

In the arbitration between

- 1. STEWARD MALTA LIMITED (MALTA)**
- 2. STEWARD MALTA MANAGEMENT LIMITED (MALTA)**
- 3. STEWARD MALTA ASSETS LIMITED (MALTA)**

- Claimants -

v.

**GOVERNMENT OF THE REPUBLIC OF MALTA**

- Respondent -

v.

- 1. STEWARD HEALTH CARE INTERNATIONAL LIMITED (MALTA)**
- 2. STEWARD HEALTH CARE INTERNATIONAL S.L.U. (SPAIN)**
- 3. STEWARD HEALTH CARE INTERNATIONAL INVESTORS LLC  
(DELAWARE)**

- Additional Parties -

# **FINAL AWARD**

**3 November 2025**

**ICC Case No. 27684/ELU**

Valletta, Malta (Place of Arbitration)

Before the Arbitral Tribunal composed of  
Dr. Michael W. Bühler, Presiding Arbitrator  
David Kavanagh KC, Co-Arbitrator  
Dr. Cecilia Carrara, Co-Arbitrator

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**TABLE OF CONTENT**

|             |                                                                                          |           |
|-------------|------------------------------------------------------------------------------------------|-----------|
| <b>I.</b>   | <b>INTRODUCTION.....</b>                                                                 | <b>1</b>  |
| <b>A.</b>   | <b>OVERVIEW OF THE DISPUTE .....</b>                                                     | <b>1</b>  |
| <b>B.</b>   | <b>THE CLAIMANTS AND THEIR REPRESENTATIVES .....</b>                                     | <b>1</b>  |
| <b>C.</b>   | <b>THE RESPONDENT AND ITS REPRESENTATIVES.....</b>                                       | <b>3</b>  |
| <b>D.</b>   | <b>THE ADDITIONAL PARTIES AND THEIR REPRESENTATIVES<br/>.....</b>                        | <b>4</b>  |
| <b>D.</b>   | <b>THE ARBITRAL TRIBUNAL.....</b>                                                        | <b>7</b>  |
| <b>E.</b>   | <b>THE SECRETARIAT OF THE ICC COURT OF ARBITRATION.</b>                                  | <b>7</b>  |
| <b>II.</b>  | <b>THE PROCEDURAL HISTORY.....</b>                                                       | <b>8</b>  |
| <b>A.</b>   | <b>THE PROCEEDINGS UNTIL THE EVIDENTIARY HEARING....</b>                                 | <b>8</b>  |
| <b>B.</b>   | <b>FROM THE EVIDENTIARY HEARING TO THE CLOSING OF<br/>THE ARBITRAL PROCEEDINGS .....</b> | <b>25</b> |
| <b>C.</b>   | <b>TIME-LIMIT FOR RENDING THE AWARD .....</b>                                            | <b>32</b> |
| <b>D.</b>   | <b>STRUCTURE OF THE AWARD .....</b>                                                      | <b>32</b> |
| <b>III.</b> | <b>THE RELEVANT FACTS.....</b>                                                           | <b>33</b> |
| <b>A.</b>   | <b>SUMMARY OF THE DISPUTE.....</b>                                                       | <b>33</b> |
| <b>B.</b>   | <b>PRELIMINARY REMARKS.....</b>                                                          | <b>33</b> |
| <b>C.</b>   | <b>THE CONCESSION, ITS PARTIES AND OTHER RELEVANT<br/>ENTITIES .....</b>                 | <b>37</b> |
| <b>D.</b>   | <b>THE HOSPITAL SITUATION PRIOR TO THE CONCESSION<br/>AND GOM’S TENDER .....</b>         | <b>39</b> |
| <b>E.</b>   | <b>THE CONCLUSION OF THE CONCESSION .....</b>                                            | <b>43</b> |
| 1.          | The Concession Agreement.....                                                            | 43        |
| 2.          | The HSDA .....                                                                           | 47        |
| 3.          | The LSA.....                                                                             | 47        |
| 4.          | The Emphyteutical Deed .....                                                             | 48        |
| <b>F.</b>   | <b>THE PERFORMANCE OF THE CONCESSION .....</b>                                           | <b>48</b> |

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|            |                                                                                             |            |
|------------|---------------------------------------------------------------------------------------------|------------|
| 1.         | VGH's contract performance prior to February 2018 .....                                     | 49         |
| 2.         | The Steward Group Takeover of Vitals .....                                                  | 51         |
| 3.         | The Parties' Attempts to Renegotiate the Concession.....                                    | 54         |
| 4.         | The Concession Performance after the Steward Group takeover of Vitals.....                  | 60         |
| <b>G.</b>  | <b>THE DELIA JUDGMENTS .....</b>                                                            | <b>65</b>  |
| <b>H.</b>  | <b>THE PARTIES' TERMINATION NOTICES AND HAND-BACK .....</b>                                 | <b>67</b>  |
| <b>IV.</b> | <b>THE PARTIES' POSITION IN A NUTSHELL AND REQUESTS FOR RELIEF .....</b>                    | <b>73</b>  |
| <b>A.</b>  | <b>THE POSITION OF CLAIMANTS AND OF THE REMAINING AP AND THEIR REQUEST FOR RELIEF .....</b> | <b>73</b>  |
| <b>B.</b>  | <b>THE POSITION OF RESPONDENT AND ITS REQUEST FOR RELIEF .....</b>                          | <b>75</b>  |
| <b>V.</b>  | <b>ARBITRAL JURISDICTION .....</b>                                                          | <b>79</b>  |
| <b>A.</b>  | <b>THE ARBITRATION AGREEMENTS.....</b>                                                      | <b>79</b>  |
| <b>B.</b>  | <b>JURISDICTION <i>RATIONAE MATERIAE</i>.....</b>                                           | <b>82</b>  |
| <b>C.</b>  | <b>JURISDICTION <i>RATIONAE PERSONAE</i>.....</b>                                           | <b>83</b>  |
| 1.         | The position of the Respondent .....                                                        | 83         |
| 2.         | The position of the Claimants and Remaining AP .....                                        | 87         |
| 3.         | The Tribunal's analysis.....                                                                | 92         |
| <b>VI.</b> | <b>THE MERITS OF CLAIMANTS' CONTRACTUAL CLAIMS.....</b>                                     | <b>103</b> |
| <b>A.</b>  | <b>PRELIMINARY OBSERVATIONS .....</b>                                                       | <b>103</b> |
| <b>B.</b>  | <b>THE RESPONDENT'S DELIA II DEFENSE.....</b>                                               | <b>104</b> |
| 1.         | The position of the Respondent .....                                                        | 104        |
| 2.         | The position of the Claimants.....                                                          | 112        |
| 3.         | The Tribunal's analysis.....                                                                | 117        |
| <b>C.</b>  | <b>RESPONDENT'S STATE AID DEFENSE.....</b>                                                  | <b>134</b> |
| 1.         | The position of the Respondent .....                                                        | 134        |
| 2.         | The position of the Claimants.....                                                          | 138        |
| 3.         | The Tribunal's analysis.....                                                                | 143        |

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|              |                                                                       |            |
|--------------|-----------------------------------------------------------------------|------------|
| <b>D.</b>    | <b>THE TERMINATION OF THE AGREEMENTS.....</b>                         | <b>143</b> |
| 1.           | The position of the Claimants.....                                    | 143        |
| 2.           | The position of the Respondent .....                                  | 151        |
| 3.           | The Tribunal's analysis.....                                          | 152        |
| <b>VII.</b>  | <b>THE MERITS OF RESPONDENT'S CONTRACTUAL COUNTERCLAIM.....</b>       | <b>153</b> |
| <b>VIII.</b> | <b>THE MERITS AND QUANTUM OF THE PARTIES' RESTORATION CLAIMS.....</b> | <b>154</b> |
| <b>A.</b>    | <b>PRELIMINARY OBSERVATIONS .....</b>                                 | <b>154</b> |
| <b>B.</b>    | <b>THE SCOPE OF THE RESTORATION CLAIMS.....</b>                       | <b>154</b> |
| 1.           | The position of the Respondent .....                                  | 154        |
| 2.           | The position of the Claimants.....                                    | 157        |
| 3.           | The Tribunal's analysis.....                                          | 159        |
| <b>C.</b>    | <b>THE QUANTUM OF THE RESTORATION CLAIMS .....</b>                    | <b>164</b> |
| 1.           | The position of the Respondent .....                                  | 165        |
| 2.           | The position of the Claimants.....                                    | 168        |
| 3.           | The Tribunal's analysis.....                                          | 170        |
| <b>D.</b>    | <b>INTEREST .....</b>                                                 | <b>182</b> |
| 1.           | The position of the Respondent .....                                  | 182        |
| 2.           | The Position of the Claimants.....                                    | 183        |
| 3.           | The Tribunal's analysis.....                                          | 183        |
| <b>IX.</b>   | <b>THE COSTS OF THIS ARBITRATION .....</b>                            | <b>185</b> |
| <b>A.</b>    | <b>THE COSTS OF THE CLAIMANTS AND THE REMAINING AP .....</b>          | <b>185</b> |
| <b>B.</b>    | <b>THE COSTS OF THE RESPONDENT .....</b>                              | <b>187</b> |
| <b>C.</b>    | <b>THE TRIBUNAL'S ANALYSIS .....</b>                                  | <b>191</b> |
| <b>X.</b>    | <b>THE ARBITRAL TRIBUNAL'S HOLDINGS.....</b>                          | <b>199</b> |

**LIST OF ABBREVIATIONS AND DEFINED TERMS  
USED IN THE FINAL AWARD**

|                        |                                                                                                       |
|------------------------|-------------------------------------------------------------------------------------------------------|
| Accuracy Report I      | The [first] expert report of Laura Cózar and Joseph Kirby from Accuracy dated 16 February 2024, CEX-1 |
| Accuracy Report II     | The second expert report of Laura Cózar and Joseph Kirby from Accuracy dated 8 November 2024, CEX-2   |
| Accuracy Report III    | The third expert report of Laura Cózar and Joseph Kirby from Accuracy dated 18 March 2025, CEX-6      |
| Agreements             | The Concession Agreement, the LSA and the HSDA                                                        |
| Answer                 | Respondent's Answer to the Request for Arbitration and Counterclaims dated 19 June 2023               |
| Appellants             | The Appellant Companies having appealed Delia I                                                       |
| Arbitration Agreements | The arbitration clauses contained in the Concession Agreement, the LSA and the HSDA                   |
| Bluestone              | Bluestone Investments Malta Limited                                                                   |
| BoV                    | Bank of Valletta                                                                                      |
| b/w                    | Between                                                                                               |
| CA Addendum            | The Addendum of 30 June 2017 to the Concession Agreement                                              |
| CC Rejoinder           | Claimants' Rejoinder to Counterclaim dated 14 March 2025 (partially redacted)                         |
| C-Cost Brief           | Claimants' Cost submission dated 5 September 2025                                                     |
| CEX-1                  | First Expert Report of Laura Cózar and Joseph Kirby from Accuracy dated 16 February 2024              |
| CEX-2                  | Second Expert Report of Laura Cózar and Joseph Kirby from Accuracy dated 8 November 2024              |
| CEX-3                  | (First) Expert Report of Professor Jacques Derenne from Sheppard Mullin dated 8 November 2024         |
| CEX-4                  | (First) Expert report of Nicole Robins from Oxera dated 8 November 2024                               |
| CEX-5                  | (First) Expert Report of Dr. Tonio Fenech dated 8 November 2024                                       |
| CEX-6                  | Third Expert Report of Laura Cózar and Joseph Kirby from Accuracy dated 18 March 2025                 |

|                                    |                                                                                                                               |
|------------------------------------|-------------------------------------------------------------------------------------------------------------------------------|
| CEX-7                              | Second Expert Report of Professor Jacques Derenne from Sheppard Mullin dated 18 March 2025                                    |
| CEX-8                              | Second Expert Report of Nicole Robins from Oxera dated 18 March 2025                                                          |
| CEX-9                              | Second Expert Report of Tonio Fenech dated 18 March 2025                                                                      |
| Charlton Report I                  | (First) Expert Witness Report of Mr. Anthony Charlton of HKA dated 24 May 2024 with factual exhibits AC-1 to AC-36, REX-1     |
| Charlton Report II                 | Second Expert Witness Report of Mr. Anthony Charlton of HKA dated 31 January 2025 with factual exhibits AC-37 to AC-62, REX-6 |
| Civil Code or MCC                  | The Civil Code of Malta                                                                                                       |
| Civil Court                        | First Hall, Civil Court of Malta                                                                                              |
| Claimants' DPR I                   | Claimants' Document Production Requests dated 12 July 2024                                                                    |
| Claimants' DPR II                  | Claimants' Document Production Requests dated 6 October 2024                                                                  |
| CMC I                              | The first case Management Conference held on 30 October 2023                                                                  |
| CMC II                             | The second case Management Conference held on 5 June 2024                                                                     |
| Commercial Code                    | The Commercial Code of Malta                                                                                                  |
| Committee                          | The GoM's Valuation and Adjudication Committee                                                                                |
| Concession                         | The concession for the Hospitals granted on 9 September 2015 by the GoM to VGH                                                |
| Concession Agreement               | The Services Concession Agreement dated 30 November 2015 b/w GoM and Vitals or SCA                                            |
| Concession and Related Instruments | The Concession Agreement, the HSDA, the LSA and the Emphyteutical Deed                                                        |
| C-OS                               | The Opening Statement of Claimants and the Remaining Additional Parties at the Hearing                                        |
| C-PHB                              | Claimants' and Additional Parties' Post-hearing brief of 27 June 2025                                                         |
| CWS-1                              | Witness statement of Dr. Nadine Delicata dated 16 February 2024                                                               |
| Deed                               | The Emphyteutical Deed dated 22 March 2016 b/w Maltese Commissioner of Land, GoM and VGH Asset                                |
| Delia Claim                        | The lawsuit filed by Mr. Adrian Delia on 19 February 2018 before the Maltese Civil Court                                      |

|                               |                                                                                                                                                       |
|-------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|
| Delia I                       | The Judgment of the First Hall, Civil Case on Case No. 133/2018 dated 24 February 2023 (C-0017 + C-0441)                                              |
| Delia II                      | The Judgment of the Maltese Court of Appeal dated 23 October 2023 (C-0216)                                                                            |
| Delia II Defense              | Respondent's Defense relying on Delia II                                                                                                              |
| Delia Judgments               | Delia I and Delia II                                                                                                                                  |
| Derenne Report I              | (First) Expert Report of Professor Jacques Derenne from Sheppard Mullin dated 8 November 2024, CEX-3                                                  |
| Derenne Report II             | Second Expert Report of Professor Jacques Derenne from Sheppard Mullin dated 18 March 2025, CEX-7                                                     |
| Direct Agreement              | The agreement between GoM, Claimants and BoV dated 22 June 2018, as amended and restated on 13 November 2018 and on 17 July 2019 (C-0122, Schedule 1) |
| Emphyteutical Deed            | The Emphyteutical Deed dated 22 March 2016 b/w Maltese Commissioner of Land, GoM and VGH Asset                                                        |
| Fenech Report I               | The Expert Report of Dr. Tonio Fenech dated 8 November 2024, CEX-5                                                                                    |
| Fenech Report II              | The Expert Report of Dr. Tonio Fenech dated 18 March 2025, CEX-9                                                                                      |
| Freshfields                   | Freshfields Bruckhaus Deringer LLP, counsel of Claimants and Remaining Additional Parties                                                             |
| GGH                           | The Gozo General Hospital, in Gozo                                                                                                                    |
| GoM                           | The Government of Malta                                                                                                                               |
| GoM Notice                    | The GoM Control Step-in and Termination Notice issued by Respondent's letter of 21 March 2023 (C-0027)                                                |
| GT Report                     | Grant Thornton Report " <i>Valuation and Verification of New Build and Improvement Costs</i> " dated 3 June 2021 (AC-006)                             |
| Healthcare Services Agreement | The Health Services Delivery Agreement dated 30 November 2015 b/w GoM and VGH Management                                                              |
| Hearing                       | The evidentiary hearing held in Paris from 5 – 9 May 2025                                                                                             |
| Hospitals                     | The SLH, GGH and KGRH covered by the Concession                                                                                                       |
| HSDA                          | The Healthcare Services Agreement                                                                                                                     |
| ICC Rules                     | The ICC Rules of Arbitration of 1 January 2021                                                                                                        |

|                                          |                                                                                                                                         |
|------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|
| Initial AP or Initial Additional Parties | The Additional Parties 1 – 8 referred to at ¶ 8 of the Award                                                                            |
| IRR                                      | Internal rate of return                                                                                                                 |
| KGRH                                     | The Karen Grech Rehabilitation Hospital, in Malta                                                                                       |
| Labour Agreement                         | The Labour Supply Agreement dated 8 January 2016 b/w GoM and VGH Management, also referred to as LSA                                    |
| List of Resources                        | As per Appendices 1 and 2 to Labour Agreement                                                                                           |
| LSA                                      | The Labour Agreement                                                                                                                    |
| LSA Addendum                             | The Addendum to the LSA dated 30 June 2017                                                                                              |
| M.                                       | Million                                                                                                                                 |
| MEH                                      | The Ministry for Energy and Health of Malta                                                                                             |
| MFH                                      | The Ministry for Health of Malta                                                                                                        |
| N.                                       | Footnote                                                                                                                                |
| NAO                                      | The National Audit Office of Malta                                                                                                      |
| NAO Report I                             | The (first) NAO audit report of July 2020, Part 1 (exhibit CW-47 and Q-1)                                                               |
| NAO Report II                            | The (second) NAO audit report of December 2021, Part II (exhibit CW-48 and Q-0002)                                                      |
| NAO Report III                           | The third NAO audit report of May 2022 (exhibit Q-0003)                                                                                 |
| NAO Reports                              | The NAO Reports I, II and III                                                                                                           |
| <i>Neckarpri</i>                         | RL-0052, <i>Neckarpri GmbH/EDF International SAS / Das Land Baden-Württemberg</i> , Final Award, ICC Case No. 18519                     |
| OCEO                                     | Outside Counsel's Eyes Only                                                                                                             |
| OCEO Reply                               | The unredacted version of the Statement of Reply and Defense to the Counterclaim dated 8 November 2024 of Claimants and the AP 1 – AP 3 |
| OCEO Rejoinder                           | The unredacted version of Respondent's Statement of Rejoinder and Reply to the Counterclaim dated 31 January 2025                       |
| OCEO CC Rejoinder                        | The unredacted version of Claimants' Rejoinder on Counterclaim dated 18 March 2025 of Claimants and the Remaining AP                    |
| p.                                       | Page                                                                                                                                    |
| pp.                                      | Pages                                                                                                                                   |



|                                              |                                                                                                                     |
|----------------------------------------------|---------------------------------------------------------------------------------------------------------------------|
| PO 1                                         | Procedural Order No. 1 dated 2 November 2023 (Procedural Rules)                                                     |
| PO 2                                         | Procedural Order No. 2 dated 3 November 2023 (First Procedural Directions and Procedural Timetable)                 |
| PO 3                                         | Procedural Order No. 3 dated 10 June 2024 (Second Case Management Conference: Follow-up)                            |
| PO 4                                         | Procedural Order No. 4 dated 2 August 2024 (Document Production Requests)                                           |
| PO 5                                         | Procedural Order No. 5 dated 2 August 2024 (Respondent's PO 1 ¶ 34 Application)                                     |
| PO 6                                         | Procedural Order No. 6 dated 11 September 2024 (Security for costs)                                                 |
| PO 7                                         | Procedural Order No. 7 dated 29 October 2024 (Disclosure of Withheld Documents)                                     |
| PO 8                                         | Procedural Order No. 8 dated 18 November 2024 (Respondent's DPR II)                                                 |
| PO 9                                         | Procedural Order No. 9 dated 20 January 2025 (Release from this arbitration of AP 4 and AP 5)                       |
| PO 10                                        | Procedural Order No. 10 dated 20 April 2025 (Evidentiary Hearing)                                                   |
| PO 11                                        | Procedural Order No. 11 dated 14 May 2025 (Closing of the Proceedings & post-hearing matters)                       |
| PPP                                          | Public-private partnership                                                                                          |
| PPT                                          | The PowerPoint Presentations made by the Parties' experts at the Hearing                                            |
| PT                                           | The Procedural Timetable, attached to PO 2                                                                          |
| Q&A Memo                                     | The list of questions sent by the Tribunal to the Parties on 12 May 2025 for the virtual Q&A session of 13 May 2025 |
| Q&A Session                                  | The virtual Q&A session held by the Tribunal with the Parties on 13 May 2025                                        |
| Rejoinder                                    | Respondent's Statement of Rejoinder and Reply to the Counterclaim dated 31 January 2025 (partially redacted)        |
| R-Cost Brief                                 | Respondent's Cost submission dated 5 September 2025                                                                 |
| R-Cost Rebuttal                              | Respondent's comments dated 19 September 2025 on C-Cost Brief                                                       |
| Related Instruments                          | The three Agreements associated with the Concession Agreement                                                       |
| Remaining AP or Remaining Additional Parties | The Additional Parties 1 – 3, subject to this Final Award.                                                          |

|                                    |                                                                                                                                              |
|------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------|
| Reply                              | The Statement of Reply and Defense to the Counterclaim dated 8 November 2024 of Claimants and the Remaining AP (partially redacted)          |
| Respondent's DPR I                 | Respondent's Document Production Requests dated 12 July 2024                                                                                 |
| Respondent's DPR II                | Respondent's Document Production Requests dated 1 November 2024                                                                              |
| Respondent's PO 1 ¶ 34 Application | Respondent's Application dated 11 July 2024 for the production of additional documents on the basis of PO 1 ¶ 34                             |
| REX-1                              | (First) Expert Witness Report of Mr. Anthony Charlton of HKA dated 24 May 2024 with factual exhibits AC-1 to AC-36                           |
| REX-2                              | (First) Expert Witness Report of Connor Quigley K.C. dated 9 May 2024 with factual exhibits Q1 to Q3 and legal authorities QL-1 to QL-31     |
| REX-3                              | Expert Report of Professor Alex Torpiano dated 24 May 2024 with factual exhibits 1-18                                                        |
| REX-4                              | (First) Expert Report of Mr. Chris Williams from HKA dated 24 May 2024 with factual exhibits CW-1 to CW-63                                   |
| REX-5                              | (First) Expert Report of Dr. Roderick Zammit Pace dated 20 May 2024 with legal exhibits RZP-1 to RZP-30                                      |
| REX-6                              | Second Expert Witness Report of Mr. Anthony Charlton of HKA dated 31 January 2025 with factual exhibits AC-37 to AC-62                       |
| REX-7                              | Second Expert Report of Dr. Roderick Zammit Pace dated 20 May 2024 with legal exhibits RZP-1 to RZP-30                                       |
| REX-8                              | Second Expert Witness Report of Connor Quigley K.C. dated 31 January 2025 with factual exhibits Q4 to Q5 and legal authorities QL32 to QL-38 |
| REX-9                              | Second Expert Report of Mr. Chris Williams from HKA dated 31 January 2025 with factual exhibits CW-64 to CW-81                               |
| RfA                                | Claimants' Request for Arbitration dated 7 April 2023                                                                                        |
| RfJ                                | Respondent's Request for Joinder dated 19 June 2023 against the Initial AP                                                                   |
| RfP                                | The GoM's Request for Proposal dated 27 March 2015                                                                                           |
| RfR                                | Request for relief                                                                                                                           |
| Robins Report I                    | (First) Expert Report of Nicole Robins from Oxera dated 8 November 2024, CEX-4                                                               |

|                      |                                                                                                                                                                                      |
|----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Robins Report II     | Second Expert Report of Nicole Robins from Oxera dated 18 March 2025, CEX-8                                                                                                          |
| R-OS                 | Respondent's Opening Statement at the Hearing                                                                                                                                        |
| R-PHB                | Respondent's Post-hearing brief of 27 June 2025                                                                                                                                      |
| RWS-1                | Witness Statement of Mr. John Abela dated 24 May 2024 including factual exhibits JA-1 to JA-10                                                                                       |
| RWS-2                | Witness Statement of Ms. Carmen Ciantar dated 24 May 2024 including factual exhibits CC-1 to CC-6                                                                                    |
| RWS-3                | Witness Statement of Dr. Joseph Zarb Adami dated 24 May 2024 including factual exhibits JZA-1 to JZA-21                                                                              |
| SAMB                 | The State Aid Monitoring Board of Malta                                                                                                                                              |
| SCA                  | The Concession Agreement                                                                                                                                                             |
| Schedule 7           | Th seventh Schedule to the SCA                                                                                                                                                       |
| Schedule 7 Payments  | Termination Payments pursuant to Schedule 7 of the SCA                                                                                                                               |
| Settlement Agreement | The Agreement b/w GoM and the Claimants dated 19 February 2021 providing for the payment of Euro 25.4M                                                                               |
| SfC Application      | The Security for Costs Application of Respondent dated 18 June 2024                                                                                                                  |
| Shortfall            | A shortfall in the Resources supplied by the GOM relative to the level set out in the List of Resources (Accuracy)                                                                   |
| SLH                  | The Saint Luke's Hospital in Malta                                                                                                                                                   |
| SoC                  | Claimants' Statement of Claim dated 16 February 2024                                                                                                                                 |
| SoD&C                | Respondent's Statement of Defence and Counterclaim dated 24 May 2024                                                                                                                 |
| SPA                  | The Sale and Purchase Agreement dated 21 December 2017 b/w Bluestone Investments Malta Limited and Stewart International Malta (SOC 46)                                              |
| State Aid Defense    | Respondent's defense relying on unlawful State aid by virtue of the laws of the EU and Malta                                                                                         |
| State Aid Regulation | The Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (QL-0003) |
| Termination Date     | The date of 18 March 2023, when the Transaction Agreements were terminated                                                                                                           |

|                        |                                                                                                                     |
|------------------------|---------------------------------------------------------------------------------------------------------------------|
| Termination Notice     | Termination Notice issued by Claimants to GoM on 16 March 2023                                                      |
| Third-Party Submission | The (unsolicited) submission dated 18 March 2025 sent to the ICC by the The Daphne Caruana Galizia Foundation       |
| TOR                    | The Terms of Reference signed by the Parties and the Tribunal and dated 2 November 2023 (in ICC Case No. 27684/ELU) |
| Transaction Agreements | The Concession Agreement, the HSDA, the LSA and the Deed                                                            |
| Tribunal               | The Arbitral Tribunal in ICC Case No. 27684/ELU, referred to at ¶¶ 13 <i>et seq.</i> of the Award                   |
| TSA                    | Draft Termination and Settlement Agreement (R-0234)                                                                 |
| US Entities            | The Additional Parties 4 and 5                                                                                      |
| VGH                    | Vitals Global Healthcare Limited                                                                                    |
| VGH Asset              | Vitals Global Healthcare Assets Ltd                                                                                 |
| VGH Group              | VGH, VGH Management and VGH Assets                                                                                  |
| VGH Management         | Vitals Global Health Care Management Ltd.                                                                           |
| Vitals                 | VGH, VGH Management and VGH Assets                                                                                  |
| WACC                   | Weighted average cost capital                                                                                       |

## **I. INTRODUCTION**

### **A. OVERVIEW OF THE DISPUTE**

1. The present arbitration relates to a dispute between the Parties arising out of a Services Concession Agreement dated 30 November 2015 and related agreements in relation to a concession granted by the GoM to the Claimants for the redevelopment, maintenance, management and administration of three public hospitals in Malta (the “**Concession**”). The Concession came to an end under circumstances disputed between the Parties, causing both Parties to make significant claims against each other, which are the subject of this Final Award.
2. Sadly, the concession for these hospitals turned out to be a failure and gave rise to different proceedings, including before the Courts of Malta. The primary victims of this failure are the citizens of Malta who were anxious of receiving through a private public partnership improved health care services in an improved hospital environment in their beautiful country.

### **B. THE CLAIMANTS AND THEIR REPRESENTATIVES**

3. The Claimants in this arbitration are:
  - **Steward Malta Limited** (the “**Claimant No 1**”), a wholly owned subsidiary of the Steward Health Care group, a private hospital operator in the United States, is a limited liability company incorporated under the laws of Malta (company registration No. C70546) with its registered office at:

Steward Malta Limited  
Portomaso Business Centre  
Portomaso, St Julian’s PTM01
  - **Malta Steward Malta Management Limited** (the “**Claimant No 2**”) is a limited liability company incorporated under the laws of Malta (company registration No. C70624) with its registered office at:

Steward Malta  
St Luke’s Hospital Campus  
Guardamangia Hill, Pieta’ PTA 1312  
Malta
  - **Steward Malta Assets Limited** (the “**Claimant No 3**”) is a limited liability company incorporated under the laws of Malta (company registration No. C70625) with its registered office at:

Steward Malta  
St Luke’s Hospital Campus

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Guardamangia Hill, Pieta' PTA 1312  
Malta

4. Claimants 1 to 3 are collectively referred to as the “**Claimants.**”
5. Claimants are duly represented in these proceedings by:

FRESHFIELDS BRUCKHAUS DERINGER  
LLP

Tel: [REDACTED]

Mr. Noah Rubins KC  
Mr. Yuri Mantilla  
Ms. April Lacson  
Ms. Camille Strosser  
Mr. Valerio Letizia  
Ms. Dinara Mustafina  
Mr. Mohit Mahla

E-mail: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9 Avenue de Messine  
F-75008 Paris

and

MAMO TCV  
Mr. Joseph Camilleri  
Mr. Jonathan Abela  
Ms. Paula Briffa

E-mail: [REDACTED]

103 Palazzo Pietro Stiges,  
Strait Street,  
VLT 1436, Valletta  
Malta

6. Until 16 November 2023, Latham & Watkins LLP in Paris and London represented Claimants. As of that date, Freshfields Bruckhaus Deringer LLP (“**Freshfields**”) represent Claimants.<sup>1</sup> At Freshfields’ request, Ms. Nuria Ros, Senior Counsel, Steward Health Care International, Calle de Velásquez 32, Madrid 28001, Spain, was added to the list of recipients on behalf of the Claimants.

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<sup>1</sup> Letter from Freshfields dated 16 November 2023 to the Arbitral Tribunal.

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**C. THE RESPONDENT AND ITS REPRESENTATIVES**

7. The Respondent is the Government of the Republic of Malta (the “**GoM**” or the “**Respondent**”). The GoM is represented by Dr. Joseph Chetcuti, Permanent Secretary at the Ministry for Health (the “**MFH**”). Its address for the purpose of notices in these proceedings is:

Palazzo Castellania,  
15 Merchant Street,  
Valletta, VL T2000,  
Malta

E-mail: [REDACTED]

The Respondent is duly represented in these proceedings by:

CLYDE&CO  
Ms. Nadia Darwazeh  
Ms. Sophie Bayrou  
Ms. Elisabeth Wagner  
Mr. Rémi Sassine  
Ms. Louise Sura  
Ms. Dilara Khamitova  
Ms. Yuliia Pavlo

Tel: [REDACTED]

E-mail: [REDACTED]

134 boulevard Haussmann  
F-75008 Paris

and

CLYDE & CO LLP  
Mr. Loukas Mistelis  
Mr. Robin Bandar  
Ms. Leonor D’Albiousse  
The St Botolph Building  
138 Houndsditch  
London EC3A 7AR  
United Kingdom

Tel: [REDACTED]

E-mail: [REDACTED]

and

GANADO ADVOCATES  
Mr. Antoine Cremona  
Mr. Louis Cassar Pullicino  
Mr. Clement Mifsud Bonnici  
Ms. Luisa Cassar Pullicino  
Ms. Yasmine Ellul  
171, Old Bakery Street  
VLT 1455, Valletta  
Malta

Tel: [REDACTED]

E-mail: [REDACTED]

and

Dr. Christopher Soler  
State Advocate  
OFFICE OF THE STATE ADVOCATE  
Casa Scaglia 16, Mikiel  
Anton Vassalli Street  
VLT 1311, Valletta  
Malta

E-mail: [REDACTED]

and

Dr. Alex Sciberras  
LEGAL & RELOCATION SERVICES  
32A Scots House, South Street  
VLT1101, Valletta  
Malta.

Tel: [REDACTED]

E-mail: [REDACTED]

#### **D. THE ADDITIONAL PARTIES AND THEIR REPRESENTATIVES**

8. Originally, and pursuant to a Request for Joinder made by Respondent on 19 June 2023, the following eight Additional Parties were part of this arbitration. They will jointly be referred to as the “**Initial Additional Parties**” or, simply, the “**Initial AP**”:

- **Steward Health Care International Limited** (the “**AP 1**”), which is a limited liability company incorporated under the laws of Malta (company registration no. C83293), with its registered office at:

St. Luke’s Hospital Campus  
Guardamangia Hill  
Pieta PTA1312  
Malta

- **Steward Health Care International SL** (the “**AP 2**”), which is a private limited company incorporated under the laws of Spain (company registration no. B88616321), with its registered office at:

Calle de Velázquez, 34  
28001 Madrid  
Spain

- **Steward Health Care International Investors LLC** (the “**AP 3**”), which is a private limited company under the laws of Delaware, U.S.A. (company registration no. 7961508, Delaware), located at the following known addresses:



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1209 Orange Street,  
Wilmington, Delaware 19801,  
U.S.A.

4939, Brookview Drive,  
Dallas, 75220 Texas, U.S.A.

For reasons that will be explained below,<sup>2</sup> AP 1 – AP 3 will be referred to as the “**Remaining Additional Parties**” or simply the “**Remaining AP.**”

- **Steward Health Care System LLC** (the “**AP 4**”), which is a limited liability company incorporated under the laws of Delaware, U.S.A. (company registration no. 4801236, Delaware), with its registered address at:

1209 Orange Street,  
Wilmington, New Castle,  
Delaware, 19801,  
U.S.A.

- **Steward Health Care System LLC** (initially the Additional Party 5), which is incorporated as a foreign limited liability company incorporated under the laws of Texas, U.S.A. (company registration no. 0802810415 and no. 32064796025, Texas)
- **Steward Health Care System LLC** (initially the Additional Party 6), which is incorporated as a foreign limited liability company incorporated under the laws of Massachusetts, U.S.A. (no. 272473240, previously no. 001027897, Massachusetts).

AP 5 and AP 6 were said to be located at the following known addresses:<sup>3</sup>

900 N. Pearl Street  
Suite 2400 Dallas  
75201, Texas  
U.S.A. (principal office)

111 Huntington Avenue  
Ste 1800  
Boston, Massachusetts 02199-7653,  
U.S.A.

299 Park Avenue  
New York, NY 10171-0001  
U.S.A.

500 Boylston Street  
Boston, Massachusetts 02116-3740  
U.S.A.

- **Steward Health Care International LLC** (initially the Additional Party 7, but in this Award referred to as the “**AP 5**”), which is a limited liability company incorporated under the laws of Delaware, U.S.A. (company registration no. 4818883, Delaware) with its registered address at:

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<sup>2</sup> See below at ¶¶ 72-76.

<sup>3</sup> TOR, p. 7.

1209 Orange Street, Wilmington,  
New Castle, Delaware, 19801,  
U.S.A.

- **Steward Health Care International LLC** (initially the Additional Party 8) was said to be a registered as a foreign limited liability company incorporated under the laws of Massachusetts, U.S.A. (company registration no. 272490096, Massachusetts) and to be located at the following known addresses:<sup>4</sup>

1900 N. Pearl Street,  
Suite 2400 Dallas, 75201, Texas,  
U.S.A. (principal office)

111 Huntington Avenue Ste,  
1800, Boston, Massachusetts 02199-7653,  
U.S.A.

299 Park Avenue,  
New York, NY 10171-0001,  
U.S.A.

500 Boylston Street,  
Boston, Massachusetts 02116-3740,  
U.S.A.

9. The Remaining AP are also represented by Claimants' counsel, Freshfields, as identified above at ¶ 6.
10. Initially, the AP 4 – AP 5 were also represented by Claimants' counsel Freshfields until 13 August 2024, after which date, they were represented in this arbitration by

WEIL, GOTSHAL & MANGES LLP  
Mr. David Lender  
Mr. Theodore Tsekerides  
Ms. Kathleen Stanaro

E-mail: [REDACTED]  
[REDACTED]  
[REDACTED]

767 5th Ave,  
New York, NY 10153, USA

11. AP 4 and AP 5 were, however, released from this arbitration in January 2025, as further explained below.<sup>5</sup> Thus, the only parties subject to this Final Award are the Claimants, the Remaining AP and Respondent.

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<sup>4</sup> Idem.

<sup>5</sup> See below at ¶ 76.

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12. Claimants, Respondent, and the Additional Parties (depending on context, comprising the Initial or the Remaining AP) will be referred to collectively as the “**Parties**.”

**D. THE ARBITRAL TRIBUNAL**

13. The Arbitral Tribunal (the “**Tribunal**”) was initially and until 23 January 2025 constituted as follows:
- Mr. Gary BORN, arbitrator nominated by the Claimants and the Initial Additional Parties and domiciled at [REDACTED].
  - Ms. Cecilia CARRARA, arbitrator nominated by the Respondent and domiciled at [REDACTED].
  - Dr. Michael W. BÜHLER, presiding arbitrator appointed by the ICC Court and domiciled at [REDACTED].
14. The Secretary General of the ICC Court confirmed Mr. Born and Ms. Carrera as co-arbitrators on 25 July 2023. On 20 September 2023, the ICC Court made a direct appointment of Mr. Bühler as presiding arbitrator pursuant to Article 13(4) of the ICC Rules.
15. Following Mr. Born’s tender of resignation as an arbitrator by correspondence dated 9 January 2025, the ICC Court accepted Mr. Born’s resignation at its session of 23 January 2025, at which date Mr. Born’s resignation became effective. The Claimants and the Remaining AP were invited to appoint a replacement arbitrator, which they did on 30 January 2025, by nominating David Kavanagh KC as their co-arbitrator. The latter was confirmed as such by the Secretary General of the ICC Court on 7 February 2025.
16. Mr. Kavanagh is domiciled at [REDACTED].

**E. THE SECRETARIAT OF THE ICC COURT OF ARBITRATION**

17. The ICC Team 5 at the Secretariat of the ICC Court (the “**Secretariat**”) is in charge of the present ICC Case No. 27684/ELU (counsel: Ms. Stella Leptourgou; deputy counsel: Mr. Avishai Azriel).

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## II. THE PROCEDURAL HISTORY

### A. THE PROCEEDINGS UNTIL THE EVIDENTIARY HEARING

18. On 7 April 2023, the Claimants filed with the ICC the Request for Arbitration together with exhibits **C-0062** to **C-0063** (the “**RfA**”), which the Secretariat notified to the Respondent on 12 April 2023.
19. Prior thereto, *i.e.*, on 29 March 2023, the Claimants had filed with the ICC an Application for Emergency Measures along with accompanying exhibits **C-0001** to **C-0037** and exhibits **CL-0001** to **CL-0002**. On 6 April 2023, the Respondent submitted its Answer to Application for Emergency Measures with accompanying exhibits **R-0001** to **R-0007** and **RL-0001** to **RL-0010**, followed, on 7 April 2023, by Claimants’ Reply to the Answer to Application for Emergency Measures along with exhibits **C-0038** to **C-0061**.<sup>6</sup> On 8 April 2023, the Respondent submitted its Rejoinder with the Emergency Arbitrator along with the accompanying exhibits **R-0008** to **R-0012** and **RL-0011** to **RL-0016**.
20. By an order dated 14 April 2023, Mr. Paolo Marzolini, acting as Emergency Arbitrator, dismissed Claimants’ Application for Emergency Measures as inadmissible and ordered Claimants to pay to Respondent the costs of the Emergency Arbitrator proceedings<sup>7</sup> and to bear their own legal costs and expenses as well as the ICC administrative expenses and fees and expenses of the Emergency Arbitrator.<sup>8</sup>
21. On 19 June 2023, following an extension granted by the Secretariat, the Respondent filed its Answer to the Request for Arbitration and Counterclaims as well as a Request for Joinder, together with Exhibits **R-0001** to **R-0051** and **RL-0001** to **RL-0025** (the “**Answer to CC**”). The Request for Joinder was directed against the Initial Additional Parties referred to at ¶ 9 above (the “**RfJ**”). The RfJ was notified by the Secretariat to the Initial AP on 5 July 2023.
22. By letter of 12 July 2023, the Initial AP informed the Secretariat that jointly with the Claimants they nominated Mr. Gary Born as co-arbitrator in accordance with Article 12(7) of the ICC Rules. They also informed the Secretariat of their intention to submit jurisdictional objections for their referral to the ICC Court under Article 6(3) and 6(4) of the ICC Rules.

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<sup>6</sup> All exhibits filed during the emergency arbitrator proceedings are part of the record of exhibits relied upon by the parties and the Arbitral Tribunal in this arbitration.

<sup>7</sup> GBP 203,101.65, EUR 66,693.60 and USD 1,237.50, R-0026, p. 51.

<sup>8</sup> R-0026.

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23. On 15 August 2023, the Claimants filed their Reply to the Counterclaims. On the same date, the Initial Additional Parties filed their “*Pleas Under Article 6(3)*”, both submissions being supported by Exhibits **C-0064** to **C-0070** and **CL-0003** to **CL-0013**.
24. On 22 September 2023, following the constitution of the Arbitral Tribunal, the Secretariat transmitted the file to the three members of the Tribunal. Shortly before, by letter of 13 September 2023, the Secretariat informed the Parties that the pleas pursuant to Article 6(3) of the ICC Rules had not been referred to the ICC Court and that the Tribunal was to decide any question of jurisdiction or whether the claims may be determined together, after providing the Parties with an opportunity to comment.
25. Upon receipt of the file, the Tribunal provided the Parties with the drafts of the Terms of Reference, of a skeleton Procedural Timetable and of a first Procedural Order together with a questionnaire identifying matters for procedural directions. It invited the Parties to submit their comments in writing, which the Parties did. On that basis, a first Case Management Conference was held with the Parties via videoconference on 30 October 2023 (“**CMC I**”). It was recorded with the agreement of the Parties. Each party was given the opportunity to comment on the previously agreed items on the agenda.<sup>9</sup>
26. Thereupon the Terms of Reference were signed by the Parties and the Tribunal; they are dated 2 November 2023 (“**TOR**”). On the same day, the Tribunal issued Procedural Order No. 1 setting forth the Procedural Rules to be followed in this arbitration (“**PO 1**”).
27. The following day, on 3 November 2024, the Tribunal issued Procedural Order No. 2 (“**PO 2**”), to which the Procedural Timetable (“**PT**”) was attached as Appendix B. The request of the Claimants and the Initial AP to have the arbitration proceedings bifurcated so as to deal first with “*all jurisdictional and admissibility objections in the case*”, on which the Parties had made oral presentations during the CMC I, was dismissed by PO 2.<sup>10</sup>
28. The PT further provided for a second Case management Conference to be held on 5 or 6 June 2024 and the evidentiary hearing to start on 5 May 2025.
29. By email of 10 January 2024, the presiding arbitrator informed the Parties of his new contact details, as set out above at ¶ 13.
30. On 16 February 2024, the Claimants along with the Initial AP filed their Statement of Claim (the “**SoC**”), together with a witness statement dated 16 February 2024 of Dr. Nadine Delicata (**CWS-1**), the (first) expert report dated 16 February 2024 of Laura Cózar and Joseph Kirby from Accuracy

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<sup>9</sup> See PO 2 of 3 November 2023, ¶¶ 1, 2 and Appendix A thereto.

<sup>10</sup> PO 2, ¶¶ 15 – 22 sets out the reasons for the Tribunal’s decision not to bifurcate.

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with exhibits ACC-001 to ACC-073 (**CEX-1**), referred to by the Tribunal as the “**Accuracy Report I**”.

31. The SoC was also supported by the factual exhibits **C-0071** to **C-0240** and legal authorities **CL-0014** to **CL-0028**.
32. On 24 May 2024, the Respondent filed its Statement of Defense and Counterclaim (“**SoD&C**”) together with three witness statements dated 24 May 2024 respectively of (i) John Abela, including factual exhibits **JA-1** to **JA-10 (RWS-1)**, (ii) Carmen Ciantar, including factual exhibits **CC-1** to **CC-6 (RWS-2)** and (iii) Dr. Joseph Zarb Adami, including factual exhibits **JZA-1** to **JZA-21 (RWS-3)**, (iv) an expert report dated 20 May of Dr. Roderick Zammit Pace with legal exhibits **RZP-1** to **RZP-30 (REX-5)**, as well as four expert reports dated 24 May 2024 respectively of
- (i) Anthony Charlton of HKA with factual exhibits **AC-1** to **AC-36 (REX-1)**, referred to by the Tribunal as the “**Charlton Report I**”;
  - (ii) Connor Quigley KC with factual exhibits and legal authorities **QL-1** to **QL-31 (REX-2)**;
  - (iii) Professor Alex Torpiano with factual exhibits **AT-1** to **AT-18 (REX-3)**; and
  - (iv) Chris Williams from HKA with factual exhibits **CW-1** to **CW-63 (REX-4)**.
33. The SoD&C was also supported by the factual exhibits **R-0052** to **R-0146** and legal authorities **RL-0026** to **RL-0064**.
34. On 5 June 2024, the Tribunal held a second case management conference with the Parties to discuss the steps forward in the arbitration proceedings, in particular the potential impact on this arbitration of the Judgment of the Maltese Court of Appeal of 23 October 2023<sup>11</sup> with a view of possibly limiting the scope of the Parties’ forthcoming submissions (the “**CMC II**”).<sup>12</sup> As both Parties took the view that a limitation of the scope of submissions would not be efficient, the Tribunal accepted that the proceedings be pursued in accordance with the PT, as recorded in Procedural Order No. 3 dated 10 June 2024 (“**PO 3**”) at ¶ 12.
35. However, the Tribunal invited the Parties

*“to explain, when dealing with the impact of the Delia Court of Appeal Judgment, whether it has, as a matter of the applicable, law, res iudicata effect, whether it brought the Concession and Related Agreements to an end with ex tunc/ab initio effect or only, ex nunc, from the date of the Judgment (if so, the first or second instance judgment). What findings, if any, of the Judgment are binding upon the Parties to this arbitration and/or upon the Arbitral Tribunal? Assuming the rescission declared by the Delia Judgment would have had ex tunc effect, where would that leave the termination declared by Claimants in March*

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<sup>11</sup> Exhibit **C-0216**.

<sup>12</sup> Email of the Arbitral Tribunal dated 3 June 2024 to the Parties.

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*2023, and thereafter, the one by Respondent? Assuming, again hypothetically, Respondent would prevail with its primary case theory, what would be the relevance of EU State aid law, and why and how would it affect the quantum of Respondent's case in that scenario? These issues are identified by the Arbitral Tribunal as relevant ones, without limitation of any and all other arguments that the Parties may wish to raise and develop in the course of this arbitration in accordance with PO 1 and the PT.”<sup>13</sup>*

36. On 12 July 2024, in accordance with the PT, the Claimants submitted to the Tribunal their Stern Schedule containing 19 requests (and multiple sub-requests) for the production of documents by the Respondent (“**Claimants’ DPR I**”). On the same date, the Respondent submitted to the Tribunal its Stern Schedule containing 15 requests (and multiple sub-requests) for the production of documents by the Claimants and the AP (“**Respondent’s DPR I**”).
37. On 2 August 2024, *i.e.*, at the date foreseen in item 15 of the PT, the Tribunal issued its fourth procedural order dealing with the Parties’ document production requests (“**PO 4**”). It ordered the Parties to exchange electronically the documents as determined in Appendices A and B of PO 4 (containing respectively Claimants’ DPR I and Respondent’s DPR I) “*without delay, if possible, on a rolling basis, and at the very latest*” on 23 August 2024.
38. Also on 2 August 2024, the Tribunal issued its fifth procedural order (“**PO 5**”) dealing with an application made by the Respondent on 11 July 2024 based on PO 1 ¶ 34, by which Respondent sought the production of additional documents from the Claimants and the AP (“**Respondent’s PO 1 ¶ 34 Application**”). After having received on 17 July 2024 Claimants’ reply to Respondent’s PO 1 ¶ 34 Application, Respondent’s further observations thereto on 23 July 2024, and finally, on 30 July 2024, Claimants’ additional observations, the Tribunal decided to deny and reject Respondent’s PO 1 ¶ 34 Application, reserving its decision on costs.<sup>14</sup>
39. By email of 18 June 2024, the Respondent filed an Application for Security for Costs dated 18 June 2024 together with factual exhibits **R-0147** to **R-0155** and legal authorities **RL-0065** to **RL-0068** (the “**SfC Application**”). It gave rise to an agreed exchange of submissions as follows: on 23 July 2024, Claimants and the Initial AP filed their Observations on the SfC Application together with exhibits **CL-0029** to **CL-0047** as new legal authorities. In turn, on 6 August 2024, the Respondent filed its Response to Claimants’ Observations together with exhibits **R-0069** to **R-0072** and **RL-0156** to **RL-0159**, followed on 20 August 2024 by the Claimants and the Remaining AP’s Additional Observations on the Application together with exhibits **CL-0048** to **CL-0051**.
40. By email of 21 August 2024, Weil, Gotshal & Manges LLP (“**Weil**”) sent a letter to the Tribunal on behalf of Steward Health Care System LLC (AP 4) and Steward Health Care International LLC

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<sup>13</sup> PO 3, ¶ 13.

<sup>14</sup> PO 5, ¶ 34. The reasons for the Tribunal’s decision are set forth at PO 5, ¶¶ 24 -33.

(AP 5), together the “US Entities”, which prompted the Tribunal to submit the following two questions to the Parties by email of 23 August 2024:

- “First, is there agreement that AP 4-8 are in fact only the two aforementioned US Entities? If so, would the Parties be prepared to make a stipulation to the effect?”
- Second, does Respondent agree with the position of the US entities regarding the Automatic Stay (as defined in Weil’s letter of 21 August), and if so, does Respondent agree with “the US Entities’ position that given the Automatic Stay no security can be imposed on the US Entities and the application should be denied with regard to those entities?”

41. By email of 30 August 2024, the Respondent replied as follows to these two issues:

*“As to the first legal issue, namely whether there is agreement that AP 4-8 are in fact only two entities (...), based on the representations made by the APs 4-8 in their letter dated 22 August 2024 (FNI), Respondent is prepared to make such a stipulation. Respondent has reached out to Claimants and all APs, which have confirmed that they also agree with such stipulation. (...)*

*As to the second legal issue, namely whether Respondent agrees with the position of the US entities regarding the Automatic Stay (as defined in Weil’s letter of 21 August 2024), and if so, whether Respondent agrees “that given the Automatic Stay no security can be imposed on the US Entities”, Respondent confirms that for purposes of its Security for Cost application filed on 18 June 2024, it withdraws at this stage its application for security against AP 4-8. However, Respondent, reserves all rights with respect to the automatic stay and its applicability to this arbitration.”*

42. By email of the same date, counsel for the Claimants and the Remaining AP confirmed “*their agreement with the stipulation concerning Additional Parties 4-8 and acknowledge[d] the Respondent’s position on the second legal issue. (...).*” By email of 6 September 2024, counsel for AP 4 and 5 advised the Arbitral Tribunal as follows: “*To confirm, the US Entities (AP 4 and AP [5]) are in agreement with the positions expressed by Respondent and Claimants on the correct identity of the US Entities, the withdrawal of Respondent’s Security for Cost application against AP 4 and AP 5, and all parties reserving their respective rights with respect to the automatic stay (...).*”

43. As per the request of the Tribunal, on 30 August 2024, the Respondent submitted a breakdown of “*its projected costs, limited to its defence against Claimants’ claims.*” The Respondent estimated the fees for legal representation and expert “*with regard to Respondent’s defenses only*” at Euro 2,845,000 and its expenses at approximately Euro 150,000.



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44. The Claimants and the Remaining AP provided their comments thereon by letter dated 9 September 2024. On the same day, the Tribunal acknowledged their receipt and reminded the Parties that this concluded the Parties' exchange on the SfC Application.
45. On 11 September 2024, the Tribunal issued its sixth Procedural Order regarding the SfC Application ("PO 6") with the following decision: *"Accordingly, based on the foregoing, the Arbitral Tribunal hereby notes the agreement of the Parties that the AP 4-8 effectively consist of AP 4 and 7 only and decides, insofar as the Application is directed against Claimants and AP 1-3, to (i) dismiss the Application without prejudice, and to (ii) reserve its decision on cost."*<sup>15</sup>
46. The names of what initially were referred to in the RfJ as the Additional Parties 5, 6 and 8 were removed from the case caption of PO 6, as acknowledged by the Secretariat by its letter of 17 September 2024.
47. In accordance with the request made by the Tribunal in PO 6, on 2 October 2024, both Parties filed their cost submissions in relation to the SfC Application.
48. By email of 6 October 2024, the Claimants and the Remaining AP filed a request for an order that the Respondent disclose withheld documents together with Annex A ("**List of Withheld Documents concerning Requests 2 A and 2 D**"), factual exhibits **C-0241** to **C-0244** and legal authorities **CL-0502** to **CL-0060** ("**Claimants' Document Production Request II**" or, simply, "**Claimants' DPR II**"). As directed by the Tribunal, on 11 October 2024, the Respondent submitted its comments to Claimants' DPR II with exhibits **RL-073** to **RL-088** as new legal authorities. By email of 17 October 2024, the Claimants and the Remaining AP filed a reply letter together with exhibit **CL-0061**.
49. By email of 22 October 2024, the Tribunal acknowledged receipt of the Parties' most recent submissions and explained, that in its view, *"the Parties have clarified and expressed their divergent views in a sufficient manner for it to be now able to form a considered view and to render its decision."*
50. Shortly thereafter, the Claimants informed the Arbitral Tribunal *"that on 21 October 2024, the Respondent updated its privilege log, adding two documents under the Claimants' Request No 6A and claiming that both are privileged under Article 36(1) of the Freedom of Information Act."* The Claimants attached to their email an updated version of Annex A, including these two documents as Document Requests Nos. 32 and 33. The Claimants also attached Respondent's revised privilege

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<sup>15</sup> PO 6, ¶ 59. The reasons for the Tribunal's decision are set forth at PO 6, ¶¶ 39 – 58.

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log of 21 October 2024 and a redline version against the 23 August 2024 privilege log (exhibits C-0245 and C-0246).

