are any other saved costs than salaries during Period 2[197], Claimant explained that, during Period 2, it would have only incurred salaries as opposed to other costs, since the other costs were paid in advance during Period 1 to cover the totality of the Project including Period 2, whereas the salaries accrue continuously as work is being provided by the salary earner.[198]

375. The Arbitral Tribunal finds this explanation plausible since it is in accordance with clause 2.2 of Annex 3 of the Consultancy Agreement (Exhibit C-1), according to which "*during the first week of each month, the Consultant* [Claimant] *will invoice the Client* [Respondent], *for the staff deployments expended during the previous month*".

376. At the Hearing, upon the Arbitral Tribunal's question as to why Claimant did not apply the alternative method, Claimant explained that: "*after conducting our review we came to the same conclusion as the Tribunal. We do arrive to the same figure, you are entirely right. I believe that we must have sought the maximum possible transparency and we wanted to offer a transparent breakdown of all the figures that we are putting the Tribunal. Maybe that was an excess of transparency and I am tempted by saying that the Tribunal can apply any method it wants because at the end of the day we are reaching the same figure, the same result*".[199]

377. Further, Claimant confirmed at the Hearing that it is claiming the amount of USD 4,342,924.15 as damages irrespective of the category claimed, whether it is an actual loss or a loss of profit[200]. Claimant explained that: "*in Article 169 of the Civil Code, we have under a generic heading of 'damages' actual loss and lost [sic] of profit. We thought that we should present to the Tribunal our claim under two headings, actual loss and loss of profit. Both fail under damages. To answer your question, sir, yes we are claiming the aggregate amount of 4 (X) million under the global title of damages pursuant to Article 169(2)*".[201]

378. The Arbitral Tribunal is thus reassured by the fact that, regardless of the method used (Claimant's original method or the alternative method), Claimant's entitlement to damages (within the meaning of Article 169 of the Iraqi Civil Code) resulting from its deprivation of the remaining value of the Consultancy Agreement amounts to USD 4,342,924.15.

[196] CsA, para. 135. Although at this paragraph, Claimant stated (without any evidence provided) that the costs it expected to incur during this period were USD 832,305.28, in its SoQ and more precisely in its Exhibit C-46, Claimant calculated the saving costs as being equal to USD 847,647.85 (Salaries period 2 – Saved). Claimant confirmed during the Hearing that the right figure to be taken into consideration is 847,647.85 (Hearing Transcript, p. 118, lines 2-8).
[197] Hearing Transcript, p.120, lines 8-25 and p. 121, lines 1-6.
[198] Hearing Transcript, p. 10, lines 2-23.
[199] Hearing Transcript, p. 122, lines 1-11.
[200] Hearing Transcript, p. 122, lines-12-21.
[201] Hearing Transcript, p. 123, lines 8-15.

379. For the abovementioned reasons, the Arbitral Tribunal orders Respondent to pay Claimant the amount of USD 4,342,924.15.

3. Claimant's claim for interest on the outstanding amounts due under the Consultancy Agreement

380. The Arbitral Tribunal will first recall Claimant's position (Section B.3.a.) before presenting its determination on Claimant's claim for interest (Section B.3.b.).

a. *Summary of Claimant's position*

381. In its SoC, Claimant contends that it is entitled to interest on the "*outstanding amounts due under the Consultancy Agreement*"[202], it being noted that Claimant has requested "*Pre-award and post award interest*" as per Claimant's prayer for relief (see paras. 172-175 above).

382. According to Claimant, Article 171 of the Iraqi Civil Code provides that interest of 5% in commercial matters accrues on the outstanding payment as of the date of the filing of a claim until full payment.[203]

383. Article 171, indeed, states:

> "*Where the object of the obligation is a sum of money which was known at the time the obligation arose and the debtor delayed the payment thereof he shall be obligated to pay to the creditor by way of damages for the delay a legal interest at the rate of four per cent in regard to civil matters and five per cent in respect of commercial matters; this interest will commence from the date of filing a judicial claim in respect thereof if the agreement or the commercial usage has not fixed a different rate for the running of the interest save in all cases where the law has provided otherwise*".[204]

384. Claimant contends that this arbitration concerns a commercial dispute and the ICC deemed that this arbitration commenced on 2 June 2021.[205]

385. Claimant concludes that interest is payable at a rate of 5% from 2 June 2021 on the total amount that the Tribunal may determine is due to it.[206]

b. *The Tribunal's determination*

386. The Arbitral Tribunal recognizes that the present dispute is a commercial one since it is related to Respondent's monetary obligations under the Consultancy Agreement, which subject-matter is the provision of consultancy services in the context of the construction of Respondent's new headquarter.

387. The Arbitral Tribunal recalls that Claimant initiated the present arbitration by submitting the RfA on 2 June 2021 (see Section IV.A above).

