EXHIBIT A-2

Marseille-Kliniken AG / Government of the Republic of Equatorial Guinea

Swiss Chambers' Arbitration Institution
Arbitration No. 600413-2015

Arbitral Award

Marseille-Kliniken AG, Chamerstrasse 67, CH-6300 Zug

Claimant

Represented by Prof. Dr. Bernd Reinmüller, Bory & Associés, Avocats, 1, Place Longemalle, CH-1204 Genève

vs.

The Government of the Republic of Equatorial Guinea, Presidential Palace, Rue du 12 Octobre, Malabo, Equatorial Guinea

Respondent

Represented by Jean-Charles Tchikaya, Cabinet d'Avocats, 15, Cours Georges Clemenceau, F-33000 Bordeaux

and/or Francisco Evui Nguema Mukue, GETESA-MALABO, C/Rey Bonkoro n°7, Malabo, Equatorial Guinea

and/or Peter J. Merz and/or Dr. Lulcien Valloni, Froriep, Bellerivestrasse 201, CH-8034 Zürich

Before the Arbitration Tribunal consisting of:
Dr. Felix Fischer (Co-Arbitrator)
Melissa Magliana (Co-Arbitrator)
Dr. Andrea Meier (Chairman

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B-SB	Respondent 's Statement from February 28, 2017 regarding Outcome of the Evidence
B-SeA	Respondent's Statement from August 14, 2017 regarding K-SeA
First Arbitration Decision	Arbitral Award from Dec. 5, 2014 in Arbitration Proceedings No. 600257-2011
First Arbitration Decision	Swiss Rules Arbitral Award No. 600257-2011 (with Arbitral Award from Dec. 5, 201 finalized)
MV	Management Contract for Polyclinic La Paz (Bata) from Dec. 14th, 2009 (= Supplement K-1)
KA	Statement of Defense from July 13, 2016
K-KN	Claimant's Own Cost Statement from March 6, 2017
KS	Plea from April 26, 2016
K-SB	Claimant's Statement from February 28, 2017 regarding the outcome of the evidence
K-SeA	Claimant's Statement from May 29, 2017 regarding Savings in Expenditures Secretariat of the Arbitration Tribunal's Swiss Chambers Arbitration Institution
Secretariat	Secretariat of the Arbitration Court of the Swiss Chambers'

	Arbitration Institution
SPwC	Statement of Pricewaterhouse Coopers GmbH from May 24, 2017 regarding Savings in Expenditures at Claimant's request (= Supplement K-93)
WP	Verbatim Minutes of Arbitration Session from Dec. 5, 2016
ZE	Witness Statements

II. INTRODUCTION

A. Matter of Dispute

1 The dispute in arbitration is based upon a management contract entered into by the Parties with regard to the Polyclinic La Paz (Bata) on December 14, 2009 (*Contrato de gestión del Hospital Polyclinic of La Paz (Bata)*) ("**Management Contract**" or " **MV**", Supplement K-1). Claimant demands that Respondent pay a fee ("**Management Fee**") of EUR 53,891,600 plus interest. Respondent raised an objection to Arbitration Court's jurisdiction. Moreover, Respondent contests Claimant's Claim and asserts that the Management Contract had been terminated.

B. Parties

1. Claimant

2. Claimant, **Marseille-Kliniken AG**, is a Corporation organized under Swiss Law with seat in

Chamerstrasse 67
6300 Zug
Switzerland

3. Claimant is represented by:

Prof. Dr. Bernd Reinmüller
Bory & Associés, Avocats
1, Place Longemalle
1204 Genève
Switzerland
Telephone.: +41 22 718 88 44
Fax: +41 22 718 88 48
Email: bre@verslaw.ch

2 **Respondent**

4 Respondent is the **Government of the Republic of Equatorial Guinea,** official address:

Presidential Palace
Rue du 12 Octobre
Malabo
Equatorial Guinea

5 Respondent is represented by:
Jean-Charles Tchikaya
Cabinet d'Avocats
15, Cours Georges Clemenceau
F-33000 Bordeaux
Email: jctchikaya@avocatline.fr

Francisco Evui Nguema Mukue
GETESA-MALABO
C/ Rey Bonkoro no7
Malabo
Equatorial Guinea
Email: sejomse@gmail.com

Peter J. Merz and/or Dr. Lucien Valloni
Froriep Legal AG
Bellerivestrasse 201
CH-8034 Zürich
Telephone: +41 44 386 60 00
Email: pmerz@froriep.ch
lvalloni@froriep.ch

C. Arbitration Court

6 The Arbitration Court was established in accordance with the Rules of the International Swiss Arbitration Regulations ("**Swiss Rules**", in force since June 2012).

7 The Co-Arbitrator appointed by Claimant and confirmed by the Arbitration Tribunal of the Swiss Chambers' Arbitration Institution ("**Court of Law**") is:

Dr. Felix Fischer
BodmerFischer AG
Limmatquai 94
Postfach 3978
8021 Zürich
Switzerland
Telephone: +41 44 711 71 71
Fax: +41 44 711 7111
Email: fischer@bodmerfischer.chh

8 Through Claimant's default, the Co-Arbitrator appointed by the Tribunal is:

Melissa Magliana, J.D.
Homburger AG
Prime Tower
Hardstrasse 201
8005 Zürich
Switzerland
Telephone: +41 43 222 10 00
Fax: +41 43 222 15 00
Email: melissa.magliana@homburger.chh

9 The Tribunal's Chairman appointed by the Co-Arbitrators and confirmed by the Tribunal is:

Dr. Andrea Meier
Wattmann & Merker
Kirchgasse 48
8024 Zürich
Switzerland
Telephone: +41 44 212 10 11
Fax: +41 44 212 15 11
Email: a.meier@wartmann-merker.ch

10 The Secretary appointed by the Arbitration Tribunal with Claimant's consent and without objection from Respondent, unavailable to be heard, is:

Gerarda Coppola
Wartmann & Merker
Kirchgasse 48
8024 Zürich

Switzerland
Telephone: +41 44 212 1011
Fax: +41442121511
Email: g.coppola@wartmann-merker.ch

D. The Parties' Request for Remedy

1. Claimant

11 In the Notice of Arbitration from January 28, 2015, Claimant files the following request for remedy:

> *Based upon the Management Contract from December 14, 2009 Cl-1, Respondent shall be obligated to pay Claimant EUR 53,891,600 plus 5% interest from the due date of the individual claim portions or monthly remunerations, respectively.*
>
> *All costs and damages shall be borne by Respondent*

12 This request for remedy is specified by Claimant in the Statement of Claim from April 26, 2016 as follows:

> *I. With regard to the Arbitration Tribunal's jurisdiction, I request that the following be recognized:*
>
> *1. The Arbitration Tribunal has jurisdiction over the Parties' dispute.*
>
> *2. Respondent shall bear all costs in connection with the Arbitration Tribunal's jurisdiction issue, regardless of the outcome of the Proceedings in the principal matter.*
>
> *3. The Arbitration Tribunal's Costs shall be determined within the scope of the ruling in the Principal Legal Matter.*
>
> *II. As to the Request for Remedy I ask the following be recognized:*
>
> *1. Based upon the Management Contract from December 14, 2009, Respondent shall pay the partial amount of 10% of EUR 5,600,000.00 for the Polyclinic "La Paz" (Bata) for the months of August until and including December 2010, and for the months of January up until and including March 2011 a partial amount of 10% on EUR 5,600,000.00 for a total of EUR 560,000.00 plus 5% interest*

- *on EUR 5,600,000.00 from the date of 05/01/2010*

2. *Respondent shall pay Claimant for the months beginning in April 2011 up until and including December 2011 and for the months of January 2012 up until and including August 2012 an amount of EUR 700,000.00 per each month, respectively, minus the monthly savings in expenses of EUR 112,000.00, i.e. EUR 588,000.00 per month, multiplied by 17 months, for a total of EUR 9,996.000.00, and a partial 10% payment thereof, i.e. EUR 999,600.00 plus 5% interest*

- *on EUR 235,200.00 beginning 05/01/2010 and*
- *on EUR 705,600.00 beginning 05/01/2011 and*
- *on EUR 58,800.00 beginning 05/01/2012*

3 *Respondent shall pay Claimant for each month from September 2012 up until and including January 2015 an amount of EUR 700,000.00 minus savings in monthly expenses of EUR 112,000.00, i.e. EUR 588,000.00 per month, multiplied by 29 months, for a total of EUR 17,052,000.00, plus 5 % payment interest*

- *on EUR 6,468,000.00 beginning 05/01/2012 and*
- *on EUR 7,056,000.00 beginning 05/01/2013 and*
- *on EUR 3,528,00.00 beginning 05/01/2014*

4. *Respondent shall pay Claimant for the months beginning in February 2015 up until and including July 2015 an amount of EUR 700,000.00 each, minus the monthly savings in expenses of EUR 112,000.00, i.e. EUR 588,000.00 per month multiplied by 6 months, resulting in the sum of EUR 3,528,000.00 plus 5% interest*

- *on EUR 3,528,000.00 beginning 05/01/2014.*

5. *Respondent shall pay Claimant for the months beginning in August 2015 up until and including July 2016 an amount of EUR 700,000.00 each minus monthly savings in expenses of EUR 112,000.00, i.e. EUR 588,000.00 per month multiplied by 12 months, resulting in EUR 7,056,000.00 plus 5% interest*

- *on EUR 7,056,000.00 beginning 05/01/2015*

6. *Respondent shall pay Claimant for the months beginning in August 2016 up until and including July 2017 an amount of EUR 700,000.00 each minus monthly savings in expenses of EUR 112,000.00, i.e. EUR 588,000.00 per month multiplied by 12 months, resulting in a sum of EUR 7,056,000.00 plus 5% interest*

   - *on EUR 7,056,000.00 beginning 05/01/2016.*

7. *At Claimant's request it was determined that the Management Contract from December 14, 2009 was not terminated and continues to be effective beyond January 2015, including from August 2017 up until and including January 2020.*

   It was further determined that

   Respondent is obligated to pay the contractually agreed upon annual Management Fee three months prior to the end of the billing year in an advance sum for each subsequent year according to Item 7.2 of the Management Contract from December 14, 2009, on the due date of the individual annual sums in the amount of EUR 8,400,000.00 minus monthly savings in expenses of EUR 112,000.00 multiplied by 12 months, i.e. EUR 588,000.00 per month multiplied by 12 months, totaling EUR 7,056,000.00 \ per year up until the end of the management contract, up until and including January 2020; if in default, add 5% interest from the due date of the respective annual sum for the time period beginning August 1,2017 up until and including July 31, 2018 from 05/01/2017, for the time period beginning August 1, 2018 up until and including July 31, 2019 from 05/01/2018, and for the time period from August 1, 2019 up until and including January 31, 2020, beginning 05/01/2019.

8. *Costs and damages from the Arbitration Tribunal Proceedings are borne by Respondent, in any case in the amount of Respondent's default of advance cost payment.*

9. *Moreover, we request admission and acceptance of further explanations and pieces of evidence, particularly from the decision regarding the Arbitration Tribunal's jurisdiction from September 16, 2013 in the Arbitration Proceedings No. 600257-2011 and from the Arbitration Proceedings No. 600257-2011 for the modification/supplementation and specification of Claimant's Statement (besides the claims filings) by the Arbitration Tribunal.*

13 In the reply from September 16, 2015 Claimant added the following Request:

1. *Respondent's Request to 1.) to determine that Respondent's objection regarding the Arbitration Tribunal's jurisdiction was admissible and justified, is to be dismissed.*

2. *Respondent's request to 2.) that the Arbitration Tribunal's jurisdiction for this current litigation be pronounced altogether invalid, should be dismissed.*

3. *Claimant's requests regarding jurisdiction (A.I. 1-3 Grounds for Plea) shall be accepted.*

4. *Respondent's Alternative Requests concerning Claims 1 and 2:*

   a) *The Arbitration Tribunal shall suspend Proceedings until Claimant has initiated the arbitration process followed by due process in Equatorial Guinea, and, having obtained a court decision, intends to seek recourse against it.*

   b) *The Arbitration Tribunal shall suspend Proceedings until Claimant has sought due process before the competent Courts in Equatorial Guinea, and, having obtained a court decision, intends to seek recourse against it.*

5. *Respondent shall bear the costs incurred by the Arbitration Proceedings including appropriate compensation to be determined by the Arbitration Tribunal in Claimant's favor).*

6. *Respondent's Requests 1 - 7 on pages 3 and 4 of the statement of defense from July 13, 2016 are to be dismissed with costs assigned.*

Claimant further requests – beyond the grounds given in Requests 1 – 6 of the application – that instead of the current request for assessment according to Claimant's Request 7 in its Grounds for Claim from April 26, 2016 - the following be recognized:

7 a) *It is ascertained that the management contract from December 14, 2009 was not terminated and continues to be effective beyond January 31, 2015, as well as from August 2017 up until and including January 2020.*

b) Three months prior to the end of the billing year, Respondent shall pay Claimant the contractually agreed-upon annual Management Fee for each respective following year, according to Item 7.2 of the Management Contract from December 14, 2009, on the due date of the individual annual sums in the amount of EUR 8,400,000.00 minus the savings in monthly expenses of EUR 112,000.00 multiplied by 12 months, creating a total of EUR 7,056,000.00 per year up until the end of the Management Contract up until and including January 2020; if in default, an additional 5% interest from the due date of the respective annual sum for the period beginning August 1, 2017 up until and including July 31, 2018 beginning May 1, 2017, for the period beginning August 1, 2018 from May 1, 2017, up until and including July 31, 2019 from May 1, 2018, for the period from August 1, 2018 up until and including July 31, 2019 beginning on May 1, 2018, and for the period beginning August 1, 2019 up until and including January 31, 2020, beginning May 1, 2019.

Alternatively:

Respondent shall pay Claimant for lost profit for the months beginning August 2017 up until and including January 2020 a sum of EUR 700,000.00 per month minus the monthly savings in expenses of EUR 112,000.00, i.e. EUR 588,000.00 per month multiplied by 30 months, a total of EUR 17,640,000.00 plus 5% interest on EUR 17,640,000.00 from July 14 2016.from July 14, 2016.

Requests 8 and 9 in the Grounds for Claim are upheld.

2 Respondent

14 In its statement of Defense from July 13, 2016, Respondent raised the following legal request:

1. *The Arbitration Tribunal finds that Respondent's objection to the Arbitration Tribunal's jurisdiction is admissible and justified.*

2. *The Arbitration Tribunal declares that it does not have jurisdiction for the litigation in its entirety.*

3. *Claimant's Requests as to jurisdiction (A.I.1 to 3 of the Grounds) shall be dismissed, inasmuch as they should even be taken into consideration.*

4. *Alternative to Requests 1 and 2:*

a) The Arbitration Tribunal suspend Proceedings until Claimant has initiated the arbitration process followed by due process in Equatorial Guinea, and, having obtained a court decision, intends to seek recourse against it.

b) The Arbitration Tribunal shall suspend Proceedings until Claimant has sought due process before the competent Courts in Equatorial Guinea, and, having obtained a court decision, intends to seek recourse against it.

5. *Claimant shall bear the costs of the Arbitration Proceedings (incl. appropriate cost compensation awarded by the Arbitration Tribunal in favor of the Respondent.)*

And in the event that the Arbitration Tribunal confirms its jurisdiction over the following

REQUESTS:

1. *The Arbitration Tribunal dismisses Claimant's Claim in its entirety, insofar as it should even be acknowledged.*

2. *Alternative to Request 1:*

The Arbitration Tribunal finds that the Management Contract from December 14, 2009 was terminated, effective immediately, on September 12, 2011 at the latest, and dismisses the Claim comprising Requests II.2 to II.9 (Grounds for Claim).

3. *Alternative to Request 2:*

The Arbitration Tribunal finds that the Management Contract from December 14, 2009 was terminated on September12,2011, at the latest, effective immediately, and dismisses the Claim comprising Requests II.2 to 9 (Grounds for Claim).

4. *Alternative to Request 3:*

The Arbitration Tribunal finds that the Management Contract from December 14, 2009 was terminated on December 14, 2014 at any rate, and dismisses the Claim comprising Requests II.4 to 9 (Grounds for Claim) .

5. *Alternative to Request 4:*

The Arbitration Tribunal finds that the Management Contract from December 14, 2009 was terminated effective immediately at the latest with the conclusion

of the Agreement from May 26, 2015 and dismisses the Claim comprising Requests II.4 to 9 (Grounds for Claim).

6. *Alternative to Request 5:*

The Arbitration Tribunal finds that the Management Contract from December 14, 2009 was terminated effective immediately, at the latest with the delivery of this Statement of Defense to Claimant, and dismisses the Claim comprising Requests II.6 to 9 (Grounds).