51. By email of 22 October 2024, the Respondent confirmed that it agreed with the Claimants' inclusion of Document Requests Nos. 32 and 33 and submitted an updated version of Annex A, which the Tribunal adopted as "**Annex A bis**" for the purpose of its forthcoming procedural order.
52. On 29 October 2024, the Tribunal issued its seventh Procedural Order ("**PO 7**") dealing with the Claimants' application concerning several of the documents that the Respondent had withheld from disclosure on account of immunity and privileges.
53. By letter of 29 October 2024, counsel for the AP 4 and AP 5 advised the Tribunal that the Parties had reached the following agreement:

*"1. All parties agree that the arbitration with respect to AP 4 and AP 5, including Respondent's counterclaims in this arbitration (the "Counterclaims") and all briefing schedules, timelines and hearing dates, are stayed, consistent with section 362(a) of the US Bankruptcy Code, until at least December 16, 2024.*

*2. The parties further agree that the arbitration may proceed in all respects as it relates to all other parties and the bankruptcy filing of AP 4 and AP 5 does not prevent the continuance of the arbitration, on the current scheduled timeline (and hearing dates), with respect to the other parties.*

*3. In order to ensure that actions taken in the arbitration, including during the Stay Period, do not prejudice AP 4 and AP 5*

*a. No findings of fact or conclusions of law that may be determined by this Tribunal, including as they relate to issues of alter ego, shall be binding as against AP 4 or AP 5 either in this arbitration or any future proceeding, nor will any party use or rely on any such findings of fact or conclusions of law against AP 4 or AP 5 in this arbitration or any future proceeding, including for use in support of arguments based on collateral estoppel, res judicata, or any other preclusion theory against AP 4 and AP 5;*

*b. Should the Counterclaims need to be adjudicated against AP 4 and AP 5 at a later date, all parties, including AP 4 and AP 5 will be provided the opportunity to put forward a full set of briefings and arguments before the Tribunal or in any other proceeding and no party shall be deemed to have waived any rights, arguments or claims with respect to the Counterclaims against AP 4 and AP 5, other than those identified in paragraph "a." above;*

*c. For the avoidance of doubt, in the event that AP 4 and AP 5 at a later date submit filings before the Tribunal with respect to the merits of the Counterclaims, any findings of fact or conclusions of law determined by this Tribunal thereafter and resulting from such filings, shall be binding on AP 4 and AP 5.*

*d. All parties reserve their respective rights to argue at a later time their position on the applicability of the automatic stay, including to a further extension of the Stay Period and the extension of the automatic stay to non-debtors.*

*4. In order to provide Respondent sufficient time to determine if it will file a proof of claim in the bankruptcy proceeding of AP 4 and AP 5, the bar date for Respondent to file any such proof of claim has been extended to November 25, 2024. It is the parties' expectation that if no proof of claim is filed by Respondent, AP 4 and AP 5 will be dismissed from this arbitration."*

54. Counsel for the Claimants and the Remaining AP and for the Respondent signed that letter, thereby expressing agreement with its content.
55. By email of 30 October 2024, the Claimants provided the list of 9 (nine) authorized recipients of its legal team of outside counsel, as per the agreement reached with the Respondent, and confirmed the latter by email of the same day.
56. By yet another email of 30 October 2024, the Tribunal noted the Parties' agreement regarding the stay of the proceedings with respect solely to the AP 4 and AP 5 as well as the Parties' position in that respect. The Tribunal further noted that under the circumstances, it expected to hear again from the Parties as to any further developments by no later than 20 December 2024.
57. On 1 November 2024, the Respondent sent to the Arbitral Tribunal a letter together with its new exhibits **R-0160 to R-0165** ("**Respondent's DPR II**"), by which the Respondent requested "*that the Tribunal order the production of the Documents set out in section (C) of this letter, in addition to an order in accordance with paragraph 30 of this letter, namely for Claimants to reissue the Documents listed in Annex A of its 11 October 2024 correspondence without redactions. Respondent requests the disclosure of these Documents by no later than 15 November 2024 to minimise the impact on Respondent's timetable to prepare and file its submission.*" (Respondent's DPR II, ¶ 62).
58. On the same day, the Tribunal acknowledged receipt of Respondent's DPR II as well as Claimants' request to be given until 15 November 2024 to respond thereto, which the Respondent opposed by a subsequent email of the same day.
59. Considering that the Claimants were fully aware of Respondent's desire to obtain more and better documents since its 11 October 2024 letter (exhibit **R-165**), and thus had ample time to consider the matter, and while the Tribunal was cognizant of the fact that the Claimants were preparing their Reply and in parallel pursuing their request for production of the Withheld Documents, the Tribunal granted the Claimants by email of 4 November 2024 (only) "*until no later than Tuesday, 12 November 2024, to respond to Respondent's DPR II.*"
60. By email of 9 November 2024 (2:24 am CET), the Tribunal received a partially redacted version of the Claimants and the Remaining AP's Statement of Reply and Defense to the Counterclaim

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dated 8 November 2024 (the “**Reply**”), and shortly thereafter an unredacted/OCEO version of the same document (the “**OCEO Reply**”).<sup>16</sup>

61. The Reply was accompanied by four expert reports, all dated 8 November 2024:
- (i) the second Expert Report of Ms. Laura Cózar and Mr. Joseph Kirby from Accuracy with exhibits **ACC-074** to **ACC-122 (CEX-2)**, referred to by the Tribunal as the “**Accuracy Report II**”);
  - (ii) the (first) Expert Report of Professor Jacques Derenne from Sheppard Mullin with exhibits **JD-1** to **JD-77 (CEX-3** or the “**Derenne Report**”);
  - (iii) the (first) Expert Report of Ms. Nicole Robins from Oxera with exhibits **NR-01** to **NR-17 (CEX-4** or the “**Robins Report**”); and,
  - (iv) the (first) Expert Report of Dr. Tonio Fenech with exhibits **TF-1** to **TF-31 (CEX-5** or the “**Fenech Report**”).

The Claimants transmitted also a soft copy of Claimants’ Consolidated Index of Factual Exhibits and Claimants’ Consolidated Index of Legal Authorities.

62. The Reply was also supported by factual exhibits, **C-0247** to **C-0359** and legal authorities, **CL-0062** to **CL-0106**, which the Claimants submitted a few days later via the link to a secure file transfer.<sup>17</sup>
63. By letter of 12 November 2024, the Claimants replied to Respondent’s DPR II, by submitting in support exhibits **C-0360** and **CL-0107**. The following day, the Tribunal acknowledged receipt of Claimants’ reply, noting that the Parties were in discussions regarding the production of 455 unredacted documents and that it was confident that the Parties would have shortly completed this process.
64. The Tribunal further noted that (i) regarding Requests nos. 2, 8, 9, Claimants had produced further documents requested by the Respondent and (ii) regarding Requests nos. 1, 3, 6 and 14, while noting Claimants’ position, it appeared to the Tribunal that at that stage no further ruling was required in relation thereto.
65. The Tribunal therefore invited the Respondent to comment, which it did by letter of 15 November 2024. Based on these submissions, the Tribunal issued on 18 November 2024 its eighth procedural order dealing with Respondent’s DPR II (“**PO 8**”).

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<sup>16</sup> Unless otherwise stated, references in this Award to the Reply will always be to its partially redacted version. References to the unredacted version of the Reply will in turn refer to the “OCEO Reply”.

<sup>17</sup> By email of 13 November 2024. The link included access to the exhibits to the expert reports **CEX-2** to **CEX-5**. By a separate email of the same day, Claimants also provided a link for a secure file transfer for the OCEO Exhibits **C-OCEO-0001** to **C-OCEO-0004**.

66. PO 8 reads in relevant part as follows:

*“(2.) The document production orders made by the Arbitral Tribunal in PO 4 and Appendix B are clear as regards the scope of documents Claimants are required to search for and to produce: While no order was made against any of the AP, Claimants were expected to include any relevant documents held by the AP to the extent Claimants would have “possession, custody or control” of these documents. The Arbitral Tribunal expressed this by referring to its general assumption “Claimants have access to a certain amount of document that may be held by the AP.” (PO 4, ¶ 21). In the Reply to Respondent’s DPR II, Claimants seem to confirm that understanding when they state that “the production process targeted Documents pertaining to those Additional Parties that are within the Claimants” possession, custody, or control.”*

*As part of the control function, Claimants may well have to request the AP to “search for or to produce documents;” while no such obligations exists for the AP as far as the Arbitral Tribunal is concerned (as the Tribunal’s order has not been issued directly against the AP), this does not mean that the AP may have no obligations of any kind to assist Claimants in locating and producing to them documents which the latter would have request them to search for and to produce.*

*Ms. Nuria Ros, who the Arbitral Tribunal understands to be a member of AP 2, who is copied on the Tribunal’s communications, and even attended the 2<sup>nd</sup> CMC of 5 June 2024, would appear to be the right conduit for making these missing documents available to Claimants, at the very minimum those held by AP 2 itself.*

**(3.) Request 1**

*The Arbitral Tribunal is not satisfied by Claimants’ explanation, at Reply to Respondent’s DPR, ¶ 23, “that the Documents produced represent the entirety of responsive information available to them following diligent searches conducted by Claimants’ employees and the counsel team.” This statement falls short of an explanation why the documents now still requested by Respondent could not be made available by Claimants.*

*Accordingly, Claimants are **ordered** to conduct the necessary enquiries to obtain and produce the Documents Respondent has referred to at Respondent’s DPR II, ¶ 33.*

**(4.) Request 3**

*For the same reasons as above, including under Request 1, **Claimants are ordered** to conduct the necessary enquiries to obtain and produce the Documents Respondent has referred to at Respondent’s DPR II, ¶ 40 and ¶ 41, i.e., regarding Requests 3(a) and 3(b).*

*Regarding Request 3(c) and the redactions made to Dr. Delicata’s employment contract, without taking a view with respect to the GDPR, but given the sensitivity of compensation, the Arbitral Tribunal hereby **orders Claimants** to produce on an OCEO basis an unredacted version of Dr. Delicata’s employment contract **solely** to those members of Respondent’s outside legal team on record, that Respondent will have indicated it to it **within 2 (two) working days** of receipt of this order.*

*PO 7, ¶¶ 62 -65 and ¶ 69 apply mutatis mutanda to the unredacted version of Dr. Delicata’s employment contract.*

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(5.) **Request 6**

*For the same reasons as above, including under Request 1, **Claimants are ordered** to conduct the necessary enquiries to obtain and produce the Documents Respondent has referred to at Respondent's DPR II, ¶ 44.*

(6.) **Request 14**

***Moot**, as per Respondent's DPR II bis, ¶ 25.*

*(7) The Arbitral Tribunal notes Respondent's statement that it "has not, at present, received the unredacted copies of the '455 of the 469 documents in Annex A of the Respondent's 11 October 2024 letter'", Respondent's DPR II bis, ¶ 4.*

*The Parties **are invited** to inform the Arbitral Tribunal on the status of the production of unredacted copies of these documents **within 2 (two) working days** of receipt of this order. The Arbitral Tribunal reserves the possibility to order the production of these documents for the time being on an OCEO basis.*

*(8.) Regarding the Tribunal's orders with respect to Requests 1, 3 and 6, the Arbitral Tribunal expects **prompt compliance** by Claimants, and requests an **update** from the Parties by **Wednesday, 27 November 2024**.*

*(9) The Parties' all other comments regarding Claimants' alleged compliance with their document production obligation and the alleged applicability of the GDPR to justify non-production and/or redactions are noted by the Arbitral Tribunal.*

*Regarding the GDPR, the Arbitral Tribunal draws the attention of the Parties to the **TOR ¶¶ 110 – 113**, and to their agreement to always apply the GDPR and "to protect the personal data that may surge in this arbitration." (Emphasis in original).*

67. By email of 20 November 2024, the Respondent advised the Tribunal, amongst other things, that it had "now received further Documents relating to Requests 3(c) (Dr Delicata's employment agreements) and 13 (comprising 455 unredacted Document of the 469 Document list (...)," but on an OCEO basis. The Respondent requested that the Tribunal lift "the unilateral OCEO designation that Claimants have applied to the [Request 13] Documents," justifying its request with the need "to disclose these Documents to civil servants at the Ministry for Health of Malta, among others, who would be best placed to assist Respondent's counsel (and its appointed expert witnesses) with interpreting the data relating to the Resources."
68. At the Tribunal's invitation to provide comments, the Claimants replied by email of 22 November 2024 concluding: "Until the Respondent proposes a suitable approach that ensures compliance with GDPR obligations for all individuals granted access to personal employee data, the Tribunal should uphold the OCEO status of these unredacted documents."
69. By email of 22 November 2024, the Tribunal explained that Claimants' concern could be alleviated, "if the civil servants, with whom Respondent's counsel wishes to share the Request 13 Documents for the sole purpose of preparing its forthcoming Rejoinder, sign a confidentiality undertaking satisfactory to Claimants." The Tribunal considered it sufficient that three civil servants of Respondent "be allowed to see the unredacted versions of these documents, provided they have

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*signed the confidentiality undertaking, which Respondent will have to provide to Claimants' counsel."*

70. By email of 27 November 2024, the Claimants informed the Tribunal as follows:

- *"Ms. Nuria Ros and the Claimants' counsel team have made further searches and enquiries with the Additional Parties (the APs) and their lawyers concerning Requests 1, 3(a), 3(b), and 6.*
- *The Claimants' counsel reviewed the documents and disclosed to the Respondent 70 additional responsive documents. Of these, 42 are responsive to both Requests 3(a) and 6, while the remaining 28 are responsive to Request 6 only.*
- *The Claimants have located 11 privileged Documents responsive to Request 6. The Claimants have updated the Privilege Log accordingly and transmitted it to the Respondent.*
- *The additional enquiries and searches regarding the Documents responsive to Request 3(b) by now have not resulted in locating any additional Documents. "*

71. The Claimants further stated that regarding Requests 1, 3 and 6, this exhausted the additional searches and enquiries. By email of 2 December 2024, the Tribunal acknowledged receipt of Claimants' communication as well as the Parties' earlier confirmation that the pre-hearing conference could be moved to Monday, 14 April 2025.

72. By a letter dated 20 December 2024 from counsel for the AP 4 and AP 5, the latter explained to the Tribunal that *"it would appear appropriate for AP 4 and AP 5 to be dismissed from this arbitration."* By email of 23 December 2024, the Tribunal acknowledged receipt of that letter and requested confirmation by 10 January 2025 from the Claimants, the Remaining AP and the Respondent that they agreed that AP 4 and AP 5 be released from this arbitration, and if so, without prejudice. It expressed also the preliminary view that such a release could be made by way of a procedural order and that no decision on costs would be required as regards the AP 4 and AP 5.

73. As mentioned at ¶ 15 above, on 9 January 2025, Mr. Born tendered his resignation, as acknowledged by the Secretariat by email of 13 January 2025.

74. On 10 January 2025, the Claimants and the Remaining AP, as well as the Respondent provided their comments to the Tribunal's 23 December 2024 request of confirmation that they agreed that AP 4 and AP 5 be released from this arbitration. By email of the same day, the Tribunal noted that while all Parties agreed that the AP 4 and AP 5 should be released from this arbitration some further clarification was required.

75. Accordingly, by email of 14 January 2024, the Claimants and the Remaining AP confirmed that the release of the AP 4 and AP 5 from this arbitration would be without prejudice and confirmed that the decision on costs be deferred to later. By email of the same date, the Respondent confirmed

that the question of costs, following the release of the AP 4 and AP 5 from this arbitration, would concern only the remaining Parties to this arbitration. Accordingly, by email of 15 January 2025, the Tribunal provided the Parties with a draft procedural order by stipulation for their review and consent.

76. Based on these confirmations, the Tribunal issued on 20 January 2025 its ninth Procedural Order (“**PO 9**”) dealing with the release from this arbitration of the AP 4 and AP 5 in the following terms:

*“[T]he Arbitral Tribunal*

- Acknowledges and decides that the Parties’ agreement that the Additional Parties 4 and 5 are as from now on released from this arbitration and that such release is without prejudice.*
- decides that the names of the AP 4 and 5 shall henceforth be deleted from the case caption of this case, and*
- reserves the costs regarding PO 9 for the final award, acknowledging that any such decisions on costs would bind only the parties who are still a party to the arbitration at the time of such award.”*

77. Accordingly, as of 20 January 2025, the names of what initially were referred to in the RfJ as AP 4 and AP 7 and are referred to in this Award as AP 4 and AP 5 were removed from the case caption of this matter, as acknowledged by the Secretariat by its letter of 23 January 2025.
78. At its session of 23 January 2025, the ICC Court accepted the resignation of Mr. Born and invited the Claimants and the Remaining AP to nominate a new co-arbitrator by 10 February 2025.
79. The Claimants and the Remaining AP did so on 30 January 2025 by nominating David Kavanagh KC. As noted above at ¶ 15, the replacement of Mr. Born by Mr. Kavanagh became effective on 7 February 2025, when the latter’s nomination as co-arbitrator was confirmed by the Secretary General of the ICC Court.
80. By email of 1 February 2025 (4:56 am CET), the Tribunal received partially redacted version of the Respondent’s Statement of Rejoinder and Reply to the Counterclaim dated 31 January 2025 (the “**Rejoinder**”). The Rejoinder was also submitted in an unredacted/OCEO version (the “**OCEO Rejoinder**”).<sup>18</sup>

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<sup>18</sup> Unless otherwise stated, references in this Award to the Rejoinder will always be to its partially redacted version. References to the unredacted version of the Rejoinder will in turn be referring to the “OCEO Rejoinder.”



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81. The Rejoinder was accompanied by a second witness statement of both (i) Ms. Carmen Ciantar including factual exhibit **CC-7 (RWS-4)** and of (ii) Dr. Joseph Zarb Adami including factual exhibits **JZA-22 to JZA-36 (RWS-5)**, as well as of second expert reports dated 31 January 2025 of
- (i) Mr. Anthony Charlton of HKA with exhibits **AC-37 to AC-62 (REX-6)**, referred to by the Tribunal as the “**Charlton Report II**,”
  - (ii) Connor Quigley K.C. with factual exhibits **Q-4 to Q-5** and legal authorities **QL-32 to QL-68 (REX-8)**,
  - (iii) Mr. Chris Williams from HKA with factual exhibits **CW-65 to CW-81 (REX-9)** and
  - (iv) an expert report dated 30 January 2025 of Dr. Roderick Zammit Pace with legal exhibits **RZP-31 to RZP-82 (REX-7)**.
82. With the same email of 1 February 2025, the Respondent pointed out that the Claimants and the Remaining AP had disclosed in the Reply that Dr. Delicata may have not appear at the Hearing. Therefore, the Respondent requested confirmation from the Claimants and the Remaining AP as to whether she would appear. Further, in case Dr. Delicata would fail to appear at the Hearing, the Respondent requested the Tribunal to strike her witness statement (**CWS-1**) from the record.
83. On 5 February 2025, the Tribunal received soft copies of the factual exhibits **R-166 to R-289** and of the legal authorities **RL-90 to RL-120** filed in support of the Rejoinder, as well as exhibits **R-OCEO-1 to R-OCEO-3** in support of the OCEO Rejoinder.
84. By email of 18 March 2025, the Claimants and the Remaining AP filed their partially redacted version of the Rejoinder to Counterclaim dated 14 March 2025 (the “**CC Rejoinder**”). The CC Rejoinder was also submitted in an unredacted/OCEO version (the “**OCEO CC Rejoinder**”).<sup>19</sup>
85. The CC Rejoinder was accompanied by
- (i) the Third Expert Report of Laura Cózar and Joseph Kirby dated 18 March 2025 with exhibits **ACC-123 to ACC-144 (CEX-6)**, referred to by the Tribunal as the “**Accuracy Report III**,”
  - (ii) the Second Expert Report of Professor Jacques Derenne dated 18 March 2025 with exhibits **JD-078 to JD-101 (CEX-7)**,
  - (iii) the Second Expert Report of Nicole Robins dated 18 March 2025 with exhibits **NR-18 to NR-35 (CEX-8)**, and
  - (iv) the Second Expert Report of Tonio Fenech dated 18 March 2025 with exhibits **TF-032 to TF-35 (CEX-9)**.

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<sup>19</sup> Unless otherwise stated, references in this Award to the CC Rejoinder will always be to its partially redacted version. References to the unredacted version of the CC Rejoinder will in turn be referring to the “OCEO CC Rejoinder”.

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86. By email of 20 March 2025, the Claimants provided soft copies of the factual exhibits **C-0361** to **C-0440** and of the legal authorities **CL-0108** to **CL-0117** filed in support of the CC Rejoinder, as well as of the exhibits (and appendices) to the expert reports **CEX-6** to **CEX-9**.
87. Following a request made by the Tribunal to have a complete translation of the First Hall, Civil Court Judgment of 24 February 2023, of which exhibit **C-0017** contained only a partial translation, the Claimants submitted as exhibit **C-0441** the full English translation of that judgment by email of 21 March 2025.
88. By email of the same day, the Respondent reiterated its application of 1 February 2025 that Dr. Delicata's witness statement (**CWS-1**) be struck from the record. By email of 24 March 2025, the Tribunal requested the Claimants to indicate whether they would make Dr. Delicata available at the evidentiary hearing, and in the negative, how in the opinion of the Claimants the Tribunal should be treating Dr. Delicata's witness statement.
89. By letter of 26 March 2025, the Claimants and the Remaining AP opposed Respondent's request to have Dr. Delicata's witness statement struck from the record, while confirming that she would not appear at the evidentiary hearing. In support of Claimants' request to keep Dr. Delicata's witness statement on record, the Claimants filed the new factual exhibits **C-0442** to **C-0445** and the new legal authorities **CL-118** to **CL-0121**.
90. By email of 26 March 2025, the Tribunal informed the Parties that it had received, the day before, from the ICC an (unsolicited) submission from the The Daphne Caruana Galizia Foundation dated 18 March 2025 and received by the ICC through its general email address (the "**Third-Party Submission**").
91. The Tribunal requested the Parties to inform it whether they agree that the Third-Party Submission and its attachments should become part of the arbitral record, and if so, whether they agreed that the Third-Party Submission and its attachments should be communicated to all participants in the arbitration. In the affirmative, the Parties were to advise the Tribunal whether they wanted to submit brief comments regarding the Third-Party Submission, if so prior to the evidentiary hearing, or as part of the opening statements at the hearing.
92. By email of 31 March 2025, the Claimants and the Remaining AP took the view that the Tribunal (i) could not acknowledge receipt of the Third-Party Submission because doing so would breach the confidentiality of the arbitration, (ii) nor could it admit the Third-Party Submission to the record without the agreement of both Parties, and that in any event, (iii) it should have not admitted the Third-Party Submission to the record as this would be unduly prejudicial to the Parties at this stage of the proceedings.

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93. The same day, the Respondent requested the Tribunal to release the Third-Party Submission to the Parties since (i) the Tribunal was empowered to adopt measures related to the Third-Party Submission, (ii) it would be appropriate for the Parties to have access to the Third-Party Submission, and (iii) the acceptance in the record of the Third-Party Submission would leave the Parties' procedural and substantive rights unaltered and respect efficiency.
94. Per agreement of the Parties, on 28 March 2025, and thus a few days earlier as foreseen in PT, item no 20, the Parties notified each other of the fact witnesses and expert witnesses they wanted to examine at the evidentiary hearing. The Claimants and the Remaining AP called all of Respondent's fact witnesses and experts, except Professor Alex Torpiano. The latter had submitted an expert report dated 17 May 2024 (**REX-3**).<sup>20</sup>
95. The Respondent in turn called Dr. Delicata and all of Claimants' expert witnesses.
96. By a (first) email of 1 April 2025, the Tribunal invited the Parties to address the following questions before taking a decision regarding Respondent's request to strike Dr. Delicata's witness statement from the record:
- (i) *"When did Dr. Delicata become again a paid government employee and what position does she currently hold in the Ministry of Health?"*
  - (ii) *"When has Dr. Delicata indicated to Claimants that she does not want to testify, on what ground exactly and has she expressed her position in writing?"*
  - (iii) *"Has Dr. Delicata informed Respondent (through the Ministry of Health or otherwise) of her unwillingness or reluctance to testify in this arbitration?"*
97. By a (second) email of 1 April 2025, the Tribunal sent the Third-Party Submission to the Parties explaining that, in its view, *"it would be inappropriate for it not to share it with the Parties, and not to solicit their views as to their relevance and impact, if any for these proceedings, and thus whether to allow it to become part of the record or not."*
98. Before taking a decision on whether to have this document become part of the record, the Tribunal requested the Parties to address the following questions:
- (i) *"Does the Third-Party Submission raise any new factual matters not already on the record or in the public domain (in Malta);"*
  - (ii) *"For what issues, if any, would those new factual matters, if any, be possibly relevant and material for the outcome of this arbitration?"*

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<sup>20</sup> By email of 16 April 2025 to the Parties, the Arbitral Tribunal expressed its understanding that the expert report of Professor Torpiano should be treated in accordance with PO 1, ¶ 42.

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*(iii) Would the relief, as pleaded by the Parties in their latest written submissions be affected by any new factual matters?”*

99. By a (third) email of 1 April 2025, the Tribunal sent to the Parties a draft procedural order regarding the evidentiary hearing as well as a draft skeleton hearing schedule, for discussion with the Parties.
100. By email of 3 April 2025, the Parties answered the questions raised by the Tribunal in its (first) email of 1 April. Based on these responses, the Tribunal decided to deny Respondent’s request to strike **CWS-1** from the record. In its decision of 4 April 2025, the Tribunal considered “*the fact that Dr. Delicata has resumed her employment with the GoM in December 2024 to constitute “special circumstances” within the meaning of POI, ¶ 41 (2<sup>nd</sup> sentence)*” and accepted, “*albeit with some reluctance, that a “valid reason” for Dr. Delicata’s non-appearing at the forthcoming Hearing has been established by the Claimants.*”
101. The Tribunal further stated that it “*has given the Claimants the benefit of the doubt not the least because under the circumstances Dr. Delicata’s witness statement will in any event not bear the same weight as the statement of a witness who has been subjected to cross-examination, as Claimants themselves have acknowledged. Furthermore, by keeping Dr. Delicata’s witness statement on the record, the Arbitral Tribunal may still hear the testimony of Respondent’s witnesses to the extent Dr. Delicata’s testimony is disputed on points that are (i) truly relevant and (ii) not already covered by contemporaneous correspondence.*”
102. On 9 April 2025, both Parties addressed the questions raised by the Arbitral Tribunal in its second email of 14 April 2025. In short, neither party made a request that the Third-Party Submission be allowed on record. The Claimants and the Remaining AP further stated that if the Third-Party Submission were to be allowed on record, they “*will request postponement of the merits hearing and the establishment of a new procedural schedule, including document production and further written submission.*”
103. By email of 11 April 2025, the Tribunal received from counsel for Claimants comments on behalf of both Parties regarding their agreement or differences with the proposed draft procedural order and hearing schedule. On 13 April 2025, the Tribunal provided the Parties with a draft agenda for the pre-hearing conference, in which it listed the Parties’ points of disagreement.
104. At the virtual pre-hearing conference of 14 April 2025, the Tribunal discussed with the Parties the open points regarding the evidentiary hearing, as set out in its agenda.<sup>21</sup>

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<sup>21</sup> The pre-hearing conference was recorded, and the video recording was sent to the Parties by email of 16 April 2025.

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105. At the pre-hearing conference, the Tribunal informed the Parties that it had decided not to make the Third-Party Submission part of the record, and that it would ask the ICC to acknowledge receipt of that submission and to inform the sender that it had been transmitted to the Tribunal.
106. The Tribunal based its decision on the fact that neither party had made a request that the Third-Party Submission be made part of the record, and that admitting the Third-Party Submission on record at this late stage of the proceedings would have entailed the risk of disruption of the ongoing proceedings, for it would have meant granting the Parties the right to comment and having to postpone the evidentiary hearing to a later date.
107. On 16 April 2025, the Tribunal sent to the Parties an updated version of the draft procedural order and of the draft hearing schedule for the Parties' final review.
108. On 18 April 2025, the Tribunal issued its tenth procedural order regarding the evidentiary hearing, to which the hearing schedule, as agreed with the Parties, was attached ("**PO 10**").
109. On 24 April 2024, the Tribunal sent the Parties a list of potential questions regarding (i) Maltese law and (ii) EU State aid law issues to be discussed with the Parties' legal experts during the two hot-tubbing sessions at the evidentiary hearing.
110. By email of 25 April 2025, counsel for the Respondent sent to the Tribunal, as agreed with the Claimants, a new legal authority of the Claimants (exhibit **CL-0122**) and two new legal authorities of Respondent (exhibits **RL-0123** and **RL-0124**),<sup>22</sup> as well as the updated legal exhibits **QL-9**, **QL-19** and **QL-26** of Mr. Quigley's expert reports.
111. In accordance with PO 10, ¶15, on 3 May 2025, the Parties provided the Tribunal with soft copies of their demonstrative exhibits, respectively, **CDE-0001** to **CDE-0005** as well as **RDE-1** and **RDE-2**.

**B. FROM THE EVIDENTIARY HEARING TO THE CLOSING OF THE ARBITRAL PROCEEDINGS**

112. From 5 to 9 May 2025, the evidentiary hearing was conducted at the Delos Hearing Centre in Paris (the "**Hearing**") followed on 13 May 2025 with a virtual Q&A Session with the Parties (the "**Q&A Session**").
113. The Hearing took place in the presence of the Parties, as follows:

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<sup>22</sup> Subsequently withdrawn from the record, as noted below at ¶ 126.

- In appearance for and on behalf of Claimants and the Remaining AP:

Claimants' and the Remaining AP's Representatives

- Iñigo Gomez-Jordana, General Counsel
- Nuria Ros, Senior Legal Counsel

Claimants' and the Remaining AP's Counsel:

(i) Freshfields

- Noah Rubins KC
- Yuri Mantilla
- April Lacson
- Camille Strosser
- Valerio Letizia
- Dinara Mustafina
- Mohit Mahla
- Sophie Bergman
- Julian Edwards
- Pegah Kelasi
- Anna Rizzardi
- Claire Rohou

(ii) Mamo TCV Advocates

- Joseph Camilleri

Claimants' and the Remaining AP's Experts

- Tonio Fenech, Independent Consultant
- Jacques Derenne, Sheppard Mullin LLP
- Dimitris Vallindas, Sheppard Mullin LLP
- Nicole Robins, Oxera Consulting LLP
- Thomas Kokken, Oxera Consulting LLP
- Laura Cózar, Accuracy
- Joseph Kirby, Accuracy
- Joshua Gamble, Accuracy
- Irene Somnavilla, Accuracy

- In appearance for and on behalf of Respondent:

Respondent's Representatives:

- Christopher Soler, State Advocate
- Joseph Chetcuti, Permanent Secretary, Ministry for Health

Respondent's counsel:

(i) Clyde & Co:

- Nadia Darwazeh,
- Loukas Mistelis
- Sophie Bayrou

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- Rémi Sassine
  - Robin Bandar
  - Louise Sura
  - Elisabeth Wagner
  - Yuliia Pavlova
  - Rashad Bohn
  - Lauren Robinson
  - Dila Aynar
  - Marie Joe Dib

(ii) Ganado Advocates:

- Antoine Cremona
- Louis Cassar Pullicino
- Clement Mifsud-Bonnici
- Luisa Cassar Pullicino
- Yasmine Ellul

(iii) LRS Law Firm:

Alex Sciberras

Respondent's Factual Witnesses:

- John Abela
- Carmen Ciantar
- Dr. Joseph Zarb Adami

Respondent's Experts:

- Dr. Roderick Zammit Pace, Zammit Pace Advocates
- Conor Quigley KC
- Chris Williams, HKA
- Igor Popovic, HKA
- Hussein Farook, HKA
- Anthony Charlton, HKA
- Olesya Prantyuk, HKA.

114. On each hearing day, a verbatim transcript was established by Epiq and sent to the Parties the same day.
115. The Claimants' and the Remaining AP's Opening Statement (the "**C-OS**") and the Respondent's Opening Statement (the "**R-OS**") on the first hearing day were supported by PowerPoint presentations, of which soft and hard copies were provided to the Arbitral Tribunal.
116. On the second hearing day, the Respondent's fact witnesses, Mr. Joseph Zar Adami, Ms. Carmen Ciantar and Mr. John Abdela were examined.

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117. On the third hearing day, the Parties' legal experts, Mr. Tonio Fenech and Mr. Roderick Zammit Pace each made oral presentations and were then examined by the Arbitral Tribunal by virtue of hot tubbing, followed by questioning of the Parties.
118. Thereafter, the Parties State aid legal experts, Mr. Quigley and Mr. Jacques Derenne each made oral presentations.
119. On the fourth hearing day, Mr. Quigley and Mr. Derenne were examined by the Tribunal by virtue of hot tubbing, followed by questioning of the Parties.
120. Thereafter, the Parties' State aid economics experts, Mr. Williams and Ms. Robins each made oral presentations and were then separately examined by the Parties.
121. On the fifth and final hearing day, the Claimants' quantum experts, Ms. Cozar and Mr. Kirby made oral presentations and were then examined by the Respondent. Thereafter, the Respondent's quantum expert, Mr. Anthony Charlton made oral presentations and was then cross-examined by the Claimants.
122. The oral presentations of all experts were supported by PowerPoint presentations ("**PTT**"), which were handed out at the start of each presentation, and transmitted electronically.
123. The Hearing was adjourned by the Presiding Arbitrator on Friday, 9 May 2025 at 4:50 pm to Tuesday 13 May, 3 pm for the Parties to address some questions from the Tribunal. Before adjourning, the Presiding Arbitrator wanted to know whether the Parties had been able to fully present their case and defense during the week's Hearing. To the question whether they would like to recall a witness or an expert, or bring a new witness or another expert, both Parties replied in the negative.<sup>23</sup>
124. On 12 May 2025, the Tribunal provided the Parties with a list of questions and indicated its expectations as to the content and format of the Parties' post-hearing briefs (the "**Q&A Memo**").
125. As agreed with the Parties, the virtual Q&A Session was held on 13 May 2025 from 3 to 5 pm, with Epiq establishing again the verbatim transcript and sending it to the Parties. The Parties answered the Tribunal's questions, except questions Nos. 17 and 18 (regarding the dates of office of Respondent's members of government and public officers), which it was agreed Respondent would be sending by email. It was also agreed that Respondent would not rely on its two new legal authorities, **RL-123** and **RL-124**, which were therefore withdrawn from the record.

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<sup>23</sup> Tr., Day 5, 226:17 – 227:6.



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126. On 14 May 2025, the Tribunal issued Procedural Order No. 11 (“**PO 11**”) with Summary Minutes of the Hearing and further directions, as discussed and agreed at the close of the Hearing. The Parties were invited
- (i) to finalize any corrections to the hearing transcript by 30 May 2025,
  - (ii) to file their post-hearing briefs simultaneously on 27 June 2025 with a page limit of forty-five pages,
  - (iii) to request for leave by 4 July 2025 to file brief comments, by way of rebuttal, within a short time-limit (about a week), and
  - (iv) to file their statements of costs simultaneously on 31 July 2025, with the possibility of making comments thereto, upon leave.
127. PO 11, ¶ 7 stated that “*the Tribunal hereby closes the arbitral proceedings in accordance with Article 27 of the ICC Rules, except for the points listed in ¶¶ 9, 11, 12 and 14 below,*” and PO 10, ¶ 8 that the Tribunal “*endeavors to provide the ICC Court its draft final award within three months following receipt of the Parties’ post-hearing briefs, or following receipt of their comments thereto, if any.*”
128. By letter of 21 May 2025, the Respondent provided, with dates of Public Office held by Maltese Politicians and Civil Servants.
129. On 27 June 2025, the Claimants and the Remaining AP filed their post-hearing brief (“**C-PHB**”) together with a table listing the Claimants’ factual exhibits obtained through document production. “*ANNEX: Summary of the experts’ positions on rescission compensation and resulting claims*” was attached to the C-PHB.
130. On the same date, the Respondent filed its post-hearing brief (“**R-PHB**”) with two Appendices: Appendix A setting forth the Respondent’s Request for Relief, and Appendix B with “*relevant excerpts*” from the hearing transcript. By email of 3 July 2025, the Respondent provided the Tribunal with a list of its factual exhibits obtained through document production.
131. By email of 4 July 2025, the Claimants and the Remaining AP informed the Tribunal that they did not wish to submit rebuttal comments regarding the R-PHB. They objected, however, to the filing of Appendix A to R-PHB, “*which purports to introduce further amendments to its Request for Relief (**RfR**).*”
132. By letter of 4 July 2025, the Respondent requested leave to submit rebuttal comments to the C-PHB. By email of 6 July 2025, the Claimants and the Remaining AP observed that the Respondent’s request went beyond a request for leave and reiterated its reservation of rights to comment on the Respondent’s request.

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133. By email of 7 July 2025, the Tribunal advised the Parties that while PO 11, ¶ 11 provides for the possibility for the Parties to make brief rebuttal comments on the other party's post-hearing briefs, it required prior leave from the Tribunal. The purpose of such leave was to avoid having the Parties address issues on which the Tribunal finds that no further submissions are required. This is why PO 11 did not provide for the possibility of having one party comment on the other party's request. The Claimants and the Remaining AP's reservation of the right to comment on a request for leave was therefore moot in the circumstances.
134. The Tribunal further noted that the Respondents' letter of 4 July 2025 went, however, well beyond a mere request for leave, as it addressed and commented already, in some detail, matters raised in the C-PHB, and to the extent that it did, the Claimants and the Remaining AP remained free to submit their comments on the substance of that letter.
135. The Tribunal therefore accepted the Respondent's request, with the following *proviso*:
- (i) The Claimants may submit their comments on ¶ 4 to ¶ 11 of Respondent's 4 July 2025 letter by 10 July 2025;
  - (ii) The Respondent may submit its rebuttal comments to the C-PHB, (which will include Claimants' comments to be filed on 10 July 2025), through a rebuttal brief of no more than eight (8) pages by 16 July 2025;
  - (iii) The Respondent's rebuttal comment should be limited to the Delia claim (¶ 4) and restoration of the status quo ante (¶ 8 - ¶ 11), as the Tribunal requires no further submission on the State aid claim (¶ 5 - ¶ 7).
136. The Tribunal also invited the Respondent to address, by 10 July 2025, Claimants' request that the "*revised RfR presented in Appendix A to its PHB should be declared inadmissible.*"
137. By letter of 10 July 2025, the Claimants submitted their comments on the Respondent's letter dated 4 July 2025.
138. On the same date, the Respondent sent an email to the Tribunal explaining why, in its view, Claimants' objection should be dismissed and its Appendix A admitted into the record.
139. The Respondent submitted also a redline version of Appendix A of R-PHB comparing it with the RfR submitted at the Hearing, as well as a new legal exhibit **RL-0127**.
140. By email of 15 July 2025, the Tribunal acknowledged receipt of Claimants' letter of 10 July 2025. By a separate email of the same date, the Tribunal also acknowledged receipt of Respondent's email of 10 July 2025 addressing Appendix of the R-PHB. It advised the Parties that it needed no further submissions from the Claimants regarding the explanation provided by the Respondent and that it planned to deal with Claimants' request that the "*revised RfR presented in Appendix A to its PHB should be declared inadmissible*" in its Final Award.

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141. The Claimants were, however, given the opportunity to submit comments, if they wanted, by no later than 18 July 2025 (with a focus on Respondent's claims for interest, as made in particular for claims 1.e, 1. (f) (ii) and in 1.f. (v) of the RfR).
142. On 16 July 2025, the Respondent submitted its "*Rebuttal Comments on Steward's PHB*" addressing Claimants' position in the C-PHB in respect of the Delia claim and the restoration of the Parties to the *status quo ante*.
143. By email of 21 July 2025, the Tribunal acknowledged receipt of Respondent's latest submission and noted that the Claimants had not made use of the opportunity to comment on Respondent's email of 10 July 2025 regarding Appendix A of R-PHB.
144. On 21 July 2025, the Respondent requested an extension to file the cost submissions by 5 September 2025 since due to the summer holiday period, it required additional time to compile the costs incurred. The Respondent referred to the discussion that the Parties had with the Tribunal on the last day of the Hearing contemplating a filing of cost submissions later than 31 July and stated that it had been unable to agree with the Claimants on the requested extension.
145. By email of 22 July 2025, the Tribunal accepted the request granting both Parties the possibility to jointly file their cost submissions on 5 September 2025, at 5 pm COB.
146. On 5 September 2025, the Parties filed their respective final cost submissions.
147. The Claimants and Remaining AP filed their cost submission ("**C-Cost Brief**") together with nine new legal authorities (**CL-0123** to **CL-0131**). The Respondent filed its cost submission ("**R-Cost Brief**") together with two new factual exhibits (**R-0291** and **R-0292**) as well as two legal authorities (**RL-0127** and **RL-0128**).
148. By email of 8 September 2025, the Tribunal invited the Parties to provide it with some more information regarding their respective cost submissions, which both Parties did by email on 10 September 2025.
149. On 12 September 2025, the Respondent requested leave to comment on Claimants' cost submission. By email of 15 September 2025, the Arbitral Tribunal granted the Respondent leave to file brief comments regarding Claimants' cost submission by 19 September 2025. The Tribunal stressed that Respondent's comments "*should be strictly limited to arguments that may have an impact on the cost decision*" and that it "*will consider Respondent's comments only in that context.*"
150. By letter of 19 September 2025, the Respondent submitted its comments regarding Claimants' cost submission together with Annex C, containing updated Request for Relief as regards Respondent's updated legal representation costs (the "**R-Cost Rebuttal**").

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**C. TIME-LIMIT FOR RENDERING THE AWARD**

151. On 25 April 2024, the ICC Court extended the time-limit for rendering the final award until 29 November 2025.<sup>24</sup>
152. On 30 September 2025, the Tribunal sent its draft Final Award to the Secretariat for the ICC Court's review and approval. It advised the Parties accordingly on the same day.

**D. STRUCTURE OF THE AWARD**

153. In Section III. of this Award, the Tribunal will summarize the relevant facts underlying the Parties' dispute. They are largely undisputed.
154. In Section IV., the Tribunal will in a nutshell record the Parties' position in this arbitration and refer to their final requests for relief, upon which the Tribunal is being asked to make its determination.
155. In Section V., the Tribunal will then turn to the issue of jurisdiction, both *ratione materiae* and *ratione personae*.
156. While Sections VI. and VII. will address the merits of the Parties' claims, first concerning Claimants' contractual claims, and second concerning Respondent's contractual counterclaim, section VIII. will be devoted to the merits and the quantum of the Parties' restoration claims.
157. Section IX. will decide upon the Parties' cost claims.
158. Finally, Section X. contains the Tribunal's holdings.
159. Unless otherwise indicated, the Tribunal will always refer to the redacted version of the Parties' briefs, *i.e.*, the Reply, the Rejoinder and the CC Rejoinder. Reference to the unredacted versions will be preceded by the word "*OCEO*." Page references to the Parties' fact exhibits and legal authorities will generally be to the PDF pages.
160. The Claimants and the Remaining AP have shared a common defense along the proceedings and have jointly submitted the relevant statements in this arbitration.<sup>25</sup> Therefore, whenever the Tribunal refers in this Award to the position of the Claimants, for brevity, it refers to the position

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<sup>24</sup> Letter of the Secretariat dated 3 May 2024 to the Arbitral Tribunal with copy to the Parties.

<sup>25</sup> Rubins, Tr. Day 6, 45:15 – 46:10.

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of both the Claimants and the Remaining AP, unless it is clear from the context that only Claimants are being referred to, or if expressly stated otherwise.

161. It is primarily Section V.C., where the Tribunal will discuss the question of whether the Arbitration Agreements extend also to the Remaining Parties, that the reference to the Claimants will always also include the Remaining AP.

### **III. THE RELEVANT FACTS**

#### **A. SUMMARY OF THE DISPUTE**

162. As noted above,<sup>26</sup> the present arbitration relates to a dispute between the Parties arising out of the Concession by the GoM to the Claimants for the redevelopment, maintenance, management and administration of three public hospitals in Malta. The Concession came to an end under circumstances disputed between the Parties, causing both Parties to make significant claims against each other.
163. In a nutshell, the Parties' positions may be summarized as follows.
164. The Claimants' case mostly relies on the validity of their termination of the Transaction Agreements on the ground of a non-rectifiable GoM event of default, and hence, on their entitlement to damages and to the payment of sums due under the LSA. In addition, the Claimants reject the Respondent's counterclaims related to the alleged contractual breach of the Claimants as unfounded. The Claimants and the Remaining AP contest the Tribunal's jurisdiction over the Remaining AP.
165. The Respondent in turn argues that the Transaction Agreements have been rescinded *ab initio* by virtue of the Delia Judgments and that the Parties are therefore to be restored to their original position. On an alternative basis, the Respondent presents claims of contractual nature, starting with its declaratory relief that it validly terminated the Concession, the HSDA and the LSA. The Respondent is also seeking substantial monetary relief by invoking several grounds of alleged contractual breaches by the Claimants.

#### **B. PRELIMINARY REMARKS**

166. The present Section addresses the factual background to the Parties' dispute insofar as that is relevant to the issues to be decided by the Tribunal. Accordingly, this Section is set out in order to aid understanding the general context of these issues. Nothing said here constitutes a finding by the

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<sup>26</sup> See ¶ 1.

Tribunal regarding any disputed issue of fact, and in any event, no factual determination is being made in this Section that could be considered as decisive for the outcome of this arbitration.

167. Many facts are undisputed between the Parties and supported by the documentary record placed before the Tribunal. While other facts are, or may be disputed, the Parties have in part abstained from making submissions and from providing full evidence in that respect.<sup>27</sup> The testimonial factual evidence offered by the Parties in this arbitration has been scarce, leaving aside the witness statements of Dr. Delicata for Claimants and those of John Abela, Carmen Ciantar and Dr. Joseph Zarb Adami for Respondent.
168. Notably, neither side offered evidence from those people who were either decision makers or very closely associated with the Concession, be it at its initial or final stages or in between.
169. On the Claimants' side, this applies in the first place to Dr. Armin Ernst, who the GoM described as "*the mastermind behind Steward's involvement*",<sup>28</sup> although he had remained a Steward employee until January 2025.<sup>29</sup> Among the "*key people missing*" at the Hearing, Respondent referred also to Ralph de la Torre, Steward's global CEO, Marc Rich, Steward's global CFO and Dr. Nadine Delicata, former President of Claimant No 2 and Vice-President of AP 2.<sup>30</sup>
170. On the Respondent's side, this also applies to a cast of several relevant characters, starting at the government level with
- (i) Dr. Konrad Mizzi, who from 2 April 2014 to 28 April 2016 was the Minister of Energy and Health, from 29 April 2016 to 1 May 2017 Minister (without Portfolio) in the Office of the Prime Minister and from 9 June 2017 to 26 November 2019 Minister of Tourism, as well as
  - (ii) Dr. Chris Fearne, who from 29 April 2016 to 6 January 2024 was the Minister of Health.<sup>31</sup>
171. On the senior officer level of the GoM, the Tribunal notes the absence of testimonial evidence from the following persons, who - judging from the correspondence on record - all played relevant roles during the Concession:

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<sup>27</sup> On some issues the Parties have expressly refrained from seeking findings from the Tribunal, see in particular as regards questions ¶¶ 23 and 24 of the Q&A Memo; Rubins, Tr. Day 6, 56:25-57:7; Darwazeh, Tr. Day 6, 54:20-56:22 and 57:21-25; R-PHB, ¶ 167.

<sup>28</sup> R-PHB, ¶ 8; R-OS, pp. 19-21.

<sup>29</sup> Rubins, Tr., Day 1, 264:8-11.

<sup>30</sup> R-OS, p. 21; see also R-PHB, ¶ 8. Regarding the status of Dr. Delicata's witness statement in this arbitration, see above at ¶¶ 100, 101.

<sup>31</sup> Respondent's letter of 21 May 2025, Schedule 1, pp. 3, 4.

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- (i) Ronald Mizzi, who acted as Permanent Secretary for different ministries, starting with the Ministry of Energy and Health (the “MEH”) in April 2014 under Dr. Konrad Mizzi, until July 2024 at the Ministry of Economy;<sup>32</sup>
- (ii) Joseph Rapa, who from 26 March 2013 to 6 April 2022 was the Permanent Secretary of the MFH;<sup>33</sup>
- (iii) followed in that position from 7 April 2022 to date by Dr. Joseph Chetcuti,<sup>34</sup> who represents the GoM in this arbitration;<sup>35</sup> and, finally,
- (iv) Dr. Edgar Borg, who from 11 February 2014 to 31 December 2023 held the position of Chief Financial and Administration Officer at the MFH.<sup>36</sup>
172. Given the substantial sums at stake in this arbitration, it might have been expected that testimony would be provided by those with the most direct knowledge of the facts. However, the Tribunal believes that any additional witness testimony would have been unlikely to alter the outcome of this arbitration.
173. Thus, although there may be certain gaps in the factual record before the Tribunal, this does not prevent the Tribunal from adjudicating the Parties’ claims and deciding the merits of the dispute. As will become clear, the central issues in this case are primarily rooted in legal analysis rather than in the resolution of factual matters.<sup>37</sup>
174. The Tribunal wishes to make two additional preliminary remarks.
175. *First*, much has been said about the Claimants having remained the same since the signing of the Concession, although in February 2018 the Steward group became the Claimants’ new shareholder. This is certainly true and not disputed. While the arrival of the Steward group could have been an opportunity for both Parties to put the Concession on a new and better track, this has not happened for reasons that are disputed between the Parties. But, as will be explained below, the taking control of the Concession by Steward is of little, if any, legal relevance for deciding the Parties’ dispute.
176. However, on the Respondent’s side the same holds true. The GoM as a legal entity and as the Claimants’ counterpart under the Concession has not changed, although it is no longer run by the same Prime Minister and by the same Minister that were in charge at the time of entering into the

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<sup>32</sup> Respondent’s letter of 21 May 2025, Schedule 2, p. 5; he continued to act under Dr. Konrad Mizzi for some time thereafter.

<sup>33</sup> Respondent’s letter of 21 May 2025, Schedule 2, p. 5.

<sup>34</sup> Respondent’s letter of 21 May 2025, Schedule 2, p. 6.

<sup>35</sup> See above at ¶¶ 7, 113.

<sup>36</sup> Respondent’s letter of 21 May 2025, Schedule 2, p. 6.

<sup>37</sup> As confirmed by the Parties’ post-hearing briefs; see in that respect, in particular, R-PHB, ¶ 5.

- Concession (2015), or at the time the Steward group took over the Concession (2018), or when the Concession was terminated (2023).
177. *Second*, the General Auditor of the National Audit Office of Malta (the “**NAO**”) issued three reports concerning the Concession:
- (i) A (first) NAO audit report in July 2020, Part I, *A Review of the Tender Process* (the “**NAO Report I**”);
  - (ii) A (second) NAO audit report in December 2021, Part II, *A Review of the Contractual Framework* (the “**NAO Report II**”); and
  - (iii) A third NAO audit report in May 2023, Part III, *Steward Health Care assumes Control of the Concession* (the “**NAO Report III**”).
178. These three reports (the “**NAO Reports**”) “*were published by the NAO on its website and they were in the public domain since the time of the first publication.*”<sup>38</sup>
179. They were put on record in this arbitration via the Respondent’s expert reports in relation to the EU State aid issues.<sup>39</sup>
180. In its Q&A Memo and at the Q&A Session, the Tribunal raised the question about the evidentiary value of the NAO Reports in this arbitration.<sup>40</sup> For the Claimants, these reports “*are evidence that the NAO came to the view that it expressed in those reports with respect to certain matters related to concession in 2020 and 2021. But it is not proof of the facts that are described.*” From the Claimants’ perspective, they have “*very limited evidential value*” and “*are not binding on the Tribunal.*”<sup>41</sup>
181. The Respondent in turn considered that, in principle, “*the finding of the NAO are to be considered as factual evidence*” and to the extent “*they were relied upon by the Maltese courts and were incorporated in their judicial decisions, this would be considered juridical fact.*”<sup>42</sup>
182. The Tribunal sees no reason to disregard the NAO Reports as evidence of what the NAO thought of the Concession, and neither party has asked the Tribunal to do so. The reports are contemporaneous documents, like any other fact document put on record by the Parties. Both

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<sup>38</sup> Mistelis, Tr., Day 6, 9:22; R-PHB, ¶ 20.

<sup>39</sup> Respectively as exhibits **Q-1** (= also **CW-47** and **AC-50**), **Q-2** (= also **CW-48**) and **Q-3**.

<sup>40</sup> Q&A Memo, ¶ 7; Tr., Day 6, 5:14-9:12-20.

<sup>41</sup> Rubins, Tr., Day 6, 6:12-16; 7:14-21.

<sup>42</sup> Mistelis, Tr., Day 6, 8:2-19. An exception is to be made as regard some of the NAO’s conclusions, notably as “*the NAO reports wrongly concluded there was no breach of state aid,*” Mistelis, Tr., Day 6, 8:2-11; R-PHB, ¶ 20.



Parties have relied on them when advantageous to their position.<sup>43</sup> The findings made by the NAO are not binding upon the Tribunal, which has not relied on them (as the sole source, if at all) to determine factual issues disputed by the Parties.

183. The NAO Reports are, at a minimum, helpful in understanding the genesis of the Parties' dispute and their inability to find solutions prior to terminating the Concession, as will be shown below.
184. Finally, even if a particular fact or factual allegation is not mentioned below, the Parties should assume that the Tribunal is aware of it following the very careful review of the Parties' written submissions, including the witness statements, and factual exhibits on record.