[202] SoC, title of section 3, p. 18.
[203] SoC, para. 82.
[204] SoC, para. 82. See also CsOP, slide 62.
[205] SoC, para. 83.
[206] SoC, para. 83.

388. Pursuant to Article 171 of the Iraqi Civil Code, the starting point of interest is the date of the filing of a judicial claim, in this case the date of the filing of the RfA on 2 June 2021, as also requested by Claimant. As per the same article, interest corresponds to damages for late payment. As a result, the Tribunal agrees with Claimant that interest shall accrue until full payment. The Arbitral Tribunal therefore decides that, in accordance with Article 171 of the Iraqi Civil Code, simple interest shall run on the amounts due by Respondent for the outstanding invoices 33 to 39 (*i.e.* USD 5,847,530) and for the damages due resulting from Claimant's deprivation of the remaining value of the Consultancy Agreement (*i.e.* USD 4,342,924.15) from 2 June 2021, at the rate of 5% per annum, up to and until payment in full of said amounts by Respondent.

4. Claimant's claim in relation to the performance bond

389. The Arbitral Tribunal will first summarize Claimant's position on its claim in relation to the performance bond (Section B.4.a.) before recalling the Tribunal's Questions on this issue (Section B.4.b.) and Claimant's subsequent responses (Section B.4.c.). The Arbitral Tribunal will then rule on Claimant's i) claim for reimbursement of its legal costs associated with dealing with the attachment application before the Dubai Courts and ii) claim for the return of the performance bond (Section B.4.d.).

a. *Summary of Claimant's position prior to the Tribunal's Questions*

390. According to Claimant, "[i]*n accordance with terms of the Consultancy Agreement, CME provided CBI with a performance bond ("**PB**")*[207]*. The PB was issued from Emirates NBD Bank* […] *for the benefit of CBI*".[208]

391. Claimant further explains that pursuant to clauses 5.1.5 and 5.8.1 of the Consultancy Agreement, "*the following performance security* was put in place: *1) The Trade Bank of Iraq issued a letter of guarantee for USD 1,666,000; and 2) ENBD issued a counter guarantee of USD 1,666,000*".[209]

392. Claimant contends that on 20 September 2021, "*it was notified via ENBD that CBI had made a call on the PB*" and demanded its encashment on the basis that CME had failed to fulfill its obligations under the Consultancy Agreement.[210]

393. Upon Claimant's successful application for an "*attachment order on the PB*", the Dubai Court prohibited CBI from taking any action to encash the "*PB*".[211] (Exhibit C-22). Claimant explains that the attachment will remain in place until such time as CBI successfully challenges the order.[212]

394. As a consequence, Claimant "*seeks an order from the Tribunal directing CBI to return the PB to CME as well as payment of the legal costs associated with dealing with the attachment application in the Dubai Court*", which amount to USD 14,506.[213]

395. Claimant adds that, in this respect, clause 6.4.1 of the Consultancy Agreement provides: "*So far as the law governing the Agreement permits, **the Client shall indemnify the Consultant against the adverse effects of all claims** including claims by third parties **which arise out of or in connection with the Agreement** including any made after the expiry of the period of liability refereed [sic] to in Clause 6.2 except insofar as they are covered by the insurances arranged under the terms of Clause 7.1*".[214] (emphasis added by Claimant)

396. Claimant also relies on clause 5.1.5 of the Consultancy Agreement which provides: "*The Consultant shall pay 5% Performance Bond of the total contract in the form of an endorsed check or a letter of guarantee issued by recognized bank via Central Bank of Iraq. **The Performance Bond amount will be released to the Consultant after completion of all his services according to the Agreement***".[215] (emphasis added by Claimant)

397. Claimant concludes that "*CME incurred legal cost in the amount of US$ 14,506 with respect to dealing with the attachment application in Dubai Court. CBI is liable to pay this sum*".[216]

b. *The Tribunal's Questions in relation to the issue at stake*

398. The Tribunal states below its questions (with their original numbering) dated 11 April 2022 in relation to the performance bond:

> *4.4 To what extent could Claimant seek legal costs incurred before local courts (the alleged USD 14,406 incurred by Claimant when dealing with the attachment application in the Dubai Courts) in the context of the present arbitration? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.*
>
> *5.1 Who is the beneficiary of the letter of guarantee issued by the Trade Bank of Iraq?*
>
> *5.2 Who is the beneficiary of the counter guarantee issued by Emirates NBD Bank in Dubai? Is it Respondent or the Trade Bank of Iraq?*
>
> *5.3 In addressing questions 5.1 and 5.2 above, Claimant is invited to produce a copy of the letter of guarantee issued by the Trade Bank of Iraq and a copy of the counter guarantee issued by the Emirates NBD Bank in Dubai. Claimant is also invited to clarify/specify whether in its request to direct Respondent to return the "PB" to Claimant, the word "PB" precisely means the letter of guarantee issued by the Trade Bank of Iraq or the counter guarantee issued by the Emirates NBD Bank in Dubai? Finally, Claimant is invited to reproduce the document (email from*