7. *Claimant bears the costs of the Arbitration Proceedings (including appropriate cost compensation awarded by the Arbitration Tribunal in favor of Respondent).*

15 Moreover, Respondent submits the following filings on October 19, 2017 and in duplicate the following Requests (cf. Rejoinder* p. 5):

1. *Respondent's Request 1 made in the Reply from September 16, 2016 ("Request to 1.) to determine that Respondent's objection to the Arbitration Tribunal's jurisdiction is not admissible and justified, is to be dismissed") shall be dismissed.*

2. *Respondent's Request 2 ("Request to 2.) made in the Reply from September 16, 2016, stating that the Arbitration Tribunal shall declare its lack of jurisdiction and justification") shall be dismissed.*

3. *Request 3 made in the Reply from September 16, 2016 (Claimant's Requests regarding jurisdiction (A.I. 1-3 Grounds for Claim) shall be recognized") shall be dismissed.*

4. *Request 4 made in the Reply from September 16, 2016 ("Alternative Requests to Respondent 's Requests 1 and 2 [...]")shall be dismissed.*

5. *Request 5 made in the Reply from September 16, 2016 ("Respondent shall bear the costs [...]") shall be dismissed.*

6. *Request 6 made in the Reply from September 16, 2016 ("Respondent's Requests 1 to 7, pages 3 and 4 [...]") shall be dismissed.*

7. *Request 7a made in the Reply from September 16, 2016 ("It is found that the Management Contract was not terminated[...]") shall be dismissed.*

8. *Request 7c made in the Reply from September 16, 2016 ("Respondent shall ((*

*(*Rejoinder: German = Duplik; transl. note)*

pay Claimant the contractually agreed-upon annual Management Fee in advance, three months prior to the end of the billing year [...]") shall be dismissed.

9. The Alternative Request 7b made in the Reply from September 16, 2016 ("The Respondent shall pay Claimant for lost profits for the months beginning August 2017 [...]") shall be dismissed.

E. Arbitration Clause

16 In the present Arbitration Proceedings, Claimant refers to the Arbitration Clause according to Art. 14, Para. 3 of the Management Contract:

(Translated) German Version:

In the event of disputes arising from this contract, the Parties shall attempt to find an amicable solution prior to calling upon the courts of Equatorial Guinea. In the event of a dispute the Parties agree to seek Arbitration Proceedings before the Chamber of Commerce in Zürich.

Spanish Version:

En caso de litigio, las partes se entarán para resolver amigablemente el problema, caso contrario se dirigiarán a los tribunales de Guinea Ecuatorial. En caso de desacuerdo de una de las partes, podrá recurrir al tribunal de la Cámara de Comercio de Zurich.

F. Seat of the Arbitration Tribunal

17 The Court in Zürich declared Zürich, Switzerland the seat of the Arbitration Tribunal.

G. Applicable Law

18 By virtue of its Interim Decision from March 15, 2016, the Arbitration Tribunal determined that the present litigation is subject to Swiss Law.

H. Applicable Procedural Rules

19 These Arbitration Proceedings are subject to Swiss Rules, Art. 176 et seq. of the Federal Law governing the International Private Law (IPRG) and special procedural rules contained in the Procedural Decision No. 1 from December 16, 2015, which the Arbitration Tribunal has issued in the ongoing proceedings.

III. History of Proceedings

20 Claimant initiated the current Arbitration Proceedings by virtue of the Notice of Arbitration from January 28, 2015 to the Secretariat of the Arbitration Tribunal of the Swiss Chambers' Arbitration Institution ("**Secretariat**"). In correspondence from February 13, 2014, the Secretariat asked Respondent to enter its answer to this notice within a 30 day period, wherein it was to also comment on the number of Arbitration Judges as well as the language of the proceedings. Furthermore, the Parties were asked to agree to a location of the Arbitration Proceedings within a period of 30 days.

21 In a letter from March 11, 2015 Claimant reported that it had not been able to reach agreement with Respondent regarding the location of the Arbitration Proceedings, due to a lack of reply from Respondent.

22 In correspondence dated April 20, 2015 the Secretariat established that Respondent had not issued an answer to the Notice of Arbitration within the required time period, had not commented on the number of arbitrators and that the Parties had not agreed on a location for the Arbitration Proceedings. Therefore, the Court had assigned the matter to a three member Arbitration Tribunal under application of Art. 6 (1) and 6 (2) of the Swiss Rules. Claimant was told to name a member of the Arbitration Tribunal within a period of 15 days, Respondent within a 30 day period. Moreover, the Secretariat informed the Parties that according g to Art. 16 (1) of the Swiss Rules the Court itself would determine the location of the Arbitration Proceedings, or request that the Arbitration Tribunal make this decision. In response, Claimant named Dr. Felix Fischer the Arbitrator in correspondence from May 1, 2015.

23 By e-mail dated May 5, 2015 Attorney Jean-Charles Tchikaya informed the Secretariat that he was Respondent's legal representative and requested a Notice of Arbitration. He repeated this message by e-mail from May 11, 2015, which he also forwarded to Claimant's legal representative (cf. Supplement K-66). In his letter from July 3, 2015 the Secretariat asked Attorney Tchikaya to submit a power of attorney. Unfortunately this request was not met.

24 Instead, via email from July 8, 2015, Attorneys Dr. Sergio Esono Abeso Tomo and Francisco Evui Nguema announced that they were Respondent's legal representatives.

25 In their letter from September 2015 the Secretariat informed the Parties that the Court had confirmed Arbitrator Dr. Felix Fischer, appointed by Claimant and, supported by Art. 5 (1) of the Swiss Rules, had appointed Mrs. Melissa Magliana as a member of the Arbitration Tribunal. In a letter from November 5, 2015, the Parties were informed that the Court had confirmed Dr. Andrea Meier as Chairwoman of the Arbitration Tribunal.

26. In a letter from November 9, 2015, the Arbitration Tribunal suggested to the Parties several dates for an organizational meeting to discuss the Arbitration Rules and a provisional schedule. Moreover, the Arbitration Tribunal established an advance on costs in the amount of CHF 724,000 and asked the Parties to each pay half of the amount, i.e. CHF 362,000, each within 20 days' time. This letter was delivered to Claimant's representative on November 10, 2015 and to Respondent's representatives on November 11, 2015; however it could not be delivered directly to Respondent until November 20 via courier.

27 In her letter from November 16, 2014, Claimant stated her availability for an organizational meeting on December 11, 2015. Nothing was heard from Respondent.

28 In a letter from November 19, 2015, the Arbitration Tribunal sent to the Parties the draft of the Procedural Decision No. 1 as well as the tentative time schedule and set the deadline for a

for a written reply to no later than December 8, 2015. This letter was delivered to Claimant's legal representative on November 20, 2015 and to Respondent's legal representatives; it was delivered directly to Respondent on November 23, 2015 via courier.

29 After Respondent did not comment on the recommended date for an organizational meeting, the Arbitration Tribunal set the date for these meetings in its letter from November 26, 2015 to take place on December 11, 2015 in Zürich. This letter was delivered to Claimant's representative on November 27, 2015 and to Respondent's representatives on November 30, 2015. After several unsuccessful delivery attempts due to a refusal to accept the courier shipment, the letter was finally delivered to Respondent on December 14, 2015.

30 Claimant submitted its comments for a draft of the Procedural Guide Decision No. 1 and the tentative time schedule before the deadline on December 7, 2015. Nothing was heard from Respondent.

31 While half of the amount of the advance on costs was paid in a timely manner by Claimant with a validated date of November 30, 2015, payment was not received from Respondent, even after an extension was granted by the Arbitration Tribunal in its letter from December 4, 2015. Therefore, based upon Art. 41 Section 4 of the Swiss Rules, the Arbitration Tribunal requested in its letter from December 21, 2015 that Claimant pay Respondent's portion. In response, Claimant paid Respondent's portion of the advance on costs in the amount of CHF 362,000 timely on January 6, 2016.

32 In a letter from December 7, 2015, the Secretariat informed the Parties that the Court had decided on the Arbitration Proceeding's location in Zürich.

33 The organizational meeting took place on December 11, 2015 in Zürich and was attended by Claimant. Respondent did not attend the meeting, without notice or apology. On the

occasion of this organizational meeting the draft of the Procedural Decision No. 1 was discussed as well as the tentative time schedule.

34 Following the organizational meeting, the Arbitration Tribunal provided the Parties with the clean Procedural Decision No. 1 on December 16, 2015, including the tentative time schedule; this was delivered to Claimant's representative on December 17, 2015 and Respondent's representatives, as well as Respondent directly, on December 18, 2015. The Arbitration Tribunal provided both Parties simultaneously with a deadline to comment on the question of applicable law, the procedural language and the binding effects of the Arbitral Award from December 5, 2014 in the Swiss Rules Arbitration No. 600257-2011 between the Parties ("**first Arbitral Award**"). Claimant responded by the deadline in its correspondence from January 23, 2016. Nothing was heard from Respondent.

35 On March 15, 2016 the Arbitration Tribunal issued an Interim Decision with Procedural Decision No. 2, wherein it determined that the evaluated fact-finding requests in the Dispositiv Items 1, 4, 5, 7, and 10 of the first Arbitral Award had binding effect for evaluating Claimant's claims, while beyond the scope of this binding effect, the claims were free to be judged. Moreover, the Arbitration Tribunal decided that the litigation was subject to Swiss Law. Furthermore, German was selected to be the language used in the Proceedings.

36 In his email from March 15, 2016, Attorney Dr. Sergio Esono Abeso Tomo indicated that he no longer was Claimant's legal representative. On March 17, 2016 Attorney Jean-Charles Tchikaya informed the Arbitration Tribunal that he and attorneys Peter J. Merz and Evuy Francisco were Claimant's new legal representatives; whereupon the Arbitration Tribunal requested in a letter from March 22, 2016 that attorneys Peter J. Merz and Francisco Evuy Nguema et al. confirm their representation of Respondent and clarify for the continuation of

the Proceedings whether all courier dispatches for Respondent were to be sent only to attorney Peter J. Merz at his location in Switzerland.

37 In his letter from April 7, 2016, Attorney Peter J. Merz confirmed that he and/or Dr. Lucien Valloni would represent Respondent and that courier items could be sent to Respondent's Swiss Legal Representatives, with simultaneous notification to all of Respondent's remaining representatives via email. Moreover, he requested that French be used as the secondary language in the Proceedings.

38 In a correspondence from April 11, 2016, Claimant was asked to comment on Respondent's request regarding a secondary language for the Proceedings. Claimant replied by the deadline of April 19, 2016 and requested that Respondent's request be dismissed.

39 On April 26, 2016, Claimant submitted its timely Statement of Grounds.

40 With Procedural Decision No. 3 from May 2, 2016, the Arbitration Tribunal approved French as the secondary language in the Proceedings under consideration of certain modalities. In its submission from May 13, 2016, Claimant asked the Arbitration Tribunal to revert to the Procedural Decision and to make the respective changes to state that Respondent's entries in French could be submitted only along with a German translation. This request was denied by the Arbitration Tribunal with Procedural Decision No. 4 from May 18, 2016.

41 The statement of defense reached the Arbitration Tribunal by the given deadline (cf. Procedural Decision No. 5 from June 2, 2016) on July 13, 2016. By virtue of Procedural Decision No. 6 from July 19, 2016, the Arbitration Tribunal asked Respondent to submit the missing written Witness Statements.

42 With their submissions from July 25, 2016 and July 28, 2016, respectively, both Parties requested the implementation of a second written exchange and an Evidentiary Hearing.

43. On August 5, 2016, an organizational meeting between the Parties took place via telephone conference. As a result, the Arbitration Tribunal issued its Procedural Decision No. 7 from August 11, 2016 with the revised provisional time schedule.

44 With submission from August 18, 2016, Respondent filed the Witness Statements ("**ZE**") by Mr. Jean-Charles Tchikaya and Pantaléon Mayiboro in a timely manner. The Arbitration Tribunal noted in an e-mail from August 22, 2016 that the Witness Statements by Mr. Juan Oló Mba Nseng and Marcellino Oyono were still missing. Therefore, it ordered Respondent to inform the Tribunal when the missing Witness Statements would be submitted, pointing to Art. 9.2.2 of Procedural Decision No.1. With correspondence from August 23, 2016, Respondent informed the Arbitration Tribunal that the missing Witness Statements would be available no later than September 5, 2016. On September 5 or 6, 2016, respectively, Respondent submitted Juan Oló Mba Nseng's Witness Statement and declared that Marcellino Oyono's Witness Statement was still unavailable.

45 The Reply from September 16, 2015 and the Rejoinder from October 19, 2016 were submitted in due time.

46 With the Procedural Decision No. 8 from October 25, 2016, the Arbitration Tribunal issued a deadline to the Parties to provide notification as to which of the witnesses named by the Parties were to appear for questioning at the Evidentiary Hearing.

47 In his correspondence from November 8, 2016, Respondent's legal representative Peter J. Merz announced that all contact to Respondent's previous representative had ceased and he was unable to provide the names of the Witnesses participating in the Evidentiary Hearing. As he was unable, due to the cessation of contact, to say whether Witnesses and Respondent had been duly summoned, he requested an extension for the Evidentiary Hearing for December 5/6. Claimant requested in its comments from November 11, 2016 that Respondent's request for an extension be dismissed.

48 In its Procedural Decision No. 9 from November 15, 2016, the Arbitration Tribunal extended the requested date for the Parties to provide notification as to which Witnesses were participating in the Evidentiary Hearing and dismissed Respondent's request for a postponement.

49 With submission from November 25, 2016, Claimant named the Witnesses to be deposed. The same day, Respondent's legal representative stated that he had not received confirmation of whether or not the Witnesses named by Respondent would participate in the Evidentiary Hearing.

50 The Evidentiary Hearing took place on December 5, 2016 on the premises of Homburger AG in Zürich.

51 With Procedural Decision No. 10 from December 12, 2016, the Arbitration Tribunal issued the revised provisionary time schedule.

52 The Parties' statements regarding the evidentiary results were received by the Arbitration Tribunal on the due date of February 28, 2017 (**"K-SB" or "B-SB"**), and the Parties' Statement of Cost was received March 6 and 7, 2017, respectively (**"K-KN" or "B-KN"**). The Parties each commented on the submitted Statement of Cost (**"K-KN" or "B-KN"**) with their submission from March 14, 2017.

53 In Procedural Decision No. 11 from March 30, 2017, the Arbitration Tribunal invited Claimant to provide additional explanations for the calculation of the Management Fee, savings in expenditures and other income.

54 In correspondence from April 6, 2017, Respondent requested that, regardless of the outcome of the Proceedings, the cost for additional exchange of pleadings should be borne by Claimant, based upon the costs-by-cause principle. Moreover, the additional exchange of pleadings should not have any disadvantageous effects for Respondent in light of the principles of equal treatment and procedural equality.

55 In correspondence from May 1, 2017, Claimant requested an extension of the submission date for its statement regarding Management Fee calculations, savings in expenditures and ancillary income (cf. para. 53 above). This deadline was extended by the Arbitration Tribunal via email from May 2, 2017, namely to May 29, 2017, honoring its request.

56 Claimant's statement was received by the Arbitration Tribunal by the deadline of May 29, 2017 (**"K-SeA"**). That same day, Respondent requested via e-mail that the date for a statement in response to Claimant's new claims be set for the end of August 2017 because the client's document still required translation and due to absence for vacation time in July/August. With Procedural Decision No. 12 from May 30, 2017, the Arbitration Tribunal moved the due date for Respondent to August 15, 2017. Respondent submitted its statement in due time on August 14, 2017 (**"B-SeA"**).

57 In correspondence from August 21, 2017, Claimant requested that the Arbitration Tribunal set a submission date for a response to Respondent's statement from August 14, 2017. With Procedural Decision No. 13 from August 22, 2017, the Arbitration Tribunal set September 5, 2017 as Claimant's due date and September 19, 2017 as Respondent's due date for its rejoinder. Both submissions were made by the due dates. With Procedural Decision No.14 from October 2, 2017, the Arbitration Tribunal pronounced the Proceedings closed and ordered the Parties to submit the additional Statements of Cost by October 20, 2017. These were submitted by the due date.

58 With Procedural Decision No. 15 from October 23, 2017, the Arbitration Tribunal invited the Parties to add certain additional declarations to their Statement of Cost. The Parties submitted the supplemental information by the due date of November 3, 2017.

IV. FACTS

A. Management Contract for Polyclinic La Paz (Bata) from December 14, 2009

59 The Parties entered into a Management Contract for Polyclinic La Paz (Bata) on December 14, 2009. (*Contrato de gestión del Hospital Policlínico La Paz (Bata),* Supplement K-1).

60 Therein, Claimant agreed to take over the Management of Polyclinic La Paz including various training and continued education tasks and the development and supply of software for hospital administration.

61 Claimant's main duties are described in the Management Contract as follows:

- Item 3.1: Operation of the Polyclinic (Management), granted full, unlimited power of attorney by Respondent
- Item 3.2: Duty to carry out all personnel decisions required for operating the Polyclinic
- Item 3.3: Training- and continued education for the personnel (including advanced training courses on Claimant's e-learning system for a fee; cf. Item 10.1)
- Item 3.4: Development and supply (incl. installation; cf. Item 6.1) of software for hospital administration
- Item 3.5: Permission to use the "Brand Name."