### C. THE CONCESSION, ITS PARTIES AND OTHER RELEVANT ENTITIES

185. The Concession is based on four main agreements:<sup>44</sup>
- The Services Concession Agreement dated 30 November 2015 signed by the GoM on the one hand and (i) Vitals Global Healthcare Limited ("**VGH**" or "**HoldCo**"), (ii) Vitals Global Healthcare Assets Ltd. ("**VGH Asset**") Vitals Global Health Care Management Ltd. ("**VGH Management**") on the other hand (the "**Concession Agreement**" or "**SCA**");<sup>45</sup>
  - The Health Services Delivery Agreement dated 30 November 2015 signed by the GoM on the one hand and VGH Management on the other hand (the "**HSDA**");<sup>46</sup>
  - The Labour Supply Agreement dated 8 January 2016 signed by the GoM on the one hand and VGH Management on the other hand (the "**Labour Agreement**" or "**LSA**");<sup>47</sup>
  - The Emphyteutical Deed dated 22 March 2026 signed by the Maltese Commissioner of Land, the GoM and VGH Asset (the "**Emphyteutical Deed**" or simply the "**Deed**").<sup>48</sup>
186. The SCA, the HSDA, the LSA and the Emphyteutical Deed are collectively referred to in this Award as the "**Transaction Agreements**", or the "**Concession and Related Instruments**," or

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<sup>43</sup> For Claimants, see, *e.g.*, C-PHB, ¶ 73, and for Respondent, *e.g.*, Rejoinder, ¶ 327 and the reports of its experts Quigley and Williams.

<sup>44</sup> SoC, ¶¶ 14,15; SoD&C, ¶ 51.

<sup>45</sup> Exhibit C-0001.

<sup>46</sup> Exhibit C-0002.

<sup>47</sup> Exhibit C-0005.

<sup>48</sup> Exhibit C-0006.

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- simply as the “**Concession**”.<sup>49</sup> The reference to the “**Agreements**” relates jointly to the SCA, the HSDA and the LSA without the Emphyteutical Deed.
187. The Agreements were subsequently amended, as will be shown below.
  188. The Agreements were entered into on behalf of the GoM through the MEH and signed by Dr. Konrad Mizzi in his capacity as Minister of Energy and Health.
  189. For and on behalf of the Claimants, the same contract documents were signed by Mr. Sri Ram Tumuluri, a Canadian passport holder, as duly authorized representative of HoldCo, VGH Management and VGH Asset.
  190. In 2015/2016, VGH Management and VGH Asset were wholly owned subsidiaries of HoldCO, jointly referred to as “**Vitals**” or “**VGH Group**.”
  191. HoldCo (and thus Vitals) was in turn owned by Bluestone Investments Malta Limited (“**Bluestone**”).<sup>50</sup>
  192. In December 2017, Bluestone, acting through its President and Managing Director, Mr. Sri Ram Tumuluri, sold its shares in VGH to Stewart Healthcare International Limited (Malta).<sup>51</sup> The formal share transfer took place in February 2018.<sup>52</sup>
  193. With the share transfer, on 10 April 2018
    - HoldCo changed its name to Steward Malta Limited, which is Claimant No 1;
    - VGH Management changed its name to Steward Malta Management Limited, which is Claimant No 2; and
    - VGH Asset changed its name to Steward Malta Assets Limited, which is Claimant No 3.<sup>53</sup>
  194. Since that time, the owner of Claimant No 1, and indirectly of Claimants No 2 and No 3, is Steward Health Care International Limited, which is AP 1 in this arbitration.
  195. Steward Health Care International S.L.U (Spain), which is AP 2 in this arbitration, owns AP 1, and Steward Health Care International Investors LLC (Delaware), which is AP 3 in this arbitration,

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<sup>49</sup> Clause 1.1.1 of the Concession Agreement defines the “Transaction Agreements” as the “[Concession] Agreement and the Related Instruments”, the “Related instruments” being defined as “the Emphyteutical Deed(s), Health Services Delivery Agreement, the Labour Supply Agreement and any amendments and/ or addendum thereto.” See also **CDE-0002**.

<sup>50</sup> SoC, ¶¶ 14, 46; see also Amended Agreement for the Sale and Purchase of the entire share capital of Vitals Global Healthcare Limited dated 1 February 2018, exhibit **R-0014**, p. 24 (Schedule 1).

<sup>51</sup> SoC, ¶ 46; exhibit **R-0014**, p.2.

<sup>52</sup> SoC, ¶ 47; exhibit **C-0090**.

<sup>53</sup> Exhibits **C-0038** to **C-0040**.

owns AP 2.<sup>54</sup> Thus, since February 2018, the Claimants are indirectly wholly owned subsidiaries of AP 3.<sup>55</sup>

196. As regards Steward Health Care System LLC (Delaware) and Steward Health Care International LLC (Delaware), which until January 2025 were respectively the AP 4 and AP 5 in this arbitration,<sup>56</sup> while the Claimants contend that the AP 4 and AP 5 are “*not part of the same corporate structure*” as the Claimants and the Remaining AP, they are part of what is understood to be the “**Steward Group**,”<sup>57</sup> a generic term used in this Award to refer to the shareholders, whether direct or indirect, of the Claimants.
197. Unlike the Claimants, the Remaining AP are not signatories of the Agreements, although the Respondent asserts that they are bound by them, as will be discussed below.<sup>58</sup>

#### **D. THE HOSPITAL SITUATION PRIOR TO THE CONCESSION AND GOM’S TENDER**

198. In 2015, Malta’s (public) healthcare system covered the following hospitals with a total capacity of about 2,152 beds:<sup>59</sup>
- The Mount Carmel Hospital,
  - the Sir Paul Boffa Hospital,
  - the Mater Dei General Hospital (the “**Mater Dei**”),
  - the Gozo General Hospital on the island of Gozo (the “**GGH**”),
  - the St. Luke’s Hospital (the “**SLH**”), and
  - the Karin Grech Rehabilitation Hospital (the “**KGRH**”).

Only the latter three hospitals were subject to the Concession. They are referred to in this Award collectively as the “**Hospitals**.”

199. With the aim of reaching more efficient management and supply of services and redeveloping the Hospitals, the GoM had decided to issue a public tender for the private operation of the Hospitals. Accordingly, on 27 March 2015, the GoM published a Request for Proposals for a Services Concession for the redevelopment, maintenance, management, and operation of the sites at the Hospitals (the “**RfP**”).<sup>60</sup>

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<sup>54</sup> Exhibit **R-239**.

<sup>55</sup> Reply, N. 392.

<sup>56</sup> See above at ¶ 12 and below at ¶ 76.

<sup>57</sup> Reply, ¶ 153 and N. 392.

<sup>58</sup> To wit, until the AP 4 and AP 5 were still a party to the arbitration, Respondent claimed that the latter were also bound by the Agreements.

<sup>59</sup> Exhibit **C-0073**, ¶ 1.12. The GGH and KGRH operated with respectively 291 and 268 beds, whereas the SLH had stopped operations. The Mater Dei in turn operated 825 beds, with 65 new beds to be added.

<sup>60</sup> SoC, ¶ 13; SoD&C, ¶ 25; exhibits **C-0072** and **C-0073**.

200. The RfP described the MEH as being “among other responsibilities within its portfolio, responsible for the provision of healthcare services, healthcare services regulation and standards, and the provision of occupational health and safety.” The RfP also explained that the Maltese healthcare system “is funded through taxation and national insurance contributions and operates through public hospitals and health care centres. The publicly funded health care system is the key provider of health services in Malta. The private sector complements the provision of health services in some areas of primary health care. (...)”<sup>61</sup>
201. Pursuant to the RfP, the GoM aimed to establish the islands of Malta and Gozo as a medical hub in the Mediterranean, providing high-quality healthcare services to both residents and non-residents. The concession to be granted to a private operator was expected to improve service efficiency, upgrade facilities, and ensure long-term sustainability without compromising free healthcare for end-users. The GoM wanted a private operator to manage and operate the healthcare and ancillary services at the Hospitals through a public-private partnership.<sup>62</sup> The RfP specifically noted:
- “The [GoM] acknowledges that the highest level of healthcare services expected by End-Users cannot be achieved and maintained in the coming years unless existing methodologies, practices, and philosophy as well as an ancillary capital redevelopment programme are undertaken in the short to medium term, The [GoM] is convinced that the best value for money solution for it to offer such services from the Sites at an excellent standard is to grant the Concession to a private economy operator who will, as part of the Concession, be obliged to provide healthcare services to the [GoM] in return for compensation (...). Having assessed multiple potential options, and being in possession of clear data relating to the current cost of the public healthcare system in Malta, it is the opinion of the [GoM] that by means of this Concession it will be realising better value for money for the healthcare and ancillary services it currently offers to End-Users and without making necessary compromises on mean service levels.”*<sup>63</sup>
202. The upgrading of the Hospitals’ facilities according to an agreed redevelopment program, the establishment of a medical school at GGH and of a nursing university-level institute at SLH, state of the art research facilities, as well as development of medical tourism were listed in the RfP among the GoM’s objectives.<sup>64</sup>
203. The GoM looked for a bidder with strong financial standing, relevant experience, and a robust business plan.<sup>65</sup> The future Concessionaire was to be incorporated in Malta as a “special project company” which would enter into the concession agreement.<sup>66</sup>

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<sup>61</sup> Exhibit C-0073, ¶ 1.10.

<sup>62</sup> Exhibit C-0073, ¶ 1.1.

<sup>63</sup> Exhibit C-0073, ¶ 1.2.

<sup>64</sup> Exhibit C-0073, ¶ 1.6.

<sup>65</sup> Exhibit C-0073, ¶ 36.

<sup>66</sup> Exhibit C-0073, ¶ 2.12.

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204. On 31 March 2015, the GoM published a “*Prior Information Notice*” with the EU pursuant to Directive 2004/18/EC.<sup>67</sup>
205. By the closing date of 19 May 2015, three parties, including the VGH Group, submitted bids. VGH Group’s bid consisted of four comprehensive volumes, A-D.<sup>68</sup>
206. Amongst other things, the VGH Group described its plans, strategy and vision about attracting medical tourism in Malta, its “*strategic objectives*” being (i) “*to establish Malta & Gozo as the Destination Health within the next 10 years,*” and (ii) “*to fill around 85,000 bed days from medical tourism by 2021.*”<sup>69</sup>
207. On 19 June 2015, the GoM’s Evaluation and Adjudication Committee (the “**Committee**”) concluded that the VGH Group had submitted the best offer and recommended “*the granting of the preferred bidder status to*” the VGH Group.<sup>70</sup>
208. Regarding medical tourism at the Hospitals, the Committee noted that the VGH Group had stated
- “that the project is not viable without medical tourism. The sensitivity analysis indicated in the business plan outlines a Sensitivity wherein income from medical tourism is removed such that the only source of income from the project is derived-from [the GoM], whilst all costs for the project are retained. On this basis, the resultant annual cash flows, pre-tax and funding are negative through the service concession period of 30 years. This implies the non-sustainability of the project should operating activities in relation to medical tourism be disregarded. Based on the financial report, the medical tourism income as a percentage of total income started at 13% and increased over time to 43% over the concession period.”*<sup>71</sup> (Emphasis added).
209. The very tender, VGH Group’s bid and the selection of the bid, have become the subject of severe criticism by the NAO. Although the Tribunal was not asked by the Parties to make its own findings in that respect, the NAO’s conclusions help in understanding why the Concession never took off as contemplated. A few of the many findings and conclusions of the NAO are worth mentioning here by way of factual background of the Parties’ dispute.<sup>72</sup>

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<sup>67</sup> Exhibit **C-0074**.

<sup>68</sup> Volume A: General bidder information, exhibit **R-0063**; volume B: Technical and Operational, exhibit **R-0061**; volume C: Business plan, exhibit **R-0064** and volume D: Financial, exhibit **R-0065**.

<sup>69</sup> Exhibit **R-0064**, ¶ 10.54, and more generally regarding VGH’s medical tourism strategy, pp. 205 *et seq.*

<sup>70</sup> Procurement Evaluation Report, exhibit **C-0075**, p. 16.

<sup>71</sup> Ibid, p. 11. – The report went on to state that the VGH Group had “*identified a clear medical tourism plan.*”

<sup>72</sup> The NAO Report I consists without its Appendices of 207 pages, which cannot be summarized here, which is why the Tribunal refers primarily to the report’s Executive Summary (pp. 8-13).

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210. *First*, the NAO raised concerns about the integrity of the commissioned feasibility report, which it viewed as “*a preliminary and superficial analysis of the possible concession of three of Malta’s public hospitals*”, “*bereft of any form of independent analysis or critical thought*.”<sup>73</sup>
211. *Second*, the NAO was also concerned about the design criteria of the RfP, in particular its evaluation criteria.
212. *Third*, the NAO expressed concern that only three bids had been received, and that only one, from Vitals, was on its face compliant, rendering “*any comparative analysis of bids impossible*.”<sup>74</sup>
213. *Fourth*, for the NAO “*the VGH [Group] lacked an adequate corporate setup*” and the evidence that had been given of its “*professional and technical qualifications and management experience in all areas relevant to the concession*” was insufficient.<sup>75</sup>
214. Based on a letter written by Dr. Ernst to Dr. De la Torre on 8 January 2017, it appears that although Dr. Ernst was then the CEO of the Claimants, he made the same assessment regarding the lack of experience of the VGH Group and its owners.<sup>76</sup>
215. *Fifth*, for the Committee “[t]he commitments of the VGH [Group] were deemed overly ambitious and unrealistic to achieve within the stipulated timeframe.”<sup>77</sup>
216. Furthermore, and importantly, the NAO Report I stated: “*The evidence indicating collusive action between the parties acting on behalf of Government with the investors of the VGH renders the entire process dubious, irrespective of whether the process was in adherence with procedural and regulatory requirements*” and that for that reason, the VGH Group should have been disqualified as a bidder.<sup>78</sup>
217. At a later occasion, after the Steward Group had already taken over the Claimants, the Claimants themselves suggested in unrelated judicial proceedings in the Maltese Courts “*that there were serious deficiencies in the tendering process itself*,” stressing, however, “*that Steward, which is*

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<sup>73</sup> Exhibit **Q-1**, ¶¶ 5, 6. - The NAO was also very critical of the absence of ministerial authorization in relation to the concession (“*resulting in the anomalous scenario where three public hospitals were conceded for operation by third parties without anyone actually assuming responsibility for this decision*”), exhibit **Q-1**, ¶¶ 7, 5.2.29, 5.3.5.

<sup>74</sup> Exhibit **Q-1**, ¶¶ 5.2.95 *et seq.*

<sup>75</sup> Exhibit **Q-1**, ¶¶ 5.2.83, 5.2.84.

<sup>76</sup> Exhibit **R-0170**, pp. 1, 2; in an earlier letter to Mr. Shaukat of 20 December 2016, Dr. Ernst had this to say about Mr. Sri Ram Tumuluri: “*Multiple suspicions have been voiced about RT prior business experience and failures*,” and “[a]s a matter of fact, appropriate governance is lacking and all governance powers are concentrated in the hands of one individual- the individual who has the least experience in the field and where there are numerous questions (...),” exhibit **R-0188**, p. 2. These two exhibits were obtained by Respondent through document production, see the index attached to its letter of 1 July 2025, and their veracity of these unsigned letters not questioned by Claimants’ counsel, Tr. Day 6, 47:9-23.

<sup>77</sup> Exhibit **Q-1**, ¶ 18, ¶ 5.2.92.

<sup>78</sup> Exhibit **Q-1**, ¶¶ 4, 5, 5.2.1 *et seq.*, 5.3.7.

*now the Applicants' parent company, has never had, nor does it currently have, any relationship with the previous shareholders of the Applicants, and was not involved, in any manner, in the awarding of the Concession in 2015, and it was therefore never aware of the facts relating to the awarding of the Concession, except for the information that was public at the time.”<sup>79</sup>*

## **E. THE CONCLUSION OF THE CONCESSION**

### **1. The Concession Agreement**

218. As mentioned, the GoM signed the SCA on 30 November 2015 with HoldCo, VGH Management and VGH Asset, HoldCo and VGH Management being defined in the SCA as the **“Concessionaire.”**<sup>80</sup>
219. The SCA was signed on behalf of the GoM by the Minister of Energy and Health, Dr. Konrad Mizzi, and, on behalf of the Concessionaire, by Mr. Sri Ram Tumuluri.
220. The SCA comprises 46 Articles, preceded by 19 Preambles, and has 13 Schedules. Preamble (13) reads as follows:

*“The [GoM] is granting (...) (i) the Concessionaire rights to exploit the provision of healthcare and ancillary services from the Sites, both to the [GoM] and third parties; (ii) the AssetCo real rights over the Sites, to be granted in terms of the provisions of, and in full compliance with, the Disposal of Government Land Act and pursuant to a public deed, to enable it to provide the intended services;  
In consideration for:  
(i) the obligation to re-develop the Sites; (ii) the payment of ground rent in respect of the Sites; and (iii) the obligation to maintain and invest in the Sites for the duration of the Concession.”*

221. The SCA defines the “Sites” as the “GGH, SLH and KGRH”, which are the Hospitals. According to Preambles (14), it is not “*the intention of the [GoM] to compensate the Concessionaire for the development and ongoing maintenance of the Sites,*” and pursuant to Preambles (19): “*The beds, facilities and services capacity not reserved for use by the Government of Malta can be offered by the Concessionaire for Medical Tourism.*”
222. Clause 2.1 defines the scope of the SCA as “*the grant under an exclusive right by the GoM to the Concessionaire to develop, design, engineer, monitor, procure, finance, construct, equip, operate, maintain, embellish and manage the [Hospitals] and of a services concession for the provision by the Concessionaire of the Concession Services and the Healthcare Services on and from, the [Hospitals] in terms of this Agreement and the Related Instruments.*”

<sup>79</sup> Exhibit **R-0245**, ¶¶ 20, 32.

<sup>80</sup> SCA, exhibit **C-0001**, p. 6. As mentioned at ¶ 190, VGH, VGH Management and VGH Asset are collectively referred to as “Vitals” or “Vitals Group.”

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223. Clause 2.2 further sets out certain specific items included in the scope of the Concession.
224. The SCA fixed the Concession period at 30 years (Clause 3.2.1).
225. Clause 3.3.1 made the “*Effective Date*” of the Concession dependent on the fulfillment of several conditions precedents, which were to be “*satisfied as soon as practicable, and in any event, no later than 180 (...) Days*” from the “*Commencement Date*”, i.e., execution of the Concession Agreement, Clause 3.3.2.
226. Clause 4 deals with the emphyteutical grant for the Sites and stipulates: “*As of the Effective Date, the GoM and [VGH Asset] will enter into the Emphyteutical Deeds whereby GoM is granting to [VGH Asset], by title of temporary emphyteusis, the Sites 'tale quale' and in their current state and condition for their use by [VGH Asset] and/ or Concessionaire, as may be applicable, for the provision of the Concession Services and the Healthcare Services under the Concession.*”
227. Clause 5 provides for “*the Design and the execution of the Works in relation to the Medical College*” by the Concessionaire, and Clause 6 required the Concessionaire “*within 48 (...) months from Effective Date, [to] design, construct, equip and operate a fully-licensed university-level Nursing College at SLH.*”
228. Clause 10 lists the “*Obligations of the Concessionaire*” throughout the Concession Period, whereas Clause 11 sets out the “*Obligations of the GOM.*”
229. Notably, amongst other things, Clause 10.1.22 required the Concessionaire to pay a concession fee of Euro 3 million, payable “*in equal payments over a period of 10 (ten) years, the first such payment becoming due and payable upon the lapse of one (1) year from the Effective Date.*”
230. Clause 11.1.9 required the GoM to “*secure vacant possession of the Sites in accordance with the [Deed] (...) within 24 twenty-four) months from the Effective Date and of any other occupant of the Sites within the agreed time frames (...).*”
231. Pursuant to Clause 11.1.12, the GoM shall “*not place or create, nor permit any Public Authority or any third other third party to place or create, any burden or encumbrance, whether of a real or personal nature, over all or any part of the Sites (...)*” and, pursuant to Clause 11.1.14 it shall “*ensure that the Sites remain free from any encroachments and take all and immediate steps to remove encroachments (...).*”
232. Clause 12 deals with the Parties’ respective Warranties.
233. Clause 30 addresses “*Change in Law.*” Pursuant to Clause 30.1.4, a Change in Law takes place with “*a change in the legality, validity, binding nature and effect or enforceability of the Transaction Agreements.*” Clause 30.3 foresees for the Concessionaire the possibility of issuing a “*Change in Law Notice*” to the GoM.



234. Clause 30.4 goes on to stipulate that “[i]n the event that the Concessionaire deems that the Change in Law has given rise to a Material Adverse Effect and/ or not curable by monetary compensation, the Concessionaire may indicate in the Change in Law Notice its intention to terminate the Transaction Agreements pursuant to Clause 33.2 (Discretionary Termination), the terms of which Clause shall apply *mutatis mutandis*. (...)”
235. Clause 33 contains provisions for the SCA’s termination. The Parties have relied primarily on the following provisions:
- Clause 33.2 deals with “*Discretionary Termination*.” It allows the GoM to “*terminate [the SCA by giving 120 (one hundred and twenty) Days' notice to the Concessionaire at any point in time during the Concession Period, subject to termination payments as per Schedule 7;*”
  - Clause 33.3 deals with “*Termination due to a Non-Rectifiable Concessionaire Event of Default*.”
  - Clause 33.4 deals with “*Termination due to GoM Event of Default*.” Clause 33.4.1. describes the events that shall constitute a Non-Rectifiable GoM Event of Default, such as, pursuant to Clause 33.4.1.3, “[a] breach by GoM of any of its obligations pursuant to Clause 11.1.9, 11.1.12 and 11.1.14 under [the SCA] (...) following the lapse of 90 (ninety) Days and during such period the Concessionaire will be exempt from all its obligations pursuant to the Transaction Agreements.”
  - Pursuant to Clause 33.4.4,<sup>81</sup> “[t]he Parties agree that during the existence of a Non-Rectifiable GoM Event of Default the Concessionaire shall automatically be relieved from its obligations in terms of this Agreement.”
  - Pursuant to Clause 33.4.8,<sup>82</sup> where (in the opinion of the Concessionaire) a Non-Rectifiable GoM Events of Default has occurred, the Concessionaire “*may serve a Termination Notice on GoM specifying: - (33.4.8.1) the type and nature of the Non-Rectifiable GoM Event of Default that has occurred; and - (33.4.8.2) that the Agreement will thereby be ipso jure terminated on the date therein specified, which date shall not be less than forty-eight (48) hours from the date of service of the Termination Notice.*”
236. Clause 33.6 deals with the effects of termination due to a Change in Law and Clause 33.8 with “*Termination Payments*.” Pursuant to Clause 33.8.5, termination of the SCA “*for whatsoever reason of this Agreement shall give rise to the ipso Jure termination of the Transaction Agreements.*”
237. Finally, Clause 40 contains an arbitration clause (see below at ¶ 401.

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<sup>81</sup> Wrongly numbered as Clause 34.4.4 in the SCA, C-PHB, N. 11.

<sup>82</sup> As amended by clause 3.3.(i) of the Direct Agreement, as to which below at ¶ 24040.

238. Several Schedules were attached to the SCA, including Schedule 2 regarding the “*Redevelopment Requirements*,” Schedule 6 regarding the “*Completion Milestones*” under the Concession (“**Schedule 6 Milestones**”) and Schedule 7 regarding the “*Termination Payments*” (“**Schedule 7 Payments**”). Upon completion of the Milestones, a certificate was to be issued “*confirming that the Concession Milestones have been reached and that the Works have been carried out*,” which corresponded to the “*Completion Date*” under the SCA.<sup>83</sup>
239. On 30 June 2017, the GoM (through Dr. Konrad Mizzi, who was the Minister of Tourism) and the VGH Group (through Mr. Sri Ram Tumuluri) signed an Addendum to the SCA, varying many definitions and amending several clauses of the SCA and attaching the new Schedules 14 – 18 (the “**SCA Addendum**”).<sup>84</sup>
240. A year later, on 22 June 2018, the GoM, the Claimants and the Bank of Valletta (“**BoV**”) entered into the (first) Direct Agreement, that was subsequently amended three times, leading on 27 August 2019 to the Amendment and Restatement Agreement (the “**(Amended) Direct Agreement**” or simply the “**DA**”).<sup>85</sup> The Parties are in agreement that the DA became a formal amendment to the SCA, although, pursuant to Clause 5 of the DA in case of any conflict or inconsistency between the provisions of the DA with provisions of the SCA, the former shall prevail.<sup>86</sup>
241. Preamble B and C of the DA states that on 8 May 2018, BoV had granted Claimant No 2 a Euro 5M “*overdraft facility (...) for the purpose of financing the ManagementCo’s working capital requirements in connection with the operation of the Sites*” and “*as a condition precedent*” for such facility, the Parties and BoV had entered into the (first) Direct Agreement.<sup>87</sup>
242. Following a second loan facility of Euro 3M granted by BoV in September 2018, the (first) Direct Agreement was amended.
243. In July 2019, the BoV granted “*a term loan facility in the aggregate amount of €22,000,000 in favour of AssetCo, and a term loan facility in the aggregate amount of €5,900,000 in favour of ManagementC*,”<sup>88</sup> leading on 17 July 2019 to a second amendment of the (first) Direct Agreement.<sup>89</sup>
244. The Direct Agreement and its amendments were signed for the GoM, by Dr. Konrad Mizzi and for Claimants, by Miroslav Boyanov, the Chief Financial Officer of Steward Health Care International (*i.e.*, AP 5).

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<sup>83</sup> Exhibit C-0001, Clause 1.1.1, p. 10.

<sup>84</sup> Exhibit C-0011.

<sup>85</sup> Exhibit C-0015 (= R-0002).

<sup>86</sup> SoC, ¶ 148; C-PHB, ¶ 9; SoD&C, ¶¶ 226, 228.

<sup>87</sup> Exhibit C-0015, p. 2, Preamble B and C.

<sup>88</sup> Term loan facilities agreement of 17 July 2019 between Claimants and BoV, exhibit C-0014.

<sup>89</sup> Exhibit C-0015, p.3, Preamble F and G; the second amendment of the (first) Direct Agreement is separately on record as exhibit C-0122.

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**2. The HSDA**

245. The HSDA was signed between the GoM and VGH Management the same day as the SCA;<sup>90</sup> it was amended on 15 December 2015 by a “*First Addendum*” and a “*Second Addendum*.”<sup>91</sup>
246. The HSDA sets out the service to be provided by the Concessionaire and the fees (“*charges*”) to be paid by the GoM in accordance with Schedule 3 of the HSDA.
247. Clause 23 provides for dispute resolution as per the SCA (see below at ¶ 403) and Clause 24.1 for the termination of the HSDA “*in terms of the Concession Agreement and the relevant provisions of the Concession Agreement shall mutatis mutandis apply.*”
248. Schedule 3 provides for a “*Minimum Beds Service & Guarantee*,” the GoM guaranteeing the payment of a minimum of 712 beds per day.<sup>92</sup> Until the Completion Date, the GoM was to pay the Concessionaire for GGH and KGRH a fixed annual fee of Euro 51M for 2016, as well as for 2017 (“*plus annual healthcare budget increase for 2017*”).<sup>93</sup> A much higher fee was to become payable “*after the completion certificate of each milestone.*”<sup>94</sup>
249. The Concessionaire was to invoice the annual fee every three months (*i.e.*, Euro 12,750,000), with such invoices being payable within thirty days (as per Schedule 3, Part 1).
250. The number of beds to be supplied by the Concessionaire at the GGH and KGRH was increased by the First Addendum to the HSDA.
251. According to the Second Addendum, the GoM and the Concessionaire agreed, amongst others, on several additional services, as set out in Annex 2 thereto.

**3. The LSA**

252. The Labour Agreement, which the GoM and VGH Management had concluded on 8 January 2016, deals with the employees (“*Resources*”) that the GoM was to supply to the Concessionaire for the Hospitals, and the charges that the latter was to pay in exchange to the GoM.<sup>95</sup>
253. Sometime thereafter, a first and then a second side letter were signed by the GOM and VGH Management.

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<sup>90</sup> Exhibit C-0002.

<sup>91</sup> Exhibits C-0003 and C-0004.

<sup>92</sup> Exhibit C-0002, p. 135.

<sup>93</sup> Exhibit C-0002, p. 138, plus an additional fee for any beds at SLH that would become available in 2016 and/or 2017.

<sup>94</sup> Exhibit C-0002, Schedule 3, Part 1, p. 139. The “*Minimum Death Delivery Fee*” was fixed at Euro 72,856,500, covering also a higher amount of beds.

<sup>95</sup> Exhibit C-0005, Clauses 2 and 9 in particular.

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254. Pursuant to Clause 3.5 of the LSA, the GoM was “*to supply the Concessionaire at all times during the Concession Period with the equivalent number of Resources as indicated in the List of Resources.*” The GoM was also to “*promptly and without delay provide a replacement Resource to cure any shortfall in the number of Resources supplied to the Concessionaire (...).*”
255. Clause 11.3 stipulates that the LSA “*shall ipso jure terminate without the need for any judicial notification upon the termination of the [SCA].*”
256. Clause 12 contains an arbitration clause (see below at ¶ 402402).
257. The LSA was amended by an Addendum dated 30 June 2017 (the “**LSA Addendum**”), to which a List of Resources for the GGH and KGRH was attached, and into which certain terms of the aforementioned side letters were incorporated.<sup>96</sup> The “*List of Resources*” was defined in Clause 1.1 of the LSA Addendum as being “*the list of one thousand five hundred thirty-six (1536) Resources attached herewith (...).*”

#### **4. The Emphyteutical Deed**

258. The Emphyteutical Deed was concluded on 22 March 2016 before a Maltese Notary Public by (i) Malta Industrial Parks Limited, appearing on behalf of the Commissioner of Land, being referred to as the “*Grantor*”, (ii) the GoM and (iii) VGH Asset being referred to as the “*Grantee*.”
259. Under this Deed, VGH Asset was granted the temporary title over the land of the Hospitals, against an annual (total) ground-rent of Euro 525,000.<sup>97</sup>
260. Pursuant to Clause 2 of the Deed, the GoM declares that “*the Grantor is hereby authorized to dispose of the Sites in terms of the Disposal of Government Land Act (...)*” and that “*the Grantor is fully empowered in terms of Commissioner of Land Ordinance (...) to dispose of the [Hospitals] in the manner determined by the Disposal of Government Land Act (...), including by granting emphyteutical title over the Sites to the Grantee.*”<sup>98</sup>
261. Clause 4.9.1 of the Deed contains a jurisdictional clause in favor of the Maltese courts.

#### **F. THE PERFORMANCE OF THE CONCESSION**

262. The Parties have different assessments about the performance of the Concession by respectively the Concessionaire and the GoM.

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<sup>96</sup> Exhibit **C-0013**. As explained by John Abela, “the List of Resources was not prepared or available when the Concession started but was subsequently provided with the Addendum to the LSA dated 30 June 2017,” RWS-1, ¶ 20.

<sup>97</sup> Exhibit **C-0006**, Clause 4.2.

<sup>98</sup> Exhibit **C-0006**, Clause 2.1 and 2.3.

263. To better understand the factual background of the dispute, it is helpful to separate the period prior (1.) and after (4.) the taking over of the Concessionaire by the Steward Group, but also to describe the record regarding the Steward Group takeover (2.) and its subsequent attempt to renegotiate with the GoM the terms of the Transaction Agreements (3.).
264. There is, however, no need to provide here a detailed account of the contractual performance, for reasons that will be explained below.

# 1. VGH's contract performance prior to February 2018

265. The set-up of the VGH Group can be seen from its organizational chart: Dr. Ernst was the CEO, Mark Lisher, the CFO, and Mina Popova, the Quality & Risk Director. Dr. Ernst acted also as the "*Chief Medical Director*" and had under him Dr. Delicata as CEO for the GGH, Stephen Zammit as the CEO for KGRH and Saba Abbas oversaw the audit.<sup>99</sup>
266. In December 2016, Dr. Ernst, Vitals' CEO, wrote a letter to Mr. Shaukat – who according to the Respondent "*apparently [was] a silent investor in VGH at the time*"<sup>100</sup> – in which he assessed the situation of Concession from Vitals' perspective. Although Dr. Ernst's assessment was self-serving, and for that reason may have been overstating, it appears to be a candid assessment. It is therefore worth quoting here large extracts from his letter:<sup>101</sup>

*"I see our strengths in:*

- *Good business model*
- *Need in the market for such models and willingness to engage*
- *Excellent pre-existing relationships facilitating entry into new markets* • *Ability to have secured a contract (Malta)*
- *Strong leadership team experienced in PPP, VC and healthcare operations*

*Risks:*

- *Underfunded enterprise with repeated cash flow problems*
- *Construction- funding and management*
- *Lack of operational and healthcare experience of lead director*
- *Lack of transparency of current contracts and obligations incurred by company*
- *Suspicious of misrepresentation of prior experience by lead director*
- *Above resulting in erosion of trust between major shareholder/ CEO and lead director*
- *Lack of proper board/ governance structure in enterprise*
- *Competition entering the space.*

<sup>99</sup> Exhibits **R-0199**, p. 2 and **R-0200**.

<sup>100</sup> Rejoinder, ¶ 49.

<sup>101</sup> Exhibit **R-0188**; Respondent has obtained that letter from Claimants through the document production, see its letter of 1 July 2025.

Details related to above risks:

*VGH entered the Malta transition in an underfunded state and has experienced cash flow problems along the way. Even though some of the GoM operational funds are now coming in more regularly, we are still in a delicate state of just keeping up with current expenses. We have experienced reputational damage with GoM for having to continuously ask for funds indicating that we are in fact underfunded, we have experienced many months of delays with paying creditors eroding our standing in the community and have not made true on promises of providing urgently needed equipment in our hospitals. It appears that we continuously plug holes by opening others.*

*This does not just represent a wasted opportunity to be perceived as a well-funded enterprise that knows what it is doing, it also opened the door to public suspicion that we are not properly equipped to do the job and that the health system may be in jeopardy. I realize that we state that over 20M have been spent, but this has not been done in a way that is visible to the public, nor has it done in a way to improve conditions for staff and facilities in a perceptible way. This issue remains unresolved.*

*Construction is a hallmark of our promise and to many of us it appears that efforts are stuck, that process and management thereof are not up to standards and that client interests are not well represented. Additionally, the conditions of the contracts are opaque, not understood by leadership and apparently, the major shareholder—and contract payment conditions appears problematic. As a matter of fact, any cost-plus scenario has the potential of injecting severe risk into the company, including an unplanned takeover if funds are not sufficient and buildings not completed. (...).”<sup>102</sup>*

267. Shortly thereafter, in his letter to Dr. De La Torre of 8 January 2017, to which the Tribunal has already referred to above at ¶ 21313, Dr. Ernst described the “current issues” of VGH as follows:

*“Claim is that 25M have been invested to date, but that has mainly been into nice digs and cars, lawyers and entertainment to build the necessary facade. There has a 10M bond been paid to GoM, but that came from construction company.*

*Multiple promises had been made to immediately improve certain areas in the hospitals upon take over, which has not happened yet. These include new ambulances, more nurses, facelifts, equipment replacements (e.g. defibrillators) and assorted other things you and I would have done immediately to show commitment and ability. Not having been able to pay for these upgrades is starting to make it clear to outside world that there are insufficient investment funds available.*

*We have experienced several cash flow crunches reflective of this lack of necessary start up investment funds. (...).” (Emphasis added).*

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<sup>102</sup> Exhibit **R-0188**, pp.1, 2.

268. In a letter of 8 August 2017 to Sri Ram Tumuluri, Vitals' President, and Mark Lisher, its CFO, Dr. Ernst, who was keen in seeing Steward taking over the Vitals Group and at the same time cherished the thought of "re-enter[ing] Steward"<sup>103</sup> mused as follows:

*"VGH's biggest problem is the lack of infrastructure and industry know-how. Bringing in a real-estate or other investor does not fundamentally change that (...). Without a real hospital operating investor who is willing to put in money and resources the success of VGH as a health care operator in the short and long run is highly doubtful."*<sup>104</sup>

269. On the same date, Dr. Ernst also wrote to Dr. de la Torre, stating amongst others:

*"When speaking with Shaukat, he also confirms my impression that Malta's government is losing patience with Ram and Mark. If Shaukat and I leave VGH, it is almost certain that the government will push for us (Steward) to take the contract over, making the necessary investments even less."*<sup>105</sup> (Emphasis added).

## 2. The Steward Group Takeover of Vitals

270. The Parties dispute whether it was the GoM which approached the Steward Group, or whether the latter approached the GoM regarding the possible take-over of Vitals.<sup>106</sup> For the Tribunal this does not matter, since this concerns an issue it will not have to resolve, as will be seen. It suffices to note here a few undisputed facts regarding the taking over of Vitals by the Steward Group.
271. It is undisputed that on 11 November 2017, Mr. Ronald Mizzi, then Permanent Secretary at the Ministry for Tourism on behalf of the GoM, and Dr. Armin Ernst on behalf of Steward Health Care International (previously AP 5, but no longer a party to this arbitration), signed a Non-Disclosure Agreement (the "NDA"), the Steward Group having expressed interest in acquiring VGH. To that effect, the Steward Group wanted to obtain from the GoM "Confidential Information", in addition to carrying out due diligence.<sup>107</sup>
272. The NDA was followed by a first meeting on 14 November 2017 in London at the law offices of McDermott Will & Emery, for what was named "Project Haven," in the presence of the lawyers of the Steward Group (McDermott), and those of the GoM (Mifsud Bonnici), as well as of Dr. Armin Ernst.<sup>108</sup>

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<sup>103</sup> Exhibit **R-0170**, p. 5 ("If things work out as we hope, I would like to stay on as CEO for the European operations as we discussed- if they do blow up, I would hope to re-enter Steward (...).") See also above at ¶ 213.

<sup>104</sup> Exhibit **R-169**, draft letter obtained by Respondent through document production request.

<sup>105</sup> *Id.*

<sup>106</sup> Reply, ¶¶ 15 *et seq.*; exhibit **C-OCEO-0004**, ¶ 4; SoD&C, ¶¶ 80, 83 ; Rejoinder, ¶¶ 50, 68 *et seq.*; Rubins, Tr. Day 1, 16:19-18:20; Darwazeh, Day 1, 130 :15 – 131:11.

<sup>107</sup> Exhibit **R-0013**; the term "Confidential Information" is defined in Clause 1 of the NDA.

<sup>108</sup> See McDermott email of 15 November 2017, exhibit **C-0081**.

273. Shortly thereafter, by a letter dated 20 November 2017 from Dr. De La Torre to Mr. Keith Schembri, the Chief of staff at the Office of the Prime Minister, Dr. De La Torre wrote on behalf of the Steward Group, through Steward Health Care System LLC (*i.e.*, the Initial AP 6) regarding its commitment to the GoM and the citizens of Malta. The letter noted, amongst others:

*“Steward HealthCare with its recent acquisitions has a footprint in multiple states with 8b USD in annual revenue and is one of the most successful operators of health care services in capitated reimbursement environments. Importantly, Steward is physician led, which is reflected in our philosophy of the patient first.” (...), and assuring the GoM that it was*

*“[to leverage all necessary resources under the direction of Dr. Armin Ernst, President of Steward HealthCare International, immediately after entering into the necessary agreements. These resources we can bring to bear include the capital of 200M to fulfill the contractual obligations, including the refurbishment of [KGRH], [SLH] and new construction of [GHH] and the attached Barts' Medical School Building.”<sup>109</sup>*

274. On 21 December 2017, a Share Purchase Agreement was entered into between Bluestone Investments Malta Limited and Steward Healthcare International Limited (the “**Original SPA**”) and was amended by agreement of 1 February 2018 (the “**Restated SPA**”).<sup>110</sup>
275. By letter of 29 December 2017 to Mr. Sri Ram Tumuluri of Vitals, the GoM extended the deadline for the submission of the financing agreements to “5 March 2018, or to one month post the expiry of the conditional” Original SPA (the “**Financing Extension Letter**”).<sup>111</sup> The letter was issued and signed by Dr. Konrad Mizzi, in his capacity as Minister of Tourism.<sup>112</sup>
276. By letter of the same day, the GoM gave its approval of the planned transfer of the share of Vitals from Bluestone Investment Malta Limited to Steward Healthcare International Limited (*i.e.*, the AP 1).
277. On 15 February 2018, the AP 1 addressed a letter, under the signature of its CEO, Dr. Armin Ernst, to the GoM, “*represented by the Minister of Tourism,*” for the attention of Dr. Konrad Mizzi, in which it stated, amongst other things:

*“2. With a view to enabling the completion of the Transaction and to further ensure that Steward is able to progress the implementation of the [SCA], we understand that the [GoM] will:*

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<sup>109</sup> Exhibit C-0082.

<sup>110</sup> Exhibit R-0014 (= exhibit R-0222).

<sup>111</sup> Exhibit C-0084. See also SoC, ¶¶ 46, 47.

<sup>112</sup> Despite the April 2016 Cabinet reshuffle, and the appointment of Dr. Chris Fearne as MoH, Dr. Konrad Mizzi had retained responsibility for the conduct of the Concession; NAO Report II, exhibit Q-2, ¶¶ 9, 21.



*2.1 work with Steward's transition and implementation team to identify the critical works and services under the [SCAs] to ensure that Steward is fully aligned with the priorities and requirements of the [GoM];*

*2.2 work collaboratively with Steward to ensure that the timelines, deliverables and other terms of the Concession Agreements are efficiently implemented (with such necessary changes as may be agreed in terms of clause 21 of the [SCA]) to meet the [GoM's] objectives and requirements;*

*2.3 use its reasonable endeavours to procure that any necessary third party will execute and deliver such documents and perform such acts as may reasonably be required in connection with the matters set out in this letter or to give full effect to the Transaction.*

*3. We further understand that the [GoM] confirms that (i) completion of the Transaction under the SPA and (ii) receipt of the letter issued by Steward dated 15 February 2018 (as attached to this letter), satisfies the Concessionaires' obligations to finance the concession under the [SACs] and the Financing Extension Letter.”<sup>113</sup>*

278. The letter was countersigned by Dr. Konrad Mizzi on behalf of the GoM by way of agreement.<sup>114</sup>
279. On 18 February 2018, pursuant to a Share Transfer Agreement executed by Mr. Sir Ram Tumuluri on behalf of Bluestone Investments Malta Limited and Dr. Armin Ernst on behalf of Steward Health Care International Limited, the shares of VGH (i.e., Claimant No 1) were transferred.<sup>115</sup>
280. By letter of 1 June 2018 addressed to the “Ministry of Tourism”, Steward Health Care System, formerly AP 4 to this arbitration, “*irrevocably and unconditionally guarantee[d] to pay you on demand a maximum amount of nine million euro (€9,000,000) in case any of the payments, performance and other obligations undertaken by ConcessionCo under or in pursuance of the Concession Agreement, including any arbitration award delivered against ConcessionCo in favour of the Government, is not duly, properly and punctually paid or performed by ConcessionCo.*”<sup>116</sup>
281. Such guarantee was issued for period of seven months and was to expire on 30 December 2018, unless extended or renewed. It is undisputed that no such extension or renewal took place following the 30 December 2018 date.<sup>117</sup>

<sup>113</sup> Exhibit **R-0015**, referred to by (i) Claimants as the “Government assurances letter”, see Reply, ¶ 18; C-OS, p. 9 and (ii) by Respondent as the “comfort letter”, see SoC&D, ¶¶ 91, 251.

<sup>114</sup> Exhibit **R-0015**, p. 2; see also exhibit **C-0256** regarding the need to obtain the Government’s assurances letter; Reply, ¶ 18; see also Rejoinder, ¶¶ 631 *et seq.* regarding the GoM’s view as to the context of that letter; C-PHB, ¶ 84 highlighting the fact that the letter of 15 February 2018 was made before the Steward Group took over the Concession.

<sup>115</sup> Exhibit **C-0090**. The names of Claimants were changed shortly thereafter to reflect their association with the Steward Group, see exhibits **C-0038** to **C-0040**.

<sup>116</sup> Exhibit **R-0016**.

<sup>117</sup> Rubins, Tr. Day 6, 3:4-20; Mistelis, Tr. Day 6, 4:6-12; see also R-PHB, ¶ 19.

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### 3. The Parties' Attempts to Renegotiate the Concession

282. Following the takeover by the Steward Group, the Parties attempted to renegotiate the terms of the Concession, which is undisputed.
283. However, the Parties disagree on the extent of the renegotiation, particularly regarding the commitments or assurances allegedly made by the GoM in this context.<sup>118</sup>
284. As discussed below, the Tribunal will not be required to make factual findings on these matters. Nonetheless, for clarity and to better understand the nature of the Parties' dispute, the Tribunal considers it useful to summarize certain discussions that took place between the Parties before the Agreements were terminated.<sup>119</sup>
285. By letter dated 25 June 2018 sent by Dr. Konrad Mizzi on behalf of the GoM to the three Claimants, and countersigned by Dr. Ernst on behalf of the latter by way of agreement to its terms, it was stated:

*"(...) It is the intention of both parties (the [GoM] and the [Claimants]), which both acknowledge is required, to seek a number of changes to the [Transaction] Agreements, such that the agreements reflect the situation pertaining in 2018, put the [Transaction] Agreements into globally bankable form and deal with other practical matters.*

*During a six-month period between the 1<sup>st</sup> of July 2018 and the 31st of December 2018 (the "Negotiation Period"), it is expected that all changes to the [Transaction] Agreements will have been crystallized, agreed (with both parties acting in good faith and reasonably) and all appropriate legal documents, recognizing the changes, having been executed. During this time, the [Claimants], in collaboration with the [GoM] (Ministry of Health) will continue to improve the operational shortcomings of the concession facilities. (...)"*<sup>120</sup>

286. In a letter of 26 July 2018 to the GoM, the Claimants identified what they considered to be "*certain matters for discussion with the Government in accordance with the (a) Government Assurance Letter, (b) Concession Agreements, and (c) Agreed Key Principles,*" after stating that they were "*diligently working to implement the Concession Agreements.*"<sup>121</sup>

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<sup>118</sup> Rubins, Tr., Day 1, 17:10-15; C-PHB, ¶ 84; Darwazeh, Tr. Day, 1, 131:7-11; 132; R-OS, p. 24; R-PHB, ¶¶ 159, 160.

<sup>119</sup> Respondent rightly pointed out that the Claimants have not advanced any claims regarding the renegotiation of the Transaction Agreements, Darwazeh, Tr., Day 1, 132:1-9 and 19-22.

<sup>120</sup> Exhibit C-0098.

<sup>121</sup> Exhibit C-0100, p. 1. A list of "*Agreed Key Principles*" was set out in Annexure 1, whereas Annexure 2 of the letter contained a list of "*Indicative Construction Milestones.*" See also exhibit C-0266 with ensuing correspondence between the Parties' outside counsel.

287. On 9 May 2019, the MFH, represented by Dr. Joseph Rapa, and Claimants Nos. 2 and 3 together with Steward Personnel Malta Ltd. signed a non-disclosure and confidentiality agreement. Its Preamble (B) and (C) stipulated:
- “(B) The Parties have entered into discussions in respect of the [Transaction] Agreements with a view to clarifying, updating and progressing the matters regulated therein (...).  
(C) During the course of such discussions (...), information of a technical, commercial, sensitive or proprietary nature may be disclosed by one Party to the other Party and accordingly the Parties agree that such disclosure shall be subject to the terms set out herein.”*<sup>122</sup>
288. On 22 August 2019, Dr. Konrad Mizzi and Dr. Armin Ernst signed a “*non-binding Memorandum of Understanding (MoU) [representing] the high-level principles to be agreed between Steward and the [GoM].*”
289. Under item “3. *Transition Period*,” the MoU stated that the “*parties agree that the transition period extends until July 2023,*” that “*the GoM commits to an increase in the charges of 9% per annum effective as of 1.1.2019,*” that following the preparation of designs, the Concessionaire was to provide “*new agreed milestones*” by 30 June 2020. By that time, the “*Concession documents need[ed] to be “adjusted to take into consideration the amended milestones.”*”<sup>123</sup>
290. By email of 13 November 2019, a team of lawyers from DLA Piper “*advising Steward in respect of the [C]oncession*”, provided the GoM’s lawyers with revised drafts of the SCA and the HSDA.<sup>124</sup>
291. A few days later, Dr. Konrad Mizzi stepped down as Minister of Tourism.
292. As a result of the political crisis in Malta that unfolded at that time, culminating in a change of government in January 2020,<sup>125</sup> the Parties’ negotiations were interrupted and only resumed in July 2020.<sup>126</sup>
293. By letter of 25 February 2020, Dr. Armin Ernst wrote to Dr. Robert Abela, the new Prime Minister, to set out the efforts and expense Steward had gone through “*to try and turn around the project since taking it over so as to ensure that the project proceeds in accordance with the [SCA] and best*

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<sup>122</sup> Exhibit C-0115.

<sup>123</sup> Exhibit C-0124, p. 1. In an email of 12 December 2019 from the GoM to Claimants, with the MFH in copy, Dr. Joseph Zarb Adami acknowledged that “*it is now clear that the transition period before completion will take a least four years (...),*” exhibit C-0295.

<sup>124</sup> Exhibit C-0290; draft SCA, C-0130; draft HSDA, exhibit C-0128. See also exhibits C-0131 and C-0292.

<sup>125</sup> Following the resignation of Prime Minister Robert Muscat, Prime Minister Dr. Robert Abela took office on 13 January 2020; Dr. Konrad Mizzi had stepped down as Minister for Tourism. See exhibit C-0137 and also exhibit C-0138.

<sup>126</sup> OCEO Reply, ¶ 33; Reply, ¶ 34.

*practice generally.*<sup>127</sup> He argued that Steward “*was basically at this stage subsidizing healthcare in Malta*” and asked for confirmation that payments allegedly due be released shortly.

294. On 3 September 2020, following earlier correspondence and meetings of the Parties held on 27 August 2020,<sup>128</sup> DLA Piper wrote to the GoM’s lawyers on a “*without prejudice*” basis stating *inter alia*: “*Our Client remains confident that a mutually acceptable agreement will be concluded between Steward and the [GoM] in relation to the Concession. This letter is sent to further facilitate the reaching of such an agreement*”. The letter went on to state that:

“*(...) we understand that your client prefers to restructure the Concession so that, in due course, the Concession is terminated and new contracts executed providing for the following:*

- a. *Termination Agreement/s for the existing Transaction Agreements (...);*
- b. *One or more new agreement/s comprising:*
  - i. *New Design/Build/Commission arrangement/s for [SLH] Campus (...), [KGRH] (...) and [GGH] (...); and*
  - ii. *New Management Services arrangements for SLH, KGRH and GGH;*
- c. *Alternatively to the 4(b)(1) and 4(b)(ii) above, one agreement that comprises the Design, Build, Operate, Maintain ("DBOM") arrangements for SLH, KGRH and GGH.*<sup>129</sup>

295. By mid-December 2020, the Parties’ lawyers exchanged drafts of the “[*Transaction*] Agreements Termination Agreement and the Settlement & Arbitration Agreement.”<sup>130</sup>
296. In early 2021, the Claimant No 2 commissioned a report from Price Waterhouse Coopers (PWC) to review the Concession Project Costs for the period up to 31 December 2020 that have been incurred by Steward (Claimant No 1) “*as part of the redevelopment, maintenance and operation of the sites at [SLH], [KGRH] and [GGH], including Bart's Medical College.*” The report noted “*that there have been discussions with [GoM] regarding the potential handing over of the three hospitals back to the [GoM]*” and that was to provide the GoM “*a Schedule of the Project Costs incurred by Steward throughout the concession period to [GoM].*”<sup>131</sup>
297. In May and early June 2021, the Parties through their outside counsel continued to exchange drafts and to have meetings regarding a Termination & Settlement Agreement and a new Hospital Management Services Agreement.<sup>132</sup> However, by letter of 2 February 2021 to Prime Minister

<sup>127</sup> Exhibit **R-0110**.

<sup>128</sup> Exhibit **C-0387**.

<sup>129</sup> Exhibit **C-0313**, ¶ 4. The letter discussed further the issue of a direct award of a new contract as a matter of European/Maltese procurement law.

<sup>130</sup> Exhibit **C-0318**.

<sup>131</sup> Exhibit **C-168**, p. 2.

<sup>132</sup> See chain of emails between Camilleri Preziosi (Ron Galea Cavallazzi) and Mamo TCV (Joseph Camilleri), with attachments during 17 May and 1 June 2021, exhibit **C-0171**.

Robert Abela, Dr. Armin Ernst expressed concern and frustration over the lack of progress in signing the new agreements.<sup>133</sup>

298. A few months later, by an 11-page long letter of 27 September 2021, signed by both Dr. Ernst, as President and CEO, and by Mr. Iñigo Gomez-Jordana, as General Counsel, the AP 2 wrote to Prime Minister Dr. Robert Abela (the “**AP 2 Letter of 27 September 2021**”) to “*reiterate the imperative need to reach an agreement with GOM going forward (and options in such respect) in respect of the Concession, which is both fair and sustainable for both parties.*”<sup>134</sup>
299. The Tribunal considers it worth citing large extracts of this letter, as many of the complaints made by the Steward Group were in fact echoed by the NAO in its second report of December 2021.
300. Steward stated, amongst other things, that it took over from Vitals in February 2018 “(a) in good faith (...) and (b) based on explicit assurances from GOM, that the Concession would be restructured to make it bankable, a condition to take on the Concession,”<sup>135</sup> and that “[t]he undertaking from [GoM] to Steward to provide a bankable concession framework (as also represented to the European Commission) has not been honoured to date. [GOM] deceived Steward by various means and specifically by, on at least two occasions (December 2020 and May/June 2021), agreeing to signing dates of documentation purporting to restructure the Concession and failing, at the last minute, to proceed to such signing.”<sup>136</sup>
301. Under the heading “*III. Why the current terms of the Concession are inapt to allow the Concession to achieve its (GOM declared intended) purpose*”, Steward further stated:
- “*The Concession was presented to the Maltese people by GOM as a PPP(...).*
  - *The Concession was structured such that the concessionaire was responsible for raising and providing the funds to develop the asset (that is, for design and construction through to completion of the asset). This was not meant to be a co-financed PPP scheme. The Concession tender involved the creation, by the successful bidder, of an SPV to deliver the project. The SPV was meant to be the channel of all cash flows inherent to the project. Assets and liabilities related to the project were expected to be recorded in the SPV balance sheet in what is commonly referred to as “ring-fencing” the cash flows.*
  - *The Concession terms and effective date required that the funds to be applied to finance the project were a mix of debt and equity which is consistent with PPP structuring.*
  - *Steward can confirm that evidence is available to the effect that (a) VGH had no equity or external financing to assume its undertakings under the Concession, (b) GOM agreed to waive over time this essential financing requirement, (c) the terms of the Transaction*

<sup>133</sup> Exhibit **C-0116**. Dr. Ernst notably wrote: “*After careful, lengthy and deliberate discussion, we did come to a reasonable solution by mid-December of last year, which was presented to cabinet and reported to us as approved. (...). Since that moment of careful optimism things have taken an unfortunate turn. While the agreement appeared to be finalized and many such assurances were given, several delaying interventions have taken place, always last minute before anticipated signing dates. Namely (...).*”

<sup>134</sup> Exhibit **R-0003**.