[207] The use of the definition "PB" by Claimant in its SoC created a confusion which prompted the Tribunal's question 5.3 (see section 4.b. below). Claimant then clarified its position in the CsA (see section 4.c. below).
[208] SoC, para. 86. Claimant's statement in its SoC that CBI is the beneficiary of the Emirates NBD Bank guarantee created a confusion which prompted the Tribunal's questions 5.1 and 5.2. Claimant then clarified its position in the CsA (see section 4.c. below).
[209] SoC, para. 89.
[210] SoC, para. 91.
[211] SoC, para. 92.
[212] SoC, para. 92.
[213] SoC, para. 93. Claimant clarified at para. 165 of the CsA that the reference in para. 93 in the SoC to the Claimant seeking an order directing CBI to return the "PB" to CME is meant to refer to the return of the original guarantee issued by TBI in favor of CBI (see also section 4.c. below).
[214] SoC, para. 93.
[215] SoC, para. 94.
[216] SoC, para. 95.

Emirates NBD Bank in Dubai to Claimant) attached to its email dated 21 September 2021 (submitted in the context of Claimant's Emergency Application for Interim Relief) in a way that allows the Tribunal to see the document's date.

5.4 If the word "PB" means the counter guarantee issued by the Emirates NBD Bank in Dubai and assuming that the beneficiary of such counter guarantee is the Trade Bank of Iraq (not Respondent), would it be possible for the Tribunal to order Respondent to return to Claimant the counter guarantee issued by the Emirates NBD Bank in Dubai? The Parties are expected to provide a full legal reasoning.

5.5 What is the applicable law governing Claimant's request to direct Respondent to return the "PB" to Claimant. Is it the law applicable to the letter of guarantee issued by the Trade Bank of Iraq? Is it the law applicable to the counter guarantee issued by the Emirates NBD Bank in Dubai? Is it the law applicable to the underlying contract i.e the Consultancy Agreement? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

5.6 Does the applicable law allow the Tribunal to direct the beneficiary of a first demand guarantee to return it? In the affirmative, under which conditions and to whom? The Parties are expected to provide a full legal reasoning and legal authorities in support of their respective positions.

5.7 To what extent clauses 6.4.1 and 5.1.5 of the Consultancy Agreement quoted by Claimant in its Statement of Claim at paras. 93 and 94 are relevant or irrelevant to Claimant's claim in relation to the performance bond? The Parties are expected to provide a full legal reasoning in support of their respective positions.

5.8 The Tribunal's understanding is that the counter guarantee issued by the Emirates NBD Bank in Dubai was the subject matter of an attachment order issued by the Dubai Courts (C-22). According to Claimant, "the attachment will remain in place until such time as CBI [Respondent] successfully challenges the order" (Claimant's Statement of Claim, para. 92). What is the basis of such assertion? In case the challenge of the attachment order was not successful, would the Dubai Courts order the Emirates NBD Bank to release the counter guarantee?

5.9 What is the current status of the letter of guarantee issued by the Trade Bank of Iraq?

c. *Summary of Claimant's responses*

399. As regards question 4.4, Claimant considers that "[i]*f CBI's call on the performance bond is found to be invalid as a consequence of its breach of contract, then the legal costs incurred in securing the attachment from Dubai courts would be considered to flow directly as a result of such breach under Article 169 (2)*".[217]

400. Moreover, before answering the Tribunal's questions 5.1 to 5.9, Claimant clarifies the structure of the performance bond, which is the following: Emirates NBD Bank in Dubai issued a counter-guarantee (n° ENBDOG16006700) in favor of the Trade Bank of Iraq (the "**ENBD Counter-Guarantee**") and then the Trade Bank of Iraq

[217] CsA, para. 139.

issued a guarantee (*i.e.* the performance bond under n° IGT1629612DRE) in favor of CBI (the "**TBI Guarantee**") (Exhibits C-32 and C-33).[218] Under the TBI Guarantee, TBI undertakes to pay CBI unconditionally on first demand "*regardless of any contestation between the parties concerned*" up to USD 1,666,000 (Exhibit C-33).