62 According to the Management Contract, Claimant's services were divided into two phases:

63: According to Item 6.1 of the MV, *Phase A* of the Contract includes a) control of revenue and expenditure as well as b) control of the financial organization, c) commencement of the installation of software by international standards, d) management and selection of all

medicinal drugs and hospital supplies by European standards and the respective quality and, finally e) professional quality control of the evaluation and quantity of staff, and notification of the administrative council. A compensation of EUR 840,000 was assessed for these services. This amount is all inclusive, with the exception of housing costs, water, electricity and local transportation for the associates working there.

64 According to Item. 6.2, *Phase B* of the Management Contract includes taking full responsibility for the technology portion, personnel, location and the entire property. It was agreed that Claimant would receive a so-called "Management Fee" of EUR 700,000 per month for these services (Item 7.1. MV).

65 It is undisputed that Phase A was completed in 2011, at the latest (cf. Rejoinder para. 47). Disputed, however, is the precise point in time of conclusion of Phase A, or the beginning of Phase B, respectively (cf. para. 186 et seq. below).

B Claimant's Withdrawal from Equatorial Guinea in March 2011

66 The Parties maintain agreement that Claimant no longer had access to Respondent's software as of December 2010 (see Reply. para. 313 a.E. and Rejoinder para.15). On March 14, 2011, Claimant's local director and the technical director of the Polyclinic La Paz (Mr. Kronenberger and Mr. Gerard) were asked to leave the Polyclinic within 48 hours and to leave the country. They departed on March 16, 2011 (KS para. 121; Supplement K-42; ZE Kronenberger, p. 5, Supplement K-39). With the departure of Mr. Kronenberger and Mr. Gerard Claimant, Claimant withdrew from the Clinic and from Equatorial Guinea, respectively (cf. KS para. 121, KA para. 57 and Rejoinder para. 125).

C. First Arbitration Proceedings and Conclusion of the Agreement Protocol from May 28, 2015

67 After Claimant withdrew from Equatorial Guinea in March 2011, Claimant entered into Arbitration Proceedings No. 600257-2011 on June 20, 2011 ("**First**

Arbitration Proceedings"). Claimant filed a partial claim comprising 90% and demanded payment of the Management Fee for Phase B beginning August 2010 up until and including August 2012.

68 The first Arbitration Proceedings resulted in a decision from December 5, 2014 (cf. Supplement K-2), by which Respondent was obligated to pay Claimant for the months of August until December 2010 and the months of January up until and including March 2011 EUR 5,040,000 plus 5% interest beginning February 1, 2011 as well as for the months of April 2011 up until and including December 2011, and the months of January 2012 up until and including August 2012 an amount of EUR 8,996,400 plus 5% interest beginning September 3, 2012 (cf. Supplement K-2 p. 85), i.e. a total amount of EUR 14,036,400 plus interest and costs.

69 In the Dispute Settlement Agreement from May 28, 2015, the Parties agreed to set the claim resulting from the Arbitral Award at EUR 16,460,218.77 (cf. B-1; Preamble and Art. 1). In doing so, the pertinent payment modalities to "*implement*" the Arbitral Award from December 5, 2014 (cf. B-1; Preamble and Art. 3) were also determined. It is disputed whether the Claims made in the present Proceedings were resolved in the Dispute Settlement Agreement and satisfied by payment of the settlement sum (cf. para. 117 et seq. below).

70 It is further disputed whether Respondent had properly and duly terminated the Management Contract on the basis of numerous claims and the expulsion of Claimant's staff in March of 2011, or, by implication, at a later date, with immediately effect, or had, at any rate, properly terminated it, or whether the contract was extended for another five years for lack of termination.

V. ARGUMENTS BY THE PARTIES

A. Claimant's Position

71 Claimant filed claims vs. Respondent on the basis of a Management Contract from December 14, 2009. The present claim includes further assertions from the Management Contract, in

addition to the compensation awarded by the first Arbitral Award (para. 68 above). Claimant declared continued willingness to resume its services for Respondent if Respondent fulfills its contractual obligations (KS para. 1 et seq.).

72 Regarding the Arbitration Tribunal's jurisdiction, Claimant offers the following explanation: Claimant refers to the Dispute Settlement Agreement from May 28, 2015. It was not correct that the Arbitration Clause therein took priority over and replaced the Arbitration Clause in the Management Contract. This agreement was made exclusively to resolve the claims awarded in the first Arbitration Proceedings. After the decision from December 5, 2014 was issued, Claimant initiated proceedings to enforce it against Respondent. Notwithstanding this action, Claimant demanded payment directly through Attorney Tomo (Reply para. 6 et seq.).

73 Claimant also points to a discussion in Hamburg on March 23, 2015 and additional correspondence and phone conversations with Jean-Charles Tchikaya, during which an agreement was reached regarding payment of the claim in three installments. Prior to signing the Dispute Settlement Agreement, Ulrich Marseille allegedly pointed out that this Arbitral Award mentioned a partial claim only, and further claims were attached to Arbitration Proceeding No. 600413-2015, whereas Jean-Charles Tchikaya was of the opinion that the claims for which judgment had been entered should be satisfied first. Hence the Dispute Settlement Agreement merely served to settle the Claims from the Arbitral Award from December 5, 2014 (Reply para. 31 et seq.).

74 The same interpretation, it was said, was clear from the Dispute Settlement Agreement, since in the Preamble and in Art. 1 and 4 reference was made to the first Arbitration Proceedings and its Award. According to Art. 3, the sum of the three installments thus corresponded precisely to the claims awarded. It was said that Claimant's other claims were not included in this (Reply para.75 et seq.). The Arbitration Clause in the Dispute Settlement Agreement was

accepted because, in the event of a (partial) default on Respondent's part, the agreed-upon payment installments would have necessitated the filing of new litigation (response para. 87.et seq.).

75 Insofar as Respondent disputes the Arbitration Tribunal's jurisdiction on the grounds that the Courts of Equatorial Guinea needed to be called upon first, one just needs to interpret the Arbitration Clause because there was general consent from the Parties to have an arbitration agreement; it was primarily a question of whether or not due legal process in Equatorial Guinea should be pursued first, prior to calling upon the Arbitration Tribunal. The Arbitration Clause should normatively be interpreted in such a way that it can function in the most efficient manner. An incremental approach to the legal recourse was challenged by the fact that the legal force of the State Court's decision would undoubtedly stand in the way of a new decision by an Arbitration Tribunal (KS para. 23 et seq.).

76 The aforementioned explanations were also confirmed by the Parties' behavior displayed in the current Arbitration Proceedings: Respondent was informed about the Arbitration Proceedings' initiation but failed to comment, which could be interpreted as agreement to the Arbitration Tribunal's jurisdiction. (KS para. 37 et seq.).

77 Furthermore, the Arbitration Clause was formulated by Respondent and should therefore be interpreted to the latter's detriment, according to the ambiguity rule. Moreover, insisting on an agreement regarding jurisdiction of a State Procedure as an imperative prerequisite of an arbitration procedure is a surprising clause. Moreover, insisting on carrying out a State Procedure could be regarded as a misuse of legal practice (KS para. 43 et seq.) There is no priority for the Spanish Version. It was allegedly clear during the Parties' negotiations that neither the Spanish nor the German version should be given priority (Reply para. 109).

78 Claimant justifies its claim in that on December 14, 2009 after lengthy negotiations, the Parties' signing of a Management Contract took place (cf. Supplement K-1). Claimant's responsibilities were divided into Phase A and Phase B (No. 6MV) (KS para. 54 et seq.).

79 Respondent's contribution in return consisted of several payments, particularly a Management Fee (No. 7 MV). The cost of Phase A was EUR 840,000; the cost for Phase B was EUR 700,000 per month (KS para. 61 f.).

80 On September 7, 2010 Claimant provided a comprehensive report on the Management Contract (Supplement K-21), wherein it concluded that the services of Phase A had been 100% completed and the services for Phase B were 58% completed. Therefore, Phase B had already been reached, which means that payment of the agreed-upon Management Fee of EUR 700,000, payable one year in advance, was now due. Moreover, Dr. Donato Ndong Oburu and Dr. Pedro Ndong Asumu confirmed on behalf of Respondent in January 2010 (recte: 2011) that Phase A had been completed (Supplement K-36; KS para. 85 et seq.).

81 After completion of Phase A, Respondent did not pay the owed amount of EUR 8,400,000. Claimant, however, continued the work and repeatedly requested payment. Subsequently there were difficulties and problems, which aggravated the fulfillment of the Management Contract as well as the poaching of employee Mensching, non-adherence to set dates, considerable delays in salary payments, satellite lines interrupted at the Minister's orders, so that Claimant had no support for the IT system, the maintenance of which occurred in Germany, and thus could not be provided, outstanding payments on Respondent's part for services provided by Claimant, etc. (KS para. 107 et seq.).

82 Software Engineer Kanbari was sent to the hospital at Bata on January 6, 2011 to deal with any possible difficulties in running the software solutions; he was however refused access to the property. Claimant made Respondent repeated offers to rectify the IT system, although the cause of it was purely based on Respondent's actions of having ordered interruptions in the satellite lines. During a telephone conversation with Fritz Kronenberger on January 15, 2011 Minister Marcellino Oyono Ntumutu simply wanted to know how the contract could be terminated (KS para. 111 et seq.).

83 On March 11, 2011 a meeting took place between the Administrative Council, Respondent's and (in part) Claimant's staff. Before Claimant's staff, Mr. Kronenberger (Finance Manager) and Gerard (Technical Manager) could make any statement, they were told to leave the room. On March 14, 2011 they were ordered to leave the Hospital La Paz within 48 hours and to leave the country (KS para. 117 et seq.).

84 It was not correct that the contract could be terminated at any time, regardless of contractual settlement according to Art. 404 OR. The Parties had agreed to a contract of a fixed term of five years, with automatic renewal if not terminated. This was a mixed contract, wherein not the agency-based * part, and, specifically, the required basis of trust were important, but the work- and service driven part far outweighed it. Moreover, particularly trust and the need for protection were lacking between the Parties. Indeed, it is Respondent who engaged in a considerable breach of contract. Based upon the Parties' mutual willingness, successful work performance had been expected in numerous areas. From a legal point of view, the Management Contract thus echoed primarily a success-oriented and thus a work/services oriented character. Claimant should be classified as a general contractor. Even a work contract can be terminated; such prerequisites, however, were definitely not given (Resp. para. 209 et seq.).

Translator's Note: *Agency is an area of commercial law dealing with a contractual or quasi-contractual tripartite, or non-contractual set of relationships when an agent is authorized to act on behalf of another (called the Principal) to create a legal relationship with a Third Party.[1] Succinctly, it may be referred to as the relationship between a principal and an agent whereby the principal, expressly or impliedly, authorizes the agent to work under his control and on his behalf. The agent is, thus, required to negotiate on behalf of the principal or bring him and third parties into contractual relationship. http://en.wikipedia.org/wiki/Agency_(law)

85 It is thought that the contract was not terminated. Yes, a phone conversation took place between Witnesses Kronenberger and Minister Marcellino, during which the Minister indicated that the contract could be terminated. There was no further discussion on this subject. A termination did not take place; the questioning of Witness Kronenberger did show, however, that he was not granted an opportunity to return to his work place and continue his work (K-SB para. 290). The employees who returned to Germany, particularly Witness Kanbari, continued to work on developing the IT system, i.e. were ready anytime to support the system on site again (cf. K-SB para. 372-376).

86 The contract in its original version had run undisputed up until January 31, 2015 but did not end on January 31, 2015 because it is subject to automatic renewal for another five years, unless it is terminated with a one year notice period. It was never pronounced terminated (KS para. 177 et seq.; Resp. para. 161 et seq., 329 et seq.).

87 The current Claim, after issuance of the first Arbitral Award, is for the remaining 10% of the monthly compensation of EUR 700,000 per every month for the months from August 2010 up until and including August 2012. Moreover, Claimant has claims for the period from September 2012 up until and including January 2015, and for the period up until and including January 2020, since the Management Contract was not terminated (KS para. 150 et seq.).

88 The Evidentiary Hearing showed that this is a case of contract remorse. After Respondent had gladly taken advantage of and accepted Claimant's services and seen that the hospital was reorganized with professional standards, Respondent thought that it could now continue operations without Claimant (K-SB para.5). Claimant, however, continued to provide work and services, or attempted to do so, respectively (K-SB para. 10, reference WP Kronenberger p. 260 N 13-15).

89 With regard to savings in expenditures, Claimants maintains that these amounted to a monthly sum of EUR 118,404 plus one-time costs of EUR 118,891 for software enhancement for hospital administration, etc. (K/SeA para. 4). Claimant hereby supports its statement through an "Expert Statement" by Statutory Auditors PricewaterhouseCoopers GmbH ("**SPwC**" Supplement K-93). As to Respondent's objection that the submitted PwC documents were not accessible, Claimant explained that they were documents made available within the scope of the current proceedings (Statement to B-SeA para. 11).

90 *Expenses for preparations of the project concerning the development of a Healthcare System in Equatorial Guinea,* i.e. the completion of a clinic in Malabo as well as establishing satellite clinics were so-called advance services in the form of acquisition costs of Claimant which were not reimbursed. In the absence of factual references to the Management Fee according to Item 6.2. MV, these costs shall therefore not be taken into consideration (K-SeA para. 23 et seq.; SPwC para. 51).

91 As to the *country risk*, Claimant states that this was evaluated as being particularly high at the time the Management Contract MV was signed, as it is today. For the majority of circumstances, Respondent would be considered to be in the highest risk category. The economic feasibility assessment on long-lasting projects is preferably obtained on the basis of present value calculations while the respective country risk is reflected in the discounted interest rate. Precise present value calculations had not been performed by Claimant in view of the Management Contract. However, an analogous evaluation of an expected return on the advance costs incurred and investments had been formulated, which, for a favorable assessment of the project, required that future risk-adequate returns would be generated in the form of a Management Fee in the contractually agreed-upon amount, minus anticipated costs. A quantification of sovereign

risk within project calculations in the form of a monetary sum was not possible. The country risk did prove true in Respondent's case (K-SeA para. 28-36; cf. the entire SPwC para. 55 et seq.).

92 As to *ancillary income,* Claimant explains that it had not acquired any income through the use of staff available since its dismissal on March 16, 2011 and did not intentionally avoid this. Claimant did not have an opportunity to reassign the largely external service providers engaged for the Bata project elsewhere. At that time no other projects were available and the contractual conditions with the external service providers ceased to exist. The entire project with its multifaceted tasks and responsibilities, including the development of a healthcare system in an African country, had a dimension that could not be replaced by other projects of the same type and complexity, not even on a smaller scale. (K-SeA para. 39 et seq.). Such a complex development project is not something that could be quickly replaced over a short period of time, in order to "seamlessly" reassign Claimant's staff (Statement B-SeaA, para. 29).

B Respondent's Position

93 In its statement of defense, Respondent raises the objection to the jurisdiction issue, with the following reasons:

94 On May 28, 2015 the Parties had entered into a comprehensive agreement for a definite settlement of the dispute between them (Supplement B-1). This Dispute Settlement Agreement represents an *overall settlement*; at its conclusion on May 28, 2015, the first Arbitration Proceedings had been completed and the second Proceedings had already begun. Item 7 of the Agreement contains an Arbitration Clause, Item 4 an Account-Balance Clause (KA para. 14 et seq.)

95 Based upon the Parties' aim to reach a comprehensive settlement of the current litigation, it was clearly the Parties' intent to have the Arbitration Clause of the Dispute Settlement Agreement take priority over and replace the Arbitration Clause embedded in the Management Contract. This

purpose becomes evident in that the Parties concurred under Item 5 that the entire agreement would become invalid in the event of a default of Respondent's payments. The Parties allegedly had wanted to find a comprehensive and final overall solution (KA para. 19 et seq.)

96 For Respondent, the matter was resolved with the conclusion of the Dispute Settlement Agreement (Rejoinder para. 13). Claimant agreed to forgo EUR 2,000,000 in the Dispute Settlement Agreement. So many concessions on the part of Claimant could mean nothing more than Claimant's desire to have the matter settled (Rejoinder para. 15 et seq.).

97 In the current proceedings, Claimant knowingly withheld the existence of the agreement from May 28, 2014, apparently viewing that agreement as non-binding; if however, Claimant wanted to contest this agreement, this would have to be done before an ICC Arbitration Tribunal (KA para. 22).

98 In the event that the Arbitration Tribunal should conclude that the Arbitration Clause of the Management Contract was not replaced by the new agreement, the following point should be raised: the German translation of the Arbitration Clause in the Management Contract *("In the event of disputes arising from this Contract, the Parties shall attempt to find an amicable solution prior to calling upon the courts of Equatorial Guinea [...]"* does not concur with the original Spanish version.

99 It was the Parties' intent to give the Spanish version of the Management Contract priority. The Parties had made and authenticated handwritten changes to the Agreement in Spanish. Moreover, both Parties had signed the left side (Spanish version) and not the German version. Therefore, the Spanish version was the valid one and the Parties should first have pursued Court Proceedings in the Republic of Equatorial Guinea, and called for the current Arbitration Proceedings only after a decision had been obtained (KA Para. 26 et seq.; Resp. para. 25 et seq.).