<sup>135</sup> In this arbitration, the GoM has always refuted the allegation that it had given any such assurances to the Steward Group, see above at ¶ 283 and N. 117.

<sup>136</sup> Exhibit **R-0003**, pp. 3 and 5.

*Agreements are not consistent with those of a ring fenced PPP in as much as, absent construction on the sites (unrealistic cost and medical tourism's projections aside) no income can support the investment necessary to carry out the works.*

- *The ability of Steward to finance the Concession investment requirements depended on the undertaking of GOM to restructure the agreements. The existing contractual framework is unsuitable to operate the Concession on its terms. The main reason for this questionable award considerations aside- is that the financial model is flawed. In essence:*

*-the SCA redevelopment requirements include, amongst others, (i) the construction of a new hospital at GGH, (ii) the redesigning and remodelling the existing building at GGH plus redesigning and remodelling of the sites at KGH and SLH, (iii) the construction and outfitting of a medical school, (iv) the construction of a dedicated research and development centre and of a nursing university institution.*

*-under the model, GOM undertakes to purchase the services of healthcare provided by the Concessionaire throughout the duration of the concession (30 years). Beds, facilities, and services capacity not reserved for use by GOM can be offered by the Concessionaire for medical tourism.*

*-medical tourism — if this was ever a realistic proposition- cannot materialize if construction of the sites is not achieved. Projections of income from medical tourism are in any event unrealistic (the PwC report based on the GOM submitted projections from VGH indicates that “[...] in 2022-the so-called “stabilized year”- the Concessionaire is projected to generate revenues ofc. Euros 67 million from medical tourism, increasing thereafter by inflation [...]).*

*-before Steward took over from VGH (February 2018) no relevant construction had taken place, nor had any other capital expenditure yet been incurred. The construction milestones were then in breach and cannot be fulfilled if the agreements are not renegotiated.*

*-construction of the sites requires financing. Such financing is unavailable under the current financial model which was not and is not fit to generate the resources to make the concession bankable. As a matter of fact, the service payment scheme in the Concession is such that it will lead to financial losses immediately and to its end term, a circumstance of which GOM was aware of given the VGH financial advisor's report from DWFF (and later PwC) was available to it.*

*-Bank financing is required to undertake construction cost is more than € 220,000,000.”*

302. In its concluding considerations, Steward stated *inter alia*:

*“We entered Malta taking over from VGH in February 2018 at your request and following the failure of VGH (and corresponding embarrassment to your Government) to honour the Concession terms. We did this in good faith and based on explicit assurances from GOM that the Concession will be restructured to make it bankable.*

*Unless the Concession is restructured in any of the forms which have to date been explored it will not be possible to achieve your declared purpose and Concession requirement to, amongst other, construct/reconstruct and embellish the sites (GGH, SLH, KGRH).*

*No financing is available in the market to undertake the investment required in the construction of the hospitals with the current cash flow model which, right from the*

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beginning, was based on unrealistic (or even outrightly false) income assumptions and projections.

*We are keen to support healthcare in Malta and are committed to help as we have shown to date. However, we did not enter the Concession to be forced into the current position and therefore request that we conclude our latest negotiations (June 2021) as soon as possible and on mutually acceptable terms.*

*There may be of course the alternative option to agree to terminate the Concession. If this is the way forward, we will provide our estimate of the termination compensation amounts.”<sup>137</sup> (Emphasis added)*

303. By letter of 6 December 2021, State Attorney Dr. Christopher Soler replied behalf of the GoM to the AP 2 Letter of 27 September 2021, which pursuant to the GoM had been sent by “*an entity which does not appear to be related directly to the concession or the Concessionaire, it is assumed that the letter is sent on behalf of the Concessionaire*” and rejecting the allegations made therein.<sup>138</sup>

304. In its two final paragraphs, the GoM stated:

*“(…) your claims that [GoM] somehow committed to making the concession 'bankable' are indeed troubling. The letter of the 15 February 2018, signed by Mr Ernst, expressly confirms that the Steward group "would be able to finance its own obligations, and those of the Concessionaire companies under the Concession Agreements, through Steward group's resources and relationships" - it was on this assurance that [GoM] accepted satisfaction of the Concessionaire's obligations to finance the concession in terms of the concession agreements. (...). Stating now that the Concessionaire is unable to procure the financing required to satisfy its obligations would, in fact, render the said declaration deceptive. Accordingly, raising now issues of bankability and making claims that the concession is not 'bankable' are both inappropriate and irrelevant.*

*It must be clarified, by reference to your concluding remarks, that [GoM] has not 'pushed' the Concessionaire in any 'current position', as you wrongly allege. [GoM] is not the party at fault. The obligations in the concession agreements remain as they were when the Steward group chose to take over the Concessionaire. GoM expects due performance of those obligations and calls upon Steward group for the performance of the same.”<sup>139</sup>*

305. Further attempts to renegotiate the Transaction Agreements failed.<sup>140</sup>

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<sup>137</sup> Exhibit **R-0003**, p. 11.

<sup>138</sup> Exhibit **R-0004**. This letter was co-signed by Mr. Ron Galea Cavallazzi, the GoM's outside counsel.

<sup>139</sup> Exhibit **R-0004**, p. 3.

<sup>140</sup> Exhibit **C-0186**, “Chris Fearne walked away from new hospitals deal despite recognizing flaws, Steward says” as per *Maltatoday* of 23 May 2022.

306. On 3 April 2023, in the context of an Application in the First Hall, Civil Court in *Commissioner for Revenue v. Steward*, Case No. 518/2023, regarding an ongoing VAT tax dispute that opposed the Claimant No 2 to the Maltese tax authorities, the Claimant No 2 resumed its view as to why these negotiations had faltered, as follows:

*“[T]here were no less than three intensive attempts to restructure the contracts to make them bankable and sustainable (in October/November 2019, October 2020 to January 2021 and again in April to June 2021). The first attempt faltered after the political turmoil and resignations in late 2019, whereas the subsequent attempts, under the new Government administration never came to fruition, solely through the fault of GoM which repeatedly reneged on its promises and retreated from discussions on some pretext or other.”<sup>141</sup>*

307. This VAT tax dispute will be further addressed below (at ¶¶ 361 *et seq.*).

#### 4. The Concession Performance after the Steward Group takeover of Vitals

308. In this arbitration, the Parties have taken very antagonistic positions regarding the performance under the Concession following Steward Group’s takeover.<sup>142</sup>

309. As will be seen below, the Tribunal will not make factual determinations regarding the performance and the legal consequences that might arise out of any non-performance. It is, however, helpful for the understanding of the Parties’ dispute to highlight some of the main events prior to the termination of the Agreements and the Parties’ position in respect of the Concession performance at the time.<sup>143</sup>

310. In a press release dated 12 November 2018, the office of the Prime Minister and MFH issued the following statement regarding the Concession:

*“GoM’s partnership with [Steward] will continue to upgrade Malta’s healthcare which is already considered one of the best in the world (...). [Steward] continues to make strong progress, with works on the anatomy centre now complete and the development of the medical school in Gozo continuing at a rapid pace. (...). [Steward] is investing €22 million in the construction of the Barts Medical School, and an additional €2.2 million in the anatomy center, (...). As the Barts Medical School reaches completion, the concessionaire will now be shifting its attention to the construction of a state-of-the-art hospital that all Gozitans will be proud of as well as to the renovation and refurbishing of [KGRH] and [SLH]. [Steward] has proven itself to be a highly committed partner, with a capable*

<sup>141</sup> Exhibit C-0049, p. 23.

<sup>142</sup> See for Claimants in particular Reply, ¶¶ 43 *et seq.*, ¶¶ 343 *et seq.*; for Respondent in particular SoD&C, ¶¶ 101 *et seq.*; Rejoinder, ¶¶ 80 *et seq.*, ¶¶ 656 *et seq.*

<sup>143</sup> Respondent rightly pointed out that Claimants have not advanced any claims regarding the renegotiation of the Transaction Agreements, Darwazeh, Tr., Day 1, 132:1-9 and 19-22.



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*leadership which has taken on all of the obligations of the [Concession] and is delivering them to the highest standards in excellent time.”<sup>144</sup> (Emphasis added).*

311. Indeed, by mid-December 2018, the QMUL Anatomy Center had been completed and by October 2019 the QMUL Barts Medical School.<sup>145</sup>
312. Around that time, Stantec,<sup>146</sup> acting as Steward’s engineering consultants, had prepared a “Room Book” medical equipment and furniture.<sup>147</sup>
313. However, a few months earlier, in internal GoM correspondence of 4 June 2019, Mr. Edgar Borg noted that the GoM had “no fixed commitment from Steward when the construction phase of SLH will start to take place. Our understanding is that at this phase they have no financing plan in place to fund this capital expenditure programme.”<sup>148</sup> (Emphasis added).
314. The financing of the rehabilitation and infrastructure works at the Hospitals was from the outset of the Concession a major issue for Claimants, as noted above.
315. In 2018, *i.e.*, in the year of the Steward Group’s takeover, the financial situation of the Claimants continued to be seriously strained. In an internal email of 12 April 2019, following the receipt of CFO statements from Steward, Mr. Edgar Borg analyzed the situation as follows:

“1) Steward have either paid, contested or agreed to pay a significant amount of creditors brought forward from VGH.  
 2) [O]n the basis of their CFO statements. Steward have made a loss of about Euro 10 million in 2018. What I question is the future sustainability of the project going forward if such results are not improved. This situation needs to be aggressively addressed for the project to have a viable future.  
 3) Steward need to pay a significant amount of creditors which will prove extremely difficult on the backdrop of their operating results. For the situation to be improved costs need to be aggressively addressed together with a significant improvement in their revenues.  
 4) Most probably the company is operating in a significant net liability situation.”<sup>149</sup> (Emphasis added).

316. The consolidated annual accounts of Claimant No 1 for the financial year of 2018 confirm that assessment: “During the year under review the Group’s turnover amounted to € 96,516,884 while

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<sup>144</sup> Exhibit C-0107.

<sup>145</sup> Exhibit C-0064; see also exhibit C-0132.

<sup>146</sup> Claimants had retained Stantec as Consultants in March 2019, exhibit C-0110.

<sup>147</sup> Exhibit R-0285. Earlier that year, in March and then April 2019, there was a “Masterplan Update presentation” by Stantec, exhibits R-0087 and R-0269. Further updates were made in September and December 2019, exhibits R-0102 and C-0294.

<sup>148</sup> Exhibit R-0108.

<sup>149</sup> Exhibit R-0082; see also follow-up email of E. Borg to M. Boyanov of 1 August 2019, exhibit R-0084.

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*its total expenses amounted to € 102,879,998. Consequently, the Group made a net loss for the financial year before charging taxation amounting to € 6,363,114.”*<sup>150</sup>

317. Two years later, during the financial year of 2020, the Claimants’ consolidated financial statements showed, however, the posting of a profit of Euro 6,053,5858 based on revenues of Euro 112,369,984.<sup>151</sup>
318. It is in 2019 that the BoV provided the Claimants with credit facilities, which the GoM understood to be “critical to ensure that the hospital concession progressed to the next stage.”
319. These facilities led to the Amended Direct Agreement of August 2019, as mentioned above at ¶ 241. The background of the DA was explained by Mr. Mizzi to Mr. Joseph Rapa in an internal email dated 27 May 2021.<sup>152</sup>
320. By a letter dated 5 December 2019 to the GoM, the Claimants requested approval to terminate the engagement of their EPC subcontractor Shapoorji Pallonji in relation to the detailed design and construction of various works at the Hospitals and to appoint a substitute subcontractor. The letter stated, amongst others, as to reason for the requested change: “*Since Steward Health Care acquired the concession from VGH, the Employer has identified a number of breaches of the EPC contract by Shapoorji Pallonji on the Projects and considers that these breaches are sufficiently serious (...) to amount to grounds under the EPC Contract to terminate Shapoorji Pallonji’s engagement on the Projects.*”<sup>153</sup>
321. In its “*Stage 2 Submission Engineering Design Report*”, also referred to as “*Pre-Planning Engineering Report*” of 4 February 2020, Stantec, noted the following: “*Stantec were appointed by Steward International Healthcare in January 2019 to initially provide Architectural and Engineering Design services for the feasibility and master-planning of the hospital development proposals to the existing [SLH] and [GGH] campuses (...). The Feasibility report was issued June 2019. The project has now moved into the next stage of design development, and this report aims to capture updates to the scheme established in the months following the June 2019 issue in order to assist the Principal Contractor in establishing initial cost estimates across both sites.*”<sup>154</sup> (Emphasis added.)
322. DLA Piper’s letter of 3 September 2020 referred to at ¶ 294 contained an Annex 1 “*Steward’s record to date in Malta in providing high-quality and value-for money healthcare,*” which sets out over several pages all the achievements the Claimants had allegedly made under the Concession since the Steward Group’s take-over.

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<sup>150</sup> Exhibit **R-0047** (=R-0266), p. 2. In fiscal year 2019, the loss at the Group level went down to Euro 803,426, exhibit **R-0048** (=R-0265), p. 2.

<sup>151</sup> Exhibit **R-0264**, p. 6.

<sup>152</sup> Exhibit **C-0320**.

<sup>153</sup> Exhibit **C-0066**, p. 2.

<sup>154</sup> Exhibit **R-0284**, p. 1; see also exhibits **C-0145**, **C-0148**, **C-0149** and **C-0298**.

323. One item of the Parties' past contention relates to the sums to which Claimants considered themselves entitled under the LSA and HDSA. The Parties eventually settled their dispute by signing a settlement agreement on 19 February 2021. It provided for the total payment of Euro 25,360,388 to Claimants.<sup>155</sup> It expressly excluded various other claims that the Claimants had raised against the GoM.<sup>156</sup>
324. By letter dated 8 November 2021 to Mr. Joseph Fenech, CEO of the GGH, the Deputy PM and Minister of Health asked for a meeting on 30 November 2021 "*to take stock of the current situation and ongoing works and plans at [GHH] regarding the delivery of the Concession and Healthcare Services in terms of the Transaction Agreements.*"
325. The GoM requested, amongst others, to be briefed on the "*current state and plans, including but not limited to any planning permits and Designs, with regards to the construction and redevelopment of the Site and the full completion of the Concession Milestones,*" as well as the "*current Financing Agreements and any others that are yet to be secured to ensure the full completion of the Concession Milestones.*"<sup>157</sup>
326. Incidentally, on the same date, i.e., 8 November 2021, the Maltese Commissioner for Revenue served a Demand Notice on Claimant No 2 regarding the payment of Euro 36.8M regarding VAT covering the tax period of 1 May 2016 through 1 June 2021,<sup>158</sup> as will be further discussed below at ¶ 361.
327. By a letter of 3 January 2022 to the GoM, Claimants raised maintenance issues at SLH campus, by noting that "*there are several areas within the Sites, including those specified above, which are still occupied by third parties in breach of the [Deed] and the SCA,*" and expressing its expectation "*to be reimbursed in full any expenses incurred in relation to such necessary maintenance and repairs since these areas are, in actual fact, occupied and enjoyed by third parties.*"<sup>159</sup>
328. By letter of 15 July 2022 sent to the GoM and addressed to Dr. Edgar Borg, the Claimants' outside counsel, Mr. Joseph Camillieri of Mamo TVC, referred to the latest two invoices issued under the LSA for the first and second quarter of 2022 denying the GoM's entitlement to receiving "*a detailed list of Government resources including: 1. FS5 for Q1 and Q2 2. Payroll breakup of employees of each month including ID, Name, Grade, Location, Payroll and NI, engagement and termination dates etc.*"<sup>160</sup>
329. Mr. Camillieri stated that Steward was not obliged to provide such information under LSA, that it was not covered by the Data Sharing Agreement between the Parties, "*which referred to Steward*

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<sup>155</sup> Exhibit **C-0167**, p. 4 ("*Settlement Sum*") and clause 2.2.

<sup>156</sup> Exhibit **C-0167**, clause 3.4.

<sup>157</sup> Exhibit **R-0025**.

<sup>158</sup> See also above at ¶ 30606.

<sup>159</sup> Exhibit **C-0016**.

<sup>160</sup> Exhibit **R-0114**.

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*Resources*” was not necessary for the purposes of the GoM’s reconciliation exercise and had never been requested before.<sup>161</sup>

330. On 25 July 2025, through a letter of its outside counsel Dr. Alex Sciberras, the GoM responded by stating, amongst others, *“that clause 7 of the LSA creates an obligation on Steward, particularly with regards to those Government Resources whose payroll is administered by it, to maintain all records necessary in terms of Applicable law. Moreover, and more importantly, in terms of clause 7.5, Steward “shall at all times allow GoM access to the records of the Resources and honour reasonable requests by GoM for copies/transcripts of such records.”*
331. In the final paragraph of his letter, Dr. Sciberas stated: *“Steward’s persistent and perennial defensive and combative stance to every reasonable GoM requests even when such requests are made in terms of the Transaction Agreements themselves, is jeopardizing the proper administration and functioning of the concession, and as such is untenable.”*<sup>162</sup>
332. By letter dated 2 September 2022, sent by Dr. Joseph Chetcuti on behalf of the Office of the Deputy Prime Minister and MFH, the GoM issued to Claimant No 2 a Rectification Notice pursuant to Clause 32.2.1 of the SCA.<sup>163</sup> It noted:

*“(…) Steward’s failure to procure and deliver to GoM a prime bank guarantee, and to present it with satisfactory and fully executed Financing Agreements in terms of the Transaction Agreements. [GoM] has taken note that, despite Steward’s erroneous and incorrect declarations that the concession as subject to the Transaction Agreements is not ‘bankable’, and despite: (1) Steward’s sole and absolute failure to properly and diligently pursue its own revenue streams and improved efficiencies as it is obliged to do in terms of the Transaction Agreements, by having consciously forfeited the exploitation element of the concession, principally by abandoning efforts to derive revenues from medical tourism; and (2) Steward’s complete reliance on GoM payments in terms of the Transaction Agreements; Steward have now registered a profit exceeding Euro 6 million as per Consolidated Accounts for 2020.”*<sup>164</sup>

333. The GoM requested to be provided within 90 days with an unconditional and irrevocable prime bank guarantee in the amount of Euro 9M, as well with *“a fully executed copy of appropriate and adequate Financing Agreements in terms the [SCA] or otherwise to provide evidence to the full satisfaction of GoM of Steward’s ability to finance its own obligations, and those of the Concessionaire companies under the Transaction Agreements, through Steward group’s resources and relationships, including but not limited to full executed agreements between the Concessionaire companies and Steward group companies and relationships and evidence of actual availability of funds and this in terms of Steward’s letter to GoM dated 15th February 2018.”*<sup>165</sup>

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<sup>161</sup> Exhibit **R-0114**, p. 2.

<sup>162</sup> Exhibit **R-0115**, p. 2.

<sup>163</sup> Exhibit **R-0001**.

<sup>164</sup> As mentioned at ¶ 31616.

<sup>165</sup> Exhibit **R-0001**, p. 2. See above at ¶ 27777 regarding the letter of 15 February 2018.

334. By letter of 30 September 2022 addressed to Dr. Chetcuti, Dr. Delicata responded on behalf of Steward rejecting (a) the alleged breaches contained in the purported Rectification Notice; addressing (b) the structural challenges facing the Concession and setting out (c) Steward's proposals to rectify the Concession with workable terms.<sup>166</sup>
335. As mentioned before, in December 2021, the General Auditor of the NAO issued the second part of his audit report focusing on the contractual framework of the Concession.<sup>167</sup> Among the main conclusions of the 464 page-long report, the Tribunal considers worth highlighting those addressing the reasons of the failure of the Concession. The Tribunal will do so in Section VIII.C.3, when discussing the value of the healthcare services provided by the Claimants.<sup>168</sup>

## G. THE DELIA JUDGMENTS

336. A turning point of the Parties' cooperation was the issuance of the Delia judgment issued on 24 February 2023 by the First Hall, Civil Court (the "**Civil Court**"), *i.e.*, the civil court of first instance ("**Delia I**").<sup>169</sup> It was the result of a judicial protest and claim filed by Dr. Adrian Delia, then a Member of the Malta House of Representatives and Leader of Opposition, on 29 January 2018<sup>170</sup> pursuant to Article 33 of the Government Lands Act (the "**Delia Claim**").
337. The Delia Claim was directed against the following persons: (i) the Prime Minister of Malta (at the time Dr. Muscat), (ii) the Attorney General, (iii) INDIS Malta Ltd. (formerly Malta Industrial Parks Ltd.), (iv) Steward Malta Assets Ltd. (formerly known as Vitals Global Healthcare Assets Ltd. and Claimant No 3 in this arbitration), (v) Steward Malta Ltd. (formerly known as Vitals Global Healthcare Limited, and Claimant No 1 in this arbitration), (vi) Steward Malta Management Ltd. (formerly known as Vitals Global Healthcare Management Ltd., and Claimant No 2 in this arbitration), (vii) the Chief Executive of the Lands Authority (who previously had assumed the functions pertaining to the Commissioner of Lands) and (viii) the Chairman of the Board of Governors of the Lands Authority. Before the Civil Court, these parties all opposed the Delia Claim.<sup>171</sup>
338. The Civil Court's holding in Delia I reads in relevant part as follows (in the English translation provided by Claimants):
- *"(...) Declares that the [SCA], the [HSDA] and the [LSA], together with the various amendments and addenda that have been entered into, shall be considered to form an integral part of the temporary Emphyteutical Concession granted to the company Steward Malta Assets*

<sup>166</sup> Exhibit **R-0005**; several points of that letter had already been made in Steward's letter of 27 September 2021, exhibit **R-0003**; see above at ¶ 298.

<sup>167</sup> Exhibit **Q-0002**. See above at ¶ 17777.

<sup>168</sup> See below at ¶¶ 84848 *et seq.*

<sup>169</sup> Exhibit **C-0017** (with English translation of the Court's considerations as of pp. 137 *et seq.*).

<sup>170</sup> Exhibit **R-0017**.

<sup>171</sup> Exhibit **C-0017**, pp. 138, 139.

*Limited, previously Vitals Global Healthcare Assets Limited, on the 22 March 2016 in the acts of the Notary Doctor Thomas Vella.*

- *Declares that the respondents Steward Malta Assets Limited, Steward Malta Limited and Steward Malta Management Limited did not fulfill and breached their obligations under the terms of the contract of 22 March 2016 as well as the [SCA], of the [HSDA] and of the [LSA] together with the amendments and addenda that were made subsequently.*
- *Declares that the Chief Executive of the Lands Authority, who assumed the functions previously assumed by the Commissioner of Lands, and the Chairman of the Board of Governors of the Lands Authority as well as the Attorney General, are under obligation, in terms of the law to guarantee the public property and to take the necessary steps to ensure that all the conditions of the granted property are fulfilled and not changed ai (sic) terms of the same contracts and a resolution of the Chamber of Deputies, and therefore:*
- *Rescinds and annuls the temporary Emphyteutical Concession in the acts of Notary Thomas Vella of 22 March 2016 as well as the [SCA], the [HSDA] and the [LSA] together (...) with the various amendments and addendums that have been made and which form an integral part of the above referenced temporary emphyteutical concession;*
- *Orders the return of all the property where the sites of [SLH] (...), [KGRH] (...) and the [GGH] (...);*
- *Nominates the Principal Notary of the [GoM] to publish the relative deed of rescission and annulment of the said temporary emphyteutic concession within a period of three months from today (...).*<sup>172</sup> (Emphasis added.)

339. On 15 March 2023, the “Appellant Companies” as the Claimants were referred to in the Malta Court of Appeal, filed an appeal against Delia I.<sup>173</sup> They were joined by AP 2 as a third-party appellant, not, however, by the GoM.
340. On 23 October 2023, the Malta Court of Appeal rendered its decision confirming Delia I, except for costs, and thus dismissing the appeal of the Appellant Companies (the “Appellants”), as well as the third-party appeal of AP 2. (“**Delia II**”).<sup>174</sup> Delia I and Delia II will be jointly referred to as the “**Delia Judgments.**”

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<sup>172</sup> Exhibit C-0017, pp. 190-191.

<sup>173</sup> Exhibits C-0018 (English translation of Claimants at pp. 96-195) and C-0070 (slightly different English translation).

<sup>174</sup> Exhibit C-0216 (English translation of Claimants at pp. 1-99); see SoC, ¶113 and SoD&C, ¶ 166.

341. On 19 January 2024, Dr. German, the Chief Notary of the GoM, published a deed of rescission formally rescinding the Emphyteutical Deed.<sup>175</sup>

## H. THE PARTIES' TERMINATION NOTICES AND HAND-BACK

342. The day after the Claimants had filed the appeal against Delia I, *i.e.*, on 16 March 2023, Dr. Armin Ernst sent on behalf of the Claimants a Termination Notice for the SCA to the GoM (the "**Termination Notice**").<sup>176</sup> It listed and described Non-Rectifiable GoM Events of Default under (a) Clause 33.4.1.3 of the SCA, arising from alleged GoM's breaches of Clauses (i) 11.1.9 of the SCA and (ii) 11.1.12 and 11.1.14 of the SCA, and (b) Clause 3.3(i) of the Direct Agreement.
343. Regarding the latter point, the Claimants stated that "*the Concessionaire relies on this ground for termination without prejudice to the Concessionaire's appeal filed against the Malta Judgment on 15 March 2023 and the grounds of appeal set out therein.*"
344. The Claimants also stated that "*the SCA will hereby be ipso jure terminated on the lapse of 48 hours from the date of service of this Notice of Termination at 09.30 CET on 16 March 2023. As such the date of termination will be 18 March 2023 (the "**Termination Date**")*"<sup>177</sup> and that "[p]ursuant to clause 33.8.5 of the SCA, the Related Instruments, (...) will also be ipso jure terminated on the Termination Date."<sup>178</sup>
345. The Claimants further requested that the GoM pay pursuant to Clause 33.8 and Part 1 of Schedule 7 of the SCA the total sum of Euro 124,873,534.30 as the "*Total Termination Payments*"<sup>179</sup> and addressed the issue of the Hand-back and the next steps.<sup>180</sup>
346. By letter of 17 March 2023, the Respondent acknowledged receipt of the Claimants' letter rejecting the alleged grounds of termination and the requested termination payments. The Respondent further stated that it would "*not assume any and all obligations of the Concessionaire relating to any Assumed Contracts and Sub-Contracts relative to the Sites or part thereof*" and requested the Claimants to "*ensure a seamless handover of the operations and the healthcare services currently being provided by the Concessionaire from the Sites and [to] honour all its assumed obligations with regards to Hand-Back obligations arising from Clause 34.1 and 34.3 of the SCA.*"<sup>181</sup>

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<sup>175</sup> Exhibit **R-0088**.

<sup>176</sup> Exhibit **C-0019**, sent Mr. Gomez-Jordana, general counsel of AP, on behalf of the Claimants under cover of an email on 16 March 2023, exhibit **C-0021**.

<sup>177</sup> Exhibit **C-0019**, ¶ 4.2.2 (emphasis in original).

<sup>178</sup> Exhibit **C-0019**, ¶ 4.3.

<sup>179</sup> Exhibit **C-0019**, ¶ 5.1.

<sup>180</sup> Exhibit **C-0019**, ¶¶ 6.1 *et seq.*, and ¶¶ 7.1 *et seq.*

<sup>181</sup> Exhibit **C-0022**.

347. By letter of 18 March 2023, the Claimants issued a Notice of Dispute pursuant to Clause 40 of the SCA contending that they had “*validly terminated the SCA following the occurrence of the Non-Rectifiable GoM Events of Default detailed in the Termination Notice*,” rejecting any contractual breaches and noting that a dispute had now arisen in accordance with Clause 40 of the SCA. The Claimants added that they were willing to cooperate with the GoM regarding Hand-back process.<sup>182</sup>
348. By letter of 21 March 2023, which the GoM referred to as the “*GoM Control Step-in and Termination Notice*” (the “**GoM Notice**”), Dr. Joseph Chetcuti, in his capacity of Permanent Secretary within the MFH, gave on behalf of the GoM “(i) *notice of Non-Rectifiable Concessionaire Events of Default*; (ii) *notice of GoM Control Step-in in terms of Clause 31.2.1.3 of the SCA*; and (iii) *Termination Notice in terms of Clause 33.3.1 SCA*, which notices are being served on Concessionaire and AssetCo as per Clause 46.2 SCA.”<sup>183</sup> Schedule 1 (“*Non-Rectifiable Concessionaire Event of Default pursuant to clause 32.1.1.1 of the SCA*” was attached to the GoM’s letter setting forth a “*non-exhaustive list of breaches of the various Medical Licenses applicable to the Sites*.”<sup>184</sup>
349. Regarding the termination of the SCA, the GoM stated in the same letter that pursuant to “*Clause 33.3.1 and Clause 31.2.4 of the SCA, GoM confirms that the Transaction Agreements shall ipso jure terminate within 15 days from the date of service of this Termination Notice which shall constitute the Termination Date, which service is being effected in terms of Clause 46.2 of the SCA*.”<sup>185</sup>
350. By the same token, the GoM appointed Dr. Joseph Chetcuti as its representative for the Hand-back Inspection and invited the Concessionaire to appoint its representative “*promptly, and in any event, within 30 days of the date of this GoM Notice*.”<sup>186</sup>
351. The Respondent added in the concluding remarks of the GoM Notice that it “*shall remain without prejudice to the potential nullity ab initio of the contractual framework, inter alia, to the effects and consequences of the final determination of the decision of the 24 February 2023, of the First Hall, Civil Court (in Case 133 / 2018 - DELIA (...)). currently under review by the Court of Appeal (...)*.”<sup>187</sup>
352. The Respondent concluded its GoM Notice by “*denouncing Concessionaire's blatant and manifest bad faith and malicious conduct as evidenced by its actions, public statements and legal positioning during the proceedings of and subsequent to the Malta Judgment inter alia: (i) by its evident and*

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<sup>182</sup> Exhibit C-0023.

<sup>183</sup> Exhibit C-0027, p. 2.

<sup>184</sup> Exhibit C-0027, pp. 9-10.

<sup>185</sup> Exhibit C-0027, ¶ 3.2, p. 7.

<sup>186</sup> Exhibit C-0027, ¶ 4.4.

<sup>187</sup> Exhibit C-0027, ¶ 5.2.



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*deliberate abject failure to defend the action, presenting no real and tangible resistance to the cause and claims as identified by the Court, failing to present all available best evidence it purports to have, and by presenting all available defenses as is evident by the Concessionaire's s appeal application, and (ii) its subsequent, most unfortunate yet not wholly unexpected stratagems of the 8 Concessionaire to attempt to use the public health services provided through the Sites as a means to accrue undue benefit to itself.”<sup>188</sup>*

353. In response to the GoM Control Step-in and Termination Notice, Dr. Ernst replied on behalf of the Claimants by letter of 22 March 2023 rejecting the GoM Notice as being “*invalid and of no effect*,” since the Claimants had already terminated the Transaction Agreements with effect of 18 March 2023.<sup>189</sup> The Claimants stated further that in any event “*no Non-Rectifiable Concessionaire Events of Default have arisen, and even if any Non-Rectifiable Concessionaire Events of Default had arisen (which is denied), the GoM has waived any such Non-Rectifiable Concessionaire Events of Default.*”<sup>190</sup> The Claimants also refused that the Hand-back process be carried out as foreseen in Section 4 of the GoM Notice.
354. Instead, the Claimants proposed to the GoM to agree on a without prejudice basis “*that the Hand-back process should take place in accordance with a detailed protocol to be agreed among the parties setting out the steps that the parties agree to take for the purposes of ensuring an orderly transition and complying with their obligations in relation to the Hand-back under the SCA.*”<sup>191</sup>
355. In its reply letter of 23 March 2023, the GoM re-affirmed, *inter alia*, “*that in terms of Clause 31.2.1 of the SCA its GoM Control Step-In has already taken effect as of 4.15pm 21st March 2023.*”<sup>192</sup>
356. On the same day, Claimant No 2 issued three invoices for Q2-2023 in the total amount of Euro 16,868,138 (inclusive of 18% VAT).<sup>193</sup>
357. By letter of 30 March 2023 to Dr. Delicata the invoices were rejected by Dr. Chetcuti as being “*invalid and ineffectively*”, the GoM considering that no further charges being due as from and during the GoM Control Step-In.<sup>194</sup>
358. On 28 March 2023, Dr. Chetcuti issued a circular letter to “*All Employees of GGH and KGRH*” stating: “*As of the 21st of March 2023, Government proceeded to terminate the Concession for*

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<sup>188</sup> Exhibit C-0027, ¶ 5.4.

<sup>189</sup> Exhibit C-0030, ¶ 3.2, p. 2.

<sup>190</sup> Exhibit C-0030, ¶ 3.3, p. 2.

<sup>191</sup> Exhibit C-0030, ¶ 4.5, p. 3.

<sup>192</sup> Exhibit C-0031.

<sup>193</sup> Exhibit C-0033. By email of 28 March 2023, to Mr. Borg (MFH) Steward (Saba Abbas) enquired about the payment of the pending bed revenue invoices for a total of Euro 591,860, exhibit C-0036.

<sup>194</sup> Exhibit C-0047.

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*reasons attributable to Steward, and, in particular, gave notice that it is exercising its Government Control Step-In Rights. The exercise of such a right means that Government has fully, and effectively, taken over the management of all the healthcare services being provided from the Hospitals (GGH and KGRH).’’<sup>195</sup>*

359. This triggered a further letter by Dr. Ernst on the same day to the GoM, stating, amongst others: *“We are obliged to remind you that your repeated attempts to interfere with our hospital employees and to compel them to follow your directions constitute a clear breach of the SCA. Please now immediately cease and desist from taking any further unlawful actions or other steps to aggravate the dispute that has arisen.”<sup>196</sup>*
360. As noted above at ¶ 19, on 29 March 2023, the Claimants filed an Emergency Arbitration with the ICC.
361. On the same day, the Commissioner for Revenue filed a request seeking a Garnishee order against Claimant No 2 for tax liabilities (unpaid VAT, interest and penalties) covering the period of 1<sup>st</sup> May 2016 through 1<sup>st</sup> June 2021, for a total amount of Euro 36,816,847.54 VAT.<sup>197</sup> The Claimant No 2 filed an application against the Commissioner in the Civil Court seeking the revocation of the Garnishee order issued by the Court on 30 March 2023.<sup>198</sup>
362. In its application to the Court, the Claimant No 2 explained the factual background of the VAT related dispute, recalling, amongst other things, that in December 2021 it had already filed an application against the VAT demand notice and that an appeal was pending before the Maltese Court of Appeal.<sup>199</sup> The Claimant No 2 further explained that the VAT liability stemmed from VGH’s prior mismanagement, VGH having created false VAT credits, which Steward had discovered only after its take-over of Claimants and which it had disclosed voluntarily to the Commissioner for Revenue.
363. A repayment plan had been proposed to the Commissioner but was ultimately never signed by the latter *“[n]otwithstanding repeated confirmations that this arrangement was acceptable to the Commissioner.”<sup>200</sup>*

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<sup>195</sup> Exhibit C-0034 and cover email to all employees, exhibit C-0035.

<sup>196</sup> Exhibit C-0063.

<sup>197</sup> Exhibit C-0044. The amount of the garnishee order was slightly lower, *i.e.*, for Euro 36,534,160.59. See above at ¶ 32626 regarding the VAT dispute.

<sup>198</sup> Exhibits C-0049 (English translation p. 18), C-0050 (p.18) and C-0051 (p. 4); see also exhibit C-0395.

<sup>199</sup> Exhibit C-0049, pp. 25-27.

<sup>200</sup> Exhibit C-0049, p. 23.

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364. It is undisputed that the VAT litigation in the Maltese courts is still pending, including before the administrative court.<sup>201</sup>
365. On 2 April 2023, Dr. Ernst wrote on behalf of the Claimants to the GoM stating, amongst other: “[a]s already repeatedly stated in our previous correspondence, your purported Control Step-in Notice and GoM Termination Notice are invalid, groundless and of no effect. As we reiterated in our letters dated 22 and 28 March 2023, you are not entitled to invoke any rights of GoM Control Step-In, nor are you entitled to unlawfully interfere with employees of the Concessionaire in the manner you have pursued.”<sup>202</sup>
366. By letter of 2 April 2023 to the Claimant No 3, INDIS requested the dissolution of the Emphetical Deed and the reversion of the Sites, by invoking Clause 4.8.2. of the Deed.<sup>203</sup>
367. By letter of 4 April 2023, the Claimant No 3 responded stating, amongst others: “*The Deed has already terminated ipso jure, and any attempts made by you to enforce any alleged rights to dissolve the Deed and compel the reversion of the Sites on the basis stated in your letter are denied, will be vigorously defended and have been made in your letter in concert with GoM as part of its course of bad faith conduct directed against Steward.*”<sup>204</sup>
368. In the days thereafter, the Parties exchanged multiple messages regarding the Hand-back process, accusing each other of not being cooperative.<sup>205</sup>
369. By way of example, in an email of 11 April 2023 sent by Mr. Alex Sciberras, acting on behalf of the GoM, to the Claimants’ lawyer, Dr. Joseph Camilleri, it was stated, amongst other things, that “*Steward is wholly unprepared to deal with the Hand-Back and lacks the resources and professional capabilities to fully and professionally administer its arising obligations. One notes by simple way of example that to date Steward never presented a Hand-Back plan and neither has it taken any proactive steps to ensure a proper handover of the services, always depending on GoM to advise, give direction and to plan the way ahead. (...).*”<sup>206</sup>

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<sup>201</sup> Exhibit **C-421**; Accuracy Report III, ¶ 2.17 a); Darwazeh, Tr. Day 5, 31:6-13 and R-PHB, ¶ 91 (“*The tax proceedings remain at an early stage (...)*”).

<sup>202</sup> Exhibit **C-0048**.

<sup>203</sup> Exhibit **C-0052**.

<sup>204</sup> Exhibit **C-0053**.

<sup>205</sup> See the GoM’s emails of 5 and 11 April 2023, exhibits **C-0055**, **C-0060** and **R-0018**; Steward’s reply emails of 6 and 9 April 2023, exhibits **R-0020** and **R-0021**.

<sup>206</sup> Exhibit **R-0019**.

370. Eventually, on 18 April 2023, the “GoM Handback coordination team met with [the] Steward counterparts being Dr Nadine Delicata, Dr Joseph Camilleri and Mr Miroslav Boyanoz.”<sup>207</sup>
371. By 21 April 2023, the SharePoint/data room had been set up allowing Steward to start uploading documents.<sup>208</sup> However, the Parties’ exchanges became even more acrimonious leading the GoM to complain by email of 29 May 2023 to the Claimants about “Steward’s refusal to further collaborate and cooperate with GoM in finalization of the HandBack process in clear breach of your obligations in terms of Clause 34 of the SCA.”<sup>209</sup>
372. As of 28 March 2023, the GoM had incorporated Malta Health Ltd with an authorized share capital of Euro 1,000 to act as service provider within the public health service.<sup>210</sup>
373. This new company was to assume material contracts entered in to by the Claimants, i.e., “all obligations arising from [these] contract/s as from 5 April 2023, including all payment obligations for services rendered or products delivered on that date onwards, with any payment obligations for services rendered or products delivered prior to that date remaining as Steward Malta liabilities.”<sup>211</sup>
374. As noted in the same email of 23 May 2023 from the GoM to the Claimants, “Malta Health Limited shall also be assuming all of Steward Malta employees in terms of the Transfer of Business (Protection of Employment) Regulations, which transfer shall be effective as of 31 May 2023.”<sup>212</sup>
375. By email of 4 May 2023, the Claimants provided Respondent with a PDF file containing “Outstanding amounts due to Hospital creditors” as of 25 April 2023.<sup>213</sup>
376. On 22 May 2023, the GoM established a Hand-Back Inspection Report under the signature of Dr. Joseph Chetcuti.<sup>214</sup> It included a visual assessment of the Hospitals prepared by the MFS under the lead of Carmen Ciantar.<sup>215</sup>
377. By letter dated 29 May 2023 (and sent by email of 30 May), the Claimants provided the Respondent with their IT Transition Plan,<sup>216</sup> which “aim[ed] to define the precise directives, actions and

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<sup>207</sup> Exhibit **R-0092**.

<sup>208</sup> Exhibit **R-0093**.

<sup>209</sup> Exhibit **R-0091**; see also exhibits **R-022**, **R-0024**, **R-0031**, **R-0032**.

<sup>210</sup> Exhibits **R-0140** and **R-0141**.

<sup>211</sup> Exhibit **R-0142**.

<sup>212</sup> Exhibit **R-0142**, p. 2.

<sup>213</sup> Exhibit **R-0024**.

<sup>214</sup> Exhibit **C-0212**; see SoD&C, ¶¶ 195 *et seq.*

<sup>215</sup> Exhibit **C-0212**, pp. 7 *et seq.*; see also R-OS, pp. 4-6, 79.

<sup>216</sup> Exhibit **C-0068**.

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*settings to be applied on current systems maintained by [Steward] that will be transitioned to the GoM after May 30, 2023 and the rules which should guide the transition of all systems, services and contracts [collectively, the “Services”, individually a “Service”] and access to information and data stored within the Services following transition.”<sup>217</sup>*

#### **IV. THE PARTIES’ POSITION IN A NUTSHELL AND REQUESTS FOR RELIEF**

##### **A. THE POSITION OF CLAIMANTS AND OF THE REMAINING AP AND THEIR REQUEST FOR RELIEF**

378. In a nutshell, the Claimants’ case is about the consequences of their termination of the Concession in March 2023. They argue that they validly terminated the Transaction Agreements on the ground of a non-rectifiable GoM event of default, and hence, are entitled to damages and to the payment of sums due under the LSA.

379. The Claimants reject the counterclaims as unfounded.

380. The Claimants and the Remaining AP contest the Tribunal’s jurisdiction over the AP.

381. In their Reply at ¶ 506,<sup>218</sup> the Claimants requested that the Arbitral Tribunal:

- (a) *DECLARE that the Tribunal has no jurisdiction over the Additional Parties and DISMISS the Respondent’s claims against all of them;*
- (b) *DECLARE that the Claimants validly terminated the Transaction Agreements by their termination notice of 16 March 2023 or, alternatively, that the Transaction Agreements terminated automatically on the issuance of the Delia Judgment;*
- (c) *DECLARE that the Respondent was not entitled to terminate the Transaction Agreements by its notice of 21 March 2023, and breached the Concession Agreement by purporting to do so;*
- (d) *DECLARE that the Respondent breached the Concession Agreement, Healthcare Services Agreement, and Labour Agreement;*
- (e) *ORDER the Respondent to pay to the Claimants as compensation for early contract termination per Schedule 7 of the Concession Agreement the amount of €129,987,842, plus pre-award interest calculated at the statutory rate of 8% per annum, compounded annually, from the date this amount became due until the date of the Tribunal’s award, amounting to €13,194,521 as of 8 November 2024;*
- (f) *ORDER the Respondent to pay to the Claimants as compensation for outstanding amounts due under the Labour Agreement the amount of €24,127,009, inclusive of pre-*

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<sup>217</sup> Exhibit R-0096, p. 2.; see also R-0033 (=also exhibit R-0089).

<sup>218</sup> Reply, ¶ 506, as confirmed in the CC Rejoinder at ¶ 331, as well as at the Hearing, Rubins Tr., Day 1, 114:25-115:21.

*award interest as of 8 November 2024 calculated in accordance with the rates specified in Chapter 13 of the Maltese Commercial Code, compounded annually, from the time payments became due until the date of the Tribunal's award;*

- (g) *ORDER the Respondent to pay to the Claimants as compensation for damages caused by the Respondent's breaches of post-termination obligations the amount of €1,869,012, inclusive of pre-award interest as of 8 November 2024 calculated at the statutory rate of 8% per annum, compounded annually, from the time payments became due until the date of the Tribunal's award;*
  - (h) *In the alternative, should the Tribunal consider the Transaction Agreements void ab initio, ORDER the Respondent to pay to the Claimants the amount of €86 million, plus pre-award interest calculated at the statutory rate of 8% per annum, compounded annually, from the date at which the benefit was received by either of the Parties until the date of the Tribunal's award, amounting to €35.2 million as of 8 November 2024;*
  - (i) *AWARD the Claimants applicable post-award interest on all sums that the Respondent is ordered to pay, at the interest rate of at least 8% per annum in accordance with the Maltese Civil and Commercial Codes;*
  - (j) *DISMISS the Respondent's counterclaims;*
  - (k) *ORDER the Respondent to reimburse the Claimants and Additional Parties for the costs of the arbitration, including the fees and expenses of the Arbitral Tribunal, the ICC costs, and the reasonable costs and expenses related to their legal representation;*
  - (l) *AWARD any other relief that the Tribunal considers appropriate.<sup>219</sup>*
382. Regarding the dismissal of the counterclaims, the Claimants stated their RfR in the following terms in the CC Rejoinder:<sup>220</sup>

- (a) *DECLARE that the Tribunal has no jurisdiction over the Additional Parties and DISMISS the Respondent's claims against all of them;*
- (b) *DECLARE that the Respondent was not entitled to terminate the Transaction Agreements by its notice of 21 March 2023, and breached the Concession Agreement by purporting to do so;*
- (c) *DISMISS the Respondent's counterclaims;*
- (d) *In the alternative, should the Tribunal consider the Transaction Agreements void ab initio, ORDER the Respondent to pay to the Claimants the amount of €86.5 million, plus pre-award interest calculated at the statutory rate of 8% per annum, compounded annually, from the date at which the benefit was received by either of the Parties until the date of the Tribunal's award, amounting to €38.3 million as of 18 March 2025;*
- (e) *ORDER the Respondent to reimburse the Claimants and Additional Parties for the costs of the arbitration, including the fees and expenses of the Arbitral Tribunal, the ICC costs, and the reasonable costs and expenses related to their legal representation;*
- (f) *ORDER the Respondent to reimburse the Claimants and Additional Parties for the costs of the arbitration, including the fees and expenses of the Arbitral Tribunal, the ICC costs, and the reasonable costs and expenses related to their legal representation; AWARD the Claimants applicable post-award interest on all sums that the Respondent is ordered to pay, at the interest rate of at least 8% per annum in accordance with the Maltese Civil and Commercial Codes; and*

<sup>219</sup> Reply, ¶ 506.

<sup>220</sup> CC Rejoinder, ¶ 332.

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(g) *AWARD any other relief that the Tribunal considers appropriate.*

383. In the C-PHB, the Claimants maintained their RfR with the following variations:
384. The claim for early contract termination (as per ¶ 381 (e)) now amounts to a total of Euro 148,245.377 comprising (i) Euro 100M + (ii) Euro 32,104,88 as the Lender's Debt as of 27 June 2025 + (iii) Euro 16,140 as pre-award interest up to 27 June 2025.<sup>221</sup>
385. The alternative (restitution) claim (as per ¶ 381 (h)) now amounts with interest calculated as of 27 June 2025 to Euro 126.7M.<sup>222</sup>

## **B. THE POSITION OF RESPONDENT AND ITS REQUEST FOR RELIEF**

386. The Respondent's primary case rests on the assumption that the Transaction Agreements have been rescinded *ab initio* by virtue of the Delia Judgments and that the Parties are therefore to be restored to their original position.
387. For the Respondent, "*the real crux of this arbitration is not for the tribunal to determine a question of liability, but rather to determine the restitution of the Parties, i.e., how to restore the Parties back to their original positions (...).*"<sup>223</sup> It considers that it is entitled to a refund from the Claimants and Remaining AP of Euro 487,980,032 plus interest.
388. The Respondent rejects the Claimants' claims, which it describes as "*a speculative attempt to shift liability on to the [GoM], with Steward not shying away from fabricating contrived and opportunistic claims to extort yet more money out of the Concession and Malta.*"<sup>224</sup>
389. Accordingly, it is only on an alternative basis that the Respondent is also pursuing claims of contractual nature, starting with its declaratory relief that it validly terminated the Concession, HSDA and LSA.<sup>225</sup>
390. The Respondent is also seeking substantial monetary relief by invoking seven grounds of alleged contractual breaches by the Claimants: (i) misrepresentation regarding Steward's financial capacity; (ii) Steward's failure to properly redevelop, operate and maintain the Hospitals; (iii) abandonment of medical tourism; (iv) overcompensation under the LSA; (v) overcompensation

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<sup>221</sup> C-PHB, ¶ 27.

<sup>222</sup> C-PHB, ¶ 33.

<sup>223</sup> R-PHB, ¶ 5.

<sup>224</sup> R-PHB, ¶ 2.

<sup>225</sup> Rejoinder, ¶ 880, g., ii., 1, as confirmed in Annex A of R-PHB,

under the HSDA; (vi) non- payment of employees by Steward, and (vii) hand-back inspection costs.<sup>226</sup>

391. In its Rejoinder at ¶ 880, the Respondent requested that the Tribunal:

- a. *Declare that it lacks jurisdiction over any claims relating to the Direct Agreement and the Emphyteutical Deed, including Steward's claims that (i) the First Delia Judgment dated 24 February 2023 constitutes a Non Rectifiable GoM Event of Default and (ii) the Government failed to vacate the Sites, since the Emphyteutical Deed and the Direct Agreement are subject to the jurisdiction of the Maltese Courts;*
- b. *Declare that it has jurisdiction over the Additional Parties;*
- c. *Dismiss all of Steward's claims since the Concession and Related Instruments have been annulled and rescinded with ab initio effect by virtue of the Delia Judgment dated 23 October 2023;*
- d. *Decide that the Parties should be restored back to the condition they were in before the Concession and Related Instruments were concluded;*
- e. *As a result, order Claimants and Additional Parties jointly and severally to pay the Government the amount of EUR 245,234,943 with interest at the rate of 8% until the date of full payment; and*
- f. *In the alternative, should the Tribunal not consider the Concession and Related Instruments to be annulled and rescinded pursuant to the Delia Judgment dated 23 October 2023,*
  - i. *Declare that the Concession, HSDA and LSA and any measure linked to the same constitute unlawful State aid;*
  - ii. *Order the full recovery of the unlawful State aid from Claimants and Additional Parties jointly and severally in the amount of EUR 87,575,990 with any additional recovery interest accrued from 31 January 2025 until the date of payment;*
  - iii. *Declare the Concession, HSDA and LSA null and void by virtue of EU and Maltese law and consequently rescind the Concession, HSDA and LSA;*
  - iv. *Decide that the Parties should be restored back to the condition they would have been in had the Concession, HSDA and LSA never been concluded;*
  - v. *As a result, order Claimants and Additional Parties jointly and severally to pay the Government the amount of EUR 165,891,414 with interest at the rate of 8% until the date of full payment; and*
  - vi. *Dismiss all of Steward's claims;*
- g. *In the further alternative, should the Tribunal not consider the Concession and Related Instruments to be annulled and rescinded pursuant to the Delia Judgement dated 23 October 2023 and/or should the Tribunal decide not to rescind the Concession, HSDA and LSA by virtue of EU and Maltese law:*
  - i. *As to Steward's claims*

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<sup>226</sup> Rejoinder, ¶ 880, g., ii, 2-11 as confirmed in Annex A of R-PHB



1. *Declare that the Government did not breach any of its obligations under the Concession, HSDA and LSA;*
2. *Declare that Steward is not entitled to raise any alleged Government breach by virtue of the exception of non-performance;*
3. *If the Tribunal upholds its jurisdiction over issues relating to the Direct Agreement, declare that the First Delia Judgment dated 24 February 2023 did not constitute a Non-Rectifiable GoM Event of Default;*
4. *Decide that Steward did not validly terminate the Concession and Related Instruments;*
5. *Decide that Steward is not entitled to recover the termination payment provided for in Clause 33.8 and Schedule 7 of the Concession;*
6. *In the alternative, should the Tribunal consider that Steward validly terminated the Concession,*
  - a. *declare that Clause 33.8 of the Concession is a penalty clause under Maltese law;*
  - b. *decide that Steward is not entitled to recover any amount of the termination payment provided for in Schedule 7 of the Concession; and*
7. *Dismiss all of Steward's claims;*

*ii. As to the Government's counterclaims*

1. *Declare that the Government validly terminated the Concession, HSDA and LSA;*
2. *Declare that Steward breached its duty to act in good faith;*
3. *Declare that Steward breached its contractual warranties and obligations under the Concession, HSDA and LSA;*
4. *Decide that Steward failed to redevelop, operate and maintain the Hospitals in accordance with the Concession, HSDA and LSA and accordingly order Steward to pay the Government for (i) the additional costs it will have to incur to pursue the redevelopment of the Hospitals at its own expense, quantified at EUR 642,270,326, with interest at the rate of 8% until the date of full payment; or in the alternative, (ii) the shortfall between the Concessionaire's expected investment and the actual amount of investment carried out by Steward, for an amount of EUR 126,464,105, with interest at the rate of 8% until the date of full payment;*
5. *Decide that Steward breached its contractual obligations relating to the development of medical tourism and accordingly order Steward to pay the amount of EUR 84,641,957, with interest at the rate of 8% until the date of full payment;*
6. *Decide that Steward was overcompensated under the LSA and accordingly order Steward to pay for the losses incurred by the Government in the amount of EUR 20,998,912, with interest at the rate of 8% until the date of full payment;*
7. *Decide that Steward was overcompensated under the HSDA and accordingly order Steward to pay for the losses incurred by the Government, in the amount of EUR 17,416,850, with interest at the rate of 8% until the date of full payment;*
8. *Decide that Steward in breach of its contractual obligations and duty to act in good faith when it unilaterally augmented the terms of employment of its own employees, and accordingly order Steward to indemnify the Government for the amount of EUR 421,806.84, with interest at the rate of 8% until the date of full payment;*
9. *Decide that Steward failed to pay salaries and pro-rata, employment entitlements of its employees up to 30 May 2023, and accordingly order Steward to indemnify the Government for the amount of EUR 596,479.31, with interest at the rate of 8% until the date of full payment;*

10. Decide that Steward is liable to reimburse the Government for the payment of the pro rata annual leave entitlement for the transferred employees and accordingly order Steward to pay the Government for the losses incurred in the amount of EUR 306,952.69, with interest at the rate of 8% until the date of full payment;

11. Decide that Steward failed to comply with its Hand-back obligations and accordingly order Steward to pay the Government for the losses incurred in the amount of EUR 110,058.04, with interest at the rate of 8% until the date of full payment;

12. Dismiss all of Steward's claims."

392. In Appendix A of the R-PHB, the Respondent maintained its RfR with several variations, to which the Claimants objected by email of 4 July 2025, as noted above at ¶ 131.