401. According to Claimant, the validity period of the ENBD Counter-Guarantee and of the TBI Guarantee were extended several times until 20 September 2021 when "*TBI informed ENDB that it had received a complying demand from CBI under the guarantee for its full amount and, in turn, demanded payment under the counter-guarantee* […] *ENBD informed CME of the same on 21 September 2021*" (Exhibits C-37 and C-43).[219]

402. Claimant confirms in its answer to questions 5.1 and 5.2 that the beneficiary of the TBI Guarantee is CBI and that the beneficiary of the ENBD Counter-Guarantee is TBI (Exhibits C-32 and C-33).[220]

403. In its answer to question 5.3, Claimant clarifies that the reference in para. 93 of the SoC to the Claimant seeking an order directing CBI to return the "PB" to CME is meant to refer to the return of the original TBI Guarantee issued by TBI in favor of CBI.[221]

404. As regards question 5.4, Claimant submits that the Arbitral Tribunal is empowered "*to order the Respondent to desist from the benefit of the letter of guarantee issued in its favour by TBI*".[222] According to Claimant, "*it is generally considered that the return by the beneficiary of the letter of guarantee evidences a relinquishment of its entitlement to claim payment thereunder*".[223]

405. In its answer to question 5.5, Claimant contends that Respondent should be ordered to return the TBI Guarantee pursuant to the principle of good faith as enshrined in Article 150.1 of the Iraqi Civil Code.[224] Claimant adds that "*accordingly, the applicable law is Iraqi law as the governing law of the Consultancy Agreement*".

406. Yet, in its answer to question 5.6, Claimant acknowledges that "*it might be difficult to order the Respondent to return to the Claimant the letter of guarantee issued by TBI. What really matters is that the Respondent is dispossessed of the letter of guarantee and is ordered to confirm that it relinquishes any entitlement thereunder*",[225]

407. In answering question 5.7, Claimant explains that the relevance of clause 6.4.1 of the Consultancy Agreement "*stands of its own right as an indemnity issued by CBI to CME covering the adverse effects of all claims including claims by third party which arise out or in connection with the Agreement*".[226] As to the relevance of clause 5.5.1

[218] CsA, paras. 144-147. See also CsOP, slides 14 and 15.
[219] CsA, para. 156.
[220] CsA, paras. 162-163. See also CsOP, slides 14 and 15.
[221] CsA, para. 165.
[222] CsA, para. 167.
[223] CsA, para. 168.
[224] CsA, para. 172.
[225] CsA, para. 175.
[226] CsA, para. 180.

of the Consultancy Agreement, Claimant explains that given the adverse development of the events on the ground, including as a result of the non-payment by CBI of amounts due to CME and the abusive imprisonment of CME's executives upon the investigation of CBI, CME is no longer able to complete all its services according to the Consultancy Agreement.[227] Claimant concludes that the return of the performance bond is therefore essential to ensure the release of liability of CME.[228]

408. As regards question 5.8, Claimant explains that pursuant to Article 18(4) of Federal Law No. 6/2018, only the president of the Court of Dubai can revoke the attachment it issued.[229] Claimant adds that an attachment order issued by the president of the Court of Dubai can only be revoked in the event CBI files an application to the president and succeeds on that application.[230]

409. Finally, in its answer to question 5.9, Claimant recalls that, on 20 September 2021, TBI indicated to ENBD that CBI had presented a complying demand for payment under the TBI Guarantee[231] (Exhibit C-37). Claimant clarifies that by 23 March 2022, TBI had not made any payment to CBI under the TBI Guarantee (Exhibit C-39) and "*it is very unlikely that TBI has advanced out of its own pocket the amount of the performance bond to CBI*".[232]

d. *The Tribunal's determination*

410. Upon reviewing the TBI Guarantee (Exhibit C-33) and the ENBD Counter-Guarantee (Exhibit C-32), the Arbitral Tribunal is satisfied with Claimant's clarification that the beneficiary of the TBI Guarantee is CBI and that the beneficiary of the ENBD Counter-Guarantee is TBI.

411. The Arbitral Tribunal notes that due to Claimant's successful application for attachment of the ENBD Counter-Guarantee before the Dubai Courts which rendered the attachment order on 4 October 2022 (Exhibit C-22), ENBD never paid the amount of the ENBD Counter-Guarantee to TBI and TBI never paid the amount of the TBI Guarantee to CBI. Therefore, Claimant did not incur the amount of USD 1,666,000.

412. First, the Arbitral Tribunal must establish whether the call of the TBI Guarantee by Respondent on 20 September 2021 (Exhibit C-37) was legitimate and whether Claimant's claim for reimbursement of its legal costs incurred before the Dubai Courts in opposing such call is justified.

413. The Arbitral Tribunal considers that there is no evidence on file which indicates that Claimant breached any of its contractual obligations. On the contrary, the Arbitral Tribunal held that it was Respondent's breach of its obligations that led to Claimant's suspension of the Consultancy Agreement and demobilization of its staff. Therefore,

[227] CsA, para. 183.
[228] CsA, para. 183.
[229] CsA, para. 184.
[230] CsA, para. 172.
[231] CsA, para. 185.
[232] CsA, para. 185.

the Arbitral Tribunal decides that, absent any breach by CME of its obligations under the Consultancy Agreement, Respondent wrongfully called the TBI Guarantee.