100 An objective interpretation of the Arbitration Clause would lead to the same result: it was not clear that Spanish and German were valued equally if changes to the agreement were made in Spanish only and the translation was not ordered together. Moreover, the Parties could not even have misunderstood a wrong translation of the Arbitration Clause ("*before calling upon the courts of Equatorial Guinea*") to mean anything else but that these courts had to be addressed first (KA Para. 38, Rejoinder para.31 et seq.).

101 Witness Marseille confirmed that Claimant wanted a German or neutral place of jurisdiction, and that Respondent was unwilling to agree to a legal venue or Arbitration Clause without the involvement of the Courts of the Republic of Equatorial Guinea. Accordingly, a compromise was found, whereby first the Courts of the Republic of Equatorial Guinea and then an Arbitration Tribunal according to the rules of the Swiss Chamber of Commerce were to be engaged. The Witness Marseille merely confused the sequence (first the Arbitration Tribunal in Zürich, then the Republic of Equatorial Guinea, was the intended order); this represents a serious contradiction to the translated contractual text (B-SB para. 19).

102 Claimant had gone directly to the Arbitration Tribunal, without pursuing Court proceedings in the Republic of Equatorial Guinea. Hence the Arbitration Tribunal should declare its lack of Jurisdiction. Alternatively the proceedings should be suspended and the Parties given a deadline to enable them to carry out the arbitration process, as well as due process in Equatorial Guinea (KA para. 39 et seq.).

103 As to substantive law, Respondent explains the following: the agreement from May 28, 2015 governs the dispute among the Parties in a conclusive manner, which is why the request should be dismissed. Because Claimant withheld the central agreement from May 28, 2015, this indicates a misuse of rights on Claimant's part (KA para. 73 et seq.)

104 The first Arbitration Proceedings and the Grounds for the Claim of the current proceedings reveal further that Claimant had definitely left the Republic of Equatorial Guinea and has not been working for Respondent since. And since that time, Respondent has considered the Management Contract terminated and void, and has claimed this in the Counter Claim during the first Arbitration Proceedings. Claimant acknowledged that Respondent attempted to terminate the Contract since the beginning of 2011, and stated also that Claimant's staff was expelled by Respondent in March 2011. With the first Arbitral Award, Claimant received compensation until August 2012. Since March 2011, at the latest, Claimant has not provided any work or services for Respondent, as such services were neither needed nor requested because meanwhile the clinic was managed by another enterprise. Nevertheless, Claimant attempts to obtain compensation for services not performed and insists on compensation until 2020, knowing full and well that it will never work for Respondent again, due to lack of fundamental trust which is indispensable in the hospital- and caregiving field. (KA Para. 55 et seq.).

105 Respondent refers to the statements made by Witness Marseille, based upon which the contract was effectively terminated in December 2010, or terminated by Claimant, respectively (cf. –SB para. 21 et seq.). Claimant had understood the conduct by March 2011, at the latest, to be a cancellation or termination of the contract, respectively, and it was clear to Claimant that Respondent had renounced Claimant's services (B-SB Para. 30). Moreover, Witness Marseille stated that non-compliance with the instructions to treat patients only for prepayment or a guarantee for treatment costs led to a breach of contract. The reason for this breach of contract is a result of Claimant's actions (cf. B-SB para.24 and 30).

106 The statements of Witness Regenhardt show that IT development was fully completed by the end of 2010 and the IT system was functional. Further, it was clear that, from the end of

2010, Claimant no longer had access to Respondent's IT system, that from this time on it never gained access again and was informed in January 2011, at the latest, that Respondent no longer required its services. The termination of the contract was thus clearly communicated (cf. B-SB para. 44-47). Witness Kanbari, as Claimant's recipient of the statement, had also received Respondent's implied statement of intent to terminate the MV and conveyed this (B-SB para. 51). Additionally, Witness Kronenberger had surely knowingly accepted that Respondent no longer wished to work with Claimant, and knew that the Management Contract was terminated when he left the country (B-SB para. 55-63).

107 The Management Contract is, in actuality, an order, which consisted of the administration of the Polyclinic in Bata. Projects regarding portal clinics or a nursing school had never been part of the Management Contract (Rejoinder para. 54 et seq.). This was a mixed contract, whereby the agency-based aspect and mutual trust were very important. Art. 404, Section 1 OR is therefore compellingly applicable to the Management Contract, which is why Item 12 MV does not apply and Respondent could have terminated the contract at any time, effective immediately (KA para. 89 et seq., Rejoinder para. 60 et seq.).

108 Such a termination had already been expressed by Respondent in March 2011 on the grounds of numerous complaints and the expulsion of staff. This implied termination did not take place in an untimely fashion. Claimant received a compensation of EUR 16,460,218.77 for the time until August 2012, although Claimant was no longer providing services for Respondent, and special disadvantages were neither evident nor substantiated by Claimant to indicate that the termination took place in an untimely manner (KA para. 97 et seq., Rejoinder 65 et seq.).

109 Alternatively, the termination occurred with the filing of the Counter Claim in the first Arbitration Proceedings, where Respondent clearly stated that it considered its collaboration with Claimant as having ceased (KA para. 105 et seq.).

110 Insofar as the Arbitration Tribunal did not base its view on an immediately effective termination right, Respondent terminated the Management Contract by March 2011 at the latest and in compliance with Item 12. The Management Contract did not prescribe any particular form of termination, which is why it was possible to terminate it by implication. All implied actions by Respondent represented a termination and the Management Contract, if not terminated immediately, was, in any case, not extended automatically by another five years, (KA para. 109 et seq.).

111 As the case may be, Respondent had terminated the Management Contract, effective immediately, by signing the Dispute Settlement Agreement from May 28, 2015. Should the Arbitration Tribunal be of the opinion that Respondent has not terminated the Management Contract to date, Respondent declared in its statement of defense that the contract is terminated effective immediately (KA para. 115 et seq.).

112 Regarding the "expert statement" by PwC on savings in expenditures and in consideration of the country risk (Supplement K-93) submitted by Claimant, Respondent maintains that PwC relied on Claimant's general documentation and descriptions when preparing its findings. These documents are not available to Respondent, therefore PwC's explanations could not be examined. SPwC is not considered to be conclusive evidence (B-SeA, para. 9-12).

113 *The salary expenses* for Claimant's four employees on location were not covered by the Management Fee. Item 6 MV deals with the cost of carrying out the MV for Phase A and B; these costs should strictly be kept separate from the Management Fee. Item 6 shows that the costs for services rendered during Phase A were EUR 840,000 (Item. 6.1). For Phase B of the

Contract, the monthly costs were EUR 700,000 and thus EUR 8,400,000 per year (Item 6.2). This amount included all costs for the four employees provided by Marseille, with the exception of their housing costs, water, electricity and transportation. These costs were passed on to Respondent. The Management Fee (Item 7) was not intended to cover these costs, but was separate and owed additionally (B-SEA, para. 14). Contrary to Claimant's explanations and those by PwC, it should be considered that current costs, including costs in connection with the central office in Hamburg were covered by Item 6.2 in the MV Contract, and that the Management Fee (Item 7.1) represented pure profit (consisting of the profit for the past period and future loss of profit) (B-SeA Para. 22). Claimant stated its savings in expenditures to be EUR 118,404 which is the minimum amount that should be deducted from the Management Fee. (B-SeA para. 17).

114 Moreover, Claimant's *acquisition services* have nothing to do with the filed claims from the Management Contract and could therefore not be charged to Respondent (cf. B-SeA Para. 18). Claimant has rightfully acknowledged that there is no contractual basis for the acquisition costs and those are unrelated to the Management Contract MV, which is why they should not be taken into consideration in the Management Fee (B-S-SeA para. 9)

115 The Management Fee consists exclusively of profit and country risk (B-SeA para. 30). The risk of an immediate termination of contract at any time is already calculated in the Management Fee and comprises an offset for future loss of profit in case of a potential termination of contract executed at any time. With the payment of the Management Fee up to the breach of contract, Claimant should already be compensated for a breach-of-contract scenario (cf. B-SeA para. 32 f.). The awarded sum of EUR 16,460,218.77 for the Management Fee up until August 2012 according to the first Arbitral Award includes the country risk and therefore

also the risk of a contract termination executed at any time as well as future loss of profit (B-SeA para. 36). Claimant acknowledges that in the calculation of the Management Fee the risk of a termination of contract at any time was taken into account. The Management Fee comprises, so to speak, the offset of a future loss of profit in the event of a termination of contract at any time (statement on K-SeA Para. 10, para. 25).

116 Respondent thus disputes that Claimant could not have gained any other income. With Respondent's termination of the Management Contract, Claimant's own staff was no longer required for the project by March 2011. With this staff, Claimant could have gained added value from elsewhere, which in the present case could have been considered as added additional income. Claimant is subject to damage mitigation duty, that is to say Claimant is required to reassign available employees elsewhere within reasonable limits and opportunities available. However, Claimant has omitted any documentation as to how much effort at all was made to reassign the freed-up staff after termination of the Management Contract (B-SeA Para. 38 f.; Statement to K-SeA para. 20).

VI. CONSIDERATIONS

A Arbitration Tribunal's Jurisdiction

1. Effects of Dispute Settlement Agreement on Claims from Management Contract

117 Claimant has based the Arbitration Tribunal's Jurisdiction on the Arbitration Clause in the Management Contract. Respondent counters that the Arbitration Clause was replaced by the Arbitration Clause in the overall settlement of the Dispute Settlement Agreement from May 28, 2015, which stipulates an ICC arbitration procedure. Therefore the Arbitration Tribunal does not have jurisdiction.

118 First and foremost it should be examined whether or not the Arbitration Clause in the Management Contract was replaced by the Clause in the Dispute Settlement Agreement. This question depends largely on whether or not the Dispute Settlement Agreement in the sense

of an overall settlement is intended to govern the claims from the Management Contract, or whether it is limited to Claimant's claims from the first Arbitral Award. In the first case, the Arbitration Tribunal's jurisdiction should be examined on the basis of the Arbitration Clause in the Dispute Settlement Agreement, in the latter instance on the basis of that in the Management Contract.

119 The Parties' actual intent is the determining factor for the interpretation of the Contract. If this cannot be found out, then the Parties' presumed intent should be determined using an interpretation of the Contract based upon good faith. Using such an objectified consideration aims at the understanding that reasonable Parties would have had under the given circumstances and with the present wording, or the explanations given (BSK OR I-Wiegand, Art. 18 N 11, 13; BGE 143 III 157 E. 1.2.2; 138 III 659 E. 4.2.1; 132 III 24 E. 4; 128 III 265 E. 3).

120 In the investigation of the actual as well as the presumed intent of the Parties, the starting point is the wording and systematic approach of the statements made, followed by additional supplemental means of interpretation such as concomitant circumstances and the Parties' conduct prior to and after conclusion of the contract (entire text BSK OR I-Wiegand, Art. 18N 18 et seq.).

121 One such interpretation based upon the wording and systemic approach of the Dispute Settlement Agreement leads to the following result: the Preamble refers explicitly to Arbitration Proceedings No. 600257-2011 and Respondent's sentencing therein to make payment of EUR 16,460,218.77 (*"For the Implementation of the Arbitral Award [...] THE FOLLOWING AGREEMENT WAS MADE"*). The settlement text itself refers to *"the final Claim resulting from the Arbitral Award"* in Art. 1; in Art. 2, Claimant agrees to end the period of interest accrued as awarded by the Arbitral Award in Claimant's favor as of January 31, 2015, and

to permanently waive any claims in connection with subsequent interest. In Art. 3, Claimant agrees to the settlement of its claim according to Art.1 in three equal payments. Art. 4 states that after Respondent's fulfillment of its payment obligations, Claimant shall forgo all claims against the State *"in connection with the Arbitral Award"*. Under Art. 5, the consequences of default in payment are specified and Claimant is given the right to pursue the payment of the total amount of *"its Claim"* (Supplement -1).

122 Hence all quoted Articles refer clearly and exclusively to the first Arbitration Proceedings, or the claims resulting thereof. The second Arbitration Proceedings, which had already begun, were not mentioned. Nothing is specified in the Dispute Settlement Agreement that would indicate that those claims were satisfied with a settlement. On the contrary, Art. 4 which deals with the "*legal validity*" of the Dispute Settlement Agreement, is limited to all claims in connection with "*the Arbitral Award,*" i.e. claims from the first Arbitration Proceedings. In Art. 4 Claimant shall forgo these – but not those from further Arbitration Proceedings – provided Respondent *fulfills his financial obligations.*

123 Hence the wording and the systematic approach of the Dispute Settlement Agreement are clear in terms of applicability: it comprises the claims from the first Arbitration Proceedings. Not included are any further claims from the Management Contract, including those from the second Arbitration Proceedings. The fact that the Dispute Settlement Agreement contains its own Arbitration Clause, which deviates in content from the Arbitration Clause in the Management Contract, changes nothing in this reasoning: there is no reason why Parties seeking a dispute settlement, or in connection with such settlement, would not be able to deviate from the Arbitration Clause provided in the underlying contract.

124 The correspondence submitted and the Witness Statements on the concomitant circumstances of the finalization of the Dispute Settlement Agreement confirm this conclusion:

125 Claimant's witnesses, Christiane Knak-Kammenhuber and Ulrich Marseille, have confirmed that during the meeting from March 23, 2015 in Hamburg the claims of the second Arbitration Proceedings were not discussed (WP Knak-Kammenhuber p. 24 N 29-33; WP Marseille p. 38 N 29-33, p. 39 N 1-5, 19-21, 29-31, pp. 40-41). Equally, Ulrich Marseille's letter to Respondent's legal representative, Jean-Charles Tchikaya from March 31, 2015 (Supplement K-56) mentions "*outstanding payments from the Arbitral Award by the International Arbitrage Zürich (Swiss Rules) vs. the Republic of Equatorial Guinea,*" i.e. the letter refers to the payments from the first Arbitral Award only.

126 According to Ulrich Marseille's Witness Statement, he addressed the claims from the second Arbitration Proceedings during a phone conversation with Jean-Charles Tchikaya, which took place after April 25, 1015. Jean-Charles Tchikaya voiced his opinion that first the titled claims should be taken care of; subsequently one could address the other claims and an out-of-court settlement (WP Marseille p. 38 N 27-33, p. 39, N 1-6, p. 40 N 1-7, p. 80 et seq.). This was mentioned again by Jean-Charles Tchikaya during a phone conversation with him after May 22, 2015 (Supplement. K-54, p. 5).

127 Jean-Charles Tchikaya failed to attend the Oral Proceedings, without apology, although Claimant had requested his attendance. His written Witness Statement should therefore be considered insignificant (cf. Art. 9.2.4 of Procedural Decision No. 1). The same applies to the Witness Statements of the Minister of Justice, Juan Olo Mba Nseng, who failed to appear, but who was not directly involved in the settlement discussions between the Parties with regard to the Dispute Settlement Agreement.

128 Respondent's Witness Mayiboro stated that according to his understanding the matter was settled when the Dispute Settlement Agreement was signed (WP Mayiboro p. 121, p. 132 N 3-19). Witness Mayiboro's statements prove that he has no detailed knowledge of the facts and

merely functioned as an attendee of the discussion between the two Parties in Hamburg (cf. WP Mayiboro p. 121 N 32 et seq., p. 125 N 7-11, p. 131 f. N 26 et seq., p. 142 et seq.). As to his role in the negotiations, he explained that he was selected for his German skills; he accompanied Jean-Charles Tchikaya (WP Mayiboro p. 121 a.E., cf. also p. 125 N 7-11).

129 Negotiations for Respondent were conducted by Jean-Charles Tchikaya, who, according to Ulrich Marseille's statement, held the opinion that the claims from the second Arbitration Proceedings should only be discussed after finalization of the settlement (para. 126 above). It remains to be seen whether this is in fact Respondent's opinion, but it may not be of significance in an external relationship. In its attempt to honor all of the circumstances, the Arbitration Tribunal concludes that it corresponded to the Parties' actual concurring wish or that of its representatives, that the Arbitration Clause of the Dispute Settlement Agreement was related only to the claims from the first Arbitration Proceedings. Even if one were to conclude that this actual wish cannot be discovered, an objectified interpretation of the Arbitration Clause, in view of the clarity of wording and systematic approach of the Dispute Settlement Agreement (para. 121 et seq. above) leads to the same conclusion.

130 As the Dispute Settlement Agreement is related only to the claims from the first Arbitration Proceedings, the claims raised in the current Arbitration Proceedings shall have the Arbitration Clause of the Management Contract applied.

2. Arbitration Tribunal's Jurisdiction Based on the Management Contract's Arbitration Clause

131 Therefore, if the Arbitration Clause from the Management Contract is applicable, the next question is: does the Arbitration Tribunal have jurisdiction over the present claims in accord with this Arbitration Clause?