393. More specifically, the Claimants stated: "These purported amendments include: (i) modifications to the valuation of certain claims (specifically, rescission damages and State aid damages); (ii) the addition of specific dates from which interest is to accrue for its damages claims; (iii) changes in nomenclature from "Steward" to the "Claimants and Additional Parties".

394. The Claimants considered the proposed revisions to be procedurally inadmissible at this advanced stage of the proceedings and that Respondent remained bound by its updated RfR as confirmed at the Hearing.

395. As mentioned above at ¶ 138, the Respondent submitted a redline version of its RfR showing the changes made in the R-PHB compared to the Rejoinder and explained the basis for its change.

396. The relevant changes are as follows, with the new text being underlined by the Tribunal:

(e) As a result, order Claimants and Additional Parties jointly and severally to pay the Government the amount of EUR 487,980,032, with interest at the rate of 8% starting from 24 May 2024 until the date of full payment;

(f) ii. Order the full recovery of the unlawful State aid from Claimants and Additional Parties jointly and severally in the amount of EUR ~~87,575,990~~ 79,343,529 with ~~any additional~~ recovery interest in accordance with EU State aid law accrued from ~~31 January 2025~~ the date the unlawful State aid was granted until the date of ~~payment~~ repayment;

(f) v. As a result, order Claimants and Additional Parties jointly and severally to pay the Government the amount of EUR 408,636,503 with interest at the rate of 8% starting from 19 June 2023 until the date of full payment.

397. In the RfR (g) ii. regarding the GoM's counterclaim, the word Steward was replaced in claims Nos. 1 – 11 by the words "Claimants and Additional Parties." Moreover, in the claims Nos. 4 –

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11, the start date for the claim for interest was mentioned to be each time “*from the date of the Award.*”

398. As noted above at ¶ 140, the Tribunal has advised the Parties by its email of 15 July 2025 that it would deal with the Claimants’ request that Respondent’s “*revised RfR*” be declared inadmissible in its Final Award. The Tribunal will do so in this Award, when and to the extent it will have to address the Respondent’s RfR.

## **V. ARBITRAL JURISDICTION**

### **A. THE ARBITRATION AGREEMENTS**

399. The Claimants rely on the arbitration clauses of the SCA, the LSA and the HSDA as a basis for the jurisdiction of the Arbitral Tribunal over the claims they are pursuing against the Respondent. The Respondent does likewise, as far as its counterclaim is concerned.
400. For the ease of reference, these clauses are reproduced below.
401. Clause 40 of the SCA contains the following arbitration clause<sup>227</sup>:

*“Clause 40 – Dispute Resolution*

*40.1 General*

*40.1.1 The resolution of any Dispute arising out of or in connection with any aspect of this Agreement shall be subject to the provisions of this Clause 40.*

*40.2 Amicable Dispute Resolution*

*40.2.1 If a Dispute arises between the Concessionaire and GoM in relation to this Agreement, the Concessionaire and the GoM shall actively seek to enter into good faith negotiation to resolve the Dispute within 20 (twenty) Days from the date of receipt of a formal written notification of the Dispute.*

*40.2.2 If any Dispute is resolved pursuant to this Clause (the “Resolution”), a written memorandum (a “Memorandum of Resolution”) shall be prepared and signed by each of the Concessionaire and the GoM; the Memorandum of Resolution shall:*

*40.2.2.1 confirm that the Resolution is in full and final settlement of the Dispute;*

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<sup>227</sup> Exhibit C-0001, emphasis in original omitted.

*40.2.2.2 record all matters in issue and all material factual details of the Dispute and the precise terms of the Resolution; and*

*40.2.2.3 a copy shall be supplied to the Parties.*

*40.3 Alternative Dispute Resolution and Arbitration*

*40.3.1 If the Concessionaire and the GoM fail to achieve a Resolution, either Party may refer the dispute to settlement under the International Chamber of Commerce (ICC) Mediation Rules as in force at the time of such reference.*

*40.3.2 If, after having referred the dispute to proceedings under the ICC Mediation Rules in terms of the last preceding article the Dispute has not been settled pursuant to the said Rules within 45 (forty-five) Days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such Dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce in accordance with the said Rules of Arbitration.*

*40.3.3 The number of arbitrators shall be three, the seat of arbitration shall be Malta, the language of the arbitration proceedings shall be English and all correspondence exchanged, including documents presented, shall be in English or shall be accompanied by a translation into English at the expense of the Party producing the correspondence or documents.*

*40.3.4 In case of arbitration proceedings during the Concession Period, this Agreement and the rights and obligations of the Parties hereunder shall remain in full force and effect pending the award in such arbitration proceedings.*

*40.3.5 An award delivered pursuant to arbitration proceedings instituted in terms of this Clause shall be final and binding upon the Parties and no right of appeal or review shall lie from any such award.*

*40.3.6 The Parties agree that any award delivered in arbitration which imputes a payment of an amount by the Concessionaire to GoM shall be enforced through the collection of said amount by GoM as a debt chargeable to the Performance Guarantee or New Performance Guarantee as the case may be, less any and all amounts held by any Court of Law.”*

402. Clause 12 of the LSA contains the following arbitration clause:<sup>228</sup>

*“12 – Dispute Resolution*

*12.1 The resolution of any Dispute arising out of or in connection with any aspect of this Agreement shall be subject to the provisions of this Clause 12 (Dispute Resolution).*

*12.2 If a Dispute arises between the Concessionaire and GoM in relation to this Agreement, the Concessionaire and the GoM shall actively seek to enter into good*

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<sup>228</sup> Exhibit C-0005, emphasis in original omitted.

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*faith negotiation to resolve the Dispute within 20 (twenty) Days from the date of receipt of a formal written notification of the Dispute.*

12.3 *If any Dispute is resolved pursuant to Clause 12.2 (the "Resolution"), a written memorandum (a "Memorandum of Resolution") shall be prepared and signed by each of the Concessionaire and the GoM; the Memorandum of Resolution shall:*

12.3.1 *confirm that the Resolution is in full and final settlement of the Dispute;*

12.3.2 *record all matters in issue and all material factual details of the Dispute and the precise terms of the Resolution; and*

12.3.3 *a copy shall be supplied to the Parties.*

12.4 *If the Concessionaire and the GoM fail to achieve a Resolution, either Party may refer the dispute to settlement under the International Chamber of Commerce (ICC) Mediation Rules as in force at the time of such reference.*

12.5 *If, after having referred the dispute to proceedings under the ICC Mediation Rules in terms of the last preceding Clause the Dispute has not been settled pursuant to the said Rules within 45 (forty-five) Days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such Dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce in accordance with the said Rules of Arbitration.*

12.6 *The number of arbitrators shall be three, the seat of arbitration shall be Malta, the language of the arbitration proceedings shall be English and all correspondence exchanged, including documents presented, shall be in English or shall be accompanied by a translation into English at the expense of the Party producing the correspondence or documents.*

12.7 *In case of arbitration proceedings during the duration of this Agreement, this Agreement and the rights and obligations of the Parties hereunder shall remain in full force and effect pending the award in such arbitration proceedings."*

403. Clause 23 of the HSDA contains the following arbitration clause by way of reference to the SCA:

*"Part 11 - Dispute Resolution, Governing Law and Jurisdiction*

*23. Dispute Resolution, Governing Law and Jurisdiction shall be regulated by the provisions of the Concession Agreement, and the relevant provisions shall mutatis mutandis apply."*<sup>229</sup>

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<sup>229</sup> Exhibit C-0002, emphasis in original omitted.

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404. The arbitration clauses contained in the Agreements are collectively referred to as the “**Arbitration Agreements.**”
405. The jurisdiction of the Tribunal to adjudicate the claims raised by the Claimants against the Respondent, and by the latter against the former, is not disputed, with however a *caveat* regarding “*any issues relating to the Direct Agreement.*” In that respect, the Respondent denies arbitral jurisdiction.<sup>230</sup>
406. Thus, the scope of the Arbitration Agreements being challenged, albeit to a very limited extent only, the Tribunal’s jurisdiction *rationae materiae* is at issue. It will be addressed in the next Sub-section (B.).
407. In Sub-section C., the Tribunal will then consider whether it has jurisdiction over the Remaining AP and thus determine its jurisdiction *rationae personae*.
408. Initially, the Respondent took the position that the Claimants’ claims are inadmissible, as the Claimants had not complied with the pre-arbitral procedure contemplated in Clauses 40.2 and 40.3 of the SCA.<sup>231</sup> As the Respondent has withdrawn this objection in the SoD&C,<sup>232</sup> the issue has become moot.<sup>233</sup>

## **B. JURISDICTION *RATIONAE MATERIAE***

409. The Respondent’s challenge of the Tribunal’s jurisdiction *rationae materiae* arises solely in the context of the Claimants’ claim that Delia I “*constituted a Non-Rectifiable GOM Event of Default under the Concession, pursuant to Clause 3.3(i) of the Direct Agreement.*”<sup>234</sup>
410. Since the (Amended) Direct Agreement provides for the exclusive jurisdiction of the Maltese courts, any issues relating thereto, “*including whether [Delia I] constitutes a Non-Rectifiable GoM Event of Default, is subject to the exclusive jurisdiction of the Maltese courts.*”<sup>235</sup>
411. Whatever the merits of that jurisdictional objection may be, the Tribunal considers it most appropriate to address it to the extent necessary below in Sub-section VI.D in the context of the

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<sup>230</sup> SoD&C, ¶¶ 220-229.

<sup>231</sup> TOR, ¶ 71.

<sup>232</sup> SoD&C, ¶ 667.

<sup>233</sup> Reply, ¶ 119.

<sup>234</sup> SoD&C, ¶ 220.

<sup>235</sup> SoD&C, ¶ 221.

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termination of the Transaction Agreements, with which the Respondent's jurisdictional challenge is closely linked.

**C. JURISDICTION *RATIONAE PERSONAE***

412. The issue whether the Tribunal has jurisdiction *rationae personae* over the AP 4-8 has become moot, as these entities are no longer Parties to the arbitration, as explained above at ¶ 11 and ¶ 72.
413. Accordingly, the Tribunal must decide its jurisdiction only regarding the Remaining AP.
414. It is undisputed that none of the Remaining AP have signed any of the Agreements, which contain the relevant Arbitration Agreements. Therefore, the question is whether there exists any basis for considering any of or all the Remaining AP bound by the Arbitration Agreements.
415. The Tribunal will first provide a summary of the Respondent's position (1.) and then that of the Claimants and Remaining AP (2.) before discussing and deciding this jurisdictional issue (3.).

**1. The position of the Respondent**

416. According to the Respondent, the Arbitration Agreements are binding on the Remaining AP, since international arbitration standards should apply to that issue in addition to national standards.<sup>236</sup> This arbitration is international in nature, and transnational rules of law and international arbitration principles should therefore apply to it.<sup>237</sup>
417. For the Respondent, the following grounds justify the extension of the Arbitration Agreements:

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<sup>236</sup> SoD&C, ¶¶ 235-242; Rejoinder, ¶¶ 159-163.

<sup>237</sup> Rejoinder, ¶¶ 162 *et seq.*; R-PHB, ¶ 9.

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- (i) The Remaining AP's actions constitute consent to the Arbitration Agreements;
  - (ii) the Claimants and the Remaining AP entertained complete confusion regarding their corporate entities, which justifies the lifting of the corporate veil and that the Remaining AP should be bound by the Arbitration Agreements; and
  - (iii) the Claimants and the Remaining AP all form part of a single economic unit that benefitted from unlawful State aid.<sup>238</sup>
418. Regarding *first* the Remaining AP's actions, the Respondent asserts that the consent to an arbitration agreement may be presumed based on factual circumstances such as participation in the negotiation and/or performance of an agreement by third parties.<sup>239</sup>
419. According to the Respondent, such conditions are met in the present case.<sup>240</sup>
420. For the Respondent, the Remaining AP were extensively involved in the negotiation of the Concession prior to Steward's takeover (of Vitals), Dr. Ernst having "*played a central role in the Concession since its inception and was the mastermind behind Steward's involvement.*"<sup>241</sup>
421. The Remaining AP also "*consistently conducted themselves as if they were a party to the Concession (...)*"<sup>242</sup> by: (i) providing a comfort letter on 15 February 2018;<sup>243</sup> (ii) guaranteeing Claimants' performance of the Concession through a performance bond dated 1 June 2018;<sup>244</sup> (iii) granting loans and promissory notes to Claimants;<sup>245</sup> or (iv) being involved in day-to-day discussions regarding the redevelopment of the Hospitals.<sup>246</sup>
422. Regarding the AP 1, the Respondent underlines that through Dr. Ernst, at the time the CEO and President of the AP 1, it was particularly active in the context of the negotiations between the Steward Group and the Respondent, as, *inter alia*, it provided the GoM with the aforementioned comfort letter on 15 February 2018, *i.e.*, just after having acquired VGH's shares.<sup>247</sup>

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<sup>238</sup> SoD&C, ¶¶ 243 *et seq.*

<sup>239</sup> SoD&C, ¶¶ 245-248; Rejoinder, ¶173.

<sup>240</sup> SoD&C, ¶ 249; Rejoinder, ¶¶ 185-191.

<sup>241</sup> R-PHB, ¶ 8.

<sup>242</sup> Rejoinder, ¶¶ 185 *et seq.*; SoD&C, ¶ 249.

<sup>243</sup> Exhibit **R-0015**, p. 4; see above at ¶ 297.

<sup>244</sup> Exhibit **R-0016**.

<sup>245</sup> Promissory Note of 28 May 2018, exhibit **R-0034**; see also the Subordination Agreement with BoV of 17 July 2018, **R-0035**.

<sup>246</sup> Exhibit **R-0036** re: the supply of ACAD drawings on 1 October 2020.

<sup>247</sup> SoD&C, ¶¶ 250, 254; exhibit **R-0016**.



423. In that letter, the AP 1 stated that it was able to finance its own obligations and those of the Claimants under the Concession, through Steward Group's resources and relationships.<sup>248</sup>
424. According to the Respondent, that letter also demonstrates that "*the Steward Group's financial capability was required to conclude the Concession*" and that the AP 1 implicitly consented to be bound by the Arbitration Agreements.<sup>249</sup>
425. Regarding the AP 2, the Respondent submits that the latter *de facto* managed the entire Concession. In particular, the AP 2 (i) was closely involved in the performance of the Concession, as it led the discussions with Respondent regarding the Claimants' obligations under the Concession;<sup>250</sup> (ii) it was the entity that terminated the Concession and oversaw the post-termination and hand-back procedure;<sup>251</sup> and (iii) it has been financing the costs of the Arbitration, with Mr. Iñigo Gomez-Jordana, its in-house counsel, acting as the Claimants' representative in this arbitration.<sup>252</sup>
426. Mr. Iñigo Gomez-Jordana attended together with Ms. Nuria Ros the Hearing as "*Steward's sole party representatives*", which, according to the Respondent, confirms that "*this arbitration is being driven by Steward Spain (AP 2) while the three Claimants are mere shell companies.*"<sup>253</sup> Therefore, according to the Respondent, the AP 2 implicitly consented to the Arbitration Agreements.
427. Regarding the AP 3, the Respondent stresses that, as the Claimants' shareholder, the AP 3 assumed financial responsibility for the Claimants. This is evidenced by the Claimants' financial statements for 2018, 2019 and 2020, which state that "*the shareholders have given their undertaking to support the Group so that it will continue operating in the foreseeable future.*"<sup>254</sup>
428. In light of the above, the Respondent concludes that the actions and the conduct of the Remaining AP prior to, during and after the Concession, demonstrate their consent to arbitration.
429. As to the *second* ground, the Respondent argues that the Claimants and the Remaining AP entertained "*utter opacity and confusion*" regarding their corporate entities, which justifies the piercing of the corporate veil and the extension of the Arbitration Agreements to the Remaining AP.<sup>255</sup>

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<sup>248</sup> Exhibit **R-0015**, p. 4; see also above at ¶ 29797.

<sup>249</sup> RfJ, ¶¶ 41-43.

<sup>250</sup> RfJ, ¶¶ 44-47; SoD&C, ¶ 252; exhibits **R-0003**, **R-0004**, **C-0041** - **C-0043**.

<sup>251</sup> RfJ, ¶¶ 48-50; SoD&C, ¶ 255; Rejoinder, ¶ 191; exhibits **C-0021**, **C-0022**, **C-0027**, **C-0028**, **C-0036** and **C-0041**.

<sup>252</sup> RfJ, ¶ 51; SoD&C, ¶ 255.

<sup>253</sup> R-PHB, ¶ 9.

<sup>254</sup> RfJ, ¶¶ 53-55; SoD&C, ¶ 264.

<sup>255</sup> Rejoinder, ¶¶ 192-193; R-PHB, ¶ 9.

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430. For the Respondent, all of the Steward entities form part of a single entity acting as the Claimants' *alter ego* "through an indistinguishable unity of interest and ownership," which justifies the extension of the Tribunal's jurisdiction to the Remaining AP.<sup>256</sup>
431. All the Remaining AP had "*overlapping involvement and responsibilities*" and essentially carried out the instructions given to them by the same common management or parent company.
432. Moreover, the Claimants lacked financial autonomy, active business operations and assets and had inadequate capital.<sup>257</sup> For the purpose of the Concession, "*the confusion entertained by Steward was meant to abuse the privileges of the legal personality of the three empty shells that are Claimants,*" leading the GoM to consider all these entities as, in fact, "*intertwined and inseparable*" and "*indistinguishable*".<sup>258</sup>
433. The Respondent asserts that the confusion caused by the Steward Group also affected these proceedings, as the Claimants allegedly concealed for several months the non-existence of the AP 5, 6 and 8 and showed an uncooperative attitude during the document production phase, which hindered efforts to clarify the group' structure.<sup>259</sup> In any case, the documents obtained during the document production phase would, according to the Respondent, confirm that the Claimants and the Remaining AP represent a single entity.<sup>260</sup>
434. The Respondent also submits that the Steward Group acted in bad faith and abused the limited liability of the three Claimants by leaving them undercapitalized to escape the contractual obligations they assumed *vis a vis* the GoM.<sup>261</sup>
435. The Respondent rejects the Claimants' assertion that Maltese law does not recognize the doctrine of piercing of the corporate veil. The Respondent submits that Maltese law incorporates a comparable principle, whereby if a parent or subsidiary entity is considered to be a "*shadow director*" of the relevant group entity, that entity may be held directly liable for the debts owed to a third party.<sup>262</sup>
436. Moreover, and *third*, the Respondent argues that the extension of the Arbitration Agreements to the Remaining AP also derives from the fact that all of Steward entities form part of a "*single economic unit*" for the purposes of EU competition and State aid law. Absent such extension, the GoM would

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<sup>256</sup> SoD&C, ¶¶ 262, 264(a), 269.

<sup>257</sup> RfJ, ¶ 73; SoD&C, ¶¶ 264, 267; Rejoinder, ¶ 194, ¶ 201.

<sup>258</sup> RfJ, ¶ 74; SoD&C, ¶¶ 265, 266; Rejoinder, ¶ 201.

<sup>259</sup> Rejoinder, ¶¶ 196-198.

<sup>260</sup> Rejoinder, ¶¶ 196 *et seq.* with particular reference to exhibits **R-0236 - R-0241** and **C-0329**.

<sup>261</sup> SoD&C, ¶¶ 266-269, RfJ, ¶¶ 78-83.

<sup>262</sup> SoD&C, ¶ 270; Rejoinder, ¶¶ 183-184.

be unable to recover the unlawful State aid pursuant to Article 108(3) TFEU and a breach of EU law and, as a consequence, of Malta's public policy would occur.<sup>263</sup>

437. The Respondent points out that the Court of Justice of the European Union ("CJEU"), in the context of recovery of unlawful State aid, confirmed that State aid may be recovered from parties other than the original beneficiary. The CJEU also held the relevance in such cases of the identity of the shareholders of the acquiring undertaking and the original undertaking.<sup>264</sup>
438. The Respondent contends that "*the Steward entities [...] all essentially carry out the instructions given to them by the same common management umbrella, parent company, or other entities within the group.*"<sup>265</sup>
439. Bearing these principles in mind, the Respondent submits that the nature of single economic unit of the Claimants and the Remaining AP warrants treating the Remaining AP as beneficiaries of the aid pursuant to Article 108(3) of the Treaty on the Functioning of the European Union ("TFEU"). Accordingly, the Tribunal should extend the Arbitration Agreements to the Remaining AP.<sup>266</sup>
440. In light of all the above, the Respondent concludes that the Tribunal should, by applying international arbitration standards, extend its jurisdiction to the Remaining AP and requests a declaration to that effect.<sup>267</sup>

## 2. The position of the Claimants and Remaining AP

441. The Claimants and the Remaining AP deny that the Remaining AP are bound by the Arbitration Agreements and therefore contest the Tribunal's jurisdiction over the Remaining AP.<sup>268</sup>
442. The Claimants argue that contrary to the Respondent's position, the prevailing view of arbitral tribunals and courts is that the law applicable to arbitration agreements and thus national law governs the question whether they extend to non-signatories.<sup>269</sup> In the present case, that is Maltese law, as it is the law of the chosen seat and the law chosen by the Parties to govern the merits of the dispute.<sup>270</sup> International arbitration standards, on which Respondent relies, cannot circumvent the applicable law.

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<sup>263</sup> SoD&C, ¶¶ 271-277.

<sup>264</sup> Rejoinder, ¶ 205.

<sup>265</sup> SoD&C, ¶ 274.

<sup>266</sup> Rejoinder, ¶¶ 203-208.

<sup>267</sup> Rejoinder, ¶ 880.b; see also SoD&C, ¶ 256.

<sup>268</sup> CC Rejoinder, ¶ 49.

<sup>269</sup> Reply, ¶ 122.

<sup>270</sup> Reply, ¶ 123 with particular reference to exhibit CL-0015; CC Rejoinder, ¶ 53.

443. The Claimants contend that the case law and doctrine mentioned by the Respondent in the Rejoinder do not support the Respondent's position that international arbitration standards should supersede national law on the matter of extension of arbitration clauses to non-signatories.<sup>271</sup> According to the Claimants, given that such authorities have different factual backgrounds from the present case and are misquoted by the Respondent, the latter's position is legally ungrounded.<sup>272</sup>
444. The international arbitration standards referred to by the Respondent would not permit the extension of the Tribunal's jurisdiction to the Remaining AP. The Respondent would have to prove that both the signatory and the non-signatory parties intended the Arbitration Agreements to bind also the non-signatories; knowledge of the existence of such agreements would not be enough.<sup>273</sup>
445. In any event, if the applicable law prohibits the extension of the arbitration agreement to non-signatories, as is the case under Maltese law, that determination is conclusive.<sup>274</sup> None of the legal grounds advanced by the Respondent to support the Tribunal's jurisdiction over the Remaining AP would be valid under Maltese law, which exclusively governs the question of whether the arbitration agreement can be extended.<sup>275</sup>
446. Under Maltese law, consent to arbitrate must be in writing and cannot be derived from conduct or circumstances, *i.e.*, cannot be implied.<sup>276</sup> Contrary to what the Respondent asserts, the consistent doctrine and case law of the Maltese Court of Appeal confirms that Maltese law does not permit the implicit extension of arbitration agreements to non-signatories.<sup>277</sup>
447. In any event, when the Arbitration Agreements were signed with VHG, "*the Steward Group was completely unconnected to the Concession.*" Besides, the Remaining AP have not expressly ratified the Arbitration Agreements and/or requested to join this arbitration.<sup>278</sup>
448. Furthermore, the Respondent's reliance on the doctrine of "*corporate-veil piercing*" is of no assistance either, not the least since as a matter of Maltese law, it requires fraud, which, as confirmed by Delia II, is absent in the present case.<sup>279</sup>
449. The latter doctrine only applies: (i) when a company engages in wrongful or fraudulent trading pursuant to the Maltese Companies Act and to prevent shareholders from hiding behind the

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<sup>271</sup> CC Rejoinder, ¶ 54; C-PHB, ¶ 35.

<sup>272</sup> CC Rejoinder, ¶¶ 54-55.

<sup>273</sup> Reply, ¶ 136.

<sup>274</sup> Reply, ¶ 125, ¶¶ 132, 133.

<sup>275</sup> SoC, ¶¶ 153-154; CC Rejoinder, ¶ 53; C-PHB, ¶ 35.

<sup>276</sup> SoC, ¶¶ 155-156; Reply, ¶¶ 126-127; CC Rejoinder, ¶ 57.

<sup>277</sup> CC Rejoinder, ¶¶ 57-63.

<sup>278</sup> Reply, ¶ 130.

<sup>279</sup> Reply, ¶ 131.

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company's corporate personality; or (ii) in cases of proven fraudulent conduct.<sup>280</sup> To the contrary, it does not apply to extend the applicability of an arbitration clause to non-signatories.<sup>281</sup>

450. The Claimants submit that, even if the Respondent's allegation of "*fraud*" - specifically regarding an alleged misrepresentation of the financial capacity of the Steward Group - were true, which the Claimants deny, such alleged fraud would be relevant only for tort liability, but would not impact the extension of the Arbitration Agreements to the Remaining AP.<sup>282</sup>
451. Besides, the Respondent's fraud allegation relates to an alleged misrepresentation of the financial capabilities of the Steward Group while negotiating the takeover of the Concession but does not concern the corporate structure itself.<sup>283</sup> The distinct role of the Claimants and the Remaining AP was clear and even acknowledged by the GoM. Moreover, "*most of the Additional Parties do not actually control the Claimants*" and the AP 4 and 5 "*are not even part of the same corporate structure.*"<sup>284</sup>
452. Finally, even if one were to accept that the theories on which the Respondent relies apply as part of the international arbitration standards and trump the Maltese governing law, which they do not, they constitute an insufficient basis for extending the Arbitration Agreements.
453. *First*, regarding implied consent, the Respondent is wrong to invoke implied consent both as a matter of international standards and on the facts.
454. On the one hand, the Remaining AP were not involved in negotiating or executing the Transaction Agreements, as these were finalized by Vitals in 2015 - prior to their acquisition by the Steward Group.<sup>285</sup> They further reject the Respondent's assertion that the Remaining AP later became implicitly bound by the Arbitration Agreements through their participation in the Concession's performance. In the Claimants' view, the Remaining AP's services and actions were limited to ancillary roles governed by specific contractual arrangements and did not evidence any explicit intention by the Remaining AP to be bound by the Arbitration Agreements.<sup>286</sup>
455. On the other hand, the Remaining AP's conduct following the dispute does not demonstrate either implied consent to the Arbitration Agreements. Indeed, even in legal systems that acknowledge implied consent as a basis for extending arbitration clauses to non-signatories, post-dispute

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<sup>280</sup> Reply, ¶ 149; SoC, ¶ 159.

<sup>281</sup> Reply, ¶ 131; CC Rejoinder, ¶ 62; C-PHB, ¶ 34.

<sup>282</sup> Reply, ¶¶ 150-152.

<sup>283</sup> Reply, ¶ 152.

<sup>284</sup> Reply, ¶ 153.

<sup>285</sup> Reply, ¶ 137.

<sup>286</sup> Reply, ¶¶ 139-141.

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- behavior is only relevant where the non-signatory invokes affirmatively the arbitration clause or fails to object when it is invoked against it, neither of which occurred in this instance.<sup>287</sup>
456. Furthermore, the Claimants emphasize that all termination-related correspondence was always issued solely on their behalf and that the Respondent directed its communications exclusively to the Claimants.
457. The funding of the arbitration by AP 2 would also be irrelevant to determine an extension of the Arbitration Agreements to it.<sup>288</sup>
458. Likewise, even in legal systems where estoppel could be relevant to the personal scope of an arbitration agreement, the doctrine of estoppel could not be relied upon to extend arbitration agreements to non-signatories, as Respondent has not proven that the legal prerequisites of such doctrine are met in the present case.<sup>289</sup> Indeed, the distinct conduct and the distinct legal personality of the Remaining AP were documented transparently and there is no evidence on record of the Remaining AP's intention to be bound by the Arbitration Agreements. Besides, the benefits received by the Remaining AP were merely indirect, which arguably excludes the application of the estoppel doctrine.<sup>290</sup>
459. *Second*, regarding the piercing of the corporate veil, the Respondent is equally wrong to rely on that doctrine as part of international arbitration standards; even if such doctrine existed, it could not override Maltese law, which rejects veil-piercing to extend an arbitration agreement to a non-signatory.<sup>291</sup> In any event, any veil-piercing would require fraud or other serious misconduct, where the non-signatory misused corporate structures for fraudulent purposes or to evade legal obligations, which in any event has not happened here, as noted above (¶ 448).
460. The Claimants also reject the accusations related to the confusion created by the organization and structure of the Steward entities, as the complexity of the organization is allegedly in line with standard practice.<sup>292</sup>

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<sup>287</sup> Reply, ¶ 143; CC Rejoinder, ¶ 70.

<sup>288</sup> Reply, ¶¶ 144-147 with particular reference to exhibits C-0019, C-0021, C-0023, p. 2, C-0027, C-0028 and R-0004.

<sup>289</sup> CC Rejoinder, ¶ 65.

<sup>290</sup> CC Rejoinder, ¶¶ 66-69.

<sup>291</sup> Reply, ¶¶ 149-151 and above at ¶¶ 448 *et seq.*

<sup>292</sup> Reply, ¶¶ 153-154. CC Rejoinder, ¶ 71.

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461. Finally, the Respondent's possible suffering of detrimental consequences in case the Remaining AP are not made parties to this arbitration has no relevance on whether to extend or not the Arbitration Agreement to the Remaining AP.<sup>293</sup>
462. *Third*, regarding EU State aid law, the Respondent's belief that EU State aid law could result in binding non-signatories to an arbitration agreement is mistaken.
463. EU law is silent on the extension of arbitration agreements to non-signatories, which remains a matter of the applicable national law. Article 108(3) TFEU cannot be a basis for extending an arbitration agreement to non-signatories. That provision concerns liability and recovery of unlawful aid; it does not regulate in any manner the extension of arbitration agreements to non-signatories.<sup>294</sup>
464. The Respondent's argument, that unless the Remaining AP are bound by the Arbitration Agreements, Malta's public order will be violated as the Respondent would be unable to recover unlawful State aid in violation of Article 4(3) TEU and Article 108(3) TFEU, lacks merit. Compelling non-signatories to arbitrate would constitute a disproportionate measure, infringing on freedom of contract and due process without justification. There is no evidence that the Claimants would be unable to reimburse any allegedly unlawful State aid, and nothing prevents the Respondent from seeking redress against the Remaining AP before the appropriate courts.<sup>295</sup>
465. Furthermore, the Respondent's allegation that the Claimants and the Remaining AP do constitute a "*single economic unit*" as regards EU State aid law is not only erroneous, but also irrelevant for the question of jurisdiction. In any event, the Respondent has provided no evidence to support the argument that the Remaining AP were part of a single economic unit.<sup>296</sup>
466. The "*single economic unit*" concept is a question of liability and thus of substantive law and does not relate to jurisdictional matters such as extension of an arbitration agreement to non-signatories, which necessarily precedes any substantive law analysis.<sup>297</sup> According to the Claimants, the CJEU's case law mentioned by the Respondent and its expert Mr. Quigley does not address the concept of single economic unit and, in any event, is based on the European Commission having already affirmed its jurisdiction and having determined the existence of unlawful State aid.<sup>298</sup>
467. For all the above reasons, the Claimants and the Remaining AP refute the Tribunal's jurisdiction over the Remaining AP.

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<sup>293</sup> SoC, ¶ 161; Reply, ¶ 155.

<sup>294</sup> Rejoinder, ¶¶ 156 *et seq.*; CC Rejoinder, ¶¶ 76-78.

<sup>295</sup> Reply, ¶ 159.

<sup>296</sup> SoC, ¶ 158; Reply, ¶ 162.

<sup>297</sup> Reply, ¶¶ 160-163; CC Rejoinder, ¶¶ 77-78.

<sup>298</sup> CC Rejoinder, ¶ 79; CEX-7, ¶¶ 27-29; exhibit QL-0064, ¶¶ 2, 10, 16 and 46.

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### 3. The Tribunal's analysis

468. It is undisputed that none of the Remaining AP has signed any of the Transaction Agreements and that they have at no point invoked the benefit of the Arbitration Agreements.
469. As observed by a learned author, “[t]he extent to which non-signatories may be bound or benefited by an arbitration agreement is among the most delicate and complex issues in international commercial arbitration”<sup>299</sup> and the Parties’ extensive submissions on these issues seems to confirm that view.
470. As the Parties disagree on the law governing the issue of non-signatory parties of arbitration agreements, the Tribunal shall first determine which rules apply in that respect. The first possibility would be to decide this issue exclusively based on the law applicable to the Arbitration Agreements, *i.e.*, Maltese law, as argued by the Claimants.<sup>300</sup> An alternative approach, advocated by Respondent, would be to consider international arbitration standards *in lieu* of, or in addition to, national law.<sup>301</sup>
471. The Tribunal notes that the dispute is governed by Maltese law on the substance. As some learned authors from Malta stated, “[t]ypically, the arbitration agreement will be deemed to be governed by the law of contract.”<sup>302</sup> Considering the specific wording of the governing law clause in the Concession, the Tribunal shares this view in the present case.
472. Article 41(1) of the SCA states: “Any dispute, controversy or claim arising out of or relating to this Agreement, or any of the Transaction Agreements, or the breach, termination or invalidity thereof, shall be governed by the laws of the Republic of Malta.” (Emphasis added).
473. In the view of the Tribunal, the wording of this clause, which specifically refers to disputes, controversies or claims arising out of or relating to the Concession, and Related Instruments, is a clear indication that the Parties wanted the Arbitration Agreements to be governed by Maltese law.<sup>303</sup>
474. The Tribunal further observes that the Respondent has not advocated for the application of a different law, except to argue that international arbitration standards apply as well, or *in lieu* of Maltese law.

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<sup>299</sup> G. Born, International Commercial Arbitration (3rd edition, 2024), Chapter 10: Parties to International Arbitration Agreements, exhibit, **RL-0026**, p. 2.

<sup>300</sup> SoC, ¶¶ 153-154; CC Rejoinder, ¶ 53.

<sup>301</sup> SoD&C, ¶¶ 238-241; Rejoinder, ¶¶ 159-170.

<sup>302</sup> A. Cremona, L. C. Pullicino and C. Mifsud-Bonnici, “Malta”, in Chambers International Arbitration Global Practice Guide (2024), exhibit **CL-0105**, ¶ 3.3, p. 8.

<sup>303</sup> Clause 23 of the HSDA provides for the application *mutatis mutandis* of the SCA governing law clause, **C-0002**. Similarly, Clause 13.1 of the LSA stipulates: “Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be governed by the substantive laws of the Republic of Malta,” **C-0005**. (Emphasis added).



475. Maltese law is not only the contractually agreed governing law, but also the law of the seat of arbitration, making the issue of determining the applicable law to the Arbitration Agreements somehow redundant.
476. To be enforceable at the seat, the award will have to comply with Article V of the 1958 New York Convention, which provides, *inter alia*, the following:
- “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
- (a) (...) the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; (...).”* (Emphasis added).
477. The issue of extension of arbitration clauses to non-signatories pertains to the validity of the arbitral consent and is therefore important for ensuring the enforceability of the award. Indeed, Article V 1. (a) of the New York Convention provides that recognition and enforcement of an award may be refused if the arbitration agreement is not valid under the law to which the parties have subjected it, or under the law of the seat.
478. Thus, in the present case, the Arbitral Tribunal finds it appropriate to base its decision on Maltese law. In fact, the majority of legal authorities relied on by the Parties recognize that the law governing the arbitration clause or, the law of the seat, should govern jurisdictional matters, including the binding of non-signatories to arbitration agreement.<sup>304</sup>
479. Malta being the place of arbitration, the Tribunal fails to see on what basis it could or should apply international arbitration standards, were they to exist in this field, *in lieu* of the applicable law to the Arbitration Agreements.<sup>305</sup>
480. Likewise, while pursuant to Article 21(2) of the ICC Rules the Tribunal must consider “*relevant trade usages*,” as noted by Respondent,<sup>306</sup> the Tribunal has not been made aware of trade usages in that field.<sup>307</sup>

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<sup>304</sup> See legal authorities filed with exhibits **CL-0077**; **CL-0085**; **CL-0096**; **CL-0098**; **RL-0099**.

<sup>305</sup> In the ICC Case No. 8385 exhibit **RL-0028**, on which Respondent relies, SoD&C, ¶ 240, the sole arbitrator sitting in New York considered it preferable to apply the *lex mercatoria* to the issue whether the corporate veil of the non-signatory parent company could be lifted, although he considered that under the laws of Belgium and that of New York, he would have arrived at the same result. As noted by Claimants, this seems to be the only ICC award that took this view, which the Tribunal finds interesting, but not compelling; see Reply ¶¶ 121-122. The ICC Cases No. 2375 of 1975 and no 5739 of 1988 add nothing to that discussion, exhibits **RL-0100** and **RL-0101**.

<sup>306</sup> Rejoinder, ¶ 161.

<sup>307</sup> While K. Youssef, *The Limits of Consent: The Right or Obligation to Arbitrate of Non-Signatories in Groups of Companies, Multiparty Arbitration - Institute Dossier VII* (2010), exhibit **RL-0097**, p. 29 opined that “[f]undamentally, decision-makers should not forget that consent remains, and is likely to

481. The Arbitral Tribunal has carefully considered the authorities relied upon by the Respondent in support of its position that international arbitration standards should apply but finds neither of them conclusive.
482. The Tribunal has considered Professor Brekoulakis's article, which analyzes the efficacy of current arbitration law on the matter of extension of arbitration agreement to non-signatories and proposes that in order to assess whether non-signatories have rights or obligations in arbitration the departure point should be shifted from the concept of consent to the concept of dispute. Nonetheless, the author concedes that in principle, *national law* governs assessing the extension of arbitration agreements to non-signatories, while international standards on such matters are still developing.<sup>308</sup>
483. The Respondent relies on ICC Case No. 9873 to argue that national law may be ignored when determining jurisdiction over non-signatory parties.<sup>309</sup>
484. *First*, it is not apparent from the interim award of ICC Case No. 9873 if in that case there was any conflict between the law of the seat (*i.e.*, Paris) and international arbitration standards.
485. *Second*, the tribunal in that ICC case referred in its award to "*the principle that an arbitration agreement can only be binding on the parties if each of them has given its specific consent, and thus to extend the effect of the arbitration agreement signed by the parent company to its subsidiaries.*" It discussed with reference to established arbitral doctrine and case law (for which only two French treatises were cited), "*the mere fact that the [subsidiary] is part of a group of companies of which the [defendant] is the parent company does not, in itself, constitute a sufficient circumstance to lift the veil of [the subsidiary's] own legal personality*" and considered that circumstance in itself not to be sufficient to derogate from the aforementioned principle. It also noted that "*in addition, there must be specific circumstances which demonstrate that there is an unambiguous, at least implicit, willingness on the part of the subsidiary to adhere to the method of dispute resolution chosen by the parent company; whereas such a willingness may result from an active intervention by the subsidiary during the negotiation, performance or termination of the basic contract containing the arbitration clause,*" to conclude that such circumstances did not exist in the present case. The same applies to the case at hand, as will be discussed below (¶¶ 501 *et seq.*).
486. The Tribunal moves on to determine whether and under which circumstances non-signatory parties may be bound by arbitration agreements under Maltese law. The Tribunal finds as follows:

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*remain, the default rule in assessing jurisdiction, even though practice permits the usage of a number of approaches, criteria and norms that are less or even non-consensual,"* his conclusions are from indicating a trade usage in that respect.

<sup>308</sup> Exhibit **RL-0093**, p. 33.

<sup>309</sup> Exhibit **RL-0094**.

487. Article 2 of the Maltese Arbitration Act defines arbitration agreements by following the terms of Article 7 of the UNCITRAL Model Law on International Commercial Arbitration:

*“(1) ‘‘Arbitration agreement’’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*

*(2) The arbitration agreement shall be in writing. (...).’’<sup>310</sup>*

488. For the Claimants, it follows from the writing requirement under Maltese arbitration law that consent to arbitration must be in writing.

489. In a partial award rendered in Buenos Aires in 2016 in ICC Case No. 20674, an arbitral tribunal addressed the claimant’s argument that implicit consent allows the extension of the arbitration clause to a non-signatory as follows: *“Claimant’s arguments on the admissibility of the extension of the arbitration clause to non-signatory third parties- through implicit consent or consent derived from the conduct of third parties (estoppel) are, according to the Arbitral Tribunal, clearly limited by section 1650 of the Civil and Commercial Code of the Nation, which prescribes that the arbitration agreement must be in writing.”<sup>311</sup>*

490. The Maltese courts seem to take a similar position because of the writing requirement. Thus, in *Simon Tortell*, the Maltese Court of Appeal held in 2010 that *“(...) because, while the other defendants, not parties to the arbitration agreement, have pleaded the lack of jurisdiction of this Court, they have in no way declared that they are formally acceding to the arbitration agreement,”<sup>312</sup>* thereby suggesting that written evidence of an agreement to be bound by the arbitration clause was required.

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<sup>310</sup> Chapter 387, Arbitration Act, Exhibit **CL-0018**. (Emphasis added)

<sup>311</sup> ICC Case No. 20674, Alfredo Carlos Pott v. (1) World Capital Properties Ltd., (2) Patagonia Financial Holdings LLC, (3) Gonzalo López Jordán, and (4) Santiago Steed, Partial Award, exhibit **CL-0085**, ¶ 201. The same arbitral tribunal also considered at ¶¶ 219, 220 *“that the formal requirement of Argentine law that the arbitration agreement must be in writing does not prevent the extension of the arbitration clause to the non-signatory parties under section 54 of the LCC. In the present case, the arbitration clause is expressed in the SOA and the alleged extension of such clause to non-signatory parties will be the consequence, not of an agreement or consent, but of a regulatory requirement prescribed by Law of Commercial Companies No. 19.550. Therefore, the contractual obligations contained in a contract, including the obligations arising from the arbitration clause, may be attributed to those individuals, who, in their capacity as controlling parties of the company, executed a fraudulent maneuver resorting to the creation and / or use of various companies with the purpose of violating the contractual obligations of one of the contracting parties.”*

<sup>312</sup> Malta Court of Appeal, *Simon Tortell e v. G.S. Specialist Vehicles Ltd* 26 March 2010, exhibit **CL-0009**, p. 24; the fact that the arbitration clause may have been vague in this case, was not a controlling factor for the court’s decision, contrary to what Respondent asserts, SoD&C, ¶ 260.

491. Shortly thereafter in 2010, the Maltese Court of Appeal held in *Susan M. Waite* that “(...) any agreement to submit disputes to arbitration requires *ad validitatem* the written consent of the parties (...).”<sup>313</sup>
492. In a more recent decision, the First Hall of the Civil Court opined as follows: “*It is a principle of law that when an agreement is drawn up in writing, the content of the same agreement must be apparent from the same wording, rather than from the discussions and how they have taken place. It is presumed that what the parties have agreed has been recorded in writing, and what is discussed but does not result from the writing, is deemed either not to have been agreed or has been waived.*”<sup>314</sup>
493. Hence, in a recent publication of three learned practitioners from Malta, it is stated that “[a]n arbitration agreement applies only to the parties that have signed the arbitration agreement, and the arbitral tribunal may not assume jurisdiction over persons who are not party to an arbitration agreement. This is so even in connection with other group entities in the context of a group of companies or in the case of subcontractors in the same project (...).”<sup>315</sup>
494. It is, however, debatable whether the writing requirement as such excludes a non-signatory from being bound to an arbitration agreement by implied consent, or through some other factors, such as the piercing of corporate veil.<sup>316</sup>
495. The Tribunal is not persuaded that the writing requirement under Maltese arbitration law categorically prevents a non-signatory from being bound by an arbitration agreement. The authors of the aforementioned publication explain their position as follows: “*Under Maltese law, arbitration is recognized as a consensual process and, therefore, contracts between two parties are in principle considered to be res inter alios acta with respect to third parties. This doctrine finds application in numerous cases decided by the Superior Courts.*”
496. While consent is key indeed, it is a shortcut to suggest that a non-signatory party can never be bound by an arbitration agreement. As stated by one learned author,

*“[f]or the most part, authorities are agreed that consent is the essential foundation for ascertaining whether a particular entity has the status of a party to an arbitration agreement. Whatever legal construct is utilized, the beginning and ending question is ordinarily whether the parties, with their words and actions considered objectively and on*

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<sup>313</sup> Malta Court of Appeal, *Susan M. Waite v. Peter B Lloyd u Deborah Marshall Warren*, 28 May 2010, exhibit **CL-0021**, pp.14-15.

<sup>314</sup> First Hall of the Civil Court, *ARMS v. A & B Marine Services*, 3 July 2023, exhibit **CL-0062**, p. 2 of English translation.

<sup>315</sup> Cremona, L. C. Pullicino and C. Mifsud-Bonnici, “Malta”, in *Chambers International Arbitration Global Practice Guide* (2024), exhibit **CL-0105**, ¶ 5.7, p. 14.

<sup>316</sup> See in that respect, ICC Case No. 20674, above at ¶¶ 4899 *et seq.*

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*the basis of good faith in commercial relations, intended that a particular entity be a party to the arbitration clause.”*<sup>317</sup>

497. The same author opined that “*there is little justification for extending these requirements beyond their role with regard to the initial formation of arbitration agreements,*” to conclude that “*the form requirements of the New York Convention and national arbitration legislation apply only to the initial agreement to arbitrate and not to legal bases for subjecting parties, that are by definition “non-signatories,” to that agreement.*”<sup>318</sup>
498. The Tribunal concurs with this view. However, in the present case, it is not necessary to resolve this issue definitively. Regardless of the approach the Tribunal adopts—whether under Maltese law or by applying international standards—the facts of the case do not meet the required threshold under any of these theories to hold the Remaining AP bound by the Arbitration Agreements.
499. There exists a variety of theories for subjecting non-signatories to arbitration agreements, in particular, (i) agency, (ii) *alter ego* and lifting the corporate veil, (iii) the “group of companies”, (iv), estoppel and (v) implied consent.<sup>319</sup>
500. The Respondent has primarily relied on implied consent and the lifting of the corporate veil, but also on the novel theory of an economic unit derived from EU State aid law.
501. With respect to implied consent, the Tribunal concurs with the view that determining the existence of such consent necessitates an evaluation of the specific factual circumstances of each case, particularly focusing on the non-signatory’s actions during the negotiation and/or performance of the contract.<sup>320</sup>
502. However, based on the facts of the present case, the Tribunal is not prepared to extend the Arbitration Agreements to the Remaining AP.
503. It is undisputed that the Remaining AP did not participate in negotiating the original Transaction Agreements and, as such, could not have given any form of consent. Although Dr. Armin Ernst may have been involved behind the scenes in 2015 and potentially acted as “*the mastermind behind Steward’s involvement,*”<sup>321</sup> his role was unknown to the Respondent at that time. Consequently, Dr.

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<sup>317</sup> G. Born, International Commercial Arbitration (3rd edition, 2024), Chapter 10: Parties to International Arbitration Agreements, exhibit **RL-0026**, p. 25.

<sup>318</sup> G. Born, *op. cit.*, exhibit **RL-0026**, p. 28; see also G. Born at exhibit **RL-0099**, p. 3.

<sup>319</sup> G. Born, *op. cit.*, exhibit **RL-0099**, p. 1; A. Sesin-Tabarelli, Extension of the Arbitration Agreement to Non-Signatories, 2017(4) ICC Ct. Bull., exhibit **RL-0098**.

<sup>320</sup> G. Born, exhibit **RL-0026**, p. 8 and Reply, N. 316 with further references.

<sup>321</sup> As contended by Respondent, see above at ¶ 16969; looking in particular at Dr. Ernst’ letter of August 2018, referred to above at ¶ 127, the argument sounds plausible, although it is of no avail for the decisions to be taken by the Tribunal.

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- Ernst's actions cannot be interpreted as implied consent by the Remaining AP. The specific nature of Dr. Ernst's involvement at that time is irrelevant.<sup>322</sup>
504. The Respondent's description of the Steward Group's role as the new shareholder of the Claimants, including its interactions with the GoM at the time, does not constitute implied consent.<sup>323</sup>
505. Throughout, the Claimants were single-purpose entities established for a specific project. It is common practice in such scenarios for shareholders and affiliated companies to offer financial support, as well as managerial, legal, or other assistance. The Tribunal, as a matter of principle, finds nothing objectionable in the Shared Services Agreement, which was entered into retroactively on 20 March 2019, between the former AP 4, the Claimants, and AP 1, relating to the services detailed in Annex A of that agreement.<sup>324</sup>
506. According to that agreement, neither the AP 4 nor its personnel (as defined therein) were to "*act or hold themselves out to third parties to be, a partner, employee, or agent of the Companies in the provision of the services under*" that agreement.<sup>325</sup>
507. Schedule 8 of the SCA provided for a comprehensive model of the Parent Company Guarantee to be given by Claimants' parent company under the SCA.
508. Rather than allowing for (ICC) arbitration, as foreseen in the SCA, Clause 16.1 of Schedule 8 calls for the jurisdiction of the Malta courts as follows: "*For the benefit of GoM, the Guarantor agrees that the Courts of Malta have jurisdiction to settle any disputes in connection herewith and accordingly submit to the jurisdiction of such Courts. (...)*" Clause 16.2 further stipulates: "*Nothing in this Guarantee limits the right of GoM to bring proceedings against the Guarantor in any other Court of competent jurisdiction or concurrently in more than one jurisdiction.*"

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<sup>322</sup> The Tribunal knows relatively little about that, except from some of the internal correspondence that transpired through the document production process. The first correspondence from Dr. Ernst to Mr. Shaukat goes back to 20 December 2016, exhibit **R-0188**; see also exhibits **R-0169**, **R-0170**, **R-0172**, **R-0188** to **R-0199**, **R-0204** and **R-0209**. But in any event, the Tribunal was not asked to make any findings in that respect.

<sup>323</sup> See above at ¶ 420.

<sup>324</sup> Exhibit **C-0275**. The Tribunal offers, however, no view regarding the retroactive character of that agreement, the amounts charged for the services to be rendered, and the reality of the services rendered.

<sup>325</sup> Exhibit **C-0275**, Clause 10. Besides, that agreement was governed by English law and provided for LCIA arbitration in case of disputes (see Clauses 19 and 20), which also goes against the suggestion that the AP 1 (or the AP 4, no longer a party to the arbitration) would have implicitly consented to arbitration under the Transaction Agreements.

509. This makes it particularly difficult to see how the GoM could have expected the Claimants' parent company to consent to arbitration under the SCA, be it because of its (alleged) involvement during the negotiations or the performance of the Transaction Agreements.
510. The Tribunal also finds it difficult to infer consent from the comfort letter issued by Steward Health Care International (*i.e.*, AP 1) on 15 February 2018, to the GoM. In the final paragraph of this letter, Steward confirmed "*that it would be able to finance its own obligations, and those of the Concessionaire companies under the Concession Agreements, through Steward group's resources and relationships.*"<sup>326</sup>
511. This rather general statement from the AP 1 does not suffice to demonstrate implicit consent to arbitration. Moreover, it cannot be extended to the AP 2 or AP 3 as evidence of their consent to arbitration.
512. Likewise, the Remaining AP's "*going concern*" undertaking in favor of the Claimants, which was first recorded in the 2018 Financial Statements of Claimant No 1,<sup>327</sup> is a standard measure for a corporate shareholder determined to ensure the continued operation of its subsidiaries. This should not be interpreted as indicating any intention on the part of the Remaining AP to be bound by the Arbitration Agreements contained in the Transaction Agreements.
513. The Tribunal was not made aware of any other conduct that, whether considered alone or in conjunction with other factors, could serve as a relevant indication of the Remaining AP's - or, indeed, any other Initial AP's - willingness to be bound by the Arbitration Agreements.
514. In particular, the Tribunal is not convinced by Respondent's repeated argument that the AP 2 covered the ICC cost advances, that the Emergency Arbitration and the present arbitration were led by AP 2 and that two if its representatives appeared at the Hearing "*as Steward's sole party representatives.*"<sup>328</sup>
515. Furthermore, the fact that the AP 2 requested to be joined to the Claimants' appeal against Delia I - and thereby indicated its interest in preventing the rescission of the Transaction Agreements - can be attributed to its status as "*beneficiary, on a subordinate basis, as a junior lender to [Claimant 1] of the collateral and all other guarantees enjoyed by the [BoV].*"<sup>329</sup> However, this involvement does not amount to a sufficient expression of consent to be bound by the Arbitration Agreements.<sup>330</sup>

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<sup>326</sup> Exhibit **R-0015**; see above at ¶ 42121.

<sup>327</sup> Exhibit **R-0047** (=R-0266), 2.7, p. 14; see above at R-OS, p. 39.

<sup>328</sup> R-PHB, ¶ 9; R-OS, p. 43; see above at ¶ 42121.

<sup>329</sup> Exhibit **C-0216**, ¶ 100.

<sup>330</sup> While the Tribunal accepts Claimants' further argument that all parties to the arbitration must have had the intention to be bound (see above at ¶ 44444), no finding in that respect is required.