414. It follows that the legal costs incurred by Claimant in opposing such call constitute direct damages resulting from Respondent's wrongful call of the TBI Guarantee that must be compensated in accordance with Article 169(2) of the Iraqi Civil Code.[233]

415. The Arbitral Tribunal therefore orders Respondent to pay to Claimant the legal costs associated with dealing with the attachment application of the ENBD Counter-Guarantee in the Dubai Courts in the amount of USD 14,506.[234]

416. As clarified by Claimant during the Hearing, such claim for reimbursement of its legal costs incurred when dealing with the attachment application in September /October 2021 (Exhibit C-22) was made for the first time in its Statement of Claim (*i.e.* on 6 January 2022) and therefore interest on such amount shall start to run from the date of the SoC.[235]

417. Consequently, the Arbitral Tribunal decides, pursuant to Article 171 of the Iraqi Civil Code[236], that simple interest shall run on the amount of USD 14,506 from 6 January 2022, at the rate of 5% per annum, up to and until payment in full of said amount by Respondent.

418. Second, the Arbitral Tribunal must decide on the fate of the TBI Guarantee.

419. Clause 5.1.5 of the Consultancy Agreement (Exhibit C-1) provides for the release of the guarantee after completion of the services[237]. As previously stated, there is no evidence on file that Claimant breached its obligations. On the contrary, Claimant was prevented from completing the remaining services of the Consultancy Agreement given that Respondent's breach of its payment obligations compelled Claimant to demobilize.

420. The Arbitral Tribunal recalls that, pursuant to Article 150.1 of the Iraqi Civil Code[238], contracts should be performed in good faith. It follows that Respondent's conduct

[233] Article 169(2) of the Iraqi Civil Code specifies that: "*the damages* […] *includes [sic] the loss of and the lost profit suffered by the creditor on account of loss of or delay in receiving the right provided that this was a natural result of the failure of or delay by the debtor to perform the obligation*". See also CsOP, slide 56.
[234] See Claimant's submission on costs dated 8 December 2022, paras. 21 and 22, and Exhibit 7 attached to such submission. At the Hearing, the Tribunal authorized Claimant to submit the invoices substantiating the amount of USD 14,506 with its submission on costs and indicated that Respondent will be granted the opportunity to comment on Claimant's submission on costs (Hearing Transcript, p. 142, lines 5-15). Respondent did not submit any comments on Claimant's submission on costs by 12 December 2022 as per the Procedural Timetable N°4.
[235] Hearing Transcript, p. 140, lines 19-25 and p. 141, lines 1-23.
[236] Article 171 of the Iraqi Civil Code provides that: "*Where the object of the obligation is a sum of money which was known at the time the obligation arose and the debtor delayed the payment thereof he shall be obligated to pay to the creditor by way of damages for the delay a legal interest at the rate of four per cent in regard to civil matters and five per cent in respect of commercial matters; this interest will commence from the date of filing a judicial claim in respect thereof if the agreement or the commercial usage has not fixed a different rate for the running of the interest save in all cases where the law has provided otherwise*".
[237] Article 5.1.5 of the Consultancy Agreement stipulates that: "*The Consultant shall pay 5% Performance Bond of the total contract in the form of an endorsed check or a letter of guarantee issued by recognized bank via Central Bank of Irak. The Performance Bond amount will be released to the Consultant after completion of all his services according to the Agreement*".
[238] Article 150.1 of the Iraqi Civil Code provides that: "*The contract must be performed according to its contents and in a manner which conforms to the norms (requirements) of good faith*".

which prevented Claimant from completing the services should not turn to the Respondent's advantage by not releasing the guarantee.

421. The Arbitral Tribunal is therefore of the view that the TBI Guarantee, issued pursuant to article 5.1.5 of the Consultancy Agreement, should be released and that Respondent should no longer be able to call on the guarantee.

422. In that regard, Claimant requests in its submissions that Respondent be ordered to return to Claimant the original TBI Guarantee.[239] Such request prompted the Arbitral Tribunal's question 5.4 (see Section 4.b. above) and raised further questions during the Hearing[240] due to Claimant's assertion that "*it might be difficult to order the Respondent to return to the Claimant the letter of guarantee issued by TBI. What really matters is that the Respondent is dispossessed of the letter of guarantee and is ordered to confirm that it relinquishes any entitlement thereunder*".[241]

423. During the Hearing, Claimant clarified that what matters is to be protected from Respondent being able to call on the guarantee.[242] Claimant highlighted that this objective could be achieved either by the return of the TBI Guarantee or an order that CBI takes all the necessary steps to release such guarantee.[243]

424. The Arbitral Tribunal believes that it would not be logical to order CBI to return the original TBI Guarantee to Claimant as the latter was never the holder of such guarantee. Therefore, the Arbitral Tribunal orders CBI to take the necessary steps to release the TBI Guarantee.