132 It is undisputed that the Management Contract contains an Arbitration Clause and that it was the mutual wish of the Parties to have any arising disputes judged according to the rules of an

Arbitration Tribunal appointed by the Zürcher Chamber of Commerce. It is also undisputed that the Arbitration Clause in the Management Contract is binding for the Parties (*ratione personae*) and that the claims filed by Claimant fall under this Arbitration Clause (*ratione materiae*).

133 However, Respondent insists that the Arbitration Tribunal lacks jurisdiction because Claimant should first have called upon the courts of Equatorial Guinea prior to initiating the Arbitration Proceedings (cf. KA para. 36 et seq., 42). For lack of a claims initiation and the finalization of Circuit Court Proceedings in the Republic of Equatorial Guinea, the Arbitration Tribunal should have to declare its lack of jurisdiction or, alternatively, suspend the proceedings and set a due date for the Parties, to enable them inasmuch as possible to conduct the Arbitration Proceedings as well as due process in Equatorial Guinea, (cf. KA para. 45).

134 To answer the question whether or not Claimant should have called upon the Courts in Equatorial Guinea prior to the Arbitration Tribunal, the Arbitration Clause must be interpreted on the basis of applicable law. For international Arbitration Proceedings with seat in Switzerland, this is, in accordance with Art. 178 Section 2 IPRG, (i) the law selected by the Parties, (ii), applicable to the dispute, in particular to the main contract, or (iii) Swiss Law. Presently, the Parties have not defined any separate applicable law for the Arbitration Clause. Therefore, in accordance with Art. 178 Section 2 (ii) and (iii), Swiss Law is applicable (Interim Decision from March 15, 2016, para. 35). The Arbitration Clause according to Art. 14 Section 3 of the Management Contract reads as follows:

> (Translated) German Version:
>
> In the event a dispute should arise from this contract the Parties shall attempt to find an amicable solution prior to calling upon the Courts in Equatorial Guinea. In the event disputes should arise, the Parties agree to engage in Arbitration Proceedings before the Chamber of Commerce in Zürich.

Spanish Version:

En caso de litigo, las partes es sentarán para resolver amigablemente el problema, caso contrario se dirigiarán a los tribunales de Guinea Eucatorial. En case de desacuerdo de una de las partes, podrá recurrir al tribunal de la Cámara de Comercio de Zurich.

Translation according to certified translation by Claimant (Supplement K-82): In the event of disputes the Parties will meet and solve the problem amicably, otherwise they will turn to the Court of Equatorial Guinea. If one of the parties does not agree, the Court of the Chamber of Commerce in Zürich may be called upon.[1]

135 The Parties disagree on the point whether the Spanish version of the Management Contract takes priority over the German version. Claimant states that the German version of the Arbitration Clause does not correspond to the Spanish one, the Spanish version being the relevant one (KA para. 28 et seq.). Claimant insists that both versions have the same meaning (Reply. Claimant, para. 109).

136 In the Arbitration Tribunal's opinion, there is no reason to give priority to the Spanish version in interpreting the Arbitration Clause. The Parties have decided to have a bilingual version of the contract, without giving priority to any one language. Respondent's argument that the Spanish version has priority due to the (undisputed) fact that prior to signing handwritten changes were made in Spanish to the wording of the contract (para. 98 above), does not apply to the Arbitration Clause (Item 14 MV): no such handwritten changes appear there. Also, the (undisputed) fact that the contract was signed only on the left, i.e. beneath the Spanish text, (para. 98) is no indication that the German version should be secondary. If the Parties had

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1 The Arbitration Tribunal agrees with the translation in Supplement K-82. The translation offered by Respondent (KA para. 29) is not accurate.

intended this to be so, they could have clarified this in the contract text. Further, it must be assumed that the Parties would not have had the German and the Spanish version printed parallel to each other in the same document, if they had wanted to give priority to the Spanish version.

137 In the interpretation of the Arbitration Clause, the Arbitration Tribunal can hence use the wording of the German as well as the Spanish version. The first sentence in both versions of the Arbitration Clause mentions the Courts of Equatorial Guinea. According to the German version, the Parties shall attempt to seek an amicable solution *"prior to engaging"* the Courts of Equatorial Guinea. Similarly the Spanish version demands that the Parties shall attempt to resolve any disputes amicably and, if this is not achieved *("caso contrario")*, seek assistance from the Courts in Equatorial Guinea. However, the second sentence in both versions of the Arbitration Clause mentions an Arbitration Tribunal. In the German version, it is the Arbitration Tribunal that is to be consulted "[i]n the event of disputes." In the Spanish version, the Arbitration Tribunal is to be consulted *"[e]n caso de desacuerdo de una de las partes /if one of the Parties disagrees")*.

138 What form of relationship should apply between the Courts of Equatorial Guinea and the Arbitration Tribunal remains unclear from the wording.

139 As already pointed out, it is presently undisputed that it was the mutual wish of the Parties to have any disputes decided by an Arbitration Tribunal. Therefore, the validity of the Arbitration Clause is not in question.

140 The point of dispute is merely whether the Parties wish to make the Arbitration Tribunal's jurisdiction dependent upon prior implementation of State Proceedings before the Courts of Equatorial Guinea. Claimant's Witness, Ulrich Marseille states on this point that on the occasion of the contract negotiations on December 14, 2009 in Malabo it was agreed to use

"a neutral institution, an internationally operating Arbitration Tribunal" in case an unconventional agreement could not be reached (Witness Statement Marseille, p. 6). It was mutual intent, that in the event of a dispute both Parties could go directly to the Arbitration Tribunal, without having to call upon the Courts in Equatorial Guinea; for Claimant, a court process in Equatorial Guinea was unimaginable (Witness Statement Marseille, p. 6-7; WP Marseille, p. 44 N 5-11; p. 89 et seq.).

141 As to the point that the Arbitration Clause also mentions the Courts of Equatorial Guinea, Witness Marseille (WP Marseille, p. 90 N 7-10, confirmed in WP p. 104 N 1-9):

> *At first they weren't inclined. Then we said: then we cannot do that. So then it was announced that he said: well yes, but somehow Equatorial Guinea also has to be mentioned. That's how this clause came to be.*

142: Respondent did not call any Witnesses or ask for any other evidence regarding the interpretation of the Arbitration Clause, including Mr. Marseille's statements on the negotiations in Malabo and the Parties' intent concerning direct access to the Arbitration Tribunal. The Arbitration Tribunal holds that the actual mutual intent of the Parties cannot be determined. Therefore, an objective interpretation of the Arbitration Clause must be made in order to focus on what reasonable Parties would have understood under the present circumstances and the present wording, or the explanations given (cf. para. 118 and BSK OR I-Wiegand, Art. 18 N 11, 13; BGE 143 III 157 E 1.2.2; 138 III 659 E. 4.2.1; 132 III 24 E.4; 128 III 265 E.3). It must be considered what the proper assessment is here, as it cannot be assumed that the Parties wanted an inadequate solution (BGE 140 III 134 E.3.2 p.139; 122 III 420 E. 3a p.424; 117 II 609 E. 6c p. 621; cf. also BGE 133 III 607 E. 2.2 p. 610).

143 It is not clear from the German wording what the formulation *"in the event of disputes"* in the second sentence of the Arbitration Clause in the Management Contract refers to. Instead, the Spanish wording says *"[i]n the event of a disagreement;"* but it is equally unclear what this

disagreement refers to. It is conceivable that the *"disputes"* or the *"disagreement"* refers to a decision from the Courts in Equatorial Guinea. It is also conceivable that the *"disputes"* or *"disagreement"* refers to the question of calling upon the Courts of Equatorial Guinea per se, which would mean that one Party, if unwilling to go to these Courts, may go to the Chamber of Commerce in Zürich instead. In comparison to the first interpretation, the second interpretation makes more sense, since it enables the Parties to initiate Arbitration Proceedings directly, rather than having preceding State Proceedings. As Claimant rightfully points out, an Arbitration Tribunal should respect substantive res judicata regarding a previous decision (State Court or Arbitration Tribunal) and could not deviate from this (para. 98 above; cf. BGE 128 III 191, E. 4.a; 136 III 345, E. 2.1). Hence, a second submission to an Arbitration Tribunal would not be reasonable.

144 The question arises as to whether Parties can agree that, irrespective of the legal prejudice of a state judgment, the same matter can be heard again before an Arbitration Tribunal. This is questionable, especially because, according to the case law of the Federal Supreme Court, legal prejudice belongs to the "ordre public" (BGE 136 III 345). In any case, irrespective of the question of admissibility of such an approach, this would not be sensible, because it would result in two enforceable decisions in the same case. Such an approach is not appropriate and it is therefore unlikely that reasonable Parties would agree to do so.

145 In addition, if the Parties actually wished that an Arbitration Tribunal should act as a type of tribunal to which to appeal a state judgment, they would agree on a time limit for bringing an appeal before the tribunal and expressing their opinion on the Arbitration Tribunal's jurisdiction. It would also be reasonable to assume that, in such case, they would regulate

whether the State Courts need to be exhausted before the Court ruling can be referred to the Arbitration Tribunal. But all this is missing in the Arbitration Clause of the Management Contract.

146 Respondent's comparison with the *Court of Arbitration for Sport* (CAS) as a Court of Appeal (Rejoinder, para. 33) is inadequate, because there, the appeal would result in the ruling of an association, which cannot come into legal force if there is a challenge to the ruling before CAS.

147 Thus, an objective interpretation of the Arbitration Clause of the Management Contract leads to the conclusion that a Party may seek recourse for disputes arising from the Management Contract before an Arbitration Tribunal in Zurich without first having to submit to Proceedings before the Courts in Equatorial Guinea. Accordingly, the Arbitration Tribunal is competent to handle the claims.

148 There is also no reason for the suspension, alternately requested by Respondent, until the initiation of an arbitration and subsequent due process in Equatorial Guinea resulting in a court decision, or until a decision has been obtained from the competent Courts in Equatorial Guinea (contingent claim a and b on applications I and 2, KA p 3). It cannot be inferred from the Arbitration Clause that Claimant would first have to initiate Arbitration Proceedings before seeking recourse before the Arbitration Tribunal. According to the German version of the Arbitration Clause, in case of disputes arising from this contract, the Parties shall *"attempt to find an amicable solution prior to calling upon the Courts of Equatorial Guinea."* According to the Spanish version, the Parties will in case of disputes *"will meet and solve the problem amicably"* (para. 134 above). There is no mention of an arbitration procedure, so that Respondent's corresponding objection that it must first be carried out is not convincing.

149 The Arbitration Tribunal is therefore competent for handling the submitted claims.

B. Substantive Law

1. Question as to the Termination of Contract by Respondent

150 In the present arbitration, Claimant asserts further compensation claims under the Management Contract for the period from August 2010 to and including August 2012, for which it was already awarded a compensation totaling EUR 14,063,400 (plus interest) in the first arbitration (cf. Award of first arbitration, Dispositiv Item 2 and 3). At that time, Claimant had only requested a partial amount of 90%. Furthermore, Claimant asks for reimbursement for the period from September 2012 until and including January 2015 and beyond until and including January 2020, as it claims that the Management Contract was automatically extended by five years due to lack of termination (cf. KS p. 3 et seq. and Reply p. 3 et seq.).

151 Respondent argues that the Management Contract was subsequently terminated by implication by March 2011, at the latest, with immediate effect. Such a right of termination is thought to necessarily result from Article 404 (1) OR (cf. KA, para. 89 et seq.).

152 In Art.12. 1 MV, the Parties have agreed to a fixed term of the contract of five years, with automatic renewal for five years, unless the contract is terminated prior with a notice of one year (cf. Supplement K-l). The question thus arises as to whether Respondent was able to terminate the Management Contract with immediate effect, based on the agency-based provision of Art. 404 para. 1 CO before the expiry of the agreed term. For this purpose, it must be examined whether the agency-based provision of Article 404 (1) OR is applicable to the present contract.

a) Evaluation of the Management Contract

153 The evaluation of the components of the Management Contract to be assessed in the present case shows that this is an innominate contract, namely a mixed contract in which elements of

different contract types are combined (BSK OR I-Amstutz/Morin/Schluep, Einl. Vor Art. 184 et seq. N 8 et seq.):

154 In Item 3.1 MV, Claimant commits to the operation of the Polyclinic (management). Respondent gives Claimant an unlimited power of attorney. Claimant also makes all necessary personnel decisions for the clinic's operation (Item 3.2). These tasks are of an agency-based nature, as Claimant undertakes to provide services independently (cf. Schmid/Stöckli/Krauskopf, Swiss Code of Obligations, Special Section, 2.A., N I 877).

155 The obligation to provide training and further education for employees including advanced training courses on the applicant's e-learning system in exchange for a fee (cf. Items 3.3 and 10.1) is a mixed contract in the form of a combination contract. The obligation to provide education is of an agency-based nature, while the use of the e-learning system is subject to renting/leasing law (cf. Huguenin, Code of Obligations General and Special Section, 2.A., N 4062). Creation and adaptation of e-learning units are subject to a contract for work and services; the e-learning units must comply with a training plan that is to be developed (Items 1.4 and 1.5 MV).

156 It must be concluded that regarding the development and provision of the software for hospital administration (Item 3.4 MV, including installation, cf. Item 6.1 MV and software adaptation and maintenance costs, cf. para. 212 et seq. below) – and besides the components related to a sales contract – it is the service and work contract elements that outweigh all other contractual elements because Claimant committed to an individually determined work result (cf. BGE 124 III 456, E. 4.b, with further references, BK-Koller, Art. 363 N 220).

157 The provision of the "Brand Name" including authorization to use Claimant's logo (cf. Item 3.5 MV) is similar to having received a license. There is a certain proximity to renting or leasing rights; however, the prevailing doctrine rejects their analogous application (cf. Huguenin, Ibid. N 3801, CHK-Zenhäusern, Vorb OR 184/Licensing and Know-How Contract, N 13).

158 The conception of a nursing school mentioned in the reply (cf. Reply para. 257, cf. also WP Reinmüller, p. 12 N 17 et seq.) is not one of the clearly defined tasks according to the Management Contract. Any expenses related to this and other projects in Equatorial Guinea, e.g. the completion and operation of the hospital in Malabo, were not part of the Management Fee (cf. WP Marseille, p. 109 N 12 et seq., cf. also Respondent's document Rejoinder para. 154, B-SB para. 27, 33, B-SeA para. 18, BS-SeA para. 9 et seq., 14, 24, and also all of para. 215 et seq. below).

b) Question of Applicability of Art. 404 OR

159 Next, the applicability of Art. 404 OR is to be examined. The majority of the Arbitration Tribunal (Dr. Andrea Meier and Dr. Felix Fischer) concludes for the following reasons that Art. 404 OR is not applicable in the present case.

160 Article. 404 para. I OR stipulates that the mandate can be revoked or terminated at any time. The exercise of the right of revocation or termination at any time does not presuppose any particular reason for dissolution (for example, an "important reason") (BSK OR I-Weber Art. 404 N 5, BGE 106 II 160 = Pra 1980, 597).

161 The agency-based right of termination according to Article 404 (1) OR is a peremptory right and cannot be revoked or terminated at any time (BGE 115 II 464, E. 2a; BGE 109 II 462, E. 3e; BGer 4A 284/2013, E. 3.5.l; Gauch, Ibid., N 1966). Justification of this rule can be found, based on federal jurisdiction, in the fact that the agent is given a special position of trust and that there isn't any reason for keeping the contract in force when the relationship of trust between the Parties no longer exists (BGE 104 II 108 E.4).

162 In the case of a mixed contract (innominate contract*), the Federal Supreme Court holds the view that the right to immediate termination under Article 404 (1) OR is only applicable if the provisions of the agency-based contract appear to be appropriate with regard to the Parties being bound to a certain contract term (BGer 4A_284/2013 E 3.5.1, 4A_2011 E. 2.2). Regarding this issue, it is significant whether, according to the nature of the contract, a relationship of trust between the Parties is indispensable and whether or not it is of particular importance (BGer 4A_284/2013 E 3.5.I; 4C.24 / 1989 E. 2c).

163 The Federal Supreme Court dealt with the application of Art. 404 (1) OR to mixed contracts in more detail in its decision 4A_284/2013 from February 13, 2014. The decision was based on an agreement with which the real estate administration of Y. Immobilien AG was relocated to the premises of X. AG as part of a "cooperation agreement," where it was organized and managed by X. AG. The shared right of use of the rooms including infrastructure was not granted to Y. Immobilien AG by a separate agreement, but integrated into Claimant's organization under the latter's direction. The right of joint use itself was therefore based on the existing relationship of trust between the Parties. Furthermore, X. AG was granted a power of attorney over the operating account, from which it was able to make withdrawals. In fact, X. AG made various transfers to itself even after termination by Y. Immobilien AG in order to compensate itself for the losses due to the premature termination of the contract. The Federal Supreme Court came to the conclusion that incorporation into the operation of X. AG as well as the extensive competencies assigned to it required an increased relationship of trust compared to ordinary property management, which made the application of the agency-based provisions for the dissolution of the contract appear to be reasonable (E. 3.5.2).