516. Finally, when considering the response given by the GoM to the above-mentioned letter of the AP 2 dated December 2021, in which the State Advocate questioned the capacity of AP 2 to respond on behalf of the Claimants - (since the Initial AP “*does not appear to be related directly to the concession or the Concessionaire*”) - ,<sup>331</sup> it seems quite clear that the GoM did not consider that AP 2 (or for that purpose any other of the Initial AP) had become its contractual counterpart.
517. For the same reason, the Tribunal rejects the argument that the Arbitration Agreements can be extended to the Remaining AP on the basis of the doctrine of estoppel.
518. The Respondent’s reliance on case law concerning estoppel, which has, in certain instances, extended arbitration clauses to non-signatories who were unwilling to participate in arbitration but nonetheless received direct benefits under the contract, is similarly unpersuasive.<sup>332</sup> In this regard, the Tribunal observes that this doctrine is rarely applied to bind non-signatories to arbitration agreements.<sup>333</sup>
519. The Tribunal now turns briefly to the question of whether by applying the *alter ego* or piercing the corporate veil theory, the Remaining AP could be held to be bound by the Arbitration Agreements.
520. The Maltese court cases relied upon by the Respondent address the personal financial liability of individual directors for fraud rather than the issue of extension of arbitration agreements. The Respondent admits that Maltese law recognizes only a “*similar principle*” to the doctrine of piercing the corporate veil, suggesting it might be applicable to the extension of arbitration agreements.<sup>334</sup>
521. In any event, the Respondent’s reliance on the *alter ego* or piercing of corporate veil theory is unavailing in the present case. In general terms, the existence of an *alter ego* relationship requires that one party, *i.e.*, the non-signatory, dominated the actions of the contracting party or that it exercised its position to defraud a third party or to evade legal obligations.<sup>335</sup> Similarly, to disregard a company’s separate legal personality and hold its shareholders liable for the company’s acts, fraudulent conduct or evasion of legal obligations would have to exist.<sup>336</sup>

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<sup>331</sup> See above at ¶ 303.

<sup>332</sup> Rejoinder, ¶¶ 162-172; Exhibit **RL-0094**, **RL-0095**, pp. 253-360, **RL-0096**, p. 1417, **RL-0097**, p. 96, **RL-0098**, **RL-0099**, p. 117, **RL-0100** and **RL-0101**.

<sup>333</sup> A. Sesin-Tabarelli, Extension of the Arbitration Agreement to Non-Signatories, 2017(4) ICC Ct. Bull., p. 17, exhibit **RL-0098** at p. 19 regarding, in particular, civil law jurisdictions.

<sup>334</sup> SoD&C, ¶¶ 270.

<sup>335</sup> A. Sesin-Tabarelli, *op.cit.*, exhibit **RL-0098** at p. 19.

<sup>336</sup> Sébastien Besson, “Chapter 8. Piercing the Corporate Veil: Back on the Right Track”, in Bernard Hanotiau and Eric Schwartz (eds.), ICC Dossier No. 7: Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 7, 2010), exhibit **CL-0077**; A. Sesin-Tabarelli, *op.cit.*, exhibit **RL-0098** at p. 20.



522. Importantly, when dealing with single-purpose companies, non-recourse to the shareholders is typically done by design. In that regard, the RfP provided as follows: “*The Concessionaire will be required to set up (either directly or through a holding company) a special project company (“ConcessionCo”) incorporated in Malta, which would enter into the Concession Agreement.*”<sup>337</sup> (Emphasis added).
523. The RfP provided only for a first demand unconditional and irrevocable Performance Guarantee from a European prime bank in the amount of Euro 9M.<sup>338</sup> No other security, such as a parent company guarantee, was required.
524. The latter was, however, foreseen in the SCA. Its Clause 43.2 stipulated that “[t]he Parent Company Guarantee shall guarantee the performance of Concessionaire's obligations under this Agreement and shall indemnify GoM in case of the Concessionaire's non-performance.”
525. At the time of entering into the SCA, the Claimants’ parent company was Bluestone Special Situation 4 Limited, an offshore company in the British Virgin Islands.<sup>339</sup>
526. When the Steward Group took over the Concession in 2018, the parent company of Vitals became Steward Health Care International (Malta), *i.e.*, AP 1, which in turn was owned by AP 2, the latter being owned by AP 3.<sup>340</sup> The jurisdictional clause of the Parent Company Guarantee was not modified, and it seems that no attempt was made to change that clause and to provide for ICC arbitration, as in the Transaction Agreements. Whatever the reasons for that might have been, lack of experience of the drafters or their preference for the courts over arbitration in case of disputes under the Parent Company Guarantee, the Tribunal has difficulties in following the argument that the AP 1 could somehow have consented to be a party to an arbitration involving the Claimants.
527. Accordingly, it does not matter how the group organizes itself and how it allocates ancillary or support functions. While, as noted, there exist exceptions in particular in the case of fraud, none has been invoked here by Respondent as regards the time of Steward’s takeover of the Concession, or any time thereafter, and no such fraud has been shown to have been committed by the Remaining AP at the time of taking over the Claimants.

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<sup>337</sup> Exhibit C-0073, ¶ 2.13. The following paragraph, ¶ 2.13, goes on: “*For the purposes of this RFP, ConcessionCo is a collective description of the contracting entity assuming the responsibilities and obligations as will be defined in the Concession Agreement and in this RFP. It is not intended to preclude any multi structural legal arrangement of companies that ConcessionCo might comprise as members. (...).*”

<sup>338</sup> Exhibit C-0073, ¶ 2.21 - ¶ 2.25.

<sup>339</sup> SCA, exhibit C-0001, clause 1.1. (Definitions), p. 14.

<sup>340</sup> See above at ¶¶ 19494 *et seq.*

528. While it may well be that in its 16 February 2018 letter of comfort, the AP 1 may have overstated the financial capacity of the Steward Group,<sup>341</sup> this would in and by itself is not sufficient to justify an extension of the Arbitration Agreements to it, let alone to the remaining AP 2 and/or 3. The Concession was never modelled on the financial capacity of the Concessionaires' shareholder(s).
529. In any event, it can hardly be said that the GoM acted with much diligence when allowing the Steward Group to take over the Claimants, since it received neither a Performance Guarantee as foreseen in the SCA (Clause 14),<sup>342</sup> nor a Parent Company Guarantee (from AP 2), as also foreseen in the SCA (Clause 43).
530. Finally, the Tribunal now turns to Respondent's argument that the Arbitration Agreements should be extended to the Remaining AP on the basis that all Steward entities constitute a single economic unit for the purposes of EU competition and State aid law. Regardless of the Tribunal's findings on these issues (see below ¶¶ 7455 *et seq.*), the Tribunal observes that the existence of a single economic unit is not determinative for establishing arbitral jurisdiction.
531. The Respondent itself has taken the position that the "*extension of the recovery against the Additional Parties is not a procedural matter, but directly arises from the Tribunal's obligation to take all necessary steps to effectively order recovery of unlawful State Aid.*"<sup>343</sup> But even if arbitral tribunals would have such an obligation under EU law, it could not serve as a basis for establishing affirmative arbitral jurisdiction, which is inherently based on consent.
532. The Tribunal is not aware of, nor did the Parties refer to, any precedent or other authority that would suggest that jurisdiction of arbitral tribunals over non-signatory parties can be established based on provisions of EU competition and/or EU State aid law. While these laws are unquestionably part of Maltese law due to Malta's membership in the European Union, no authority has been cited to support such an extension of arbitral jurisdiction.<sup>344</sup>

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<sup>341</sup> Besides, the reference in that letter to the Steward group's annual revenue being approximately USD 8 billion is as such hardly a sign of the financial health and solidity of the group. Other financial indicators, such as its EBITDA, would have been more telling.

<sup>342</sup> As highlighted by the Respondent, in response to the Tribunal question ¶ 6 of the Q&M Memo, the letter of 1 June 2018 from Steward Health Care System LLC (formerly AP 4), to the GoM, referred to above at ¶ 280 (exhibit **R-0016**) did not meet the requirements of a Parent Company Guarantee. In fact, the letter was not meant to serve as an Euro 9M Performance Bond, but it also failed to satisfy the contractual criteria for such a bond. It was not issued by a bank, was valid for only a very short period, and "*was never extended or replaced,*" R-PHB, ¶ 19.

<sup>343</sup> Rejoinder, ¶ 312.

<sup>344</sup> The Tribunal finds Mr. Quigley's reference to the alleged direct effect of Article 108(3) TFEU to be an insufficient basis to establish jurisdiction over the Remaining AP, REX-8, ¶¶ 59-66.

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533. As a last point, the Tribunal acknowledges the Respondent's position that it may suffer considerable prejudice if the Tribunal does not extend this arbitration to the Remaining AP.
534. However, had the Respondent ever wished to secure the possibility of commencing arbitration against the AP, it could have done so by requesting that they execute appropriate instruments providing for their adherence to the Arbitration Agreements. Leaving aside whether the AP would have accepted such adhesion, nothing in the record suggests that the GoM ever requested it.
535. Accordingly, the consequences of this situation rest with the GoM.
536. Nonetheless, this does not prevent the GoM from initiating proceedings before the competent courts, also under EU State aid law, against the Remaining AP, should it consider such action necessary or appropriate for any claims it believes it may have against any of them.
537. In view of the foregoing considerations, the Tribunal concludes and determines that it lacks jurisdiction over the Remaining AP.

## VI. THE MERITS OF CLAIMANTS' CONTRACTUAL CLAIMS

### A. PRELIMINARY OBSERVATIONS

538. Claimants seek declaratory and monetary relief, which are premised on the assumption that Claimants have validly terminated the Transaction Agreements and that Respondent was in breach of the Concession, the HSDA and the LSA.
539. On this basis, the Claimants are pursuing, as their primary case, three separate claims for compensation, the first arising under the SCA for the payment of Euro 129,987,842 (plus interest),<sup>345</sup> the second arising out of the LSA for the payment of Euro 24,127,009 (plus interest) as outstanding amounts due thereunder,<sup>346</sup> and a third one for the payment of Euro 1,869,012 as damages for Respondent's breaches of post-termination obligations (the "**Claimants' Contractual Claims**").<sup>347</sup>
540. Respondent's primary defense against Claimants' Contractual Claims is based on its position that Delia II rescinded the Transaction Agreements with effect *ex tunc* and requires the Parties to be restored to their original position. Respondent argues *alternatively* that the Concession, the HSDA and the LSA constitute unlawful State aid and therefore are null and void by virtue of EU and

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<sup>345</sup> Claimants' RfR as set forth in Reply, ¶ 506 (e) and supra at ¶ 3811.

<sup>346</sup> Claimants' RfR as set forth in Reply, ¶ 506 (f) and supra at ¶ 3811.

<sup>347</sup> Claimants' RfR as set forth in Reply, ¶ 506 (g) and supra at ¶ 3811.

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Maltese law. Respondent's first defense will be referred to as the "**Delia II Defense**" and its second defense as the "**State Aid Defense**."

541. The Delia II Defense, and alternatively the State Aid Defense, are advanced by Respondent in two respects: *On the one hand*, these defenses serve to justify the absence of any contractual liability towards Claimants and on that basis, to reject Claimants' Contractual Claims. *On the other hand*, they serve as the basis for Respondent's claims to have the Parties restored back to the condition they would have been in had the Transaction Agreements never been concluded.
542. Therefore, regarding both defenses, the Arbitral Tribunal will under the two following sub-sections first present Respondent's position (1.), and then that of Claimants (2.) before discussing them (3.).
543. Only if Respondent were to be successful with either the Delia II Defense or the State Aid Defense, will the Tribunal have to deal with the financial aspects resulting therefrom, since Respondent uses both defenses, albeit alternatively, as the basis for its counterclaims. Thus, only if and to the extent necessary, the Arbitral Tribunal will address the quantum of Respondent's claims following from the Delia II Defense or State Aid Defense.

## **B. THE RESPONDENT'S DELIA II DEFENSE**

544. In this Sub-section, we will address the relevance and impact of the Delia Judgments, on which the Parties have divergent views. In a nutshell, and as will be discussed in more detail below, the Parties' position is as follows:
545. The Respondent argues that Delia II resulted in the rescission of the Transaction Agreements, as a result of which the Parties must be restored to their original position. Respondent's Delia II Defense trumps all its other claims as well as Claimants' contractual claims. It is only if the Delia II Defense fails that Respondent's other claims will have to be considered.
546. The Claimant in turn considers Delia II to be irrelevant for the dispute but argues that Delia I constituted a "*Non-Rectifiable GoM event of Default*" under the Concession, which therefore justified its Termination Notice. The latter argument will only be relevant if the Delia II Defense fails and will then have to be discussed in the context of the Claimants' Termination Notice.

### **1. The position of the Respondent**

547. The Respondent's primary position in this arbitration is that the Transaction Agreements are null and void by virtue of the Delia Judgments.<sup>348</sup>

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<sup>348</sup> Rejoinder, Section VI. on pp. 58 *et seq.*

548. It is useful to begin by outlining the Respondent’s position regarding the Delia Judgments and why it argues, in reliance on the opinion of its Maltese law expert, Dr. Zammit Pace, that the declaration of annulment and rescission found in the operative part of Delia I must have *ex tunc* effect on the Transaction Agreements. According to the Respondent, this requires that the Parties be restored to the *status quo ante*, as if the contracts had never been executed.
549. Thereafter, the Tribunal will describe the Respondent’s case on why the Delia Judgments are binding on the Tribunal under applicable principles of *res judicata*.
550. The Respondent argues that the declarations of annulment and rescission in the operative parts of the Delia Judgments were based upon Articles 33 and 31 of the Government Land Act (the “GLA”),<sup>349</sup> which regulates the disposal of Government land. Delia I grounded its decision specifically on Article 33(1) of the GLA, pursuant to which “[a]ny disposal of land, to which article 31 applies, which was disposed of differently from the provisions of that article, shall be null and void.”<sup>350</sup>
551. In reliance on Dr. Zammit Pace’s expert report, the Respondent argues that the nullity provided for in Article 33(1) of the GLA “is a nullity expressly imposed by law” as per Article 1212 MCC. As is clear from Delia II, the “contract lacks a genuine legal basis that would have made it valid under article 31 [of the GLA].”<sup>351</sup>
552. For the Respondent, the relevant provision in this case is Article 31(g) (C)(i)(b), which provides that
- “(C) Transfer by title of temporary emphyteusis:
- (i) Government land may be transferred by title of temporary emphyteusis:
- (b) if it consists in land which is offered for an industrial project after applicant would have satisfied the competent authority about the benefit which the project would render to the country’s economy and that it would create an adequate number of jobs.”
553. The Civil Court and the Court of Appeal both held that the Deed and the Related Instruments were to be treated as one agreement (“*quid unum*”) because “they were intended for the same purposes and represent the same agreement although divided into several instruments for reasons of practicality.”<sup>352</sup> According to the Respondent, this conclusion meant that any finding that the disposal of land (under the Deed) was null and void under Article 33 also meant by extension

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<sup>349</sup> Exhibit **RL-0001 (=RZP-048)**, GLA, Chapter 573 of the Laws of Malta.

<sup>350</sup> Rejoinder, ¶¶ 213 *et seq.*

<sup>351</sup> Rejoinder, ¶¶ 218, 219 with further references.

<sup>352</sup> Exhibit **C-0216**, ¶ 57; **REX-5**, ¶¶ 54(1), 66; **REX-7**, ¶ 105(i).

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(*mutatis mutandis*) that the related agreements were to be treated as null and void, even though the language of Article 33 of the GLA refers only to land.

554. The Respondent relies upon ¶ 71 of Delia II, where the Court of Appeal identified the declarations contained in Clause 2.2 of the Deed as setting out the basis for the Concession's compliance with Article 31(g) (C)(i)(b) of the GLA. The wording of Clause 2.2 of the Deed closely mirrors the language of the sub-section, when it stipulates:

*“Clause 2.2. The Grantor declares that the Grantee has satisfied the Government about the benefit which the project, being an industrial project within the healthcare industry, and which comprises the redevelopment and maintenance of the sites by the Grantee and the use of the sites by the Concessionaire for healthcare and ancillary services, will render to the country's economy, including but not limited to the creation of an adequate number of jobs.”*<sup>353</sup>

555. The Respondent further relies upon ¶ 72 of Delia II, in which the Court of Appeal stated:

*“This [i.e., Clause 2.2 of the Deed] would have been a good legal basis for the contract to be validly undertaken, provided it was actually true. It has been seen, however, that there had been an ulterior motive behind the contract, and what was said about its legal basis is the fruit of simulation and collusion. This means that the contract lacks a genuine legal basis that would have made it valid under article 31 of Chapter 573, and this gives locus standing to the plaintiff, as a member of the First House of Representatives at the time of the application before the First Hall of the Civil Court to request to enforce the contract under article 33(2) because it is within the duties of a member of the House of Representatives and within the Power of the Court to cancel a contract such as the one in question when it is shown that it was undertaken for ulterior purposes and not for the good of the country.”*<sup>354</sup>

556. For the Respondent, the Court of Appeal relied upon the finding of collusion and simulation as the basis for the finding that there had been a breach of Article 31 of the GLA.<sup>355</sup>
557. The Respondent also relies in this regard upon findings as to “*collusion*” and “*simulation*” made by the Court of Appeal in ¶¶ 18 and 67 of Delia II concerning the circumstances of the granting of the concession and its subsequent performance.
558. In these paragraphs, the Court of Appeal disagreed with the Civil Court's finding in Delia I that the Concession had been procured because of the fraudulent deception of the GoM by the bidders (*i.e.*, Vitals), which induced the GoM to enter the Concession. Instead, the Court of Appeal advanced a

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<sup>353</sup> Zammit Pace, PTT, p. 16.

<sup>354</sup> Rejoinder, ¶ 219.

<sup>355</sup> REX-7, ¶¶ 142-145.

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different theory and found that the parties had colluded together to enter “*simulated*” contracts which were not intended to provide for a quality medical service but were for an ulterior purpose.<sup>356</sup>

559. In the view of the Respondent, the Court of Appeal also agreed with the Civil Court’s findings that there had been a breach of contractual performance by the Claimants, for example, by the failure to meet contractual milestones.

560. However, according to Respondent, the Court of Appeal went further and relied upon such breaches of contract (and the GoM’s failed response thereto) in order to support its theory that there had been (continuing) collusion between the parties which provided a further basis for its finding that the Concession lacked a genuine legal basis that would have made it valid under Article 31(1)(g) (C)(i)(b) of the GLA.

561. The Respondent relies on ¶ 67 of Delia II:

*“It has been noted that the concession to the appellant companies was given not as a result of deception from one of the parties, but as a result of the collusion between the two parties, which occurred not only when the appellant companies were selected as the preferred bidder after being given access to privileged information, and that the concession was granted when it was already known that it was not feasible, but also when the agreement was supposed to have been carried out and, though nothing was done in regard to this, those were supposed to be under a duty to protect the interests of the country, instead of protecting those interests, gave one extension of time after another, so that they would not reveal that the agreement was merely a façade and not truly “the real deal” and continued to pay millions of euros to the appellant companies even though they had not been fulfilling their obligations.”*

562. The Respondent argues that the breaches of contract findings by themselves were not the basis for the declarations of rescission and annulment made by the Court of Appeal. They were rather used by the Court of Appeal in support of its further finding that there had been a breach of Articles 33(1) and 31 of the GLA, because they demonstrated that there were on-going collusion and simulation as described in ¶¶ 67 and 72 of Delia II. The Respondent then asserts that it was these breaches of the GLA that were the basis of the declarations of annulment and rescission.

563. Turning to the consequences of the declarations of annulment and rescission made in Delia I and II, the Respondent relies upon Article 1212 MCC, which provides for a two-limb test as follows:

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<sup>356</sup> Exhibit C-0216, ¶ 18: “*In the opinion of this court, the events of the story do not show deception by one party and ingenuity from the other, as the First Hall believed, but collusion between the appellant companies and high level representatives of the Government or its agencies which led to the signing of simulated contracts not intended to provide a quality medical service but for ulterior motives.*”

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*“Any agreement which is defective by reason of the absence of any of the conditions essential to the validity of contracts, or which is expressly declared by law to be null, shall be subject to rescission.”*<sup>357</sup>

564. Respondent argues that the consequences of rescission are governed by the second limb of Article 1212, since this is a case where the relevant Agreements have been declared by law to be null. The Respondent then says the effect of rescission on the basis of Article 1212 must be dealt with by Article 1209(1) MCC.
565. For the Respondent, Article 1212 and Article 1209, which appear in the same section of the MCC under the heading “*VII Of Rescission*”, are inextricably linked in this way.
566. According to the Respondent, it follows from Article 1209(1) MCC that under Maltese law the rescission of a contract has *ab initio* effect. Parliamentary debates and case law, including the recent Grech Appeal Judgment,<sup>358</sup> confirm that rescission declared due to a breach of Article 33(1) of the GLA has *ab initio* effect.<sup>359</sup>
567. Article 1209 MCC provides for a single remedy in the case of rescission: restoration of the parties to their original position before the contract.<sup>360</sup>
568. On this basis, the Respondent contends that the rescission operates *ex tunc* with *ab initio* effect. Therefore, any rights exercised by the Parties prior to the rescission declared by Delia II have no legal effect, as the latter “*overrides the earlier purported terminations.*”<sup>361</sup>
569. Hence, the Tribunal must make an order which restores the Parties to the position they were in before the Transaction Agreements were made.
570. The Respondent rejects the argument that the rescission declared by Delia I and II is based solely on contractual breaches, which give rise to a right to dissolve (*i.e.*, terminate) the contracts in accordance with their terms. Rescission and dissolution are two distinct concepts under Maltese law.

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<sup>357</sup> Zammit Pace PTT, pp. 25, 26.

<sup>358</sup> *The Hon. Leader of the Opposition and Leader of the Nationalist Party Bernard Grech et v the State Advocate*, Court of Appeal, 2 December 2024, exhibit **RZP-35**.

<sup>359</sup> Rejoinder, ¶¶ 228 *et seq.*

<sup>360</sup> Zammit Pace PTT, p. 36 ; **REX-5**, ¶¶ 40-44; **REX-7**, ¶¶ 187, 228-233.

<sup>361</sup> Rejoinder, ¶¶ 235 *et seq.*



571. In the case of dissolution, there may be a perfectly valid contract that may be dissolved (*i.e.*, terminated) because of a breach of its terms by one of the parties. Dissolution then takes effect *ex nunc*.<sup>362</sup>
572. According to the Respondent, the distinction between rescission and dissolution was explained in the decision of the Court of Appeal in *Albert Sacco v John Camilleri* as follows:
- “It is imperative to underscore that the inference drawn in the plaintiff’s claim ought not to have been “rescission” which is associated with the annulment of the contract. Furthermore, as articulated in the judgment in Elena Agius v Giuseppe Cianco noe, Civil Appeals, dated 3 February 1936, such a determination invariably necessitates an ad hoc judicial declaration. As qualified, the first claim should instead have been for the “dissolution” of the contract, which although it must also be declared judicially, is a different concept from rescission to the extent that the law categorises them under different subheadings. In this instance, it is not the case of a contract which is defective and therefore annulable but rather a perfect contract subject to dissolution because according to the plaintiff the defendant did not fulfill his obligation, alleging that the works did not reach the required level of craftsmanship.”*<sup>363</sup>
573. For the Respondent, this distinction is also reflected in the structure of the MCC itself which deals with rescission in Articles 1209 to 1231 (under the heading “*VII Of Rescission*”), while dissolution is regulated under a completely different set of articles, being Articles 1066 to 1069 (under the heading “*Of The Resolutive Condition*”).<sup>364</sup>
574. As regards the issue of *res judicata*, the Respondent contends that under Maltese law a judgment becomes final and definitive once it is delivered by the Court of Appeal and at that point the judgment constitutes *res judicata* on issues of juridical facts which are established by the judgment.<sup>365</sup>
575. In the opinion of the Respondent’s expert, Dr. Zammit Pace, “*a juridical fact is the title, or basis, for the demand made before the court and which has been established by a judgment which becomes res judicata.*”<sup>366</sup> The Respondent’s expert relies upon the following passage from Professor Galiza’s commentary in Notes on Civil Law Vol IV:

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<sup>362</sup> Zammit Pace PTT, p. 30.

<sup>363</sup> Exhibit **RZP-69** at p. 6; Zammit Pace PTT, p. 27.

<sup>364</sup> Zammit Pace PTT, p. 29.

<sup>365</sup> **REX-7**, ¶ 44.

<sup>366</sup> **REX-7**, ¶ 43, ¶ 57.

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*“(...) Every judgment exists and holds good not only between the parties but also vis a vis all since every person is bound to respect it insofar as it governs the relation between the parties (...).”<sup>367</sup>*

576. The Respondent argues that the notion of *res judicata* as the determination of a juridical fact is distinct from the plea of *res judicata* by way of defense to an action.<sup>368</sup>
577. In that latter regard, Dr. Zammit Pace accepts the argument put forward by the Claimants’ expert Dr. Fenech that for a plea of *res judicata* under Maltese law there exists a three-stage test which requires (i) identity of parties (*eadem personae*) (ii) identity of subject matter (*eadem res*) and (iii) identity of cause of action (*eadem causa petendi*).<sup>369</sup>
578. However, it is the Respondent’s view that none of the Parties are raising a plea of *res judicata* and therefore the plea is not relevant to the arbitration.<sup>370</sup>
579. For the Respondent, the notion of *res judicata* must instead be considered from the perspective of the finality of the judgement on an issue of juridical fact and in that regard relies upon the decision of the First Hall Civil Court in *Roberto Tabone noe v Joseph Cannataci* where it said:

*“Even aside from the notion of *res judicata* true and proper, which gives rise to the plea of non bias in idem, a *res judicata* is always valid to define an issue based upon the same ratio pretending (...).”<sup>371</sup>*

580. The rational for the rule is to safeguard the certainty of rights and to avoid conflicting judgments on the same issue as explained by the Court of Appeal in *Anton Spiteri v Shawn Ritchie & others*:

*“The *res judicata* safeguards the certainty of rights established in a judgment (...) to avoid possibility of conflicting judgments and to do away with the possibility of issues remaining open to the prejudice of the rights established by the judgment which has been delivered (...).”<sup>372</sup>*

581. A judgment which is *res judicata* binds all people, including third parties, and the operative part of Delia I (from pages 190 onwards) is therefore binding upon the Parties to the Transaction

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<sup>367</sup> Exhibit **RZP-31** at pp. 1428-1429; see **REX-7**, ¶¶ 63-64; Zammit Pace PTT, p. 40.

<sup>368</sup> Rejoinder, ¶¶ 239 *et seq.*; **REX-7**, ¶ 56.

<sup>369</sup> **REX-7**, ¶¶ 59-60 responding to ¶ 78 of **CEX-5**.

<sup>370</sup> **REX-7**, ¶ 60.

<sup>371</sup> Exhibit **RZP-40**, p. 2; **REX-7**, ¶ 61.

<sup>372</sup> Exhibit **RZP-41**; Zammit Pace PPT, 41.

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- Agreements (who, the Respondent contends, were all parties to the Delia lawsuit),<sup>373</sup> as well as upon third parties. This includes the Arbitral Tribunal, who must, in conformity with the Delia Judgments, acknowledge that the Transaction Agreements have been rescinded and annulled.<sup>374</sup>
582. Delia II determines the rescission of the Concession and Related Instruments and thus a “*juridical fact, which is final and definitive*.”<sup>375</sup> The Respondent relies on this juridical fact in this arbitration.<sup>376</sup>
583. In this regard, the Respondent also relies upon a subsequent related judgment of the Maltese Court of Appeal in *Bernard Grech v the State Advocate* issued on 2 December 2024, concerning an action for a declaration that the State Advocate had the power and duty to act independently of any governmental direction following the decision in Delia II to bring an action against those parties who acted wrongfully, fraudulently and in collusion with third parties against the interest of the state in relation to the Concession.
584. According to the Respondent, the Court of Appeal in *Grech* relied upon Delia II as having established in a final and definitive manner that there was collusion between certain parties and held the State Advocate had the power to act “*against those parties who have an obligation of restitution under Article 33 of Chapter 573 “in the context of the rescission of the hospitals contract as mentioned in the judgement of this Court of 23 October 2023.*”<sup>377</sup>
585. Finally, since Maltese law is applicable and the seat of arbitration is in Malta, the award of this Tribunal would not be enforceable if the latter were to “*disregard the judicial determinations of [Delia II] and uphold either party’s contractual claims.*”<sup>378</sup>

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<sup>373</sup> On the question of the status of parties to the Delia proceedings and this arbitration, the Respondent says it makes no difference to the binding nature of Delia II whether the parties to the Related Agreements were parties to the Delia proceedings as plaintiffs or defendants (**REX-7**, ¶ 87). It does not matter that at the time of the proceedings before the Civil Court, the GoM and the Claimants were “*on the same side*” and no dispute between them was adjudicated by the Court.

Finally, on the question of parties, the Respondent rejects the argument made by the Claimants’ expert Dr. Fenech that the GoM was not a party to the Delia proceedings since only the Prime Minister was named as party (**CEX-5**, ¶ 102).

According to Dr. Zammit Pace by virtue of Article 181B of the Code of Organisation and Civil Procedure, Chapter 12 of the laws of Malta (exhibit **RZP-44**), the Prime Minister as the head of the GoM is vested with the Government’s judicial representation in an action against the GoM (**REX-7**, ¶¶ 74-77).

<sup>374</sup> Rejoinder, ¶¶ 261, 262.

<sup>375</sup> **REX-7**, ¶ 56.

<sup>376</sup> **REX-7**, ¶ 48.

<sup>377</sup> Exhibit **RZP-35**, ¶ 47 (p. 78); Rejoinder, ¶¶ 247 *et seq.*

<sup>378</sup> Rejoinder, ¶ 263.

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## 2. The position of the Claimants

586. The Tribunal will first outline the Claimants' case on the proper interpretation of the Delia Judgments and then consider their case as to whether there is a *res judicata* effect, which is binding on the Tribunal and the Parties to this arbitration.
587. The Claimants' starting point is that the claim of Dr. Delia was brought forward and decided not on the basis of breaches of Articles 31 and 33 of the GLA (and a claim for nullity), but on the basis of contractual breaches that occurred several years after the actual transfer of land.<sup>379</sup> Any consideration of Article 33 of the GLA by the Court of Appeal was strictly limited to the question of whether Dr. Delia had *locus standi* to bring claims in respect of contracts to which he was not a party.<sup>380</sup>
588. The Civil Court made findings (upheld by the Court of Appeal) that there had been breaches of contract and these were the sole basis upon which the declaration of rescission was made. Given the contractual basis for the declaration of rescission, the Claimants argue that the remedy is naturally forward looking and takes effect *ex nunc*.<sup>381</sup> It does not nullify the terms of the relevant contracts so that any terms concerning the regulation of termination remain in place.
589. Hence, the Court of Appeal did not decide how the rescission would take effect (in the light of the contractual termination provisions contained in the SCA) and deliberately left open this question for determination by a future court or tribunal of competent jurisdiction.<sup>382</sup>
590. However, the Claimants contend that under Maltese law, “[e]very declaration intended by the court to be conclusive or binding shall be included in the operative part of the judgment.’ Consistent with this rule, when a rescission is based on the GLA Maltese courts explicitly state so in the judgment’s operative part.”<sup>383</sup>
591. The Claimants further contend that Article 33(2) of the GLA provided a gateway or an administrative law window through which Dr. Delia could advance his claims concerning the Transaction Agreements.<sup>384</sup> In its judgment, the Civil Court found that Members of Parliament have a duty to ensure that public property is transferred in compliance with any relevant administrative procedures and that Government representatives have a duty to ensure that contractual obligations of transferees are adhered to throughout the life of any concession and that where the transferee is

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<sup>379</sup> Rejoinder, ¶¶ 83-86.

<sup>380</sup> C-PHB, ¶ 42; exhibit C-0216, ¶¶ 66-73, 76, 79, 104.

<sup>381</sup> CC Rejoinder, ¶ 83, 84; see also CEX-9, ¶ 10.

<sup>382</sup> Reply, ¶ 253; CC Rejoinder, ¶ 83.

<sup>383</sup> C-PBH, ¶ 41.

<sup>384</sup> CC Rejoinder, ¶ 88.

in default corrective action should be taken.<sup>385</sup> Members of Parliament therefore have *locus standi* under Article 33 of the GLA to bring an action where the Attorney General has failed to do so.<sup>386</sup> As explained by Dr. Fenech in his presentation to the Tribunal at the Hearing, Dr. Delia's claim is "*an element or a form of derivative action*" to enforce contractual rights and obligations.<sup>387</sup>

592. The Claimants also stress that Dr. Delia's original sworn request for relief sought a declaration that there had been a breach of the Related Instruments and did not seek any relief under Articles 33 and 31 of the GLA.<sup>388</sup>
593. With reference to ¶ 76 of Delia II, the Claimants further argue that the Court of Appeal's findings concerning its theory as to the collusion between the GoM and the Concessionaires simply went to the question whether Dr. Delia had *locus standi*.<sup>389</sup>
594. Finally, the Claimants point out that early in its judgment, the Court of Appeal (at ¶ 33) made it clear that it was an open question as to whether the rescission order by the Civil Court had taken effect *ex nunc* (as the Claimants contend) or whether it meant the nullity *ab initio* of the Transaction Documents.<sup>390</sup>
595. Therefore, since there was no finding of nullity under Articles 33 and 31 of the GLA, the rescission ordered by the Court of Appeal could not have been made pursuant to Article 1212 MCC since the

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<sup>385</sup> Exhibit C-441, ¶¶ 381-384.

<sup>386</sup> Exhibit C-441, ¶ 385.

<sup>387</sup> Tr. Day 3, 16:3-10.

<sup>388</sup> Exhibit C-0091, Sworn application of Dr. Delia 19 February 2018 reads in that respect as follows: "*Declare and decide that the defendants Vitals Global Healthcare Assets Limited, Vitals Global Healthcare Limited and Vitals Global Healthcare Limited did not abide by and acted in breach of their obligations in terms of a contract dated 22<sup>nd</sup> March 2016, in the records of Notary Dr Thomas Vella and of the Service Concessions Agreement, the Labour Supply Agreement and amendments and/or addenda, which documents form an integral part of the above mentioned temporary emphyteutical concession.*" - ¶¶ 48, 53, 54 and 75 from Delia I were the key examples identified by Dr. Fenech in his presentation to the Tribunal in this regard.

<sup>389</sup> ¶ 76 of Delia II reads as follows: "*This court also had to consider fraud and collusion because those considerations were relevant and necessary not for the court to see whether there were wilful acts that vitiated consent but in order to arrive at a conclusion regarding the plaintiff's locus standi.*"

<sup>390</sup> Exhibit C-0216, ¶ 33, which reads as follows: "*Another reason why this plea is unfounded is that, independently from the question as to whether the termination notice is valid or not, the timing of when the concession ended, namely whether it is when the termination notice was given or else if and when rescission is pronounced due to default or otherwise if and when nullity ab initio of the concession is pronounced could be relevant to the legal position of the appellant companies. This is also being said because the appeal also affects the issue whether the appealed judgment pronounced the nullity of the concession or its rescission ex nunc.*"

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second limb was not engaged (it being common ground between the Parties that the first limb of Article 1212 was not applicable).<sup>391</sup>

596. The Claimants rather sustain that the Court of Appeal declared the rescission pursuant to the Maltese contractual remedy of dissolution of a contract pursuant to a “*resolutive condition*.” Enforcement of the dissolution of a contract through a resolutive condition is a particular Maltese law concept and is one of several remedies for contractual breach, others being damages and specific performance. The application of these contractual remedies in this case flows naturally from the findings of contractual breach made the Civil Court and Court of Appeal, which Claimants argue were the basis for the declarations made.
597. Under Maltese law, a resolutive condition is one of the consequences of contractual breach or non-performance under the MCC (Articles 1066 to 1069). Resolutive conditions can be expressly stated by the parties in their contracts or can be implied into agreements. Parties are allowed to stipulate in their agreements what the effect of a resolutive condition should be.<sup>392</sup>
598. At the Hearing when asked by the Tribunal during the experts’ hot-tubbing session how the resolutive provisions in Article 1066 MCC work, Dr. Fenech stated:

*“(...) what is important to understand is that the resolutive condition gives the effect of dissolution of a contract. You remember I mentioned before that rescission is available for both dissolution as well as nullity, yes. So the resolutive condition brings about the dissolution of the contract and the relevant obligations concerned. It is retrospective in its objective, unless the contract itself provides otherwise. This is why the word “dissolution” is very important, because it doesn’t ameliorate the terms of the contract themselves as nullity would. You would go about its objective, which is bringing the parties back to where they started from, but taking into account the terms of the contract. In the terms of the contract, as is the case, I think, in the context of the agreements which are the subject of this arbitration, where the parties do anticipate and provide for situations of termination, those will apply.”<sup>393</sup> (Emphasis added)*

599. Dr. Fenech is here suggesting that in the present case, if the rescission were to operate by way of dissolution pursuant to a resolutive condition, the relevant resolutive condition would be those contractual terms (such as project milestones) which the Civil Court and the Court of Appeal found had been breached. The Related Instruments would be dissolved but the contractually agreed terms as to what happens on termination contained in the SCA would be respected and enforced.
600. In his first Expert Report, Dr. Fenech explained why rescission can operate in this way in the context of contractual breaches and dissolution for resolutive condition without the need for there

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<sup>391</sup> See above at ¶ 56464.

<sup>392</sup> Tr. Day 3, 94:11-25 and 95:1-5 and the comments of Dr. Zammit Pace.

<sup>393</sup> Tr. Day 3, 92:4-24.

to be a finding of nullity (or lack of conditions essential to validity) under the first or second limb of Article 1212 MCC, which in turn lead to the application of the *ab initio* (*ex tunc*) remedy provided for in Article 1209 MCC:

*“(43) (...) The effects of rescission in such circumstances should, in my view, be seen and understood in the context of contract termination, as the contract will have been valid when concluded, and remained in effect to the point of final judgment or other valid termination. (...).”*

*(45) The above elements indicate that the Court is clearly taking a wide approach to the concept of rescission, in terms of both the causal factors and the effects of rescission. The Fist Hall judgment appears to be confirmed by the CoA, such that the meaning of rescission has matured to the point of supporting remedies providing for restitution, dissolution as well as damages, depending on the circumstances of the case.”<sup>394</sup>*

601. Finally, with regard to the wording of the dispositive sections of the Delia Judgments, the Claimants rely on the expert testimony given by Dr. Fenech at the Hearing, who had introduced a new argument concerning the meaning of the Maltese words used by both Courts in the dispositive section dealing with the rescission and annulment of the Deed and the Related Instruments.
602. The Claimants point out that the word “*thassar*” is not the same Maltese word as is used in Article 1209 MCC, which uses the word “*rexxisjoni*” for the word rescission and that the word “*thassar*” is not used consistently in the MCC. Indeed, at the Hearing, Dr Fenech clarified that “*thassar*” is not used consistently in the Maltese Civil Code.<sup>395</sup> For example, he pointed out that Article 992 MCC translates “*thassar*” as “revoked” in the context of “revoked by mutual consent of the parties”, with no *ab initio* consequence.<sup>396</sup> According to the Claimants, the Court of Appeal in the Delia case also explicitly confirmed that rescission can be *ex nunc*, and used both “*thassar*” and “*rexxisjoni*” in its reasoning.<sup>397</sup> The Court of Appeal’s confirmation of outstanding termination and compensation issues would further undermines the Respondent’s case.<sup>398</sup> Therefore, Maltese law does not restrict rescission to *ex tunc/ab initio*.<sup>399</sup>
603. As regards at last the issue *res judicata*, the Claimants recall that under Maltese law there is a three-stage test which requires (i) identity of parties (*eadem personae*) (ii) identity of subject matter

<sup>394</sup> CEX-5, ¶¶ 43, 45; see also Claimants’ Opening Statement, Rubins, Tr. Day 1, 75:15-24.

<sup>395</sup> Tr., Day 3, 26:22-27:23.

<sup>396</sup> Tr., Day 3, 26:19-27:11.

<sup>397</sup> C-216, paras 33, 48; Tr., Day 3, 28:5-10.

<sup>398</sup> Tr., Day 3, 19:3-21:2; 62:11-25; C-216, ¶ 33.

<sup>399</sup> C-PHB, ¶ 46.

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(*eadem res*) and (iii) identity of cause of action (*eadem causa petendi*) before the defense of *res judicata* can apply.<sup>400</sup>

604. However, as regards (i) the identity of parties, the Claimants assert that the parties in the Delia Judgments were different from the Parties in the arbitration. These judgments involve a claim by Dr. Delia against eight defendants: the Prime Minister, the CEO of the Lands Authority, the Chairman of the Board of Governors of the Lands Authority and the three Claimants. Although government officials were named as defendants, the GoM as a distinct legal entity was not a party.<sup>401</sup>
605. Moreover, the Delia Judgments never addressed or decided a controversy between the Parties to this arbitration because during the Delia proceedings (up to the judgment at first instance) the Parties to this arbitration were “on the same side” and were disputing Dr. Delia’s claims. It was only during the appeal that the GoM supported the original judgment.<sup>402</sup>
606. As to (ii) the identity of subject matter, the Claimants argue that the subject matter of the disputes differs significantly in that the Delia action focused on whether the granting of land for the concession through the Deed had violated the GLA.
607. In contrast, this arbitration is about the purported termination of the Transaction Agreements in accordance with the terms of the SCA. Other new issues, such as the EU State aid case, are only present in this arbitration and the arbitration is concerned with claims for compensation whereas the Delia action was not.
608. The Claimants also refer to the observations made by the Court of Appeal in Delia II, by which it acknowledged that the termination notice and the dispute surrounding it as well as the timing of when the Concession ended and any related compensation were not part of the Delia claim and remained unresolved.<sup>403</sup>
609. Finally, as to (iii) the identity of causes of action, the Claimants argue that they differ since the Delia claim and Delia Judgements were grounded on Article 33 of the GLA concerning the legality of the lease of public land granted under the Deed, whereas this arbitration includes claims and counterclaims founded on the Transaction Agreements.<sup>404</sup>

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<sup>400</sup> Reply at ¶¶ 245-255. As noted above, insofar Respondent are of the same view, ¶ 577.

<sup>401</sup> Reply, ¶ 248.

<sup>402</sup> Idem.

<sup>403</sup> Reply, ¶ 249 with reference to Delia II, exhibit C-0216, ¶¶ 32, 33.

<sup>404</sup> Reply, ¶ 250.



610. In light of the above, the Claimants conclude that since the triple identify test is not satisfied, the Delia Judgment has no *res judicata* effect on the Parties and the Tribunal does not need to adhere to its determinations of fact or law.

### 3. The Tribunal's analysis

611. When deciding the question of what was actually decided by the Delia Judgments (and in particular by the Court of Appeal), the Tribunal considers that the exercise should begin with the actual language used in the operative part of Delia I (which Delia II has confirmed, except for costs).
612. The Civil Court, First Hall, decided as follows in the fourth paragraph 4 of its holding, which has already been cited above at ¶ 338, but which is reproduced again here given its importance for this dispute:

*“Rescinds and annuls the temporary Emphyteutical Concession in the acts of Notary Thomas Vella of 22 March 2016 as well as the Services Concession Agreement of 30 November 2015 as well as the Services Concession Agreement of 30 November 2015 and the Labour Supply Agreement of 8 February 2016 together with the amendments and addenda that were made subsequently.”*<sup>405</sup>

613. It is self-evident that this paragraph does not expressly set out the legal basis for the Court's decision. It does not refer to Article 33 of the GLA and nor does it say that the decision was made on the basis of a dissolution of the contract due to a breach of its terms.
614. However, the paragraph uses the words “*rescinds and annuls*” and the Tribunal considers that particular weight must be placed on the deliberate use of the word “*annuls*”. The Tribunal rhetorically asks: what else could this mean except that the Court was declaring the Transaction Agreements to be a nullity?
615. The use of the word “*annuls*” seems to the Tribunal to be entirely consistent with the Respondent's interpretation of the Court of Appeal's reasoning with regard to the application of Articles 33 and 31 of the GLA, which the Tribunal, for the reasons set out below, in any event, finds to be the more persuasive argument. The use of the word “*annuls*” in contrast is deeply problematic for the Claimants' argument that the Court was basing its declaration on the theory that under Maltese law rescission has been assimilated to mean the dissolution of the relevant contracts due to breaches of their terms.
616. The use of the word “*annuls*” also strongly suggests that the Respondent is correct to argue that this was a case where the Court was acting in the context of the second limb of Article 1212 MCC

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<sup>405</sup> Delia I, exhibit C-0017, p. 191 and Delia II, exhibit C-0216, ¶ 6 (Emphasis in original).

(i.e., a contract “declared by law to be null”), which in turns leads the Tribunal to the remedy in Article 1209 MCC that the Parties must be restored to the pre-contract position. The first paragraph of that provision reads as follows:

*“The rescission of a contract shall, unless the law provides otherwise, operate so as to restore the parties to the condition in which they were before the contract.”*

617. The use of the word “annuls” was the subject of cross-examination of Dr. Fenech at the Hearing where Claimants’ legal expert offered the following explanation:

*Q. You contend that rescission and dissolution have been assimilated under Maltese law?*

*DR FENECH: Yes, the way I would explain it --*

*Q. By the courts?*

*DR FENECH: -- is that the courts have taken a rather lax approach to situations of claims involving rescission, of contract, for example.*

*Q. This is on this basis that you reached the conclusion that rescission may also have an ex nunc effect, right?*

*DR FENECH: It is that, and it is particularly driven by these court decisions that I am referring to, including the latest expression of it by the court, where it is pretty explicit.*

*Q. In fact if we can pull up again CEX-5, paragraph 57(...). These are your words?*

*DR FENECH: Yes.*

*Q. "My view for rescission to have ex tunc effect, the circumstances delineated by 1212 of the Civil Code must subsist. This article contemplates the classic grounds ..."*

*Then you quote the article. Can we at least agree that all instances of nullity, nullity, bring about an ab initio effect of --*

*DR FENECH: Agreed.*

*Q. Let's not, you know, squabble about terminology now. We know the parties' respective positions, but where the Delia judgment rescinded or resolved, or rescinded in any other different meaning of rescinded, can we at least agree that the Court of Appeal annulled the agreements?*

*DR FENECH: The Court of Appeal annulled -- no, and I say this with all sincerity, I feel that the word "nullity" came into the decide part, simply because, as I have seen in practice more than once, the way claims are drafted by the lawyers seem to follow a pattern, and very often the court simply reproduces the claim in the decide part if they are going to accept it.*

*Q. I have heard you a few minutes ago, before Mr Rubins' questions, in the tail end of the hot-tubbing session, stating that effectively what is the binding part of judgments is the (...) decision part?*

*DR FENECH: You are right, it is.*

*Q. Can we agree at least on a (...) face value reading of the judgment, that the decide part says (...)?*

*DR FENECH: I can certainly agree that the word was used.*

*Q. Yes, and hypothetically, and I am not committing you to this particular case, we agree certainly that the effect of nullity is always ex tunc.*

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DR FENECH: *Yes.*<sup>406</sup>

618. The Tribunal is not persuaded by this attempt to downplay and explain away the use of the word “*annuls*” in the operative part of Delia I, which is of course the most important part of the judgment. It seems to the Tribunal that the wording was a deliberate choice and in the case of the Court of Appeal, it followed from its reasoning as to the application of Articles 33 and 31 of the GLA, which the Tribunal now considers in more detail.
619. The judgment of the Court of Appeal was divided into several parts. For the reasons explained below, it is important to consider its structure to better understand the context and relevance of the various paragraphs from Delia II, which the Parties have quoted in their submissions to support their respective cases.
620. After summarizing the procedural history<sup>407</sup> and reproducing large parts of Delia I,<sup>408</sup> the Court of Appeal then set out an overview of the case and set out a series of “*facts and conclusions*” which contains an overview of what the case was about.<sup>409</sup>
621. Thereafter, the Court analyzed the four pleas made by Dr. Delia as to why the appeal was inadmissible:
- (1) First, the appellants lacked legal interest to bring the appeal;<sup>410</sup>
  - (2) Second, significant parts of the appeal did not concern the operative part of the judgment, but were appeals of findings that were orbiter;<sup>411</sup>
  - (3) Third, the appeal raised issues which were vexatious or frivolous;<sup>412</sup>
  - (4) Fourth, the appeal contained unfounded allegations of fact.<sup>413</sup>
622. The Court then considered the grounds of appeal as follows:
- (1) First, the lack of clarity in the sworn application.<sup>414</sup>
  - (2) Second, the Civil Court’s confusion over the concepts of nullity and termination rescission based on default.<sup>415</sup>
  - (3) Third, the Civil Court was not competent to review the Concession contracts under the GLA.<sup>416</sup>

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<sup>406</sup> Tr. Day 3, 177:12-179:12.

<sup>407</sup> Exhibit C-0216, ¶¶ 1-6.

<sup>408</sup> Exhibit C-0216, ¶ 7, pp. 8-42.

<sup>409</sup> Exhibit C-0216, ¶¶ 8-29, pp. 42-48.

<sup>410</sup> Exhibit C-0216, ¶¶ 30-33.

<sup>411</sup> Exhibit C-0216, ¶¶ 34-36.

<sup>412</sup> Exhibit C-0216, ¶¶ 37-40.

<sup>413</sup> Exhibit C-0216, ¶¶ 42-45.

<sup>414</sup> Exhibit C-0216, ¶¶ 46-51, pp. 57-62.

<sup>415</sup> Exhibit C-0216, ¶¶ 52-55, pp. 62-64.

<sup>416</sup> Exhibit C-0216, ¶¶ 56-69, pp. 64-65.

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- (4) The fourth and fifth grounds of appeal both concerned questions of Dr. Delia's locus standi in relation to whether he could rely upon Article 22 of the GLA and whether his intervention breached the principle of *res inter alios acta* and were taken together.<sup>417</sup>
- (5) Sixth, the Civil Court acted *ultra petita* and *ultra vires* when considering allegations of fraud.<sup>418</sup>
- (6) The seventh and eight grounds were related to the findings of fraud, which should not have been made because the appellants had not had a proper opportunity to answer the case against them.<sup>419</sup>
- (7) Ninth, the Civil Court showed bias in considering the evidence against the appellants.<sup>420</sup>
- (8) Tenth, there was a lack of clarity in the operative part of Delia I.<sup>421</sup>
- (9) Eleventh, the appealed judgment violated article 63 of the TFEU since it amounted to indirect expropriation.<sup>422</sup>
- (10) The twelfth ground concerned the allocation of costs by the Civil Court.<sup>423</sup>
623. Each of the Parties has picked out various paragraphs in the Court of Appeal judgment to support its case. For example, the Claimants suggest that the Court of Appeal only found the considerations of collusion relevant to the issue of legal standing, and rely to that effect on the following language in ¶ 76 of Delia II:
- “(...) this court also had to consider fraud and collusion because those considerations were relevant and necessary not for the court to see whether there were willful acts that vitiated consent but in order to arrive at a conclusion regarding the plaintiff's locus standi they were also not ultra vires.”*
624. In the Tribunal's view, Delia II must be read as a whole, rather than as a collection of individual and isolated paragraphs picked out and referenced out of proper context.
625. The Tribunal further believes that, when read as a whole, the Court of Appeal established a coherent approach to characterizing the facts of the case, based upon collusion and simulation by the Parties. This approach is consistent with the argument that the Court considered that the Claimants were in breach of Articles 31 and 33 of the GLA.
626. It is appropriate to quote here the full text of Article 33 of the GLA:

*“(1) Any disposal of land, to which article 31 applies, which was disposed of differently from the provisions of that article, shall be null and void.*

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<sup>417</sup> Exhibit C-0216, ¶¶ 60-73, pp. 65-76.

<sup>418</sup> Exhibit C-0216, ¶¶ 74-76, pp. 76-78.

<sup>419</sup> Exhibit C-0216, ¶¶ 78-83, pp. 78-86.

<sup>420</sup> Exhibit C-0216, ¶¶ 84-86, pp. 86-88.

<sup>421</sup> Exhibit C-0216, ¶¶ 87-93, pp. 89-91.

<sup>422</sup> Exhibit C-0216, ¶¶ 94-96, pp. 91-94.

<sup>423</sup> Exhibit C-0216, ¶¶ 97-98, pp. 94-96. The remaining part of the Court of Appeal's judgment concern matters appealed by Steward Spain and were dealt with in ¶¶ 99-110.

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*(2) The nullity of a disposal made in contravention of the article aforesaid may be demanded by the parties involved in the disposal and also by the State Advocate or by any person who is a member of the House of Representatives at the time of the demand before the Civil Court, First Hall.”*

627. A proper reading of the judgment shows that this approach permeated the Court’s entire analysis of the various pleas and grounds of appeal, which included, but were not restricted to questions of *locus standi*, as and when such questions arose whilst the Court worked its way through the grounds of appeal.

628. The Court of Appeal’s theory as to collusion was set out at the very start of its judgment in the overview section:

*“In the opinion of this court, the events of the story do not show deception by one party and ingenuity from the other, as the First Hall believed, but collusion between the appellant companies and high level representatives of the Government or its agencies which led to the signing of simulated contracts not intended to provide a quality medical service but for ulterior motives.”<sup>424</sup>*

629. The key distinction in the Court of Appeal’s approach, as compared to that of the Civil Court, was its rejection of the idea that the Claimants had committed fraud against the GoM.

630. The Court of Appeal was not comfortable with the Civil Court’s findings of fraud and instead developed the notion of collusion/simulation by both Parties.

631. The collusion theory was further developed as follows at ¶ 67 of Delia II:

*“It has been noted that the concession to the appellant companies was given not as a result of deception from one of the parties, but as a result of the collusion between the two parties, which occurred not only when the appellant companies were selected as the preferred bidder after being given access to privileged information, and that the concession was granted when it was already known that it was not feasible, but also when the agreement was supposed to have been carried out and, though nothing was done in regard to this, those were supposed to be under a duty to protect the interests of the country, instead of protecting those interests, gave one extension of time after another, so that they would not reveal that the agreement was merely a façade and not truly “the real deal” and continued to pay millions of euros to the appellant companies even though they had not been fulfilling their obligations.”<sup>425</sup>*

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<sup>424</sup> Exhibit C-0216, ¶ 18.

<sup>425</sup> Exhibit C-0216, ¶ 67.