425. Since the Arbitral Tribunal granted Claimant's claim aiming to release the TBI Guarantee, it has not to rule on Claimant's alternative claim introduced in its Opening Presentation according to which "*in the alternative to* (d) [(d) being the order in relation to the release of the guarantee] *Claimant requests the Tribunal to award CBI to compensate CME the total value of the performance bond in the amount of USD 1,666,000.00*".[244]

IX. COSTS OF THE ARBITRATION

A. The Parties' contentions

1. Claimant's position

426. In its SoC dated 6 January 2022, Claimant requests the Tribunal to order Respondent to pay: "*f) Costs (including the costs of the arbitration, including legal costs).*"[245]

427. In its submission on costs dated 8 December 2022, Claimant seeks the following relief with regard to costs: "*a. The Claimant seeks an order that the Respondent pay the costs set out in the attached Cost Schedule, that it has incurred in this Arbitration; b. Interest from the date of the Order until payment*".[246]

428. In its submission on costs, Claimant assesses the costs it has incurred in connection with the arbitral proceedings as follows:[247]

- ICC costs: USD 237,304[248]
- Legal costs:
  - Baker Mckenzie: USD 139,133.25[249]
  - DLA Piper: USD 305,072.03[250]
  - Ali Malek K.C: USD 11,600[251]
  - Prof. Georges Affaki of AFFAKI law firm: USD 500,308.62[252]
- Lloyd Michaux: USD 6,155.66[253]

429. According to Claimant, the grand total of its costs is therefore USD 1,199,573.56.[254]

430. In Claimant's submission on costs, DLA Piper Middle East LLP (the lawyers currently representing Claimant) stated that "*We (DLA Piper Middle East LLP) confirm and certify that all costs have been validly incurred and billed, or will be billed to our client*".[255]

431. Claimant submits, for costs' allocation purposes, that the usual approach of costs following the event should apply in this arbitration, this general principle being well established in international arbitration both generally and specifically under the ICC Rules.[256]

432. Claimant contends that its cost claim is reasonable and proportionate given the nature of the dispute, the allegations advanced and the overall value. Claimant adds that these proceedings were unavoidable in the circumstances where Respondent failed to meet its contractual obligations for many years and no resolution was possible.[257] Claimant clarifies that the matter was, in large part, managed at associate level to ensure costs were reasonable and, notwithstanding this, the rates and the number and level of fee earners in all circumstances are reasonable, particularly by reference to the amount of work undertaken and the value of the claims.[258]

[239] SoC, para. 93. See also CsOP, slide 71.
[240] Hearing Transcript, pages 62-67.
[241] CsA, para. 175.
[242] Hearing Transcript, p. 63, lines 11-17.
[243] Hearing Transcript, p. 67, lines 14-22 and p. 97, lines 1-11.
[244] CsOP, slide 71. See also Hearing Transcript, p. 57, lines 19-25 and p. 58, lines 1-3.
[245] SoC, para. 112(f).
[246] Claimant's submission on costs, para. 24.
[247] Claimant's submission on costs, para. 3
[248] Exhibit 5 attached to Claimant's submission on costs.
[249] Exhibit 1 attached to Claimant's submission on costs.
[250] Exhibit 2 attached to Claimant's submission on costs.
[251] Exhibit 3 attached to Claimant's submission on costs.
[252] Exhibit 4 attached to Claimant's submission on costs.
[253] Exhibit 6 attached to Claimant's submission on costs.
[254] Claimant's submission on costs, para. 3.
[255] Claimant's submission on costs, para. 5.
[256] Claimant's submission on costs, paras. 7-8. See also, footnote n°7 of such submission referring to the 2015 ICC Commission Report on Decisions on Costs in International Arbitration.
[257] Claimant's submission on costs, para. 12.
[258] Claimant's submission on costs, para. 10.

433. Claimant further submits that the matter was complicated as a result of Respondent's total disregard for the arbitration and non-participation.[259] This necessitated, according to Claimant, the Tribunal taking on the role of the "*devil's advocate*" and raising detailed questions to Claimant throughout the arbitration, including complex questions under French and Iraqi law.[260] Claimant concludes that this entailed "*significant work*".[261]

434. Claimant also argues that there cannot be any criticism of Claimant's conduct throughout the course of the arbitration, while, in contrast, Respondent has shown a total disrespect for Claimant, the Tribunal, the ICC and the arbitral process by deliberately ignoring the arbitration despite being continually notified of each procedural milestone throughout the entire arbitration.[262]

435. Finally, Claimant recalls that Respondent made a bad faith demand for payment of the performance bond and that this caused Claimant to incur costs in the amount of USD 14,506 in defending it before the Dubai Courts.[263] Claimant clarifies that to the extent the amount of USD 14,506 is granted to Claimant as damages "*that sum will need to be deducted from the total amount awarded to the Claimant as part of its relief for costs*".[264]

2. Respondent's position

436. Respondent did not file any submission on costs nor any comments on Claimant's submission on costs (respectively scheduled on 8 and 12 December 2022 in accordance with the Procedural Timetable N°4).