164 The present contract under adjudication concerns management of a hospital, training of employees and development of hospital software. The Management Contract consists

of provisions used in agency, work and services, licensing, renting/leasing and sales contracts (para.154 et seq. above). Significant contractual tasks, such as operation of the hospital and training and further education of employees include agency-based elements. With regard to the overall assessment of whether an application of Art. 404 OR is appropriate, it is held that the other contract types represented in the Management Contract are also significant because the option to terminate without good cause is limited to the law of agency, and is not applicable to other contract types. In addition, the subsequent consideration of all circumstances shows that, according to the nature of the contract and in particular its implementation by the Parties, a relationship of trust between the Parties was not an indispensable condition for the performance of the contract and that Respondent did not need the protection against a right to immediate termination executable at any time and without good cause.

165 Without a doubt, the provision of health care services is a sensitive area. However, Respondent chose a professional service provider whose obligations were contractually regulated. The contractual arrangement in turn provided Claimant with extensive authority for managing the clinic: Item 3.1, gave Claimant full power of attorney which entitled it to provide or receive all declarations necessary for the operation of the hospital. According to Item 3.2. MV, Claimant was permitted to make all personnel decisions, to conclude various types of supply contracts with patients and relatives and to conclude all other contracts that it deemed suitable for a financially sound operation of the clinic. For this purpose, Claimant, in accordance with Item 2.1 MV, was provided with a budget that it was expected to use, to the best of its knowledge, to cover all necessary business expenses.

166 In addition to the contract text, other relevant factors must also be taken into account, including, in particular, the performance of the contract by the Parties and related limitations on contractual powers. Such overall considerations make it clear that Respondent had

extensive rights of control in operational decisions, including financial matters, and that Claimant's decisions required Respondent's approval. In detail:

167 Ulrich Marseille stated that Claimant's staff members were required to have all decisions, including personnel decisions, approved by Dr. Ing. Pedro (cf. WP Marseille, p 45 N 11 et seq.):

> ***Witness Marseille:*** *Mr. Marcelino was the Minister, but in the administration, there was some kind of a watchdog. That was a professor or a doctor - I don't have the name with me right now - who was sitting there all day and always observed. Whenever decisions were made, one had to always go to him first, and he had to confirm them again. So, if we hired new doctors from Israel or from South America, our people could not sign, but one had to always go to him - I do not know what his name was - -*
>
> ***Prof. Dr. Bernd Reinmüller:*** *Was it Dr. Pedro?*
>
> ***Witness Marseille:*** *Dr. Pedro. /... }*

168 Fritz Kronenberger stated in his Witness Statement that Dr. Pedro and Dr. Donato were in the clinic as functionaries of the government (WP Kronenberger, p. 250 N 15 et seq.).

169 According to Ralf Reinsch's testimony, administration of local staff was carried out under the sole authority of Dr. Ing. Pedro (Witness Statement Reinsch, Supplement K-14, p. 5 below).

170 The responsibility for the purchase and selection of medicinal drugs and other hospital materials remained, as directed by the Administrative Council, contrary to Item 6.l.d) of the Management Contract with Dr. Ing. Stamler (KS para. 96, Supplement K-36, undisputed). Dr. Stamler reported directly to Respondent as the latter's employee (KS para 96, undisputed).

171 Mr. Marcellino Oyono Ntutumu, Minister of Health of Equatorial Guinea, was Chairman of the Administrative Council of the Clinic (cf. Witness Statement by Fritz Kronenberger from

Kronenberger from April 28, 2011, Supplement K-39, p. 4). Mr. Kronenberger, who was responsible to Claimant for carrying out local financial administrative duties, had to report the figures to the Administrative Council (WP Kronenberger, p. 271, N 6-17).

172 After all, Mr. Mensching, who was previously employed as an accountant by Claimant and directly reported to Mr. Kronenberg, was directly employed by Respondent as of January 1, 2011 (KS para. 110; Supplement K-38 p. 1 et seq., not disputed).

173 The ultimate decision-making power with regard to operational management thus lay as before with Respondent or its representatives on site. Respondent therefore did not need the special protection offered by the right of termination executable at any time under Art. 404 OR.*

174 It should also be borne in mind that it was established conclusively during the first Arbitration Proceedings that Claimant had duly fulfilled its obligations under the Management Contract. The first Arbitration Tribunal has made a binding determination for this Arbitration that Respondent's objection concerning the non-fulfillment or improper performance of the contract by Claimant was unfounded (cf. Interim Decision paras. 49-51). Because of its proper fulfillment, Claimant therefore had no reason for mistrust, which would have necessitated a special relationship of trust on Respondent's part in order to continue the contractual relationship.

175 In view of the mixed nature of the Management Contract, the selection of a professional service provider for the operation of the hospital in Bata, the fact that Respondent had reserved extensive decision and control options regarding management of the hospital, and in view of the contractual fulfillment by Claimant, it appears that *in this case* a special relationship of trust was not an indispensable condition for Claimant's continued work under the Management Contract. It would therefore not be appropriate to grant Respondent the right to immediate termination executable at any time without important cause in accordance with Art. 404 OR.

*OR= Obligationenrecht/Swiss Code of Obligations; transl. note)

176 Respondent's argument (para. 104 above) that it had lost trust in Claimant (whereby this cannot be attributed to incorrect performance on Claimant's part; para. 174 above) does not justify an *immediate* termination under Art 404 OR. On the other hand, whether Respondent communicated to Claimant this loss of trust and a desire to withdraw from the contract does have a bearing on the question of termination by implication at the end of the regular contract term. This will be examined in the following section.

2. Implied Termination by Respondent at the End of the Regular Contract Term

177 Because the contractually agreed provisions for termination, in accordance with Item 12.1 MV do not provide any formal requirements for termination, such termination is also possible by implication. Based on the evidence, particularly due to the findings at the Oral Hearing, the Arbitration Tribunal holds it has been proved that Respondent terminated the Management Contract in March 2011 by implication:

178 This is supported by the fact that Mr. Kronenberger and Mr. Gerard were expelled from the country on March 16, 2011 (cf. Witness Statement Kronenberger, Supplement K-39, p. 5, WP Marseille, p. 50 N 10 et seq.; WP Kronenberger, p. 272 N 6-14; cf. also Supplement K-42). After leaving the country in March 2011, it is undisputed that Claimant no longer provided services to Respondent in Equatorial Guinea (WP Regenhardt p. 180, N17-21, WP Kronenberger p. 272 N 16-24).

179 Respondent informed Claimant several times that it wished to terminate the contract. According to Fritz Kronenberger, the Minister had told him the following on January 15, 2011 (cf. Witness Statement Kronenberger, Supplement K-39 p.5):

> *We no longer trust the Marseille-Kliniken. Further collaboration no longer makes sense. [...] I do not feel like it anymore. And it's best that we cancel the contract!*

180 Fritz Kronenberger also stated this in his e-mail to Axel Regenhardt from January 15, 2011 (cf. Supplement K-40).

181 On the occasion of the Arbitration Hearing on December 5, 2016, Fritz Kronenberger confirmed that Minister Marcellino wanted to withdraw from the contract (WP Kronenberger p. 277 N28 et seq.):

> *He [Minister Marcellino] wanted to get out of the contract, very clearly, yes.*

182 Ulrich Marseille also stated in his letter from January 31, 2011 (cf. Supplement K-38 page 4):

> *After all this, it should be clear that you no longer have any interest in ensuring that the concluded contract is also performed in accordance with its provisions, but rather want to just "coldly" force us out of the contract..*

183 In his testimony, Ulrich Marseille confirmed that he had understood Respondent's intention to terminate the contract. He stated (WP Marseille p. 53 N 19-24):

> *We felt that the contract was to be terminated by the normative power of the facts. To put it a bit crudely. We have a contract that we have negotiated for a few years, we have tried very hard, and now the contract is simply terminated by sending people away like that.*

184 The Witness Testimonies thus show that Claimant clearly understood Respondent's wish to terminate the contract and to no longer use Claimant's services.

185 It follows that Respondent terminated the contract by implication in March 2011 by expelling Claimant's employees. Thus, in accordance with Art. 12.1 MV, Respondent properly terminated the contract at the end of its five-year term (for contract tern, cf. para. 196 et seq. below).

3. Start and End Dates for Term of Management Fee

a) ***Start of Phase B***

186 The monthly Management Fee according to Item 7.1 is being applied with start of Phase B (Item 6.2 MV) and amounts to EUR 700,000 per month or EUR 8,400,000 per year. To calculate the fee due, it must be determined when Phase B began.

187 Claimant states that Phase B began after conclusion of Phase A, effective August 1, 2010 (KS, para. 147). Respondent states that Supplement K-21 makes it clear that Phase 1 (i.e. Phase A) was completed on September 7, 2010, and that Phase B had begun to run (Rejoinder* para. 56).

188 The Management Contract only expressly regulates the beginning of the first phase (Phase A). Its start date was contracted for February 1, 2010 (Article 4.1). Phase A is defined in Art. 6.1. of the Management Contract, Phase B in Art. 6.2. Phase A comprises the following services (cf. Supplement K-1, Item 6. l):

(a) Control of Revenue and Expenditure

(b) Control of Financial Organization

(c) Start with Installation of Software in Accordance With the International Standard

(d) Management and Selection of All Medicinal Drugs and All Hospital Material in Accordance with European Standard and Quality

(e) Professional Control of Quality of Recruitment Vetting and Quantity of Employees, and Report to the Administrative Council.

189 Phase A was to be remunerated in the amount of EUR 840,000 (Item 6.1 Section 2 MV); this amount was paid by Respondent at the end of February 2010 (KS para. 63).

190 Phase B was defined in the Management Contract as follows (Item 6.2 MV):

This phase includes full responsibility for the technical part, personnel, location and all property on Marseilles. [...]

191 In a "report on the Management Contract" from September 7, 2010 (Supplement K-21), Claimant concludes that 100% of the services for Phase A and 58% of the services for Phase B were rendered. A prerequisite for the provision of the pending 42% of services is the transfer of the overall management, which has not yet taken place. Thus, Phase B has been reached (for complete information cf. Supplement K-21 p. 15 and KS paras. 83-100).

192 The "Management Contract Report" (German: "Bericht zum Managementvertrag"; note transl.) from September 7, 2010 (Supplement K-21), the conclusion of which Respondent does not dispute, confirms the fulfillment of all Phase A services, except for the management and selection of medicinal drugs, which remained with Dr. Stamler (cf. para. 170 above), i.e. control of revenue and expenditure, control of financial organization, start with installation of software and control of quality and quantity of employees. The time when this work was completed can be determined on the basis of the following documents:

> Concerning the control of revenue and expenditure and control of financial organization, it follows from p. 6 of the Management Contract report that the company EPOS, on behalf of Claimant, audited the technical, management and financial departments of the hospital and summarized the results in an audit report dated July 2010. It can therefore be assumed that these tasks were completed by the end of July 2010.
>
> Regarding the start of the software installation process, the report on the Management Contract states, on the bottom of page 8, that the hospital's software systems went live on August 1, 2010 Thus, it is assumed that these tasks were completed as of August 1, 2010.
>
> Regarding control of quality and quantity of employees, Dr. Doehler, generated reports, one on August 6 and one on August 9, 2010, on the staffing situation and the number of the most common treatments in the clinic (cf. Supplement K-27). Because the reports are based on previous findings, it can be assumed that these were available by the beginning of August 2010.

193 It can therefore be assumed that Phase A was completed at the beginning of August 2010 and that Phase B had started.

194 Whether Phase B had been properly fulfilled is not to be reassessed by the Arbitration Tribunal, as it is bound by the findings of the first Arbitration Tribunal. The first Arbitration Tribunal dismissed, in a legally binding manner, Respondent's request for determination that Respondent lawfully exercised its right to raise a plea of non-performance and that Respondent's plea of non-performance was well-founded (cf. Interim Decision, para. 55 et seq.).

195 From a temporal point of view, this legally binding decision is limited to events up to and including August 2012, as the Arbitration Tribunal only took these into account. Therefore, the Parties were at liberty, in the present proceedings, to assert subsequent circumstances, provided that they were relevant to the assessment of the Claims (cf. Interim Decision, para. 66). Such arguments were not presented. It is undisputed that since April 2011, Claimant has no longer provided contractual services (cf. para. 177 et seq. above). Accordingly, the question of proper compliance by Claimant no longer arose.

b) End of Regular Contract Term

196 The contract provides for a fixed term of five years (Item 12.1. MV). According to Claimant, the regular contract term ran until January 31, 2015 (KS para. 178). According to Respondent, the regular contract term ended on December 14, 2014. Respondent calculates the five-year contract term from the date when the Management Contract was concluded, i.e. from December 14, 2009 (Rejoinder para. 112 and Supplement K-1 p. 13). In doing so, Respondent ignores that the Management Contract in Item. 4.1. specifies that the first phase of the contract will be in force as of February 1, 2010. Thus, the duration of the contract is to be calculated from that date, which leads to an expiry date of January 31, 2015.

c) Result

197 Subsequently, Claimant is in principle entitled to payment of the monthly Management Fee of EUR 700,000 pursuant to Item 7.1 MV from August 2010 until January 31, 2015, whereby from April 2011 onward, the saved expenditures as well as the country risk included in the determination of the Management Fee are to be deducted (cf. next section para. 4.a) et seq., para. 218 et seq.).

4. Savings in Expenditures

a) Claimant's Supplementary Information on Expenditures Saved with the Aid of an Auditor

198 Claimant is to deduct from the Management Fee the expenditures it has saved from the time when Respondent no longer used its services. This follows from an analogous application of the principles for the calculation of losses suffered in accordance with Art. 97 OR, according to which the creditor's fulfillment interest lies in the net margin remaining after deduction of saved expenditures (BSK* OR I-Wiegand, Art. 97 N 38a with further references). Claimant does not dispute that principle; its own calculations also take saved expenditures into account (cf. KS para. 181 et seq.).

199 The Arbitration Tribunal holds it is correct that - as requested by Claimant -, no saved expenditures will be deducted from the Management Fee for the time until the end of March 2011. In March 2011, Claimant withdrew from the clinic and from Equatorial Guinea (para. 66 above). Up to this time, Claimant provided services under the Management Contract. The plea of non-fulfillment of services was rejected, with full legal force, by the first Arbitration Tribunal (para. 194 above).

200 From April 2011 onward, Claimant deducts monthly expenses of EUR 112,000. Claimant bases the calculation on a statement by auditing and tax consulting firm RSM Altavis GmbH ("**RSM**") dated July 15, 2014 (Supplement K-46; cf. KS para. 192 et seq.). In Procedural Decision No. 11, the Arbitration Tribunal stated that this statement required

(*BSK = Basler Kommentare/Basel Commentaries = a publication commenting on the most important laws of Switzerland such as, for example, the OR; transl. note)

additional information. Accordingly, Claimant was instructed to provide a statement of all other expenditures saved, in addition to the summary in attachment K-46 (Expenditures Saved on Site), either at the central office in Hamburg, with third-party suppliers or elsewhere. The saved expenditures were to be determined and confirmed by an external auditor.

201 Claimant subsequently submitted an expert opinion from PricewaterhouseCoopers GmbH ("**SPwC**", Supplement K-93), which estimated the amount of saved expenditures at EUR 118,404 per month (Supplement K-93, para. 79) under additional consideration of one-time costs for software add-ons for the hospital administration in the amount of approximately EUR 118,891 for the months April to July 2011 (SPwC para. 43).

202 Respondent states that the calculation of the costs according to SPwC is neither verifiable nor traceable from Respondent's point of view and was based solely on Claimant's assessments and statements. Respondent states that, due to a lack of knowledge of the documents, it cannot verify these remarks and cannot commission its own "expert opinion." The statements by PwC are based on Claimant's one-sided representations and are therefore not meaningful. However, Respondent takes note of the amounts claimed by Claimant and takes the view that they should be deducted at least to the extent of the figures determined by Claimant (B-SeA*, paragraphs 10-17).