632. At the Hearing, in answering questions from the Tribunal, Dr. Zammit Pace gave the following explanation with reference to the Court's aforementioned statement:

*"What the court is saying here, the concession was given not as a result of deception, which is what the first court had found, but as a result of collusion between the two parties. The Court of Appeal is identifying what it relied upon to establish collusion. It is saying that there was collusion when the appellant companies were selected as the preferred bidder after being given access to privileged information. That there was collusion when the concession was granted, even though it was known that it was not feasible. And that there was collusion when there was non-performance, as the court had found, but those who are supposed to be under a duty to protect the interests of the country did not take any action. Each of those three instances in effect are an illustration of the collusions found by the court.*

MR KAVANAGH: *Where did the breaches of the milestones fit into that, is this the extension of time?*

DR ZAMMIT PACE: *It is the third limb, and also when the agreement -- perhaps the translation here is a literal translation of the Maltese, it makes it a little bit difficult to follow, but when the agreement was supposed to have been carried out, and though nothing was done in regard to this, that is by the Steward defendants, those that were supposed to be under the duty to protect the interests of the country, that is certain representatives of the government, instead of protecting those interests gave one extension of time after another, so this relates specifically to the milestones, so that they would not reveal that the agreement was merely a facade and not truly the real deal. (...)."*<sup>426</sup>

633. The linkage of the collusion theory and Articles 33 and 31 of the GLA was established in ¶ 72 of Delia II:

*"This [i.e., Clause 2.2 of the Emphyteusis Deed] would have been a good legal basis for the contract to be validly undertaken, provided it was actually true. It has been seen, however, that there had been an ulterior motive behind the contract, and what was said about its legal basis is the fruit of simulation and collusion. This means that the contract lacks a genuine legal basis that would have made it valid under article 31 of Chapter 573, and this gives locus standing to the plaintiff, as a member of the First House of Representatives at the time of the application before the First Hall of the Civil Court to request to enforce the contract under article 33(2) because it is within the duties of a member of the House of Representatives and within the Power of the Court to cancel a contract such as the one in question when it is shown that it was undertaken for ulterior purposes and not for the good of the country."*

634. The Tribunal agrees with the Respondent that the above paragraphs show that for the Court of Appeal any breaches of contract by themselves were not the basis for the declarations of rescission and annulment.

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<sup>426</sup> Tr. Day 3, 82:8-83:13; see also Zammit Pace, PTT, p. 21.

635. Instead, what the Respondent effectively says, is that the breach of contract findings was used by the Court of Appeal as a springboard to support its further finding that there had been a breach of Articles 33(1) and 31 of the GLA.

636. When asked at the Hearing by the Tribunal how the breaches of contract (such as the milestones) can retrospectively be refitted back into being breaches of the provisions in Article 31(g)(C)(i)(b) of the GLA, Dr. Zammit Pace described the Respondent's position as follows:

*"The Court of Appeal did agree with the court of first instance that there was a breach of performance by the Steward defendants. The Court of Appeal, however, did not stop there. So it took that breach. It considered the inaction by certain representatives of government in relation to that breach, it considered that, it established that. That lack of action in the light of those contractual breaches was actually evidence of the collusion and simulation, just like other activities in the process leading up to the award of the concession was also evidence of that collusion."*<sup>427</sup>

637. Further on this point, the Tribunal agrees with the Respondent's Maltese law expert that it would be an extremely unusual result for the Court of Appeal to allow Dr. Delia to take part on one basis (i.e., Articles 33 and 31 of the GLA) and then decide the substance of the case on a completely different basis.

638. In that regard, the Tribunal finds the observations made by Dr. Zammit Pace at the Hearing to be persuasive:

*"I am suggesting that it ought to be helpful to the tribunal that both experts agree that the court referred to article 33 to determine Mr Delia's locus standi. Because after all, what is locus standi? Locus standi is what determines the interest of a claimant to bring a particular form of action, not to bring any action. I cannot contemplate of a situation where a claimant may have locus standi under one provision of law, which affords one type of remedy, in order to then exercise a totally different remedy. That, in my view, is anti-juridical as a concept. The fact that the court is determining that Mr Delia has locus standi in terms of article 33 of the GLA means that that action could only proceed as an article 33 action under the GLA."*<sup>428</sup>

639. The Tribunal also takes note in this regard of the Court of Appeal's treatment of the second ground of appeal where the appellants said that the Civil Court had confused the concept of "nullity and termination/rescission based on default." In ¶ 52 of its judgment, the Court of Appeal sets out the terms of ¶ 133 of the appeal notice which explained:

*"This shows a clear contradiction between the considerations of the Court and its final decision, in the sense that if the Concession were to be considered "null" because it was*

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<sup>427</sup> Tr. Day 3, 80:7-81:20.

<sup>428</sup> Tr. Day 3, 73:13-74:3.

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*affected by fraud, then the final decision cannot be based on an alleged default in performance. The same contradiction can even be found in the request for the Principal Government Notary to “publish the relevant act of cancellation and nullity” of the emphyteutical concession which is a contradiction in terms because it is not possible to have cancellation of an agreement that is null ab initio (...).”<sup>429</sup>*

640. This passage succinctly reflects the Claimants’ case in this arbitration. The Court of Appeal answered this point in ¶¶ 53, 54 of its judgment:

*“(53) It is true that the First Hall was not at all precise in its choice of words and in its explanation of the relevant concepts. After all, not even the law itself is altogether clear when dealing with reasons leading to a nullity under the rubric On the Revocation in the Civil Code. However, the First Hall did not cancel the concession on the basis of fraud but on the basis of breach of contract as, after all the plaintiff had requested. Fraud, as we shall see later, has relevance for the case, but as we saw above [fn6 references to 18 of the Judgment], it was not fraud in the sense of deceit made by one of the parties which are such that without them the other party would not have contracted” however rather it took the form of collusion between the two parties.*

*(54) It is true that clarifications are needed regarding the Court’s decision, as will be seen later, but the fact remains that default was the reason which led the First Hall to cancel the concession not fraud, and therefore there the appealed judgment does not contain inconsistencies which the appellants complain about.”*

641. These paragraphs show that, when confronted with the argument in the appeal notice that a declaration of nullity “*cannot be based on an alleged breach of performance*,” the Court of Appeal rejected the appellants’ position. Instead, it reiterated its collusion theory, initially presented in ¶ 18 of its judgment.
642. As explained in ¶ 640 above, the Claimants rely on ¶¶ 53 and 54 and other similar paragraphs in the judgment (*i.e.*, ¶¶ 48 and 75) and the references they contain to “*breach of contract*” and “*default*” as the basis for cancellation. The Tribunal understands this to be the primary argument advanced by the Claimants to say that the basis for the rescission ordered by the Court of Appeal is purely contractual in nature and should therefore have *ex nunc* effect.
643. However, the Tribunal does not believe these passages in Delia II assist the Claimants given that they are made in the context of the Court of Appeal replacing the Civil Court’s theory of fraud (practiced by one party on the other) vitiating consent with its own theory of collusion and simulation giving rise to breaches of Article 33 of the GLA, where in turn the breaches of contract and default are considered by the Court, rightly or not, as indicators of the existence of collusion.

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<sup>429</sup> Exhibit C-0216, p. 63.



644. The Tribunal considers that the Respondent is correct in its analysis that the Court of Appeal relied on Article 33 of the GLA when making its declaration of annulment. It also considers that the accompanying declaration of rescission is based upon the second limb of Article 1212 MCC, *i.e.*, nullity by declaration of law.<sup>430</sup>
645. Turning to the Claimants' argument, seeking to explain the meaning of the use of the word "*annuls*" in the operative part of Delia I, the Claimants' expert Dr. Fenech tried to persuade the Tribunal that rescission took effect in the contractual context of dissolution for a resolutive condition thereby having *ex nunc* effect, such that the provisions of Article 1209 MCC do not apply.
646. Although the Claimants' submissions were serious and thoughtful and well presented, on balance, the Tribunal was not convinced.
647. The main problem with the Claimants' argument was that they did not present much hard authority to support. The Tribunal notes that the relevant paragraphs of Dr. Fenech's report provide only vague references to judicial trends since the mid-20<sup>th</sup> century and the relatively limited cited authority.<sup>431</sup>
648. The principal case relied upon is the judgment of the Court of Appeal, *Gatt v Galea*,<sup>432</sup> which is the only case quoted from in the supporting footnote (although three other cases were cited). At the Hearing, Dr. Fenech confirmed that the decision in *Gatt v Galea* (together with the commentary from Professor Galizia) was the main authority relied upon.
649. Dr. Fenech also accepted that the majority of the cases supported what might be considered the orthodox view espoused by Dr. Zammit Pace that rescission is only considered in the context of nullity through the application of Articles 1212 and 1209 MCC:

*"But as I have tried to explain in my various reports, the courts as a matter of fact have gone well beyond that, and this is where Gatt v Galea and the other cases come to the fore, where the courts have expanded what doctrinal writers, particularly on the continent, used to talk about in terms of how the action and the concept of rescission should be encapsulated. This is where that famous quote from Gatt v Galea and Professor Caruana Galizia himself talks about rescission being used, both for nullity as well as rescission. Hence my point where I said, and I did say this, unless there is nullity the parties can alter the effects of what would otherwise be --*

*MR KAVANAGH: Is it just the commentary? Because when I read the report I was not sure I could find what the actual case law was on. I have read the section in the commentary on the code, it would be helpful, after this, perhaps, to have [the cases] – (...).*

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<sup>430</sup> As mentioned in the summary of the Parties' positions, it is common ground between the Parties that the first limb does not apply.

<sup>431</sup> CEX-5, ¶¶ 43-45.

<sup>432</sup> Exhibit TF-01.

DR FENECH: *The main one is Gatt v Galea, which is a 1965 case, and TF-1 is the reference. Then there are also other references, TF-32 (...).*

MR KAVANAGH: *It is those cases that you primarily rely upon to make that --*

DR FENECH: *No, they are simply illustrative of how the courts have expanded upon the, shall we say doctrinal discipline that Dr Zammit Pace is espousing here, that you only consider rescission in the context of nullity, where therefore 1212 becomes essential to 1209. I am saying that that is the majority of the cases, but certainly not the totality.*<sup>433</sup>

650. The Tribunal considered carefully the decision in *Gatt v Galea* and the other cited cases. However, the Tribunal considers that these cases are outliers which were decided on their own particular facts and do not displace the Court of Appeal's authority relied upon by the Respondent which shows that rescission and dissolution are two distinct concepts under Maltese law.

651. In *Albert Sacco v John Camilleri*, the Court of Appeal's distinction was explained as follows:

*"It is imperative to underscore that the inference drawn in the plaintiff's claim ought not to have been "rescission" which is associated with the annulment of the contract. Furthermore, as articulated in the judgment in Elena Agius v Giuseppe Ciancio noe, Civil Appeals, dated 3 February 1936, such a determination invariably necessitates an ad hoc judicial declaration. As qualified, the first claim should instead have been for the "dissolution" of the contract, which although it must also be declared judicially, is a different concept from rescission to the extent that the law categorises them under different sub-headings. In this instance, it is not the case of a contract which is defective and therefore annulable but rather a perfect contract subject to dissolution because according to the plaintiff the defendant did not fulfill his obligation, alleging that the works did not reach the required level of craftsmanship."*<sup>434</sup>

652. Finally, there is no evidence in *Delia II* that the Court of Appeal considered that it was giving effect to a dissolution of the Transaction Agreements pursuant to a resolutive condition rather than rescinding on the basis of a declaration of nullity.

653. There is one reference to resolutive condition towards the end of the judgment where the Court of Appeal was considering the eleventh ground of appeal concerning an alleged breach of Article 63 of the TFEU on the basis of indirect expropriation:

*"The appellants are confusing the concept of expropriation with the concept of rescission of a contract because of contractual default. If we were to accept this argument it would mean that a contract of acquisition of property cannot be rescinded as a consequence of a court judgment, under any circumstance, not even if – as clearly results in the present case – there is a breach of the obligations of the contract, which obligations are a resolutive condition of the contract. Indeed even the constitution states in Article 37 that there cannot*

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<sup>433</sup> Tr. Day 3, 106:14-107:21.

<sup>434</sup> Exhibit **RZP-69** at p. 6.

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*be considered to be illicit expropriation of property when this occurs “in the execution of a judgment of the Court.*

*This grievance is therefore frivolous, and is merely an attempt to introduce a ‘European’ element to the dispute.”<sup>435</sup>*

654. These statements in Delia II were the subject of cross-examination of Dr. Zammit Pace as to whether they might indicate that the Court of Appeal considered that rescission could arise simply from a breach of contract:

*“Q. Again here, in its hypothetical the Court of Appeal is positing that there can be rescission on the basis of a breach of the obligations of the contract, which are a resolute condition of the contract. Isn't that right?*

*DR ZAMMIT PACE: I believe that the court is taking the argument which has been made by the appellants and it is saying that according to the appellants' argument a contract of acquisition of property cannot be rescinded as a consequence of a court judgment, even if, and so on. So the court here in my view seems to be dealing with the appellant's argument as opposed to setting out a statement of Maltese law.*

*Q. When it says "even if" the Court of Appeal is positing its own scenario, it is not a scenario drawn from the appellant's brief, the "even if", it says the appellant is wrong because that would prevent rescission even in this scenario, which they haven't thought of. But I am thinking of it, I am positing it, and I say that can't possibly be right, because there has to be a possibility of rescission in that circumstance, isn't that a fair statement of what the Court of Appeal is doing there?*

*DR ZAMMIT PACE: I don't think it is as simple as that. I think the starting point is that in the Court of Appeal's view the appellants are confusing two notions. I understand that to be notions which have been put forward by the appellants, and the Court of Appeal is, as I say, engaging in the appellant's line of thought and argumentation. I don't view this as the court setting out any form of statement as to the position under Maltese law.*

*Q. So you don't think that the more likely or the more reasonable way to understand the Court of Appeal's statement in this paragraph is that it is using the word "rescission" broadly to encompass various sorts of ending of contracts, you don't think that's the better way to read it?*

*DR ZAMMIT PACE: I don't read it in that way.”<sup>436</sup>*

655. The Tribunal agrees with Dr. Zammit Pace that the aforementioned observations of the Court (in ¶¶ 95, 96 of Delia II) are simply dealing with the Appellants' argument rather than seeking to set out anything which purports to be a statement of Maltese law.

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<sup>435</sup> Exhibit C-0216, ¶¶ 95, 96 at p. 94.

<sup>436</sup> Tr. Day 3, 166:3-167:1.

656. The Tribunal also takes note of the discussion of Delia II in the Court of Appeal's recent decision in *Grech v the State Advocate*. The Court's understanding in that decision of 2 December 2024 of the reasoning in Delia II was described as follows at the Hearing:

*"The declaration by the Court of Appeal [in the Delia Judgment] that there was collusion in the award of contracts to the Vital companies would have been made in passing (obiter dictum) if it were not required as the reasoning for the operative part of the judgment. In fact, it was however necessary because it was due to the finding of collusion that the Court reached the conclusion to rescind the contracts."*<sup>437</sup>

657. In the view of the Tribunal, the above passage confirms that the Court of Appeal in *Grech* thought that the Delia Court of Appeal's findings of collusion (which it had linked in turn to a breach of Articles 33 and 31 of the GLA in the manner described above) were not limited to questions going to Dr. Delia's *locus standi*, as Claimants argue in this arbitration.
658. Instead, the Court of Appeal in *Grech* considered that the findings of collusion were the foundation of the decision in Delia II to rescind the Transaction Agreements.
659. While the Tribunal does not regard the Court of Appeal's analysis in *Grech* of Delia II to be binding upon it as a matter of *res judicata*, it does consider that it lends powerful support to Respondent's position about the proper understanding of Delia II.
660. Finally, the Tribunal will address the argument introduced by Dr. Fenech at the Hearing concerning the Maltese words used by both Delia Courts in the dispositive section of their judgments when dealing with the rescission and annulment of the Deed and the Related Instruments. The Maltese words used in the original text are "*Thassar u tannulla*."
661. Up until the Hearing, the Parties had translated these words as "*Rescinds and annuls*." There is no dispute between the Parties about the meaning of the word "*tannulla*," which means "*annuls*."
662. Although this point was raised at the Hearing and picked up by the Claimants in their post-hearing submission,<sup>438</sup> the Tribunal does not consider that the Claimants meaningfully advanced this argument over the course of their submissions.
663. For example, during the course of his presentation, Dr. Fenech explained the different uses of the words "*thassar*" and "*rexxisjoni*" throughout the MCC and repeated that "*rexxisjoni*" is the word used in Article 1209.<sup>439</sup> He then explained that the Maltese language has two principle linguistic

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<sup>437</sup> Exhibit **RZP-35**, ¶ 28 at p. 37. See also **REX-7**, ¶ 210.

<sup>438</sup> C-PHB, ¶ 46.

<sup>439</sup> Tr. Day 3, 26:14-27:23.

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routes, being the Romance and Semetic languages, before concluding that “*different words (...) are used for more or less the same meaning.*”<sup>440</sup>

664. However, it was not suggested by Dr. Fenech that the outcome of this issue in the arbitration turned on these linguistic subtleties. That would be consistent with the fact that prior to the Hearing the point was never raised by the Claimants and their legal expert. The Tribunal therefore puts this issue to one side and does not find it probative.
665. In conclusion, the Tribunal considers that the Court of Appeal’s declaration of rescission and annulment in ¶ 4 of the operative part of Delia II was based upon a finding that there had been a breach of Articles 33 and 31 of the GLA for the reasons explained above. Accordingly, the second limb of Article 1212 MCC was engaged, such that the order of rescission takes effect *ex tunc*, through the operation of Article 1209 MCC. That article, in turn, provides that the parties should be restored to the position that they were in before the relevant contracts were entered into.
666. The scope and application of Article 1209 MCC in this case is considered in more detail in the Quantum Section below.
667. This leaves the issue of *res judicata*, on which the Parties have expressed divergent views.
668. The Tribunal considers that the Respondent is correct in its primary argument that the question before the Tribunal must be considered from the perspective of the finality of the judgment on an issue of juridical fact.
669. The Tribunal further agrees with the Respondent that this goes beyond the raising of *res judicata* as a plea by way of defense, which is the way the Claimants put their case, arguing that it requires compliance with the so-called triple identity test which has been set out above in ¶¶ 603603-610.
670. Such a strict triple identity test is a familiar requirement found in many civil law systems, including as an example, the French Civil Code.
671. However, the Tribunal considers that this strict rule is not the position under Maltese law and relies upon the two cases cited by the Respondent, the first being the decision of the First Hall Civil Court in *Roberto Tabone noe v Joseph Cannataci* where the Court said:

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<sup>440</sup> Tr. Day, 3, 27:20-23.

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*“Even aside from the notion of res judicata true and proper, which gives rise to the plea of non bis in idem, a res judicata is always valid to define an issue based upon the same ratio petendi.”<sup>441</sup> (Emphasis added).*

672. The second case relied upon by the Respondent is the Court of Appeal’s decision in *Anton Spiteri v Shawn Ritchie & others*, where the Court said:

*“The res judicata safeguards the certainty of rights established in a judgment (...) to avoid possibility of conflicting judgments and to do away with the possibility of issues remaining open to the prejudice of the rights established by the judgment which has been delivered (...).”<sup>442</sup>*

673. In the view of the Tribunal, adopting the Claimants’ position would result in the Claimants being able to sidestep the decision made by the Court of Appeal in *Delia II* on the rescission of the Transaction Agreements by the simple expedient of adding additional claims (or new causes of action) in any arbitration (or other proceedings) which flowed from the original finding of rescission. Such additional claims (or causes of action) could include the claim for the termination sum under the SCA and damages more generally.

674. That would appear to the Tribunal to circumvent the policy which emerges from the two Maltese cases cited above requiring finality and certainty on decided issues.

675. During the hot-tubbing session at the Hearing, in which the Parties’ legal experts engaged in a most candid and helpful way, there was discussion on the question of the identity of the parties and in particular on the question of whether it made a difference if the Parties to the present arbitration were present, but not adverse to each other in the *Delia* proceedings.

676. Dr. Zammit Pace described the position as follows:

*“Yes, I do understand the question, I just want to make it clear that I am not looking at an estoppel as an English law notion, but I am dealing with the issue of res judicata. So both courts, including the Court of Appeal, decided that the parties to the transaction agreements were all parties to the court action in the *Delia* judgment. So we had the government side and we had the Steward and Malta defendants. The Court of Appeal also decided that Mr *Delia* had locus standi in terms of article 33. At point in time, you have what the Maltese courts would call the integrity of judicial proceedings, in Maltese legalese (...), because all the parties having an interest in the transaction agreements were parties to the lawsuit. Whether as plaintiff or as defendant from a Maltese law point of view makes absolutely no difference, because the judgment is equally binding in relation to all parties to the *Delia* court case. This is my response to what Dr Fenech has called the problem that*

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<sup>441</sup> Exhibit **RZP-40**, p. 2 and **REX-7**, ¶ 61.

<sup>442</sup> Exhibit **RZP-41**, ¶ 45.

*government and the Steward Malta defendants were on the same side. From a Maltese law perspective you have the integrity of the judicial proceedings. The judgment is therefore equally binding on government and on the Steward Malta defendants, and it makes no difference whether that's in the capacity of plaintiff or as defendant. It is binding.*<sup>443</sup>

677. A few moments later, in response to a further question from the Tribunal, Dr. Zammit Pace elaborated his position and Dr. Fenech then set out his contrary view:

*“DR ZAMMIT PACE: I am not saying that that's not the case, but I am saying that whether the government and the Steward Malta defendants are all defendants or not has no bearing on the issue, at least from a Maltese perspective, because the proceedings are whole, they are integral. All the parties to the contract are parties in one form or another to the court case, which rescinded and annulled the transaction agreements. So the defendants can never claim that that judgment is not res judicata, because the government was not acting as plaintiff but was also a defendant. Juridically, at least from a Maltese perspective, it makes no difference whatsoever.*

*DR FENECH: “I disagree that that is the Maltese law. My point is this principle is allowed in Maltese law if they are counter-parties, whether they are plaintiff or defendant is of no consequence as long as they are counter-parties. One is saying X and the other is countering it. When they are on the same side, it is a completely different matter. They were actually helping each other rather than countering each other, it is when they are countering each other that it makes no difference whether they are plaintiff or defendant. Here they were not countering each other at all.”<sup>444</sup>*

678. The Tribunal considers that the approach of Dr. Zammit Pace is to be preferred as most naturally reflecting the policy behind the principles of *res judicata* under Maltese law.
679. The Tribunal would also note that by the time of the appeal, the Claimants and the Respondent were taking opposite views on what should be decided, since the Respondent had chosen not to support the appeal and had effectively sided with Dr. Delia.<sup>445</sup>
680. Lastly, on this issue the Tribunal has already noted, in describing Respondent's position, the reliance which it places on the decision of the Court of Appeal in *Grech v the State Advocate*,<sup>446</sup>

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<sup>443</sup> Tr. Day 3, 139:5-140:7.

<sup>444</sup> Tr. Day 3, 141:2-25.

<sup>445</sup> As regards the formal status of the GoM in the Delia proceedings, the Tribunal accepts Respondent's argument that Dr. Fenech is wrong to assert that the GoM was not a party to the Delia proceedings since only the Prime Minister was named as a party, **CEX-5**, ¶ 102. The Tribunal accepts the evidence of Dr. Zammit Pace that by virtue of Article 181B of the Code of Organisation and Civil Procedure, Chapter 12 of the laws of Malta (exhibit **RZP-44**) the Prime Minister as the head of GoM is vested with the judicial representation of GoM in an action against the GoM, **REX-7**, ¶¶ 74-77.

<sup>446</sup> Exhibit **RZP-35**.

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where Dr. Zammit Pace opined that “*the Court relied on the Delia Judgment as establishing as a juridical fact, that the Transaction Agreements were rescinded*”.<sup>447</sup> (Emphasis added).

681. Although, as explained, the Tribunal does agree with the Respondent’s case on the issue of juridical fact as regards the Court of Appeal’s decision to “*rescind and annul*” the Transaction Agreements, it should make clear, for the sake of completeness, that it does not consider that the *Grech* judgment supports Respondent’s argument in the way it has suggested.

682. The Tribunal agrees instead with Dr. Fenech’s view of the *Grech* case:

*“If I may add to that, in my view the reason why there was reference to the Delia judgment was not because there was any res judicata issue at stake, they were not bound by it in my view. All it was, was this was a case about something completely different and it was a case about whether or not the Attorney General should have taken action in terms of trying to reclaim amounts lost by the government as a result of the Delia judgment. The Delia judgment was not part of the matter to be decided, and that is why the parties as well as the court simply took it as a fact that that was the decision, and the question was whether or not the Attorney General had a duty to proceed beyond. (...)”*<sup>448</sup>

683. The Tribunal agrees that in the *Grech* case none of the parties to it were disputing that the Court of Appeal in Delia II had been correct in making the decision of rescinding and annulling the Transaction Agreements.

684. Therefore, the *res judicata* effect of Delia II and the question of what was or was not a juridical fact was simply not an issue in the *Grech* matter. The Court of Appeal in *Grech* was simply recording that as a matter of fact such a declaration had been made (and what the reasoning of the decision had been) and then moved on to decide what action, if any, should be taken by the State Advocate and other government officials.

685. The Court of Appeal’s decision in *Grech* is, however, still highly persuasive in explaining how Maltese courts understood the reasoning of the Court of Appeal in Delia II (as already explained in ¶¶ 654 - 657 above).

686. The next and final question that arises is the extent of the juridical fact that was decided by the Court of Appeal in Delia II and whether the relevant juridical fact is limited under Maltese law to the operative part of the decision of the Court of Appeal in Delia II.

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<sup>447</sup> Tr. Day 3, 125:10-16.

<sup>448</sup> Tr. Day 3, 126:1-14.



687. The position of the Claimants is that it is only the operative part of the judgment. Dr. Fenech explained his position as follows:

*“I would like to put forward a different view if I may. First of all, what is the law? The law is it is only the decided part of the judgment which is part of res judicata. Only. There have been some judgments, there I agree, where it is said look, in order to understand the decision, sometimes you need to go in to and that is a matter of judgment, and as you know, we do not have stare decisis in Malta, so that doesn't mean that future judgments are going to follow that line of reasoning. The law is that it is only the decide part which is binding.”*<sup>449</sup>

688. Dr. Zammit Pace advances a different position. He accepts that it is not every finding of fact made by the Civil Court and upheld and adopted by the Court of Appeal which can claim the status of a juridical fact. It is only those facts which are necessary and integral to the decided part of the judgment.<sup>450</sup>

689. According to Dr. Zammit Pace that would include the finding of collusion made by the Court of Appeal since that was integral to the finding that there had been a breach of Articles 33 and 31 of the GLA, which was the basis for the order of rescission and annulment in the operative part.

690. Dr. Zammit Pace goes one step further and says that the findings of breach of contract contained in Delia II, specifically in relation to the performance of milestones, are also judicial facts since they formed the basis of the finding of collusion and are therefore sufficiently proximate and integral to the decision in the operative part. When asked by the Tribunal whether findings in relation to the milestones would be a juridical fact by which the Tribunal would be bound, he replied:

*“In my opinion they would be, because the court, in its reasoning leading to the decision, tied the findings of fact relating to the breaches to the finding of collusion, and then from the decision or from its findings on collusion, then it moved on to 31, and the decision on rescission (...).”*<sup>451</sup>

691. For the Tribunal this view goes too far. There is no express statutory basis for treating any findings made by the Maltese courts as juridical facts, even where they have not become part of the operative part of the court's decision. The Tribunal would take different views if the Delia Courts had included declaratory relief as part of their decisions, to the effect that, for instance, there had been collusion between Vitals and the GoM at the time of entering into the Transaction Agreements. No such declarations were made by the Courts (as none had been requested by Dr. Delia).

692. In terms of legal certainty, the approach proposed by Dr. Zammit Pace raises far too much uncertainty and is not necessary to safeguard the principle of *res judicata*, where applicable.

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<sup>449</sup> Tr. Day 3, 126:2-131:4-15.

<sup>450</sup> REX-7, ¶¶ 203-211; Tr. Day 3, 129:16-20.

<sup>451</sup> Tr. Day 3, 130:2-10.

693. To conclude, this Tribunal accepts that it is bound by the fourth paragraph of the operative part of the Delia I but does not consider it is bound by the Court's findings as to collusion or breaches of contract.
694. In any case, the issue of a juridical fact could only become relevant when it comes to the valuation of the healthcare services provided by the Claimants, which will be discussed in the Section on Quantum. However, Delia I made no specific findings regarding the services rendered by the Claimants and breaches of the HSDA in the performance of these services,<sup>452</sup> let alone Delia II. They complain about the lack of completion of the Milestones, but this concerns a different issue, as will be discussed below at ¶¶ 878 *et seq.*
695. Neither Party has requested, however, that the Tribunal make a specific declaration to the effect that the Delia Judgments have rescinded and annulled the Transaction Agreements.<sup>453</sup> The Tribunal therefore abstains from doing so. Moreover, strictly speaking, such declaration is not required, as the Tribunal's order to have the Parties restored to their original position pursuant to Article 1209 MCC is nothing but the result of the Tribunal's aforementioned conclusion.

## C. RESPONDENT'S STATE AID DEFENSE

696. The Respondent having been successful with its Delia II Defense, its alternative State Aid Defense has become moot. Considering, however, the efforts both Parties have deployed in relation to that defense, the Tribunal sets out the Parties' main arguments.

### 1. The position of the Respondent

697. In reliance of the expert witness testimony of Mr. Quigley, the Respondent asserts that pursuant to the case law of the CJEU, commercial arbitral tribunals are capable of hearing disputes that involve the application of EU law, although they cannot make any reference to the CJEU, and while they do so, they "*are required to give full effect to EU law when applying national law of an EU Member State, in the same way as national courts.*"<sup>454</sup> Where an arbitral tribunal makes a finding of unlawful State aid, it must pursuant to Article 103(3) TFEU also award all necessary measures to negate State aid.<sup>455</sup> The direct effect of Article 108(3) TFEU includes the power of arbitral tribunals to order the recovery of State aid paid, as well as interest and damages.<sup>456</sup>

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<sup>452</sup> As the review of the full judgment put on record as exhibit C-0441 makes clear.

<sup>453</sup> In the Rejoinder, the Respondent sought relief in the following terms: "*Dismiss all of Steward's claims since the Concession and Related Instruments have been annulled and rescinded with ab initio effect by virtue of the Delia Judgment dated 23 October 2023,*" see above at ¶ 122.c. In the R-PHB, the RfR remained unchanged in that respect, see above at ¶ 395.

<sup>454</sup> Rejoinder, ¶ 304.

<sup>455</sup> R-PHB, ¶¶ 51-57.

<sup>456</sup> Rejoinder, ¶ 310.

698. For the Respondent, where the benefit of a contract has been passed onto persons who are part of the same economic unit, the claim for recovery of the unlawful State aid inherently must include these persons. The extension of the recovery against the Additional Parties is a substantive, not a procedural matter, as it arises “*from the Tribunal’s obligation to take all necessary steps to effectively order recovery of unlawful State aid.*”<sup>457</sup> Based on Mr. Quigley’s view, the Concession was not just aimed at a certain amount of public healthcare, but “*also in particular about taking responsibility for the operation and management of the Hospitals, developing teaching facilities and developing medical tourism (regardless of whether it was or was not developed ex post).*” Where healthcare services are provided for remuneration, regardless of the status of the operator, it would be an economic activity. It was up to the Concessionaire to use any excess amount of income for its benefit.<sup>458</sup>
699. According to the Respondent, the Claimants represent an “*undertaking*” engaged in economic activity.<sup>459</sup> It notes that both legal experts agreed at the Hearing that it “*entirely depends on the facts as to whether the Concessionaire was an undertaking engaged in economic activity.*” As explained by Mr. Quigley at the Hearing, the question whether an undertaking is engaged in economic activity must be ascertained at the time of the grant of the aid *ex ante*.<sup>460</sup>
700. The Claimants were engaged to provide services on commercial terms as independent third-party contractors to the GoM and/or Ministries as public authorities exercising public law powers. Article 168(7) TFEU does not preclude the State aid rules from applying. An EU Member State may outsource a very significant part of the public healthcare domain to third party economic operators and thereby become subject to the EU State aid rules.<sup>461</sup>
701. The Respondent lists the five relevant criteria of EU State aid law that must be met pursuant to Article 107(1) TFEU as follows: (i) transfer of State resources, (ii) imputability to the State, (iii) selective advantage, (iv) distortion of competition and effect on trade, and (v) economic advantage. Pursuant to the Respondent, the Claimants accepted that the first two of these criteria are met in the present case, *i.e.*, the transfer of Government resources through the Concession and the imputability of the Concession to the State.<sup>462</sup>
702. Regarding the third criterion, the granting of a selective advantage, the Respondent contends that the Claimants’ expert witness had conceded that this criterion is met, and that the Claimants solely

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<sup>457</sup> Rejoinder, ¶¶ 310, 312.

<sup>458</sup> R-PHB, ¶¶ 63, 64.

<sup>459</sup> Rejoinder, ¶¶ 338 *et seq.* ; R-PHB, ¶¶ 62 *et seq.*

<sup>460</sup> R-PHB, ¶ 66.

<sup>461</sup> Rejoinder, ¶¶ 337-344.

<sup>462</sup> Rejoinder, ¶¶ 314, 315 ; Reply, ¶ 277.

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challenge that the GoM “*has not discharged its burden of proof in showing that the [Concession] granted an economic advantage (...)*.”<sup>463</sup>

703. For the Respondent, the fourth criterion, distortion of competition and effect on trade, is met as well; although inextricably linked, these are separate and distinct conditions. In the present case, there was nothing hypothetical or presumed as to the effect on trade, as the RfP was “*open invitation to all health service management operators anywhere in the EU (...)*,” and it does not matter that no bidders from other EU Member States responded to the RfP.<sup>464</sup> With reference to Mr. Quigley’s expert testimony, the Respondent argues that the test is whether there is a potential effect on trade at the time when the aid was granted and that in a liberalized market there is a presumption of potential effect on trade. Besides, there is no specific percentage or threshold below which trade between Member States is not affected.<sup>465</sup>
704. The distortion of competition results from the economic activity, which existed through the provision of healthcare management services for a fee and is to be assessed beyond the geographical scope of Malta.<sup>466</sup>
705. Finally, for the Respondent, the fifth criterion, the granting of an economic advantage to the Claimants, is met as well. In reliance of Mr. Quigley’s expert witness opinion, the Respondent contends that the presumption that the Concession aligned with market conditions falls, since it has shown that the procurement process was discriminatory and not transparent, that there were several shortcomings with the design of the RfP and the due diligence of VGH was severely lacking. The Claimants themselves had relied on occasion on the NAO’s criticism of the deficient tender process.<sup>467</sup> The Respondent relies in particular on statements made by the Claimants before the Maltese courts relating to an application filed against Medical Associates of Northern Virginia, Inc. in February 2021.<sup>468</sup>
706. It follows from the ineffective tender process that an economic advantage was granted and the publication of the tender in the Official Journal of the EU and Government Gazette of Malta “*is not sufficient to show that a competitive, transparent, non-discriminatory, and unconditional tender process took place.*”<sup>469</sup>
707. Respondent rejects and refutes, point by point, Claimants’ criticism about its experts’ application of the Market Economic Operator Principle (the “**MEOP Test**”), which both Parties agree must be

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<sup>463</sup> Rejoinder, ¶¶ 317, 318.

<sup>464</sup> Rejoinder, ¶¶ 319 *et seq.*

<sup>465</sup> R-PHB, ¶¶ 76, 77.

<sup>466</sup> Rejoinder, ¶¶ 324, 325.

<sup>467</sup> Rejoinder, ¶¶ 326 *et seq.*

<sup>468</sup> Exhibit **R-245**, ¶¶ 27 *et seq.*

<sup>469</sup> Rejoinder, ¶ 330.

made to assess whether an advantage constitutes State aid.<sup>470</sup> Since the Concession gave rise to over-compensation, the GoM did not act like a “*market economic operator*.” Such over-compensation occurred under each of the Transaction Agreements taken individually, but also when taken cumulatively.

708. In order to quantify the State aid, it was appropriate for Mr. Williams to use “*the VGH financial model editing it to reflect the changes agreed in 2017,*” and that undeniably, the State guarantee lowered the cost of borrowing for the Concessionaire.<sup>471</sup>
709. The GoM used the “*VGH Model*” to carry out the MEOP Test, as it had become a shared model between the Parties and no other financial modeling was undertaken.<sup>472</sup> Claimants’ expert, Ms. Robin, had no alternative to offer for making a MEOP assessment and was unable to provide any test based on benchmarking.<sup>473</sup>
710. The Respondent maintains, based on Mr. Williams’s expert opinion and testimony at the Hearing, that the LSA granted a disproportionate advantage and that the Concession generated for Claimants a “*super normal profit*”, which they “*would not have benefitted from in a normal market and, accordingly, the GoM did not act like a market economic operator.*”<sup>474</sup>
711. For Respondent, the GoM’s failure to notify the State aid does not preclude recovery of the unlawful State aid.<sup>475</sup> Respondent notes that the Parties’ expert witnesses agree that if the Concession were to constitute State aid, it would be unlawful, as it had not been notified to the EU Commission, and regardless of whether it is subsequently found to be compatible.<sup>476</sup>
712. The Respondent disagrees with Claimants’ other defenses as to the GoM’s entitlement to recover what it considers to be unlawful State aid.
713. *First*, the limitation period is 30 years, not two years, as the latter period applies only to actions in tort, and therefore not to the request for the recovery unlawful State aid.<sup>477</sup> In any event, the GoM would still be able to recover the amount of the State aid pursuant to Article 1209 MCC, as it constitutes a “*thing received or obtained*” by virtue of the rescinded Transaction Agreements.<sup>478</sup>

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<sup>470</sup> Rejoinder, ¶¶ 331 *et seq.*

<sup>471</sup> Rejoinder, ¶ 371.

<sup>472</sup> R-PHB, ¶¶ 69, 70.

<sup>473</sup> R-PHB, ¶¶ 72, 73.

<sup>474</sup> Rejoinder, ¶ 336 ; R-PHB, ¶¶ 73-75.

<sup>475</sup> R-PHB, ¶¶ 58-61.

<sup>476</sup> R-PHB, ¶ 58 ; Rejoinder, ¶ 345 ; CEX-3, ¶ 108 ; REX-8, ¶ 124.

<sup>477</sup> Rejoinder, ¶¶ 347 *et seq.*

<sup>478</sup> Rejoinder, ¶ 351.

714. *Second*, the fact that the GoM failed to notify the EU Commission of the State aid does not in and of itself amount to an “*abuse of law*” and does not affect its obligation to recover such aid pursuant to Article 108(3) TFEU. Without the EU Commission’s approval, a purported ratification or affirmation by the GoM could never have validated the unlawful State aid, contrary to Claimants’ position.<sup>479</sup> Besides, the beneficiary of the unlawful State aid cannot claim legitimate expectation that transaction is lawful.<sup>480</sup>
715. The primary part of the GoM’s State Aid Defense leads it to seek a declaration from the Tribunal “*that the Concession, HSDA and LSA and any measure linked to the same constitute unlawful State aid.*”<sup>481</sup>

## 2. The position of the Claimants

716. Although Claimants do not dispute the jurisdiction of the Tribunal to assess and determine whether the Concession could constitute unlawful State aid, they deny its power to order the recovery of unlawful State aid.<sup>482</sup> In reliance on the Derenne Report I and II, the Claimants explain that EU law gives no power to arbitral tribunals to order recovery of unlawful State aid; this power is reserved to the exclusive jurisdiction of domestic courts, in the case at hand, to the First Hall Civil Court.<sup>483</sup>
717. The Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (the “**State Aid Regulation**”) has the state courts, not arbitral tribunals as its addressees, since only the former, but not the latter can seek a preliminary ruling from the CJEU under article 267 TFEU.<sup>484</sup>
718. This lack of authority does not mean that arbitral tribunals are not to observe EU law. It “*simply reflects the allocation of responsibilities within the EU legal framework, where different bodies play distinct roles in ensuring the comprehensive application of EU law.*”<sup>485</sup> And, contrary to what Mr. Quigley stated at the Hearing, Article 108 TFEU does not give arbitral tribunals such power.<sup>486</sup>
719. In any case, the Concession does not constitute State aid, and even if it did, this would provide the GoM no basis to escape liability. It is for the GoM to prove the existence of State aid, which it cannot do.<sup>487</sup> As per Article 107(1) TFEU, for State aid to exist, the following cumulative

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<sup>479</sup> Rejoinder, ¶¶ 356 *et seq.*

<sup>480</sup> R-PHB, ¶¶ 58-60.

<sup>481</sup> Appendix A to R-PHB, claim 1.f.(i). As part of its counterclaim, Respondent’s also seeks monetary relief, see above at ¶¶ 805 *et seq.* and below at ¶¶ 87777 *et seq.*

<sup>482</sup> CC Rejoinder, ¶¶ 126 *et seq.*; Reply, ¶¶ 270 *et seq.*

<sup>483</sup> Reply, ¶ 273(a); CEX-3, ¶ 19 and exhibit CL-0089, p. 2.

<sup>484</sup> Derenne II, ¶¶ 7 *et seq.*

<sup>485</sup> CC Rejoinder, ¶ 129.

<sup>486</sup> C-PHB, ¶¶ 68, 69.

<sup>487</sup> Reply, ¶¶ 269, 275; CC Rejoinder, ¶ 132.

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- requirements must be satisfied: the measure must be (i) imputable to the State and entail the transfer of State resources; (ii) benefit an “*undertaking*”; (iii) confer a selective “*advantage*”; and (iv) distort competition and affect trade between Member States. Except for the first requirement, the other three are not met.
720. The Claimants primarily rely on the Derenne Report I and II and on the Robin Report, but in part also on the Quigley Reports authored on behalf of Respondent, to show that no State aid exists.
721. The Claimants, as the Concession holder, were not an “*undertaking*” engaging in an “*economic activity*”, as Malta’s national healthcare system is not economic in nature for the purpose of EU State aid rules.<sup>488</sup> It is not the status of the entity, whether public or private, for-profit or non-profit, but the nature of its activities that matters.<sup>489</sup>
722. According to the Claimants, healthcare services are non-economic, and therefore activities like construction or refurbishment are also non-economic.<sup>490</sup> Contrary to Mr. Quigley’s argument, the Concession was not a “*carve out*” of the public healthcare system.<sup>491</sup> “*Since running the three Hospitals was a non-economic activity when performed by the [GoM], outsourcing to a private party did change this classification.*”<sup>492</sup>
723. The Respondent has also failed to show that the Claimants obtained from the GoM an “*advantage*” which it could not have obtained “*under normal market conditions.*” This would have to involve an *ex-ante* (pre-2017) assessment from the GoM’s perspective, which Respondent’s expert Mr. Williams has not performed.<sup>493</sup> Using Claimants’ estimated profitability based on VGH’s financial model does not allow assessing the economic viability of the Concession from the GoM’s perspective, making therefore Mr. William’s analysis meaningless.<sup>494</sup>
724. When a public competitive tender is put in place, there is “*a presumption that the transaction aligns with market conditions,*” as in the present case.<sup>495</sup> Regarding the absence of EU State aid, the Claimants rely on the conclusions of both Malta’s State Aid Monitoring Board (the “**SAMB**”) and of the NAO Report II.<sup>496</sup>
725. The Claimants further note that the NAO Report II references a specific submission from the SAMB, which the Respondent failed to disclose, although the Tribunal had ordered the

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<sup>488</sup> Reply, ¶¶ 278-281.

<sup>489</sup> CC Rejoinder, ¶ 135.

<sup>490</sup> C-PHB, ¶ 60.

<sup>491</sup> C-PHB, ¶ 61.

<sup>492</sup> CC Rejoinder, ¶ 136.

<sup>493</sup> C-PHB, ¶ 65.

<sup>494</sup> C-PHB, ¶ 66.

<sup>495</sup> Reply, ¶¶ 282-284.

<sup>496</sup> CC Rejoinder, ¶¶ 138-142; exhibit Q-0002, ¶ 6.5.4. in particular.

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Respondent to do so. According to the Claimants, it follows that the withheld document must have confirmed the absence of State aid.<sup>497</sup>

726. The Claimants argue in reliance on the two expert reports of Ms. Robin that in any case the Respondent has not established that the GoM failed to act as a market operator under the MEOP Test and that, therefore, the Respondent failed to prove any “*advantage*” that Claimant received under EU law.<sup>498</sup>
727. According to the Claimants, the Respondent’s experts have “*made several fundamental errors in their application of the MEOP Test,*” *first*, by failing to consider the revenues and benefits the GoM expected to receive from the Concession; *second*, by failing to consider the Agreements as a whole, and *third*, by analyzing the collective effect of the Agreements “*from the perspective of the Concessionaire rather than the [GoM]*.”<sup>499</sup>
728. Moreover, the Respondent’s expert, Mr. Williams, has artificially overstated VGH’s expected internal rate of return (the “**IRR**”) and understated its weighted average cost of capital (the “**WACC**”).<sup>500</sup>
729. Finally, the Respondent failed to show that the Concession affected “*intra-EU trade.*” It is undisputed that the healthcare services provided under the Concession were “*exclusively to local patients*” at the Hospitals, with the projected allocation of 150 beds to medical tourism being “*marginal in relation to overall hospital capacity in Malta.*” Healthcare markets are local in nature; besides neither of the two other bidders for the Concession were from the EU and the Concession attracted no interest from EU businesses.<sup>501</sup> The absence of any complaints from local or foreign competitors confirms that the Concession had no impact on intra-EU trade.
730. Besides, the GoM’s intention to develop medical tourism is irrelevant; what counts are the effects, even *ex post* actual effects of which there were none here, as no medical tourism existed.<sup>502</sup>
731. The Respondent ignored the two-part test for assessing the impact on intra-EU trade, which the European Commission has established, as can be seen from the *Slovenia* and the *Marinvest* cases. These cases rested on two key findings: (i) limited cross-border consumers and (ii) negligible effect

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<sup>497</sup> CC Rejoinder, ¶ 143.

<sup>498</sup> CC Rejoinder, ¶¶ 144, 150.

<sup>499</sup> CC Rejoinder, ¶¶ 145 *et seq.*; Reply, ¶¶ 285, 286.

<sup>500</sup> CC Rejoinder, ¶ 149.

<sup>501</sup> Reply, ¶¶ 287-291.

<sup>502</sup> C-PHB, ¶ 63, 64.



- on cross-border investment.<sup>503</sup> The Claimants in turn reject the alternative arguments made by Respondent as being irrelevant, because disconnected from the EU Commission's criteria.<sup>504</sup>
732. Furthermore, it is precisely because the Concession does not constitute State aid, that the GoM never notified the EU Commission about it, and why neither the Maltese authorities, who had reviewed the Concession, nor the EU Commission, which was aware of it, considered it to constitute unlawful State aid.<sup>505</sup>
733. Last but not least, the Claimants reject the argument that the lack of notification of the alleged State aid to the EU Commission renders it unlawful, and that as a result thereof the GoM would be entitled to seek (i) recovery of the alleged aid and (ii) a declaration that the Agreements are null and void. It is also wrong to consider that the compensation sought by the Claimants would constitute additional unlawful State aid.<sup>506</sup>
734. Even if the Respondent had a valid claim for unlawful State aid and the Tribunal were empowered to order its recovery, the claims for recovery and for rescission based on State aid would fail for at least two reasons.
735. *First*, they are time-barred.<sup>507</sup>
736. As Maltese law lacks a limitation specific to State aid claims, the general two-year limitation for liability arising for breaches of Maltese law, thereby including EU law applies.<sup>508</sup> It does not matter where the recovery claim is qualified as a claim for damages or for restitution of undue payment, since in either case, the claim would be subject to the two-year limitation period under Maltese law.<sup>509</sup>
737. Pursuant to Article 2153 MCC, the limitation period is two years running from the date on which the alleged aid was granted, which, according to the Claimants, is when the SCA was concluded on 30 November 2015.
738. *Second*, the GoM would also be precluded from recovering the alleged aid pursuant the general principle that no one can benefit from his own unlawful conduct. Having represented and warranted in the SCA that the Concession complied with EU law,<sup>510</sup> by allowing the GoM to recover State

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<sup>503</sup> CC Rejoinder, ¶¶ 151-153; exhibits **JD-0051** and **JD-0052**.

<sup>504</sup> CC Rejoinder, ¶¶ 154-156.

<sup>505</sup> Reply, ¶ 292.

<sup>506</sup> Reply, ¶ 293.

<sup>507</sup> CC Rejoinder, ¶¶ 158 *et seq.*; Reply, ¶¶ 294 *et seq.*

<sup>508</sup> CC Rejoinder, ¶ 161, C-PHB, ¶¶ 55, 56.

<sup>509</sup> C-PHB, ¶ 57.

<sup>510</sup> Exhibit **C-0001**, Clause 12.5 as amended.

aid, the GoM would benefit from its own “*violation of an applicable legal disposition, the compliance with which [the State] guaranteed*” in the contract.<sup>511</sup> The GoM cannot rely on EU law after the fact to escape its contractual obligations in an “*attempt to gain a financial advantage [that] has nothing to do with preserving the competitive level playing field.*”<sup>512</sup>

739. For the Claimants, the situation in the present case is very similar to the *Neckarpri* case, where “*a distinguished tribunal rejected a similar claim on this precise basis.*”<sup>513</sup> In the present case, the GoM’s abuse of EU State aid law could not be any clearer, since it has not “*offered any explanation for its continuing refusal to notify the European Commission*” of the alleged State aid.<sup>514</sup>
740. Even if the Concession were to constitute unlawful State aid, the Respondent’s claim for rescission would be subject to a five-year limitation period, which would have started on 30 November 2015, when the GoM granted the Concession and would have expired long before Respondent first alleged unlawful State aid on 19 June 2023.<sup>515</sup> EU State aid law provides, however, no basis to rescind the Concession.<sup>516</sup>
741. Furthermore, the Respondent is precluded from pursuing rescission as it affirmed the Transaction Agreements for several years. The Respondent wrongly invokes the exception of Article 1230 MCC, since clearance by the EU Commission was not a requisite formality for the validity of these Agreements.<sup>517</sup>
742. There would be no basis under Maltese law to declare the Transaction Agreements null and void due to the unlawfulness of their “*subject-matter*”, “*consideration*” or “*condition*”, as wrongly argued by the Respondent.<sup>518</sup> The Respondent’s recourse to Articles 985 and 990 MCC is of no help for its case.
743. Besides, even if the Tribunal were to find that the Concession constituted unlawful State aid, any compensation awarded by this Tribunal would not constitute “*additional unlawful aid*”, as it would not be “*imputable to the State.*”<sup>519</sup>

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<sup>511</sup> Reply, ¶ 296, citing RL-0052, *Neckarpri GmbH/EDF International SAS / Das Land Baden-Württemberg*, Final Award, ICC Case No. 18519 (“*Neckarpri*”), ¶ 603.

<sup>512</sup> Reply, ¶ 296, citing RL-0052, *Neckarpri*, ¶ 615.

<sup>513</sup> CC Rejoinder, ¶¶ 164 *et seq.*; exhibit **RL-0052**.

<sup>514</sup> C-PHB, ¶ 70.

<sup>515</sup> CC Rejoinder, ¶ 172.

<sup>516</sup> C-PHB, ¶ 71.

<sup>517</sup> CC Rejoinder, ¶¶ 173, 174; Reply, ¶ 303.

<sup>518</sup> CC Rejoinder, ¶¶ 175-177; Reply, ¶¶ 301, 302.

<sup>519</sup> Reply, ¶¶ 304 *et seq.*

744. Finally, even if the Respondent could invoke *ab initio* rescission because of the alleged State aid, Article 1209 MCC would apply, and would result in the Respondent having to reimburse the Claimants.<sup>520</sup>

### 3. The Tribunal's analysis

745. Respondent's claim for the recovery of purported unlawful EU State aid, which it has argued led to the nullity, or at least rescission of the Concession, is and always was an alternative claim raised by Respondent in case that its primary case, regarding the nullity of the Concession by virtue of the Delia Judgments, would not be successful.
746. In response to the Tribunal's question to the Parties "*In case GoM were to be successful with Delia claim, would its additional claim for EU state aid not lead to double-recovery?*",<sup>521</sup> the Respondent clarified already during the Q&A session, that in the "*Delia scenario (...) we are not claiming state aid in terms of state aid being legally state aid, so there is no need for [the Tribunal] to order the reimbursement of recovery interest.*"<sup>522</sup> The Claimants acknowledged Respondent's clarification as "*very helpful*" and stated that "*(...) in the scenario where the Tribunal finds that the contract should be rescinded ab initio, there is no longer any basis for a finding or any remedy whatsoever as a matter of State aid.*"<sup>523</sup>
747. In the R-PHB, ¶ 79, the Respondent confirmed that its "*primary position is that, to the extent that the Concession and Related Instruments are null and void ab initio by virtue of the Delia Judgment and the Parties are restored to the status quo ante before the conclusion of the Concession, the Tribunal does not need to make a finding as to State aid. Indeed, in such a case the State aid will have been automatically restored to the Government, since the parties will have been put back into the position they were in before the Concession. The elements of State aid received by Steward are things and benefits to be restored in the case of rescission irrespective of whether they satisfy the legal requirements of Article 107(1) TFEU.*"
748. In conclusion, the Respondent's highly disputed counterclaim for the recovery of the purported unlawful EU State aid has become moot and requires no decision from the Tribunal.

## D. THE TERMINATION OF THE AGREEMENTS

### 1. The position of the Claimants

749. For the Claimants, the Transaction Agreements have come to an end by virtue of the Termination Notice, or alternatively, by change in law on 24 February 2023, or at latest on 19 July 2023 for

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<sup>520</sup> CC Rejoinder, ¶ 178.

<sup>521</sup> Q&A Memo, ¶ 9.

<sup>522</sup> Darwazeh, Tr., Day 6, 26:20-24; also 27:14-28:5 and 29:3-8.