B. The Tribunal's decision

437. The Arbitral Tribunal considers the costs incurred by Claimant in connection with this arbitration reasonable and therefore recoverable. Indeed, these costs (including lawyers' fees) are within the range of amounts usually incurred in high profile construction arbitration with an amount in dispute of around USD 12 million involving complex factual, legal and damages' assessment issues. The Tribunal agrees with Claimant that Respondent's lack of participation to the proceedings complicated this matter. In particular, in order for Respondent to have a fair trial despite its lack of participation to the proceedings, the Tribunal had to ask 21 written questions to the Parties on 11 April 2022 involving complex issues of Iraqi and French laws, which Claimant had to deal with. Claimant, thus, added a French counsel to its team of lawyers to tackle particularly the French law issues. The legal issues raised involved various areas of law including compliance/non-compliance with a pre-arbitral step, mediation, conflict of laws, arbitration law, contract law, entitlement to loss of profit and first demand guarantees. Moreover, following the CE Decision dated 22 September 2022 annulling article 750-1 of the FCCP, the Tribunal had to ask further questions in relation thereto given that Claimant was

[259] Claimant's submission on costs, para. 14.
[260] Claimant's submission on costs, para. 14.
[261] Claimant's submission on costs, para.14.
[262] Claimant's submission on costs, paras. 16 and 19.
[263] Claimant's submission on costs, para. 21 and Exhibit 7 attached to Claimant's submission on costs.
[264] Claimant's submission on costs, para. 22.

relying on article 750-1 in its previous submission tackling the issue of non-compliance with a pre-arbitral step.

438. Pursuant to Articles 38(4) and (5) of the ICC Rules, the Arbitral Tribunal has a wide discretion in determining which party should bear all, or part, of the costs of the arbitration. In exercising its discretionary power, the Arbitral Tribunal resorts to the general principle usually applied in international arbitration proceedings according to which the costs should follow the event. This approach is standard for arbitral tribunals.[265]

439. The Arbitral Tribunal will therefore take into consideration its ruling on the claims to apportion the ICC costs of arbitration, and the legal and other costs incurred by Claimant, it being noted that for arbitral tribunals to determine which party has succeeded in the arbitration, that party needs not prevail in all aspects. Rather, it must succeed as to its "*core or primary claim or outcome*".[266]

440. Concerning the ICC costs of arbitration (*i.e.* the arbitrators' fees and expenses and the ICC administrative expenses) at its session of 17 February 2023, the ICC Court fixed the arbitration costs at USD 230,000 pursuant to Article 38 of the ICC Rules, which represents the amount of the advance on costs already paid by Claimant.[267]

441. Based on the general principle of the costs should follow the event, the Tribunal decides that having granted Claimant's claims (and thus Claimant being the successful party in this arbitration), Respondent is to bear 100 % of the ICC costs of arbitration. The ICC Court having fixed the ICC costs of arbitration at the amount of USD 230,000 and Claimant having advanced such amount, Respondent shall reimburse Claimant the amount of USD 230,000 in addition to the VAT amounting to USD 7,304 paid by Claimant to cover Respondent's VAT on the ICC administrative expenses.

442. As to the legal and other costs incurred by Claimant, the Tribunal also applies the general principle of the costs should follow the event. The Tribunal therefore decides that Respondent shall reimburse Claimant the latter's legal and other costs in the amount of USD 947,763.56.[268]

[265] ICC Commission Report, Decisions on Costs in International Arbitration, p.4.
[266] ICC Commission Report, Decisions on Costs in International Arbitration, p.11.
[267] On 24 June 2021 and pursuant to Article 37(1) of the ICC Rules, the ICC Secretary General fixed the provisional advance on costs at USD 60,000 to be supported by Claimant. Claimant paid the requested provisional advance on costs of USD 60,000. At its session of 5 August 2021 and pursuant to Article 37(2) of the ICC Rules, the ICC Court decided to fix the advance on costs at USD 230,000. Claimant paid its remaining share of the advance on costs amounting to USD 55,000 (USD 115,000 – USD 60,000). In addition, Claimant paid Respondent's share of the advance on costs amounting to USD 115,000 and Respondent's VAT on the ICC administrative expenses in the amount of USD 7,304. Consequently, Claimant paid a total amount of USD 230,000 and a VAT amount of USD 7,304.
[268] *i.e.* **USD 962,269.56** (*i.e.* 139,133.25 + 305,072.03 + 11,600 + 500,308.62 + 6,155.66) which represents the addition of the legal costs and Lloyd Michaux' fees at para. 428 above - **USD 14,506** which were granted as damages associated with dealing with the attachment application in the Dubai Courts = **USD 947, 763.56**. In its submission on costs (at para. 22) Claimant clarifies that to the extent the amount of USD 14,506 is granted to Claimant as damages "*that sum will need to be deducted from the total amount awarded to the Claimant as part of its relief for costs*". Given that the Tribunal granted the USD 14,506 as damages (see Section, VIII.B.4.d above), this sum is deducted from Claimant's costs.