203 Respondent's objections are irrelevant. Claimant's appointment of an auditor to determine the expenditures saved was made based on the Arbitration Tribunal's request because it held that the legally satisfactory statement by auditing and tax consulting firm RSM Altavis GmbH dated July 15, 2014 (Supplement K-46) should be supplemented with regard to certain points. The issue of RSM's summary of expenditures saved had already been broached by Claimant in its Statement of Claim, without Respondent having asserted in its statement of defense or its

(*B-SeA = Beilage SeA/ Supplement SeA; transl. note)

Rejoinder that Respondent lacked the knowledge for assessing the items reported there. The objection that Respondent needed further documents from Claimant in order to be able to assess the expenditures saved was presented for the first time in Respondent's statement regarding SPwC. For that reason, this objection can relate a priori only to the additional statements made by PwC and not to the information already provided by RSM. Furthermore, if Respondent lacked certain documents to assess PwC's additional findings, it could have turned to the Arbitration Tribunal for an editorial request instead of staying idle, claiming that it could not comment on PwC's statements. At the very least, Respondent should have been able to clearly specify which statements it could comment on and in regard to which statements it was missing documents in order to do so. This did not happen. Respondent does not comment on any of the subsequently discussed categories of expenditures saved, apart from the fact that they should be deducted at least to the extent of the figures determined by Claimant or PwC (B-SeA, para. 15-17).

b) Expenses to be Covered By Management Fee

204 When determining the expenditures saved, it must be borne in mind that Claimant only had to pay part of the expenditures out of the Management Fee. According to Item 2.1 MV, Claimant was provided with a budget out of which Claimant was able to pay the arising business expenses. These included personnel costs (excluding the costs of salaries of Claimant's employees on site; cf. Item 6.2 MV), costs for specialists, material costs and other costs necessarily associated with the operation of a hospital (Item 2.1 MV lit. c and d)

205 Respondent then asserts in its statement from August 14, 2017 that Item 6 of the MV is to be strictly separated from the Management Fee (Item 7.1). For Phase B, the costs amounted to EUR 700,000 per month (Item 6.2); that sum includes all the expenses related to the four employees provided by Claimant (with the exception of their living expenses, which were

passed on to Respondent) and the expenses related to the central office in Hamburg. The Management Fee was not intended to cover these costs, but was owed separately and in addition, as a pure profit (B-SeA para. 14, 22).

206 This newly raised argument is belated and therefore ignorable. Respondent did not use this argument, neither in the statement of defense nor in the rejoinder. Nor did it clearly deny Claimant's arguments that the Management Fee had served to cover certain expenses incurred by Claimant (cf. e.g. KS, para. 62, 229 et seq.). Finally, there is no indication that Claimant would have been paid the monthly amount of EUR 700,000 in addition to the monthly Management Fee of EUR 700,000. Respondent itself states that the expenditures saved are to be deducted from the Management Fee (B-SeA, para. 17).

*c) **Salary Expenses, Ancillary Salary Costs, External Legal and Consulting Fees and Other Operational Expenses***

207 PwC, in its supplementary statement regarding costs incurred on site, comes to the same conclusion as RSM Altavis GmbH. According to RSM Altavis GmbH and PwC, most of the ongoing expenses are attributable to the salary expenses for the four employees working on the project, namely Döhler (chief physician), Mensching (accountant), Kronenberger (financial director) and Gerard (technical director). PwC bases its salary claims on the underlying employment contracts. The calculated expenses of **EUR 59,583** per month are not objectionable.

208 Ancillary salary costs and travel expenses of **EUR 13,000** per month are plausible. The same applies to the calculated external legal and consulting fees of **EUR 24,000** per month and the other operational expenses of **EUR 15,000**.

d) Continuous Training and Education

209 Regarding advanced education and training, PwC states that the expenses for such educational measures according to the Management Contract should be borne out of the budget (SPwC, para. 36). This is to be accepted because Item 3.3 para. 2 MV stipulates that the costs for further education of the employees are to be covered by the budget. For the use of e-learning software for training purposes, Claimant had available, in accordance with Item 10.I MV, a lump sum of EUR 100,000 per year and an amount of EUR 100 per employee. Axel Regenhardt, then Claimant's IT officer for the Bata project, stated in his testimony that e-learning units had to be produced on a regular basis. For the Bata project, he estimated the number of units at 30-40 with production costs between EUR 15,000 and EUR 20,000 (WP Regenhardt p. 201 et seq. N 4 et seq.). For the modification of the modules (rebuilding or adaptation) during the contract period, he estimated the costs incurred from EUR 2,000 up to EUR 15,000, depending on how extensive the change was (WP Regenhardt p. 203 N 26-31).

210 In light of these estimated figures, PwC's comments (SPwC, para. 36) are plausible in that the costs of maintaining and expanding the e-learning software and providing the e-learning systems, including the costs of creating new modules, were covered by the cost reimbursement rule for the use of the (e-learning) software in accordance with Art. 10.1 MV. These costs are therefore not to be considered as expenditures saved in relation to the Management Fee.

e) Software for Hospital Administration

aa) Software Development Costs

211 Pursuant to Item 3.4 MV, Claimant was obligated to *"develop and provide adequate software for hospital administration, human resources and the control of essential operational processes and to make it available to the hospital."*

The basic facilities were supposed to be operational within four months of taking over the hospital, while the software for the highly specialized departments and the control of the medicinal drug supply from abroad, for business administration controlling as well as individual personnel deployment planning was supposed to be operational no later than twelve months after handover of the facility. For this activity, PwC calculates costs of EUR 29,723 per month (SPwC para.37). The amount is based on information provided by Claimant concerning salary expenses for the employees involved in the project (50% of the working time of Axel Regenhardt, 100% of working time of Messrs. Smaka, Kanbari and Thies). The cost level determined by PwC is plausible. PwC considers these costs as one-time costs for the period from April to July 2011, i.e. a **total amount of EUR 118,891**, because work related to development would probably have been necessary until then (SPwC para.37). This assumption is plausible as well.

bb) Software Adaptation and Maintenance Costs

212 Claimant, referring to PwC, argues that software adaptation and maintenance costs, after completion of development-related tasks, are to be paid out of the budget (K-SeA para. 14, SPwC para. 37). Where this is derived from is unclear. It can only be deduced from the Management Contract that Claimant must bear the developmental costs, but not that the additional software adaptation or maintenance costs payable by Claimant would have to be paid out of the budget. Because these costs are related to the software which Claimant has to develop and provide pursuant to Art. 3.4 MV, the Arbitration Tribunal holds that these costs are to be borne by Claimant.

213 Claimant and its experts have not provided any information on the amount of those costs. According to Axel Regenhardt, then Claimant's IT officer for the Bata project, the costs for the normal support and maintenance operation range from EUR 12,000 to possibly

EUR 15,000 monthly, consisting of two to three FTEs ("full time equivalents", i.e. full-time equivalents for persons such as developers, support technicians) with an estimated gross salary of EUR 3,500 to 4,000 (WP Regenhardt p. 199 et seq. N 25 et seq.). Contrary to Claimant's statements (K-SeA para. 18), this information concerns expenses related to the hospital system in Bata, not the future hospital or the portal clinics. In the absence of any other information provided by Claimant, it is appropriate to accept the maximum amounts as provided by Axel Regenhardt, i.e. monthly support and maintenance costs of **EUR 15,000**. These are to be applied over the entire remaining term of the Management Contract.

f) Additional Costs at the Central Office in Hamburg

214 The additional costs calculated by PwC for the central office in Hamburg in the amount of **EUR 6,819** per month, consisting of recruitment costs, EPOS reports and the proportional monthly salaries and travel expenses of the employees working on the project at the central office (SPwC p. 20) are traceable and plausible. It should be noted that the higher costs of IT staff at headquarters from April to July 2011 for the completion of software development (50% of the work time of Axel Regenhardt, respectively 100% of the work time of Messrs. Smaka, Kanbari and Thies) were already considered as part of the software costs (cf. para. 211 above). The same applies to software support and maintenance costs (cf. para. 213 above).

g) Relevance of Project Costs for Portal Clinics

215 Ulrich Marseille, on the occasion of the Evidentiary Hearing in connection with the expenditures saved, explained that the preparation of the project for the expansion of health care services in Equatorial Guinea (completion of a second clinic in Malabo and construction of portal clinics spread throughout the country) would have cost between EUR 80,000 and EUR 100,000 per month if this project had been continued. According to Ulrich Marseille,

these costs would initially have been covered out of the Management Fee (cf. WP Marseille, p. 106 N 22-33 and p. 107 N 1-7, p. 108 N 21 et seq., p. 109 et seq.).

216 Claimant submits that it has, in reliance on the statements made by Respondent concerning the clinic in Malabo and the expansion of the satellite clinics and in anticipation of the Management Fee from a later Management Contract for the clinic in Malabo, already incurred expenses which were not remunerated and are, due to lack of factual relation to the Management Fee - according to the Management Contract of December 14, 2009 -, not to be considered as expenditures saved (K-SeA, para. 24). Respondent also states that Respondent's acquisition services are not related to the Management Contract. Claimant has voluntarily and at its own risk invested these costs in the hope of obtaining another contract (cf. B-SeA, para.18).

217 The Arbitration Tribunal considers Claimant's explanations regarding the testimony of Ulrich Marseille to be convincing; they are also recognized by Respondent. The Management Contract is limited to the hospital in Bata and does not include expenses in connection with other projects. The Management Fee was therefore a compensation for the expenses associated with the hospital in Bata. If Claimant used a surplus resulting from the Management Fee internally to pay Claimant's costs related to other planned projects, then it is irrelevant for the calculation of the saved expenditures under the Management Contract.

h) Overview of Expenditures Saved

	Monthly Expenditure Savings	**One-Time Expenditure Savings**
In EUR		
1. Salary Expenses	**59,583**	
Prof. Dr. Döhler (salary and bonus)	27,083	
Hr. Mensching (salary)	5,833	
Hr. Kronenberger (salary and bonus)	16,667	

Hr. Gerard	10,000	
2. Ancillary Salary Costs and		
Travel Expenses	**13,000**	
3. External Legal and Consulting Fees	**24,000**	
4. Other Operational Expenses	**15,000**	
5. Advanced Training and Education	**from budget**	
6. Hospital Administration Software	**15,000**	**118,091**
Software Development Costs		118,091
Software Adaptation and Maintenance Costs	15,000	
7. Costs at the Central Office in Hamburg	**6,819**	
Total	**133,402**	**118,891**

5. Country Risk Assessment

218 In the Statement of Claim from April 26, 2016, Claimant suggested that the calculation of the Management Fee had to take into account the considerable economic risk which it incurred in concluding the contract for the management of the La Paz hospital in a developing country. Political unrest, changes in the law and other imponderables were taken into account by Claimant with regard to the question whether this would make the provision of its services significantly more difficult or impossible. As an example, Claimant mentions the conversion of the rules of the payment system (KS para. 191). In Procedural Decision No 11, Claimant was asked to express in figures how the country risk was taken into account or budgeted in the calculation of the Management Fee.

219 As Claimant itself points out and as PwC confirms, the country risk for Respondent is very high (SPwC para. 65 et seq.). It further follows from Claimant's statements that it

took that risk into account as a return on the monthly Management Fee. However, it does not specify the amount of the surcharge. According to Claimant, the surcharge cannot be quantified because Claimant has never made an exact cash value calculation (para. 91, K-SeA, para. 33 above). Respondent also provides no concrete information on the amount of the surcharge, but states that the risk of immediate termination at any time is already included in the Management Fee (para 115 et seq., B-SeA para. 30 et seq. above).

220 The country risk must be deducted from the Management Fee as Respondent is hereby obligated to continue to pay to Claimant the contractually agreed Management Fee minus expenses saved until the end of the regular contract term. Country risk is reflected in risks in the exchange of services caused by the geographical location, i.e. conditions at the place of exchange of services (SPwC, paras. 57-59). Risks in the exchange of services not only include the risk that the contract service becomes completely impossible to fulfill. They also include aggravations of services, e.g. due to a change in the law or a change in the realities during the provision of services (such as the conversion of the payment system rules referred to by Claimant; para. 218 above), which in turn may increase the cost of providing the service. These risks do not apply to Claimant from the moment it left Equatorial Guinea, i.e. from April 2011 (para.195 above), because it is assumed that both sides have fulfilled without any problems. The risk surcharge is therefore to be assessed as a financial benefit, which must be deducted in the event of risk-free fulfillment.

221 In principle, Respondent bears the burden of proof that Claimant must take into account the value of the benefits it gains (BK-Weber, Art. 107 N 206, Koller, OR AT [50] N 15). However, the actual basis for the assessment of this question must be supplied by Claimant, as it was requested by Procedural Decision No. 11. Because the deduction cannot be proven numerically, the Arbitration Tribunal must estimate the amount of the risk surcharge added to the monthly Management Fee, using analogous application of Art. 42 Section 2 OR. According to PwC's

and Claimant's assessment, the very high country risk must have led to a significant surcharge of the Management Fee. This is also reflected in the fact that after deducting the expenditures saved (excluding non-recurring expenses), a monthly amount of EUR 566,598 remains (EUR 700,000 – 133,402). Taking into account Claimant's investments in the amount of EUR 3,032,200 on a straight-line basis over the entire contract period of 5 years, it also results in a monthly amortization deduction of EUR 50,537. There remains a monthly return of EUR 516,061 (or EUR 6,192,732 annually). The level of the return suggests that the - significant - country risk was, accordingly, very seriously taken into account when setting the return. According to the best estimate of the Arbitration Tribunal, the consideration of the country risk amounted to two-thirds of the remaining return, i.e. at EUR 344,041 per month.

222 Claimant points out that the country risk for Respondent has proved to be true (K-SeA, para. 36). But that would have been the case only if the contract could have been terminated prematurely by Respondent without payment of compensation. In the present case, however, Respondent is obligated under the contractual arrangement to continue to pay Claimant the contractually agreed Management Fee minus expenditures saved until the end of the regular contract term. Thus, the monthly amount of EUR 344,041 as a risk surcharge is to be deducted from the amount of EUR 566,598 (= Management Fee minus expenditures saved) from April 2011 until the end of the regular term.

223 The fact that Claimant has sought additional security against the country risk by including an Arbitration Clause in the contract (K-SeA, para. 36) does not conflict with the request that the surcharge for the country risk is to be deducted from the Management Fee. On the contrary: Due to the Arbitration Proceedings carried out as a result of the Arbitration Clause, Respondent i

is obligated to pay Claimant the monthly fee owed until the expiration of the regular contract term, which in turn means that the country risk has not materialized.

6. Other Income and Related Efforts

224 In Procedural Decision No 11, Claimant was also asked to comment on other types of income, which it was able to earn after the departure of the last employees from Equatorial Guinea on March 16, 2011 through other use of freed capacities (on-site and at the central office) and to prove it and to quantify it. In addition, Claimant had to show what efforts it had made to obtain other revenue.

225 Claimant has demonstrated convincingly that in March 2011 it had no other projects for which the external service providers (in particular Messrs. Kronenberger, Döhler and Gerard) deployed at the Bata project could have been used. It is also credible that it was unlikely that a comparable project would be found in the near future (K-SeA para. 41 et seq.). Therefore, in view of its obligation to reduce expenses – analogous to its duty to mitigate loss -, Claimant acted appropriately and reasonably by terminating as soon as possible those contractual relationships which could be terminated at short notice. As a consequence, the saved expenses for salaries for the people working on site are reflected in the saved expenditures (para. 207 above).

226 With regard to associates working on the Bata project at the central office in Hamburg, in particular the IT staff, Claimant notes that as of March 16, 2011, only a fraction of their time was dedicated to this project and that during the freed-up time they were working on other tasks for Marseille Kliniken AG, Hamburg (K-SeA, para. 48). Because Claimant credibly asserted that no replacement project could be found for the Bata project, neither in comparable or lesser size (K-SeA para. 41), a deduction for other income earned with these employees is not attributable.

7. Amount of Compensation Owed

227 For the period from August 2010 until and including March 2011, Claimant requests to be granted 10% of the Management Fee due during this period. The Arbitration Tribunal concludes that the Management Fee is payable from the commencement of Phase B, i.e. from August 1, 2010, so that the partial amount of 10% owed until March 2011 amounts to **EUR 560,000** ([10% of EUR 700,000] x 8 months).

228 For the period from April 2011 to and including August 2012, Claimant also requests to be granted 10% of the Management Fee incurred during this period minus the expenditures saved by Claimant, amounting to EUR 112,000 per month. Due to the calculation of the Arbitration Tribunal, expenses of EUR 133,402 saved from the monthly Management Fee are to be deducted. In addition, the surcharge for the country risk, estimated by the Arbitration Tribunal at EUR 344,041, is to be deducted from the monthly fee. In addition, there is a deduction for one-time expenses of EUR 118,891 from the total amount during the period from April to July 2011 (para. 211 above). This results in an amount of EUR 3,664,578 ([EUR 700,000 – 133,402 – 344,041] x 17 – EUR 118,891). Of this amount, Claimant is to be awarded the appealed partial amount of 10%, i.e. **EUR 366,458**.

229 For the period from September 2012 to and including January 2015, the saved expenses of EUR 133,402 and the country risk surcharge of EUR 344,041 are also to be deducted from the monthly Management Fee. This results in an amount of **EUR 6,454,153** ([EUR 700,000 – 133,402 – 344,041] x 29).

230 Overall, Respondent owes Claimant the amount of **EUR 7,380,611**. To the extent beyond that, Claimant's claims must be dismissed.

231 Respondent's contingent claims for a determination of the date of termination of the contract are valid in so far as it must be stated that the Management Contract was properly terminated by January 31, 2015.

VII. INTEREST

232 On the basis of Article 104 Section 1 OR, Claimant requests interest at the rate of 5% from the due date of the Management Fee to be paid in accordance with Item 7 MV.

233 Pursuant to Art. 104 Section 1 OR, a debtor who is in arrears with the payment of a financial debt has to pay default interest of 5% per annum. According to Art. 7.2 and 7.3 of the MV, the Management Fee must be paid in full for one year in advance and is always due three months before the end of the current accounting year. Due to the agreement on a certain expiry date (Art. 102 Section 2 OR), Respondent thus was in default, in each case, three months before the end of the current accounting year. The Management Fee was owed from the start of Phase B (Item 6.2 MV); Phase B began on August 1, 2010 (para. 186 et seq. above.). The settlement year therefore included the period from August 1 to and including July 31 of the following year, so that the Management Fees for this annual period was to be paid, in each case, by April 30 of the current accounting year, and Respondent was in default for non-payment by May 1 of each respective year.

234 However, this does not apply to the first annual rate of the Management Fee. A specific expiration date for this rate cannot be assumed because the date of payment of the first Management Fee was dependent on an uncertain future event (start of Phase B) (BK OR-Weber Art. 102 N 114). With regard to the claims covering the period from August 1, 2010 to and including July 31, 2011, no default can therefore be assumed as of May 1, 2010. On the contrary, Claimant needed to issue a reminder in order to serve Respondent with a notice of default for the first annual Management Fee for Phase B (Article 102 Section 1 OR).

235 By letter from January 31, 2011, Claimant unequivocally requested from Respondent that Respondent is to pay the Management Fee for Phase B no later than February 18, 2011 (cf. K-38, p. 4). This letter is to be regarded as a reminder, which is why, for the Management Fee of EUR 637,134 (= (10% of [EUR 700,000x8]) + (10% of [((EUR700,000 – 133,402 – 344,041)x4) – 118,891]) – incurred between August 1, 2010 and July 31, 2011 –, 5% interest is owed retroactively from February 18, 2011.

236 The continued interest owed is as follows:

- For the Management Fee during the period from August 1, 2011 to July 31, 2012 in the amount of EUR 267,068 (= 10% of [(EUR 700,000 – 133,402 – 344,041)x 12]), a default interest of 5% is owed as of May 1, 2011.

- For the Management Fee from August 1, 2012 to July 31, 2013 in the amount of EUR 2,470,383 (= (10% of [EUR 700,000 – 133,402 – 344,041]) + ([EUR 700,000 – 133,402 – 344,041]x11)), a default interest of 5% is owed as of May 1, 2012.

- For the Management Fee from August 1, 2013 to July 31, 2014 in the amount of EUR 2,670,684 (= [EUR 700,000 – 133,402 – 344,041x12), a default interest of 5% is owed as of May 1, 2013.

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- For the Management Fee from August 1, 2014 to January 31, 2015 in the amount of EUR 1,335,342 (= [EUR 700,000 – 133,402 – 344,041]x6), a default interest of 5% is owed as of May 1, 2014.

VIII. COSTS

A. Determination and Distribution of Arbitration Costs

237 According to Art. 38 Swiss Rules, the Arbitral Award must contain a determination of the costs of the Arbitration Proceedings.

238 Included in the costs of arbitration pursuant to Art. 38 Swiss Rules are, in accordance with Art. 38 (a) and (b) Swiss Rules, the fees of the Arbitration Tribunal and its expenses and, in accordance with Art. 38 (f), the registration fee and administrative costs pursuant to Appendix B.

239 In addition, the Arbitral Award shall determine the costs the Parties incurred for legal representation and legal assistance to the extent considered appropriate by the Arbitration Tribunal (Article 38 (e) Swiss Rules), as well as the travel expenses and other expenses of Witnesses in the amount in which these expenses are approved by the Arbitration Tribunal (Art. 38 (d) Swiss Rules).

240 According to Art. 40 (l) Swiss Rules, the costs of the Arbitration Proceedings are in principle borne by the unsuccessful Party. However, the Arbitration Tribunal may apportion any kind of costs between both Parties if it deems it appropriate with regard to the circumstances of the case.

241 According to Art. 40 (2) Swiss Rules, the Arbitration Tribunal may, with regard to the costs of legal representation and legal assistance, determine, in accordance with Art. 38 (e), in consideration of the circumstances of the case, which Party is to bear the costs, or divide these costs between the Parties if it determines that apportionment is appropriate.

242 As regards the distribution of costs, Respondent, in its letter from April 6, 2017, requested that the costs of the additional exchange of written pleadings (arbitration and compensation of Parties) for the statement on expenditures saved (cf. Procedural Decision No 11) should be based, regardless of the outcome of the proceedings, on the costs-by-cause principle (Article 40 Swiss Rules).

243 In its statement from March 2017, Claimant proposed that Respondent already bears a substantial part of the total costs because of the delays in the Arbitration Proceedings which Respondent had caused.

244 The Arbitration Tribunal cannot accept any of these views. Neither has Claimant caused the need for an additional exchange of written pleadings regarding expenditures saved, nor did Respondent delay the arbitration. Instead, the costs are divided between successful and unsuccessful Party.

245 Claimant, with regard to its main claim, prevails and receives 14% (EUR 7,380,611 of EUR 53,891,600, rounded); Respondent, accordingly, prevails in its claim and receives 86%. On the other hand, Claimant prevailed in the question of the jurisdiction of the Arbitration Tribunal. In view of the subordinate burden of examining the question of jurisdiction regarding the examination of the main claim, the Arbitration Tribunal finds it appropriate that Claimant should bear 70% and Respondent 30% of the costs of the arbitration. Furthermore, Claimant must compensate Respondent for 70% of Respondent's incurred costs, which the Arbitration Tribunal considers appropriate, while Respondent must compensate Claimant for 30% of the latter's costs, which the Arbitration Tribunal considers appropriate.

B. Costs of Arbitration Tribunal Proceedings and Administrative Costs

246 Pursuant to Art. 39 (l) and (2) Swiss Rules, fees and expenses of the Arbitration Tribunal shall be commensurate with the amount in dispute, the difficulty of the dispute, the time invested and all other relevant circumstances and shall be determined in accordance with Appendix B (Schedule of the Costs of Arbitration).

247 Pursuant to Art. 2.6 of Appendix B of the Swiss Rules, amounts in currencies other than the Swiss franc shall be converted into Swiss francs at the rate of exchange applicable at the time the Notice of Arbitration is received or at the time any new claim, counterclaim, set-off defense or amendment to a claim or defense is filed.

248 Claimant has asserted claims amounting to EUR 53,891,600 (para. 11 above). The value in dispute is therefore CHF 55,663,600, converted at the rate of exchange applicable at the time the Notice of Arbitration was received, namely on January 30, 2015[2] (cf. letter from Secretariat from February 13, 2015).

249 Given the amount in dispute of CHF 55,663,600, the administrative costs are CHF 45,566 (Articles 2.3 and 6 of Appendix B). .

[2] Currency exchange rate EUR/CHF based on www.oanda.com.

250 Based on Art. 39 (1) and (2) and Art. 40 (4) Swiss Rules and Art. 2.3 of Appendix B, the Arbitration Tribunal, with the approval of the Court, sets the compensation of the Arbitration Tribunal at CHF 678,434. This amount covers expenses of the Arbitration Tribunal of CHF 4,30 1 .45 (costs of the Oral Hearings of CHF 1,375.75 [CHF 1,000 for the premises and CHF 375.75 for meals] as well as costs for courier services and telephone conferences of CHF 2,925.70) as well as the fee of the Arbitration Tribunal in the amount of CHF 674,132.55 Based on Art. 39 (3) Swiss Rules, the Chairwoman receives 45% of the fee and the co-arbitrators 27.5% of the arbitrator's fee. The chairwoman's share of the fee also includes the fee of the secretary of the Arbitration Tribunal.

251 Claimant has paid the entire advance on costs of CHF 724,000. This advance covers all the fees and expenses of the Arbitration Tribunal and the administrative costs and is used to cover those costs. Because Respondent must bear 30% of these costs, it must reimburse Claimant for the amount of CHF 217,200.

252 In addition, Claimant paid a registration fee of CHF 8,000, of which Respondent must refund 30% to Claimant, i.e. CHF 2,400.

C. Costs Incurred by Parties

1. Costs Claimed by Claimant

253 In its Statement of Costs from March 6, 2017, Claimant claims it incurred costs in the following amount: EUR 229,352.50 for Attorney Knak-Kammenhuber, EUR 23,706.02 for Witnesses' travel expenses, EUR 5,098.62 for SD Steno Deutschland GmbH and CHF 195,389.15 for Prof. Dr. med. Bernd Reinmüller's attorney's fees.

254 By a supplementary opinion dated October 16, 2017, Claimant asserts further expenses for attorney's fees incurred since Procedural Decision No. 11 for Bernd Reinmüller in

the amount of CHF 24.347 and costs incurred through PwC's services for the preparation of the expert opinion amounting to EUR 63,090.62. Furthermore, Claimant corrects the attorney's fees of Prof. Dr. med. Reinmüller according to the entry of March 6, 2017, due to an invoice error, to CHF 196,058.85, resulting in a total of CHF 220,405.85 for the costs of his representation. The fact that, contrary to what is stated in Claimant's statement from October 16, 2017, this is a CHF instead of a EUR amount, can easily be substantiated through the enclosed invoices.

2. Costs Claimed by Respondent

255 In its Statement of Costs submitted on March 7, 2017, Respondent demands reimbursement of the following costs: EUR 125,000 for Jean-Charles Tchikaya's attorney's fees, EUR 75,000 for Evuy Nguema Mukue's attorney's fees and CHF 250,000 for attorney's fees from FRORIEP.

256 With an additional statement from October 19, 2017, Respondent asserts further costs of legal representation by FRORIEP of CHF 26,073.45 for the expenses incurred from the time Procedural Decision No. 11 was issued. In addition, it is clear from the submission from November 3, 2017 that the attorney's fees for Jean-Charles Tchikaya and Francisco Evuy Nguema Mukue, as opposed to the statement from March 7, 2017, are now EUR 153,000 and EUR 100,000, respectively.

3. Appropriateness of Costs Borne By Parties

257 With regard to the appropriateness of the costs incurred by the opposing Party, the Parties submitted the following comments:

258 In its submission to the Arbitration Tribunal from March 14, 2017, Respondent states that it leaves it to the Arbitration Tribunal to determine whether Claimant's alleged legal fees were identified in light of the fact that the Statement of Claim primarily repeats submissions

of the first arbitration claim. Respondent also noted that the travel costs at EUR 3,200 per person for Witnesses are very high.

259 In its statement from March 14, 2017, Claimant requested that the attorney's fees for Jean-Charles Tchikaya and Francisco Evuy Nguema Mukue should be dismissed because those gentlemen did not have any visibly detectable activity in the present arbitration.

260 The Arbitration Tribunal shall review the appropriateness of the asserted representation costs (Article 38 lit. e Swiss Rules). For this reason, the Arbitration Tribunal requested through Procedural Decision No. 14 from October 2, 2017 additional information about the composition of these costs. The Parties only partially complied with these requests, which is why the Arbitration Tribunal once again invited the Parties by Procedural Decision No 15 from October 23, 2017 to provide information on the hours worked by RA Knak-Kammenhuber, RA Tchikaya and RA Nguema Mukue and to subsequently file a sufficiently detailed summary of the work that they performed during this time. The Parties have been advised that they otherwise run the risk that the Arbitration Tribunal will not be able to verify the appropriateness of the asserted representation costs due to lack of information and that thus one of the requirements for reimbursement of these costs is no longer met.

261 With its statement submitted on November 3, 2017, Claimant listed the work RA Knak-Kammenhuber had carried out as a total of 693 hours and 40 minutes (cf. Supplement K-99).

262 On November 3, 2017, Respondent lodged a "Facture d'Honoraire Recapitulative" (= summary of fees; transl. note) from RA Tchikaya and an invoice from RA Nguema Mukue, both dated October 27, 2017. In these documents, RA Tchikaya and RA Nguema Mukue now claim, contrary to the statement from March 7, 2017, EUR 153,000 (instead of EUR 125,000) and EUR 100,000 (instead of EUR 75,000) for attorney's fees, respectively.

263 With regard to Claimant's own costs, the Arbitration Tribunal concludes that the attorney's fees claimed by Prof. Dr. Reinmüller amounting to CHF 220,405.85 due to the complexity of the case, the number of written pleadings to be submitted and the conducted Evidentiary Hearing, are thus reimbursable. Also reimbursable are the costs of EUR 23,706.02 for travel expenses of Witnesses, EUR 5,098.62 for SD Steno Deutschland GmbH and EUR 63,090.62 for PwC.

264 As regards the costs claimed for RA Knak-Kammenhuber, Claimant stated that RA Knak-Kammenhuber had calculated the fee in accordance with the German Lawyers' Remuneration Act, to which she was obligated under German law if no other remuneration had been negotiated with the client (Statement of Costs from March 6, 2017 and additional statement from October 16, 2017). Applicable for the present arbitration, however, is Art. 38 lit.e Swiss Rules, according to which the Arbitration Tribunal only reimburses the costs of disputing Parties that it considers appropriate (para. 260 above). After reviewing the summary of work carried out by RA Knak-Kammenhuber (Attachment K-99), the Arbitration Tribunal concludes that this list is very general with respect to the individual activities. In many places these activities are denoted as "review of records" and "assistance for Prof. Reinmüller" and "review of written submissions by Prof. Reinmüller". However, in that regard, the statement confirms what Claimant itself stated in its submission from October 16, 2017, namely that Mrs. Knak-Kammenhuber had performed an internal legal service to Claimant. Claimant explains that fact by not having its own legal department. However, such activities cannot be compensated by an external attorney's fee. However, Claimant gives no explanation as to an appropriate compensation for the services of an internal legal department and no sufficiently detailed account of the activities of RA Knak-Kammenhuber as a substitute for an internal legal service. For this reason, the costs of RA Knak-Kammenhuber are not reimbursable.

265 With respect to Respondent's own costs, the Arbitration Tribunal concludes that FRORIEP's attorney's fees amounting to CHF 250,000 and CHF 26,073.45 are appropriate and thus reimbursable, given the complexity of the case, the number of legal documents to be submitted and the Evidentiary Hearing conducted.

266 However, it is not possible to assess the appropriateness of the claimed costs for RA Tchikaya and RA Nguema Mukue, as they both lack an account of the number of hours worked and a sufficiently detailed summary of activities of RA Tchikaya and RA Nguema Mukue. The "Facture d'Honoraire Recapitulative" from October 27, 2017, submitted by RA Tchikaya, is limited to the number of hours worked (total 340 hours). Also, it is not clear from the invoice of RA Nguema Mukue from October 27, 2017 which work he has done for the claimed fixed fee. Because neither RA Tchikaya nor RA Nguema Mukue did appear at the Arbitration Tribunal, and due to the lack of this information, the Arbitration Tribunal cannot assess the volume of services they performed in relation to this case and whether they have been appropriate. Accordingly, the costs claimed in relation to their activities are not reimbursable.

267 Consequently, Claimant's reimbursable costs amount to CHF 220,405.85 and EUR 91,895.26 (= EUR 23,706.02 + 5,098.62 + 63,090.62); those of Respondent amount to CHF 276,073.45.

268 Claimant has to pay 70% of Respondent's costs, i.e. CHF 193,251.40. Respondent is responsible for 30% of Claimant's costs, i.e. CHF 66,121.75 and EUR 27,568.58 (for distribution cf. para. 245 above).

IX. ARBITRAL AWARD

1. The Arbitration Tribunal shall be competent for the handling of the submitted claims.

2. Respondent's contingent request for suspension of the proceedings until Claimant has initiated the arbitration process followed by due process in Equatorial Guinea, and, having obtained a court decision, intends to seek recourse against it, is rejected.

3. Respondent's contingent request for suspension of the proceedings until Claimant has sought due process before the competent Courts in Equatorial Guinea, and, having obtained a court decision, intends to seek recourse against it, is rejected.

4. It is determined that the Management Contract dated December 14, 2009 was properly terminated as of January 31, 2015.

5. Respondent is obligated to pay Claimant a total of EUR 7,380,611 and a default interest of 5%

- from February 18, 2011 on EUR 637,134;
- from May 1, 2011 on EUR 267,068;
- from May 1, 2012 on EUR 2,470,383;
- from May 1, 2013 on EUR 2,670,684;
- from May 1, 2014 on EUR 1,335,342.

6. In all other regards, the claim is rejected.

7. Fees and costs of the Arbitration Tribunal were set at CHF 678,434 and administrative costs at CHF 45,566. These costs are deducted from Claimant's advance payment of CHF 724,000.

8. Respondent is obligated to reimburse Claimant for Claimant's share of the fees and expenses of the Arbitration Tribunal as well as for administrative expenses in the amount of CHF 217,200 and for its share of the registration fee of CHF 2,400.

9. Claimant is obligated to pay Respondent CHF 193,251.40 as compensation for Claimant's own costs incurred.

10. Respondent is obligated to pay Claimant CHF 66,121.75 and EUR 27,568.58 as compensation for Respondent's own costs incurred.

11. Written notices to the representatives of the Parties by e-mail and by registered letter, and to the co-arbitrators and the Secretariat of the Court by email and regular mail.

Place of Arbitration: Zürich

Dr. Felix Fischer
Date: December 18, 2017

Melissa Magliana
Date: December 14, 2017

Dr. Andrea Meier

Date: December 18, 2017