443. During the Hearing, Claimant clarified that it requests interest on the ICC costs of arbitration and its legal and other costs at the rate of 5% per annum under article 171 of the Iraqi Civil Code calculated from the date of the Final Award until full payment of such amounts by Respondent.[269]

444. Article 171 of the Iraqi Civil Code[270] deals with the delay in payment of contractual obligations, it being noted that the said article is part of the section of the Iraqi Civil Code related to contractual liability. Claimant has not shown that Article 171 would apply to delay in payment (if any) of the ICC costs of arbitration and legal and other costs awarded by an arbitral tribunal. Nor did Claimant put on the record any other provision of Iraqi Law that would give the Tribunal the power to award interest on costs. As a consequence, the Tribunal decides to reject Claimant's request to be awarded interest on the ICC costs of arbitration as well as on the legal and other costs.

* * *

X. ORDER

445. For the reasons set out above, the Arbitral Tribunal:

1. Declares that it has jurisdiction to determine Cardno ME Limited's claims;

2. Decides that Cardno ME Limited's claims are admissible;

3. Decides that the Central Bank of Iraq breached its obligations under the Consultancy Agreement;

4. Orders the Central Bank of Iraq to pay Cardno ME Limited the amount of USD 5,847,530 for the outstanding invoices 33 to 39;

5. Orders the Central Bank of Iraq to pay Cardno ME Limited the amount of USD 4,342,924.15 as compensation (under Article 169 of the Iraqi Civil Code) with respect to Cardno ME Limited's deprivation of the remaining value of the Consultancy Agreement;

6. Decides that simple interest shall run on the amounts mentioned in paragraphs (4) and (5) above from 2 June 2021, at the rate of 5% per annum, up to and until payment in full of said amounts by the Central Bank of Iraq;

7. Decides that the Central Bank of Iraq's demand under the bank guarantee issued by the Trade Bank of Iraq was wrongful;

[269] Hearing Transcript, p. 101 lines 11-25 and p. 102, lines 1-14.

[270] Article 171 of the Iraqi Civil Code provides that: "*Where the object of the obligation is a sum of money which was known at the time the obligation arose and the debtor delayed the payment thereof he shall be obligated to pay to the creditor by way of damages for the delay a legal interest at the rate of four per cent in regard to civil matters and five per cent in respect of commercial matters; this interest will commence from the date of filing a judicial claim in respect thereof if the agreement or the commercial usage has not fixed a different rate for the running of the interest save in all cases where the law has provided otherwise*".

8. Orders the Central Bank of Iraq to take the necessary steps to release the bank guarantee issued by the Trade Bank of Iraq in its favor;

9. Orders the Central Bank of Iraq to pay to Cardno ME Limited the legal costs associated with dealing with the attachment application in the Dubai Courts in the amount of USD 14,506;

10. Decides that simple interest shall run on the amount mentioned in paragraph (9) above from 6 January 2022, at the rate of 5% per annum, up to and until payment in full of said amount by the Central Bank of Iraq;

11. Decides that the Central Bank of Iraq will bear 100% of the ICC costs of arbitration as fixed by the ICC Court at USD 230,000. Cardno ME Limited having advanced 100% of the ICC arbitration costs, *i.e.* USD 230,000, the Tribunal orders the Central Bank of Iraq to reimburse Cardno ME Limited the amount of USD 230,000 in addition to the amount of USD 7,304 paid by Cardno ME Limited to cover the Central Bank of Iraq's VAT on the ICC administrative expenses;

12. Decides that the Central Bank of Iraq shall bear 100% of the legal and other costs incurred by Cardno ME Limited in this arbitration and therefore orders the Central Bank of Iraq to reimburse Cardno ME Limited the amount of USD 947,763.56;

13. Dismisses Cardno ME Limited's request for interest on the amounts mentioned in paragraphs (11) and (12) above;

14. Dismisses all other claims or requests.

Place of Arbitration: Paris, France

On 26 February 2023.

Mr. Bassam Mirza
Sole Arbitrator

CERTIFIED TRUE COPY OF THE ORIGINAL
PARIS, 28 June 2025
Emmanuel JOLIVET
General Counsel
ICC International Court of Arbitration