<sup>523</sup> Rubins, Tr., Day 6, 29:12 and 30:13-16.

convenience following the repudiation of the Transaction Agreements by the GoM on 21 March 2023.<sup>524</sup>

750. The Claimants submit as their primary case that they properly terminated the Transaction Agreements considering several Government's Non-Rectifiable Events of Default.
751. Clause 33.4.8 of the SCA entitles them to terminate the Concession at any time in case of a "*Non-Rectifiable GoM Event of Default*" occurs,<sup>525</sup> by serving a termination notice on the GoM specifying the type and nature of the default event and the date of the *ipso jure* termination.
752. Further, Clause 33.8.5 of the SCA, Clause 24.1 of the HSDA, and Clause 11.3 of the LSA allegedly provide that, as a consequence of the Concession's termination for any reason, all Transaction Agreements are terminated *ipso jure*.<sup>526</sup>
753. On 16 March 2023, the Claimants served a Termination Notice on the GoM describing the events of default that justified the *ipso jure* termination of the Concession Agreement.<sup>527</sup> The Claimants' termination was based on the following Non-Rectifiable GoM Event of Default:
- (i) failure to secure vacant land of the Sites in accordance with the Deed;
  - (ii) failure to ensure Sites free from burden, encumbrance, or encroachment;
  - (iii) Delia I.
754. As to the first event, the failure to secure vacant land of the Sites in accordance with the Deed, the Claimants argue that Clauses 33.4.1.3 and 11.1.9 of the SCA provide that a Non-Rectifiable GoM Event of Default occurs if the GoM fails to secure vacant possession of the Sites in accordance with the Deed within 90 days from the agreed deadlines.<sup>528</sup>
755. According to the Claimants, the Claimant No 3 was entitled to receive free, full and vacant possession of the Occupied Areas as follows: (i) the Blood Bank at SLH within five years from 22 March 2016; (ii) the Malta Enterprise Property within two years from 22 March 2016; (iii) the Child Development Assessment Unit at SLH within two years from 22 March 2016; (iv) the Detox Center – Substance Misuse Out-Patients Unit at SLH within one year from 22 March 2016; (v) the Administration Building at GGH within one year from 22 March 2016; and (vi) any and all other

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<sup>524</sup> SoC, ¶¶ 194, 198, 208 (see also Reply, ¶ 264).

<sup>525</sup> Reply, ¶ 218.

<sup>526</sup> SoC, ¶¶ 193, 194.

<sup>527</sup> SoC, ¶ 194; Reply, ¶ 220; C-PHB, ¶ 16.

<sup>528</sup> SoC, ¶169; C-PHB, ¶ 2.

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parts of the Sites used and/or occupied by third parties by no later than nine months from 22 March 2016.<sup>529</sup>

756. Even though the above deadlines could be amended with the consent of the Claimant No 3, the Claimants submit that no such amendment was entered into by either the Claimant No 3 or by any other Claimants or by the Additional Parties.<sup>530</sup>
757. The Claimants further submit that the Respondent breached the above obligations, since, despite repeated requests, the Sites remained occupied by third parties in each instance for more than 90 days after the stipulated deadlines, thus causing a Non-Rectifiable GoM Event of Default under the SCA, from 22 March 2017 until termination.<sup>531</sup>
758. Although the Respondent does not deny the above circumstance, it argues that the non-vacated areas were “minor”, “insignificant” and “marginal” compared to the overall size of the Hospitals and did not prevent the Claimants from continuing with their work. The Claimants contest this and maintain that the occupied structures were in any event critical to the operation, and that the occupation of the Sites precluded or disrupted their operations; besides, the Transaction Agreements required the Respondent to vacate all areas without distinction or exception.<sup>532</sup>
759. In addition, the Claimants reject the Respondent’s contention that the Claimants had to issue a rectification notice threatening termination before actually terminating the Concession. Indeed, such notice is required exclusively for *Rectifiable* GoM Events of Default, while, in the case at hand, the breaches in discussion represent *Non-Rectifiable* GoM Events of Default pursuant to Clause 33.4.1.3 of the SCA. In any event, the Respondent was duly notified.<sup>533</sup>
760. The Claimants also reject the Respondent’s argument that the claim related to failure to vacate the Sites did not justify the termination because the Claimants allegedly failed to demonstrate any resulting loss.<sup>534</sup> The Claimants submit that the SCA sets no such requirement and that the liquidated damages clause provided under Schedule 7 has exactly the aim of avoiding the need of quantifying losses arising from contractual breaches. The Claimants further argue that they have shown in any case the losses suffered because of the Respondent’s default.<sup>535</sup>

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<sup>529</sup> Reply, ¶ 164; exhibits C-0006, Clauses 1.1, 4.4.1.1(a), 4.4.2.3-4, C-0001, Clauses 33.4.1.3, 11.1.9 as amended, C-0011, Clauses 1.3.1, 1.8.3.

<sup>530</sup> SoC, ¶¶ 170, 171.

<sup>531</sup> SoC, ¶ 172; C-PHB, ¶ 2.

<sup>532</sup> C-PHB, ¶ 3; see also SoC, ¶¶ 103-108.

<sup>533</sup> Reply, ¶¶ 167, 168, ¶¶ 221-228; C-PHB, ¶ 17.

<sup>534</sup> Reply, ¶ 170.

<sup>535</sup> Reply, ¶ 171.

761. Further, the Claimants contest the Respondent's argument based on the principle of exception of non-performance, arguing that it is not applicable in the case at hand. There is no general recognition of the above principle under Maltese law, although certain Maltese courts applied it based on the specific circumstances of the case. However, the principle of exception of non-performance cannot prevail over the *pacta sunt servanda* principle, *i.e.*, cannot justify a pre-existing breach.
762. Regardless of that argument, the Claimants were not in breach of contract and could not have been after 22 March 2017, as of which time they were automatically relieved of their obligations.<sup>536</sup> Besides, while the Concession Agreement provides that the Claimants could suspend their obligations in case of breaches of Respondent, the same right was not granted to the Respondent.<sup>537</sup>
763. At any rate, the exception of non-performance as applied by Maltese courts prevents a party from demanding performance under a contract only if it has failed to fulfil a significant obligation that was reciprocal and a direct condition for that performance. In addition, the failure to justify the suspension of performance by one party should be based entirely on the fault of the other party and should be serious. According to the Claimants, the Respondent failed to demonstrate such requirements, which are not fulfilled.<sup>538</sup> The Claimants submit that anyway they did not breach the contract and could not have been in breach after 22 March 2017, since by then the Respondent had triggered a Non-Rectifiable default that automatically relieved the Claimants from their obligations.<sup>539</sup>
764. As to the second event, the failure to ensure Sites free from burden, encumbrance, or encroachment, the Claimants submit that, pursuant to Clauses 11.1.12 and 11.1.14 of the SCA, the Respondent assumed responsibility for preventing any unauthorized occupation, access, or use of the Sites by third parties. Pursuant to Clause 33.4.1.3 of the SCA, the Respondent agreed that a failure to fulfill such responsibility for more than 90 days would constitute a Non-Rectifiable GoM Event of Default.<sup>540</sup>
765. For the Claimants, the Respondent failed to remove third party encroachments from several parts of the Sites, allowing its agencies to occupy and use them for years, well over 90 days after the agreed deadline. Even though the Claimants repeatedly requested the Respondent to rectify these

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<sup>536</sup> C-PHB, ¶ 4.

<sup>537</sup> Reply, ¶ 174.

<sup>538</sup> Reply, ¶¶ 175-177.

<sup>539</sup> C-PHB, ¶ 4.

<sup>540</sup> SoC, ¶¶ 173-176; Reply, ¶ 178.

breaches, the GoM failed to do so, thus giving rise to a Non-Rectifiable GoM Event of Default.<sup>541</sup> According to the Claimants, the Respondent admits its failure.<sup>542</sup>

766. Besides, the Claimants were not obliged to notify the Respondent of the default while the Concession was still in place, as Clause 33.4.1.3 of the SCA does to require notification for breaches of Clauses 11.1.12 and 11.1.14. In any case, the Claimants submit that they duly notified Respondent.<sup>543</sup>
767. The Claimants also reject the Respondent's contention that they have not shown the damage resulting from the failure to ensure Sites free from burden, encumbrance, or encroachment. According to the Claimants, no provision of the SCA requires that a Non-Rectifiable GoM Event of Default give rise to damages in order to be qualified as such. The damage suffered due to the Respondent's default was nonetheless duly communicated to Respondent.<sup>544</sup>
768. Finally, the same reasons that exclude the application of the principle of exception of non-performance to the failure to secure vacant land of the Sites in accordance with the Deed discussed above (¶¶ 761*et seq.*) also exclude the application of the principle to the Respondent's failure to ensure Sites free from burden, encumbrance, or encroachment.<sup>545</sup>
769. As to the third Non-Rectifiable Event of Default that justified the Claimants' termination, *i.e.* the publication of Delia I, the Claimants point out that on 27 August 2019, the Parties signed an amendment to the Direct Agreement providing that, under Clause 33.4.8 of the SCA, a Non-Rectifiable GoM Event of Default would occur:

*“if, by way of any Applicable Law or any final order, judgment, decision, notice, decree or any other instrument of any Public Body or otherwise, any of the Transaction Agreements are wholly or partially rescinded, terminated, declared to be null or void or invalid, withdrawn, annulled, cancelled, repealed or quashed, such an event shall be deemed to be a Non-Rectifiable GoM Event of Default”.*<sup>546</sup>

770. The definition of “Public Body” was expanded to include also “courts and tribunals in Malta or any other judicial, executive or quasi-judicial authority or body”. Such amendments were negotiated exactly to protect the Claimants, but also the Bank of Valletta from the possible outcomes of the Delia Claim that had previously been filed.<sup>547</sup>

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<sup>541</sup> Reply, ¶¶ 178-181; C-PHB, ¶¶ 5-6.

<sup>542</sup> SoC, ¶ 177; Reply, ¶¶ 164-165; C-PHB, ¶ 5, N.13.

<sup>543</sup> Reply, ¶ 182.

<sup>544</sup> Reply, ¶ 183.

<sup>545</sup> Reply, ¶ 184.

<sup>546</sup> SoC, ¶ 178; Reply, ¶¶ 185-186; C-PHB, ¶ 8.

<sup>547</sup> Reply, ¶¶ 187-188; C-PHB, ¶¶ 9-11; exhibit C-320, p. 9.

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771. For the Claimants, pursuant to these amendments if a Maltese court declares the rescission, annulment or invalidation of any of the Transaction Agreements, even in part, a Non-Rectifiable GoM Event of Default occurs.<sup>548</sup>
772. For the Claimants, Delia I represents a Non-Rectifiable GoM Event of Default that justifies Claimants' termination for the following reasons:
- (i) It was a judgment that rescinded the Deed and the other Transaction Agreements. Respondent's argument that a judgment should be final pursuant to Clause 33.4.8 of the SCA is of no relevance, as the word "*final*" only refers to "*order*"<sup>549</sup>. In addition, contrary to Respondent's contention, a default needs not be redressable to be "*Non-Rectifiable*."<sup>550</sup> In any case, Delia I should be considered "*final*" according to Maltese civil procedure, as it is not necessary to have *res judicata* effect and be enforceable for a judgment to be final,<sup>551</sup> or
  - (ii) it was an "*instrument*" of a "*Public Body*" that rescinded the Deed and the other Transaction Agreements pursuant to Clause 33.4.8 of the SCA;<sup>552</sup> or
  - (iii) even if the Delia Judgment was not a "*judgment*" or "*instrument*" of a "*Public Body*", the words "*or otherwise*" extend to circumstances of default that include any rescission, annulment, or invalidation of any of the Transaction Agreements by any means, including, for example, by an order, directive or contract regulation from a European public body.<sup>553</sup>
773. Alternatively, should the Tribunal find that the Claimants did not properly terminate the Transaction Agreements based on the GoM's Non-Rectifiable Events of Default, the Claimants submit that the Transaction Agreements terminated automatically due to a change in law caused by Delia I.<sup>554</sup>
774. The Claimants point to Clauses 33.6.1 and 33.8.5 of the SCA pursuant to which if a change in law causes a material adverse effect on the Claimants, it shall lead to an automatic early termination of the Transaction Agreements. The Claimants underline that a "*change in law*" is defined in the SCA as a "*change in the legality, validity, binding nature and effect or enforceability of the Transaction Agreements*" while a "*material adverse effect*" means any interference with the Parties' ability to "*exercise, observe and perform any of [their] material rights and obligations*" under the

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<sup>548</sup> SoC, ¶ 179.

<sup>549</sup> Reply, ¶¶ 190-192; C-PHB, ¶ 12.

<sup>550</sup> Reply, ¶ 194.

<sup>551</sup> Reply, ¶ 196-198.

<sup>552</sup> Reply, ¶¶ 199-200; C-PHB, ¶ 12.

<sup>553</sup> SoC, ¶ 180; Reply, ¶ 201.

<sup>554</sup> Reply, ¶ 230; C-PHB, ¶ 18.



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Transaction Agreements “*which is deemed to be material or significant by a bonus pater familias taking into account Good Industry Practice*”.<sup>555</sup>

775. Even though the Claimants disagree with Delia I, the latter had a material adverse impact on the Parties’ ability to perform. Indeed, immediately after Delia I, Respondent labelled the Transaction Agreements as invalid and decided not to appeal Delia I. Accordingly, even if the Transaction Agreements did not terminate for the GoM’s breaches or events leading to Non-Rectifiable GoM Events of Default, by virtue of Clause 33.6.1 of the SCA, the Transaction Agreements terminated automatically on 24 February 2023 due to Delia I.<sup>556</sup>
776. The Claimants reject Respondent’s contention that Delia I did not constitute a change in law because it lacked *res judicata* effect and was not enforceable at the moment it was issued. Indeed, the Claimants argue that in order to operate, Clause 30.1.4 of the SCA only requires an impact on the performance of the Transaction Agreements that is material from the point of view of a reasonable person, whilst Delia I did not need to be enforceable or have *res judicata* effect.<sup>557</sup>
777. The Claimants also reject Respondent’s argument that they would have had to issue a notice in case of termination based on change of law with termination taking effect only 120 days after the notice. Respondent’s position contrasts with Clause 33.6.1. of the SCA, which provides for an automatic early termination.<sup>558</sup> In any case, if prior notice had been required, the Claimants’ Termination Notice would have been sufficient, and the Transaction Agreements would have terminated at the latest 120 days after notification, *i.e.*, on 14 July 2023.<sup>559</sup>
778. Finally, the Claimants submit that the Respondent’s purported termination of 21 March 2023 is unlawful and void and had no effect. At that time, the Claimants had already lawfully terminated the Transaction Agreements.<sup>560</sup> Regardless, even if the Claimants had not validly terminated the Transaction Agreements, the GoM had no right to terminate for the following reasons:

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<sup>555</sup> SoC, ¶¶ 195-196.

<sup>556</sup> SoC, ¶¶ 197-198; C-PHB, ¶ 18.

<sup>557</sup> SoC, ¶181; Reply, ¶ 232.

<sup>558</sup> Reply, ¶¶ 233-235.

<sup>559</sup> Reply, ¶¶ 236-237.

<sup>560</sup> SoC, ¶ 199; Reply, ¶ 238.

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- (i) The Claimants did not breach the SCA;
  - (ii) none of the breaches alleged by the GoM qualify as non-rectifiable defaults and, therefore, the GoM had no right to terminate;
  - (iii) in any event, any breach by the Claimants would have occurred while GoM was in “*Non-Rectifiable*” default. Consequently, the Claimants would have been automatically relieved from their obligations pursuant to the SCA.
779. Furthermore, the Respondent’s termination was initially based on alleged Non-Rectifiable Events of Default consisting in the breach of the obligation to provide a bank guarantee in the amount of Euro 9M and proof of funds to finance the Concession. The Claimants submit that such allegations were unfounded, as proof of funds and the bank guarantee were regularly provided to the Respondent. In any case, the breaches of the above obligations are categorized as “*Rectifiable*” under the Transaction Agreements and, thus, do not allow the GoM to terminate the Concession.<sup>561</sup>
780. In addition, the Respondent based its termination on the breach of the terms of their medical licenses, including “*a laundry list of unsupported accusations;*” such allegations were “*baseless, concocted as pretext to end the Concession abruptly and without any valid justification.*”<sup>562</sup>
781. According to the Claimants, the Respondent’s allegation that they had abandoned the Concession and its business activities by not pursuing medical tourism and completing redevelopment is unfounded, as the Claimants made substantial progress and remained committed to performing the Concession until its early termination. The Claimants’ “*dedication to the Concession and the wellbeing of patients*” could be seen from their behavior in the post-termination handover process, where they tried to ensure continuity despite the GoM’s alleged obstruction.<sup>563</sup>
782. Moreover, the Claimants underline that according to the Respondent four Rectifiable events of default should qualify as “*Non-Rectifiable*” ones. According to the Claimants, the SCA includes no mechanism to convert a “*Rectifiable*” event of default into a “*Non-Rectifiable*” one, so that Respondent is precluded from terminating the Concession Agreement based on “*Rectifiable*” events of default.<sup>564</sup>
783. If the Tribunal were to find nonetheless any of the Respondent’s allegations of breach as grounded, none of the alleged breaches may justify termination, as Clause 33.4.4 of the SCA relieves the Claimants from their obligations during the existence of any GoM Non-Rectifiable Event of Default. Indeed, the Claimants argue that all the alleged breaches occurred while the Respondent was already in breach of “*Non-Rectifiable*” obligations.<sup>565</sup>

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<sup>561</sup> SoC, ¶¶ 200-202.

<sup>562</sup> SoC, ¶ 203,

<sup>563</sup> SoC, ¶ 204.

<sup>564</sup> SoC, ¶ 205.

<sup>565</sup> SoC, ¶ 206.

784. In the further alternative, should the Tribunal find that the Claimants' termination was invalid, the Claimants maintain that then the Respondent terminated the Transaction Agreements for convenience by its own notification pursuant to Clause 33.2 of the SCA. This provision allowed the GoM to terminate the SCA at its discretion at any point in time during the Concession Period. Given that the Respondent's grounds for termination were not valid, the Respondent's notice necessarily entails a termination for convenience with effect as of 19 July 2023.<sup>566</sup>

## 2. The position of the Respondent

785. It always was and has remained the Respondent's primary position that it does not have to address the Claimants' termination claim, as it considered the Transaction Agreements null and void *ab initio*. Nonetheless that claim should be rejected as invalid, as none of the grounds invoked in support of it by the Claimants have any merit.<sup>567</sup>

786. Regarding the claim that the GoM did not vacate certain areas and ensure that they were free from burden, encumbrance, or encroachments, Respondent's defense is threefold:

787. *First*, while the GoM accepts that it did not vacate certain areas at the Sites of the Saint Luke and Gozo hospitals, they represented "*marginal and peripheral areas of the Sites*."<sup>568</sup> Besides, they did not hinder the Claimants in their performance of the Concession.<sup>569</sup> This explains why the Claimants had not mentioned to the GoM before early 2022 that these areas had not been vacated.<sup>570</sup>

788. Likewise, the Claimants are wrong in arguing that the Sites were not free from burden, encumbrance encroachments, as they are using the fact that certain areas had not been vacated as a basis for this argument, which is unsupported by the SCA.<sup>571</sup> In any event, there existed no hindrance due to any alleged burden, encumbrance or encroachments, of which the Claimants had never complained, and for which no loss has been shown.<sup>572</sup>

789. *Second*, even if the Tribunal would consider that the Respondent failed to vacate certain areas and/or provide them free from burden encumbrance or encroachments, the Claimants' claims would have to be dismissed due to the exception of non-performance principle. This principle exists as a matter of Maltese law and was not excluded by agreement of the Parties.<sup>573</sup> Moreover, the conditions of the exception of non-performance are met; the Claimants wrongly sought to rely on

<sup>566</sup> SoC, ¶¶ 207, 208; Reply, ¶ 240; C-PHB, ¶¶ 19-21.

<sup>567</sup> Rejoinder, ¶ 373.

<sup>568</sup> Rejoinder, ¶¶ 375 *et seq.*, where the areas that have not been vacated are being identified; R-OS, p. 131

<sup>569</sup> SoD&C, ¶¶ 388-390; Rejoinder, ¶¶ 379, 380.

<sup>570</sup> Rejoinder, ¶ 381; R-PHB, ¶ 158.

<sup>571</sup> SoD&C, ¶¶ 392 *et seq.*; Rejoinder, ¶¶ 386-390.

<sup>572</sup> Rejoinder, ¶¶ 391, 392.

<sup>573</sup> SoC&D, ¶ 403; Rejoinder, ¶¶ 393-398.

a “*reciprocity*” obligation as a condition for raising this exception, although such condition does not exist under Maltese law, but would in any event also have been met in the present case.<sup>574</sup>

790. *Third*, the Claimants’ claims should in any case be dismissed, as the GoM did not commit any Non-Rectifiable GoM Events of Default, as the Claimants failed to issue a Rectification Notice, as required under Article 33.4.6 of the SCA.<sup>575</sup>
791. Further, regarding the additional claim that Delia I constituted a Non-Rectifiable GoM Event of Default or a change of law under the Concession, the GoM’s defense rests on the following arguments:
792. *First*, the Tribunal does not have jurisdiction to decide that Delia I constituted a Non-Rectifiable GoM Event of Default.<sup>576</sup> But even if the Tribunal were to uphold jurisdiction in that respect, it would have to find that Delia I was not a “*final*” judgment, as required by Clause 3.3(i) of the Direct Agreement. To be final, a judgment must be *res judicata*, which is not the case for a judgment that was appealed, as was the case for Delia I.<sup>577</sup>
793. *Second*, Delia I was not “*change in the legality, validity, binding nature and effect or enforceability of the Transaction Agreements*” pursuant to Clause 30.1.4 of the SCA, since Delia I was no *res judicata* and thus not enforceable.<sup>578</sup> But even if Delia I had constituted a change of law, the Claimants failed to comply with the “*Change in law Notice*” requirements under Clauses 30.3 and 30.4 of the SCA.<sup>579</sup> Claimants’ Termination Notice of 16 March 2023 failed to satisfy these requirements.<sup>580</sup>
794. *Finally*, the Respondent rejects the further alternative argument that the Transaction Agreements were terminated at the GoM’s convenience under Clause 33.2 of the SCA. It has never given any other notice other than the one based explicitly on Clause 33.3 of the SCA, *i.e.*, for Non-Rectifiable Concessionaire Event of Default.<sup>581</sup>

### 3. The Tribunal’s analysis

795. The Claimants’ claim seeking a declaration from the Tribunal that the Claimants validly terminated the Transaction Agreements by their termination notice of 16 March 2023, or alternatively, that the

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<sup>574</sup> Rejoinder, ¶¶ 399-414.

<sup>575</sup> Rejoinder, ¶¶ 416-425; see also SoD&C, ¶¶ 377-385.

<sup>576</sup> SoD&C, ¶¶ 221 *et seq.*; Rejoinder, ¶¶ 148 *et seq.*

<sup>577</sup> SoD&C 415 *et seq.*; Rejoinder, ¶¶ 431-454.

<sup>578</sup> Rejoinder, ¶¶ 456 *et seq.*

<sup>579</sup> SoD&C, ¶¶ 425-427; Rejoinder, ¶¶ 463 *et seq.*

<sup>580</sup> Rejoinder, ¶¶ 471-473.

<sup>581</sup> Rejoinder, ¶¶ 475-479.

Transaction Agreements terminated automatically on the issuance of the Delia Judgment, and seeking further, a declaration that the Respondent was not entitled to terminate the Transaction Agreements by its notice of 21 March 2023, and breached the Concession Agreement by purporting to do so,<sup>582</sup> is premised on the validity of the Transaction Agreements at the time the Parties issued their respective termination notices in March 2023.

796. Considering the Tribunal's findings that Delia I and thereafter Delia II have led to the rescission of the Transaction Agreements with *ab initio* effect, the Claimants' claim for declaratory relief has become moot, and must be rejected.
797. For the same reasons, the Claimants' Contractual Claims have also become moot and must be rejected.
798. As a result of the Tribunal's findings, the Claimants are now left with their alternative claim for the payment of Euro 126.7M (including interest up to 27 June 2025).<sup>583</sup> This claim is based on the restoration scenario, which applies to the restitution claims made by both Parties. The Tribunal will therefore deal with the merits and quantum of the Claimants' restoration claim together with the Respondent's corresponding restoration claim in Section VIII. below.

## VII. THE MERITS OF RESPONDENT'S CONTRACTUAL COUNTERCLAIM

799. In light of the findings of the Tribunal so far, it must no longer consider the Respondent's alternative counterclaim, as far as it is based on breaches of contract allegedly committed by the Claimants, notably Steward's alleged failure to invest, improve, operate and maintain the Hospitals and its alleged failure to develop medical tourism.<sup>584</sup>
800. As mentioned before at ¶ 390, the Respondent has asserted seven grounds for such breaches, which the Claimants rejected as having no merit. These claims have become moot and therefore need not to be addressed and are hereby dismissed.

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<sup>582</sup> Claimants' RfR as set forth in Reply, ¶ 506 (b) and (c) and supra at ¶ 381.

<sup>583</sup> Claimants' RfR as set forth in Reply, ¶ 506 (h) and C-PHB, ¶ 33; see above at ¶ 38585.

<sup>584</sup> R-OS, pp. 165-198 ; R-PHB, ¶¶ 166 *et seq.*

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## VIII. THE MERITS AND QUANTUM OF THE PARTIES' RESTORATION CLAIMS

### A. PRELIMINARY OBSERVATIONS

801. This Section addresses what the Tribunal conveniently refers to as the “restoration scenario,” a situation in which both Parties seek to be restored to the positions they occupied *ex ante quo*, meaning the state they would have been in had the Transaction Agreements never been concluded. This scenario raises questions regarding the scope of each Party’s possible entitlement to restitution, which the Tribunal will examine in Sub-section B.
802. The restoration scenario further presents issues of quantification, which go beyond a mere calculation exercise. The Tribunal will consider these matters in Sub-section C. below.
803. Finally, Sub-section D. will address the issue of interest.
804. Since the restoration claim constitutes the Respondent’s primary counterclaim, and in light of the fact that, as part of their alternative defense, the Claimants also seek monetary compensation within the context of the restoration scenario, the Tribunal will, in each Sub-section, first summarize the Respondent’s position (1.), followed by the Claimants’ position (2.).

### B. THE SCOPE OF THE RESTORATION CLAIMS

#### 1. The position of the Respondent

805. With reference to Article 1209(2) and (3) MCC, the Respondent contends that both Parties “*should be placed in the position in which they were in before entering into the contract*” and that it must be restored to the *status quo ante* before the conclusion of the Concession and the Related Instruments, it being uncontested between the Parties that, if a contract is rescinded, the rules on restoration set out in Article 1209 MCC must apply.<sup>585</sup>
806. To this effect, the Respondent relies on the reports of its expert Anthony Charlton of HKA, who was tasked to identify and reverse “*the monetary transfers made between the Parties*,” also in consideration of “*the costs incurred and benefits received by each Party*” pursuant to the Transaction Agreements.<sup>586</sup>
807. The Respondent rejects the instructions given by the Claimants to Accuracy for its calculations as being contrary to Maltese law, since any costs incurred may be recovered even if it did not result

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<sup>585</sup> Rejoinder, ¶¶ 267 *et seq.*

<sup>586</sup> SoD&C, ¶¶ 295-297.

- in a corresponding benefit to the other party, including payments to third parties, such as the “*VAT paid by the [GoM] (with the HSDA fees) and collected by Steward, which the latter failed to pay to the Maltese tax authorities.*”<sup>587</sup>
808. For the Respondent, the main difference between Accuracy’s and Mr. Charlton’s calculations is “*their assessment of the value of the benefit provided by Steward though healthcare services to Maltese citizens.*”<sup>588</sup> In reliance of Mr. Charlton’s second expert witness report, the Respondent considers that the value of the Claimants’ “*services must be considerably reduced by taking into account Steward’s failures.*”<sup>589</sup>
809. On that basis, the Charlton Report I arrived at the amount of Euro 359,437,131 (inclusive of EU State aid) as being owing to the GoM.<sup>590</sup> In the Charlton Report II that amount was reduced to Euro 245,234,943 (based on a 40% discount of the “*partially deficient*” services and excluding State aid).<sup>591</sup> By applying an 80% discount in case of “*highly deficient*” services, the latter amount was, however, increased to Euro 487,980,032.<sup>592</sup>
810. Dr. Zammit Pace contends that “*any cost incurred by one party (the “Restored Party”) in consequence or by virtue of the Transaction Agreements and/or benefit received by the other party (the “Restoring Party”) in consequence or by virtue of the Transaction Agreement, is to be returned to the Restored Party under the provisions of Article 1209 [MCC].*”<sup>593</sup>
811. Pursuant to Dr. Zammit Pace, “*the parties must return reciprocally what each of them has received from the other by virtue of the contract (...)*” and the courts may order that “*fruits and interest received until the demand of rescission be compensated.*”<sup>594</sup>
812. Regarding several contentious items of its restoration claim, the Respondent takes the following position:
813. **Indirect tax liability (VAT):** the Respondent considers that the indirect tax liability in the amount of Euro 41.5M<sup>595</sup> for VAT paid to the Concessionaire as part of the payments under the HSDA should be included as a net benefit to the Claimants in the restoration scenario. It “*represents an*

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<sup>587</sup> Rejoinder, ¶¶ 270-274.

<sup>588</sup> Rejoinder, ¶¶ 275 *et seq.*

<sup>589</sup> Rejoinder, ¶ 285.

<sup>590</sup> SoD&C, ¶ 298; Charlton Report I, ¶ 2.3.3.a) and Table 4-2 at p. 29.

<sup>591</sup> Rejoinder, ¶ 292; Charlton Report II, Appendix 13, tab. 13.1 and 13.4.

<sup>592</sup> R-PHB, ¶ 149; Charlton Report II, Appendix 13, tab. 13.2; R-OS, p. 78; Charlton PTT, Appendix 1. . At the Hearing, the Tribunal had allowed “*the amended request relief on the record*”, Bühler, Tr. 5, 158:4-12

<sup>593</sup> REX-7, ¶ 227; see also REX-5, ¶¶ 40 *et seq.*

<sup>594</sup> REX-5, ¶43.and exhibit RZP-20.

<sup>595</sup> To be precise: Euro 41,484,224; Charlton PTT, Appendix 1.

*actual outflow of cash*” from the GoM to the Concessionaire and there exists no risk of “*double claim or double recovery*” by the GoM.<sup>596</sup>

814. **The value of the healthcare services:** the Respondent contends that to assess the monetary value of the healthcare services provided by the Concessionaire, the Claimants’ actual costs would be the appropriate baseline. To value these services based on the fees paid by the GoM under the HSDA would significantly overstate their actual value, as these payments “*were intended to secure the Concessionaire’s profit margin.*” However, the Concessionaire’s profit margin “*does not constitute value of healthcare services to the [GoM].*” The Respondent concludes that the Claimants’ approach “*conflicts with the spirit and objective of the restoration mechanism under Article 1209 [MCC].*”<sup>597</sup>
815. However, the Respondent submits that the Claimants failed to produce the underlying cost data, although the Tribunal had ordered them to produce the corresponding records. Thus, according to the Respondent, due to the unavailability of the relevant data, the Claimants’ cost cannot be established and “[*t*]he Tribunal should therefore draw the adverse inference that the costs incurred were either unrelated to the Concession or negligible.”<sup>598</sup>
816. The Respondent further contends that its expert, Mr. Charlton, could also “*not rely on the Concessionaire’s financial statements either, due to serious concerns about their reliability (...).*”<sup>599</sup>
817. In light of the absence of reliable cost data, the Respondent adopted “*the methodology proposed by Accuracy, using, as a proxy, the amounts the [GoM] paid under the HSDA and LSA to estimate the value of healthcare services (...).*” On that basis, the Respondent arrived at value of Euro 606,862,724, to be compared against Accuracy’s “*low-case*” scenario of Euro 604,416,034.<sup>600</sup>
818. Regarding Accuracy’s “*high-case*” scenario of Euro 667,581,277, the Respondent considers it to be inflated by two elements, which lack justification.<sup>601</sup>
819. In any event, according to the Respondent, the GoM “*did not receive full value for the healthcare services provided in return for the amounts it paid.*”<sup>602</sup> Based on a 40% discount, Euro 245,234,943 should be deducted from the payment of the HSDA fees. At the Hearing, the Respondent requested that an 80% discount be applied, *i.e.*, Euro 487,980,032.<sup>603</sup>

<sup>596</sup> R-PHB, ¶¶ 87 – 91.

<sup>597</sup> R-PHB, ¶¶ 95, 96; Charlton PTT, p. 7.

<sup>598</sup> R-PHB, ¶¶ 98, 99.

<sup>599</sup> R-PHB, ¶¶ 100, 101.

<sup>600</sup> R-PHB, ¶¶ 102, 103; Charlton Report II, Appendix 13, tab. 13.2.

<sup>601</sup> R-PHB, ¶ 104; they will be addressed in Sub-section C.1. below.

<sup>602</sup> R-PHB, ¶ 105.

<sup>603</sup> See above at ¶ 809.



820. Sub-Section C.1. will address the two grounds on which the Respondent challenges that it received the full value for the payment made and the corresponding discount on these payments that the Respondent requests.
821. **Other income and expenditure received by the GoM:** the Respondent rejects the inclusion of Euro 8,584,848 in the benefit provided by the Concessionaire, as this is part of its operational expenditure, equivalent to the value of the services it has rendered. It would amount to double counting if that sum were included.<sup>604</sup>

## 2. The position of the Claimants

822. The Claimants contend that since the Respondent is seeking Euro 487.98M as part of its Delia rescission claim, it bears the burden of proving all necessary elements under Article 1209 MCC, and “*otherwise damages must not be awarded*” to the Respondent.<sup>605</sup>
823. The Claimants further note that the Respondent’s original position regarding the restoration scenario, referred to as “*Basis I Counterclaim*,” was fundamentally flawed, as it “*entirely disregards the primary benefit of the Concession to the Government: the provision of essential healthcare services to the people of Malta. No value is assigned to these services in the Respondent’s calculation (...)*.”<sup>606</sup>
824. In the words of Accuracy, the “*analysis [in the Charlton Report I] fails to reflect any value associated with the primary benefit received by the Respondent under the Concession, namely the medical services provided at the Hospitals to the people of Malta and the transfer of the operational risk. When the value of the medical services is included in his assessment, Mr Charlton’s EUR 359.4 million Basis I Counterclaim reduces to zero.*”<sup>607</sup>
825. **Indirect tax liability (VAT):** The Claimants contend that the sum of Euro 41.5M, which they have received as VAT payments, should not be part of the restoration scenario, since the Claimants “*are merely a pass-through conduit for VAT collection, and receive no benefit from it.*” They further contend that the Respondent carries the burden of proving that the Claimants will prevail in the Maltese courts allowing them to retain the VAT amount.<sup>608</sup>
826. If the Claimants would lose the VAT proceedings before the Maltese courts, there would be a risk of double recovery for the Respondent. The “*Commissioner (the party seeking payment in litigation) would demonstrate that he was not party to the arbitration, and that without triple identity there can be no binding “juridical fact” as to VAT.*” The Claimants therefore contend that

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<sup>604</sup> R-PHB, ¶ 86; Charlton Report I, ¶ 4.4.3.

<sup>605</sup> C-PHB, ¶ 94.

<sup>606</sup> Reply, ¶¶ 315, 316.

<sup>607</sup> Accuracy Report II, ¶ 5.2.c).

<sup>608</sup> C-PHB, ¶ 112.

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- excluding VAT from the restoration calculation is the only way to mitigate the risk of overcompensation to the GoM.<sup>609</sup>
827. Regarding the **value of the healthcare services**, the Respondent is wrong in wanting to base it on “*the cost to the claimants, rather than the price paid for services rendered.*”<sup>610</sup> Since the GoM was the recipient of the healthcare services, the value of these services must be assessed from the “*buyer’s*”, *i.e.*, the GoM’s perspective. The “*seller’s*” costs, *i.e.*, those of the Concessionaire, are irrelevant to the buyer.<sup>611</sup>
828. **Other income and expenditure received by the GoM:** The Claimants maintain that the sum of Euro 8,584,848, representing the Concession fee received by the Respondent, and arising from reductions applied to payments made by the GoM to the Concessionaire, constitutes a benefit to the Respondent, which must be returned to the Claimants. They further point out that Mr. Charlton included that sum in his first report,<sup>612</sup> but then omitted it from his second report without providing any explanation, let alone justification.<sup>613</sup>
829. **Post-termination services/costs incurred by the Claimants:** The Claimants include in the restoration balance the sum of Euro 1.7M paid for labor and third-party supplier costs after termination that “*directly benefitted the [GoM] in the form of essential supplies and labour for the Hospitals before the handover.*” They contend that this sum should be returned to them on rescission.<sup>614</sup>
830. **Miscellaneous additional payments claimed by the GoM:** According to the Claimants, the costs incurred by the GoM for the Grant Thornton Report “*Valuation and Verification of New Build and Improvement Costs*” dated 3 June 2021 (the “**GT Report**”)<sup>615</sup> (Euro 399,202) valuing the Claimants’ investment, expenses relating to Barts Medical School and the cost of sterilizing hospital equipment after takeover (autoclave payments of Euro 9,920) were a benefit to the Respondent, not to the Claimants. Therefore, they fall outside the scope of the restoration scenario.<sup>616</sup>

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<sup>609</sup> C-PHB, ¶ 113.

<sup>610</sup> C-PHB, ¶ 94.

<sup>611</sup> Accuracy Report I, ¶¶ 5.9, 5.32.

<sup>612</sup> Charlton Report I, ¶ 4.4.3.

<sup>613</sup> Accuracy Report III, ¶ 2.17 b).

<sup>614</sup> C-PHB, ¶ 111.

<sup>615</sup> Exhibit **R-0079** (= exhibit **AC-006**).

<sup>616</sup> C-PHB, ¶ 114.

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**3. The Tribunal's analysis**

831. The Parties agree that in case the conditions of Article 1212 MCC are met, the restoration to the *status quo ante* is to take place according to Article 1209 MCC.<sup>617</sup> That Article deals with the “*effects of rescission*” and reads as follows:

*“(1) The rescission of a contract shall, unless the law provides otherwise, operate so as to restore the parties to the condition in which they were before the contract.*

*“(2) Each party shall be bound to restore to the other any thing received or obtained in consequence or by virtue of the contract.*

*“(3) With regard to the fruits collected or the interest received up to the date of the demand for rescission, the court may, having regard to the circumstances of the case, direct a set-off of such fruits or interest.*

*“(4) Where the contract is rescinded on the ground of fraud or violence, the party guilty of such fraud or violence shall also be bound to restore to the other party the fruits which might have been collected, and which, through his fault or negligence, have not been so collected.”*

832. It is undisputed that the Transaction Agreements were not rescinded for fraud or violence, so that the provision of Article 1209(4) MCC does not apply.<sup>618</sup> Accordingly, “*fruits*” which either Party might have collected, but did not because of its fault or negligence, will not have to be considered by the Tribunal.
833. The Parties also agree that in order to establish the *status quo ante* from a financial perspective, the monetary transfers, costs incurred, and benefits received by each Party in connection with the Transaction Agreements must be assessed and compared. The Party with the lower net financial position will have to receive a refund equal to the difference between its net position and that of the other Party with the higher net financial position.
834. Contrary to what the Claimants state, the restoration claims under Article 1209 MCC do not qualify as claims for damages.

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<sup>617</sup> Reply, ¶ 322; Rejoinder, ¶ 267; C-PHB, ¶¶ 33, 44, 96; R-PHB, ¶¶ 48, 81.

<sup>618</sup> This is also the view of Dr. Zammit Pace, REX-5, ¶ 79.

835. According to Article 1125 MCC, “[w]here any person fails to discharge an obligation which he has contracted, he shall be liable in damages.”<sup>619</sup> Restoration pursuant to Article 1209 MCC has nothing to do with a failure to discharge an obligation.<sup>620</sup>
836. Likewise, Article 1135 MCC stipulates that “the damages due to the creditor are, generally, in respect of the loss which he has sustained, and the profit of which he has been deprived,”<sup>621</sup> which is very different concept from the restoration scenario.
837. Damages are meant to compensate for a loss caused by one party to the other, whereas restoration solely seeks to put the parties in the situation they would have been in if no contract had existed.
838. It is precisely because of the nullity of the underlying agreements that no contractual obligations exist that a party could have breached by failing to discharge it and for which it could owe damages to the other party.<sup>622</sup>
839. Since the restoration claim under Article 1209 MCC is not a claim for breach of contract and does not give rise to damages, the Respondent’s repeated argument that the Claimants failed to redevelop the Hospitals and to develop medical tourism lacks any relevance. This point will be further discussed when addressing the value of the HSDA services.
840. Regarding the burden of proof, the Claimants correctly refer to Article 562 of the Maltese Code of Organization and Civil Procedure.<sup>623</sup> This provision states: “*Saving any other provision of the law, the burden of proving a fact shall, in all cases, rest on the party alleging it.*”<sup>624</sup>
841. Nevertheless, in the context of the restoration scenario, this principle applies equally to both Parties, not solely to the Respondent as the party who first made that claim as part of its primary counterclaim.
842. Pursuant to Article 1209(2) MCC, the ambit of a restoration claims covers “*any thing received or obtained in consequence or by virtue of the contract.*” Thus, the law looks at the beneficiary and what it has received or obtained. It does not look, however, at costs which a party has incurred in relation to the rescinded contract, and which it would not have incurred but for the contract.
843. At the Hearing, Dr. Zammit Pace reiterated the view expressed in his second report that Article 1209 MCC also “*includes the restoration of costs incurred in connection with the rescinded*

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<sup>619</sup> Exhibit **CL-0016**.

<sup>620</sup> Accuracy’s reference to “*damages*” to the Claimants is inappropriate, as the benefit to which either party may be entitled to, does not constitute damages payable by the other party; see Accuracy PPT, 23; Accuracy Report I, ¶¶5.2.c), 5.57 et seq.

<sup>621</sup> Exhibit **CL-0016**.

<sup>622</sup> Regarding the absence of liability for damages under Article 1209 MCC, see *Carmelo Barbara v Joseph and Alexandra spouses Camenzuli* (First Hall Civil Court, 20 October 2005), exhibit **RZP-81**, p. 8; see also Dr. Zammit Pace, **REX-7**, ¶ 233; Tr. Day 3, 51:1-2 (“(...) *in the case of rescission there is no remedy for damages*”).

<sup>623</sup> C-PHB, N. 257.

<sup>624</sup> Exhibit **CL-0014**.

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*contract*,”<sup>625</sup> and, accordingly, “*the costs incurred by one party in connection with the rescinded contract are also to be restored by the other party.*”<sup>626</sup>

844. The Tribunal does not share that view for two reasons:
845. *First*, the text of article 1209 MCC does not provide for a reimbursement of costs if there was no benefit for the other part, *i.e.*, if the other part has not received “*anything*.” Besides, the Tribunal has not seen convincing support for that view.<sup>627</sup>
846. *Second*, an obligation to reimburse costs incurred by a party would be tantamount to awarding that party damages, which as Dr. Zammit Pace accepts, are not due pursuant to Article 1209 MCC.<sup>628</sup>
847. Thus, the costs, if any, do not fall to be compensated by the other party as part of the restoration scenario. The Tribunal therefore agrees with the instructions that were given to the Claimants’ financial expert rather than those of the Respondent’s expert<sup>629</sup> in assessing the benefits received by each Party.
848. **The value of the healthcare services:** With respect the value of the healthcare services provided by the Claimants to the Respondent, these services clearly represent a “*benefit*” to the GoM, which the latter must “return” by way of financial compensation.
849. The Parties agree that the healthcare services provided by the Claimants to the GoM are intangible and cannot be physically returned, so that their value should be reimbursed.<sup>630</sup> As stated by the Maltese courts in the *Paul Caruana* case, restitution “*is not always humanly possible.*”<sup>631</sup> This evidently applies to the healthcare services provided by the Claimants.
850. Accordingly, in such circumstances, the principle of restitution “*should be applied in an equitable monetary reflection,*”<sup>632</sup> *i.e.*, the monetary value must be returned.
851. In the present case, this requires the Respondent to repay the value received, resulting in a set-off against the HSDA fees already paid. After such set-off, one party may ultimately receive a net benefit.
852. In this context, the actual costs incurred by the party having provided “*something*” to the beneficiary should not be taken into account when determining the benefit received by the beneficiary. It

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<sup>625</sup> Tr. Day 3, 50:16-21; Zammit Pace, PTT, p. 36.

<sup>626</sup> **REX-7**, ¶ 232.

<sup>627</sup> Dr. Zammit Pace’ reference to the *Carmelo Barabara* case (cited at N. 498) deals with the reimbursement of notary fees together with the price paid for the purchase of an immovable property (see **REX-7**, ¶ 232). The Court simply held that “*the plaintiff has the right to cancel the sale and the money he spent in connection with the acquisition (...) should be returned to him,*” which can hardly be taken as a general statement that costs incurred by a party are generally to be reimbursed, exhibit **RZP-81**, p. 8.

<sup>628</sup> Tr. Day 3, 50:22-51:2.

<sup>629</sup> See Charlton Report II, ¶¶ 2.2.6, 3.2.13-3.2.15.

<sup>630</sup> Accuracy Report II, ¶ 5.14; R-PHB, ¶ 93.

<sup>631</sup> Exhibit **RZP-80**, p.17.

<sup>632</sup> *Idem*.

- therefore does not matter whether the cost data supplied by the Claimants was insufficient to permit a reliable cost-based assessment, as alleged by the Respondent, and no adverse inference can be drawn from any alleged insufficiency in the Claimants' document production.
853. The Tribunal finds it appropriate to include the Claimants' profit margin as part of the value of the healthcare services it has provided. The Respondent had no reason, or expectation of receiving these services "at cost," but knew that the Claimants would be rendering these services against a profit.
854. There exists no plausible reason in the present case to limit the value of the services solely to the Concessionaire's net costs. Adequate compensation necessarily assumes the existence of a profit margin, and there is no evidence in the record to suggest otherwise.
855. The *Raymond Caruana* case referred to by Respondent's legal expert concerns a different issue, since it related to the profits made by a party by way of unlawful subleasing of an apartment. The recipient of these profits had to return them. In that case, the Court of Appeal cited from its earlier decision in the matter *Chief Government Medical Officer v Christopher Camilleri* of 15 July 2002, where it had held that "[b]oth law and equity require that even the respondent is adequately compensated for the work that he carried out for the appellant."<sup>633</sup>
856. This leaves the question of how the Tribunal should assess the value of the healthcare services.
857. Specifically, should the assessment be: (i) based on the actual amounts paid by the GoM under the HSDA; (ii) at a reduced rate, reflecting the (alleged) deficiencies in the services provided; or (iii) at the higher rate that the GoM was allegedly prepared to pay for services at Mater Dei hospital?
858. The Tribunal will deal with that quantum issue in Sub-section C. below.
859. **Other income and expenditure received by the GoM:** it is undisputed, that the Concession fee was paid to the Respondent by way of a monthly pro rata reduction of Euro 75,000 of the HSDA fees which the GoM had to pay to the Concessionaire.<sup>634</sup>
860. The Tribunal agrees with the Claimants that the sum of Euro 8,584,848, which the Claimants paid to the GoM during the lifetime of the Concession as Services Concession Fee, represents a benefit to the GoM, which falls within the scope of the restoration scenario.
861. **Indirect tax liability (VAT):** It is undisputed between the Parties that the invoices raised by the Claimants against the GoM under the HSDA carried VAT.<sup>635</sup> It is also undisputed that in settling the HSDA invoices, the GoM paid the VAT charged by the Claimant No 2.<sup>636</sup>

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<sup>633</sup> Exhibit **RZP-19**, p. 32.

<sup>634</sup> This mechanism seems to have been implemented with the 2018 invoice for Q.2; see the HSDA invoices from that period to Q.1 2023 at exhibit **AC-33**, p. 11 *et seq.*

<sup>635</sup> See the HSDA invoices from 29 June 2016 onwards, which include a 18% VAT charge, exhibit **AC-33**.

<sup>636</sup> As confirmed at the Hearing, Tr. Day 5, 220:5-19.

862. However, for a considerable amount of time, the Claimant No 2 failed to pay the VAT paid by the GoM to the Maltese tax authorities, resulting in a total VAT tax liability of Claimant No 2 in the amount of Euro 41,484,224.<sup>637</sup> The quantification of such amount is undisputed between the Parties.<sup>638</sup> In addition, this tax liability is recorded in the financial statements of 31 December 2022 of Claimant No 2 as a “*current liability*.”<sup>639</sup>
863. For the Tribunal, the VAT payments of Euro 41,484,224, which the Claimant No 2 collected, represent a cash inflow received from the GoM and thus represent a benefit to them, which the Claimants must return.
864. From an accounting perspective, a tax liability recorded as such may not be viewed as a benefit, as observed by Ms. Cozar at the Hearing.<sup>640</sup> But the accounting perspective is not relevant to assess whether the Claimants have received “*anything*,” *i.e.* cash payments on account of VAT charged on top of the HSDA fees. Thus, in that respect, it does not matter that the Claimant No 2 has recorded VAT as a liability in its books.
865. Likewise, the fact that there are currently parallel court proceedings pending, in which the GoM, through the Commissioner of Revenue, seeks to recover these very VAT payments, and which Claimant No 2 resists,<sup>641</sup> is irrelevant to the question of whether the sum of Euro 41,484,224 represents a benefit to the Claimants.
866. It is also irrelevant whether the Claimants have any prospect of winning or losing the tax dispute. The Tribunal makes no attempt to predict the outcome, let alone to decide upon the VAT dispute. The fact that the VAT liability is disputed between the Parties does not change the benefit that the Claimants have received in the past.
867. It is, however, clear that by including this tax liability in the restoration scenario, the GoM becomes credited with that sum and indemnified of the VAT tax liability, which, in principle, should disappear from the books of Claimant No 2 as a “*current liability*.”
868. Consequently, it would be unjust for the GoM to try to recover the sum of Euro 41,484,224 a second time through the Maltese courts, as otherwise it would be compensated twice for the VAT liability. The Respondent expressly recognizes this when it states in its post-hearing brief:

*“If the Tribunal includes the EUR 41.5 million in its award as part of the Concessionaire’s net benefit, this will constitute a “juridical fact”, meaning that the Government would no longer have a legal interest to defend its executive title, and the claim would cease to be enforceable in that forum.”*<sup>642</sup>

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<sup>637</sup> Rejoinder, ¶ 274; Charlton Report II, ¶3.2.16.d; R-PHB, ¶ 88.

<sup>638</sup> C-PHB, ¶ 112; ACC-108, p. 26, R-PHB, ¶ 88.

<sup>639</sup> Exhibit ACC-108, p. 7 (“*Trade and other payables*”) and p. 24, Note 17.

<sup>640</sup> Cozar, Tr. Day 5, 32:2-6 and 116:1-21.

<sup>641</sup> See above at ¶¶ 36161 *et seq.*

<sup>642</sup> R-PHB, ¶ 91; see also Darwazeh, Tr. Day 5, 31:12-13 (“*no decision at this stage, indeed, so no risk of double recovery*”) and during the Q&A session on Day 6, 52:11-25: “(…) *If the tribunal includes the*

869. Accordingly, upon receipt of this Award, the GoM will be required to withdraw its claim for payment regarding the sum of Euro 41,484,224, as its recovery will have become moot. Since the Claimants initiated the VAT liability proceedings in the Maltese courts, the GoM must also agree to the Claimants' withdrawal from those court proceedings.
870. To ensure the Claimants are adequately protected against any potential attempt by the GoM to seek double-recovery, and as an added precaution, the Tribunal will clarify in its holding that the set-off as part of the Parties' restoration scenario includes the sum of Euro 41,484,224.
871. **Miscellaneous additional payments claimed by the GoM:** the Respondent seeks to exclude from its benefits the sum of Euro 399,202, which it says it paid for the GT Report and thus "*to parties other than the Concessionaire, in performance of the Concession*" and which it had instructed its expert to exclude as a cost item.<sup>643</sup>
872. The Claimants in turn instructed their experts to ignore costs that did not result in a corresponding benefit.<sup>644</sup>
873. Consistent with the Tribunal's interpretation and application of Article 1209 MCC, costs incurred by one party that did not result in a corresponding benefit to the other party fall outside the scope of the restoration scenario. Therefore, regardless of any payments the Respondent may have made to third parties in connection with the Concession, the Claimants are not obliged to refund these amounts unless the Claimants actually received a benefit from them.
874. For the sum of Euro 399,202, no such benefit was shown to exist, as this amount exclusively served the purposes of the GoM of independently establishing the value of Steward's claimed investment made at a given point in time of the Concession.<sup>645</sup>
875. Therefore, while the sum paid for the GT Report represents an expense incurred by the GoM in connection with the Concession, it should not be deducted from the benefits received by the Respondent.

### C. THE QUANTUM OF THE RESTORATION CLAIMS

876. This Sub-section discusses several items of the Parties' restoration claim, where the Parties differ over the amount of the benefit to be taken into consideration.

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*41.5 million in the total benefits then the government's executive title in the parallel proceedings would lapse (...) so that there would be no risk of double recovery (...)."*

<sup>643</sup> Charlton Report II, 3.3.3; 3.2.13 and Appendix 11, tab "11.3 Respondent's amounts", row 22 and comment 6.

<sup>644</sup> Accuracy Report II, ¶ 5.8.b; Accuracy Report III, ¶ 5.32.

<sup>645</sup> In this case, around March 2021.



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**1. The position of the Respondent**

877. According to the Respondent, it has “*a lower net financial position of EUR 121,503,473, compared to EUR 609,483,505 for the Concessionaire, and is therefore entitled to a refund of EUR 487,980,032.*”<sup>646</sup> The latter sum implies an “*illustrative discount, to factor in a refund to the GoM*” of 80%.<sup>647</sup>
878. In the “*base case*” of the Charlton Report II, using a 40% discount for a “*partially deficient*” performance, the net refund to the GoM would drop to Euro 245,234,943 and to Euro 2,489,853 if no discount would be applied.<sup>648</sup>
879. With reference to Table 3.1 in the Accuracy Report III, the Respondent states that “*there is broad agreement between the Parties on the amounts paid by the [GoM] to the Concessionaire (...),*” and that their “*core dispute (...) lies in assessing what services were effectively provided in return, and thus what benefits were actually received by the [GoM].*”<sup>649</sup>
880. One point of difference concerns, however, the exact sum of payments made by the Respondent to the Concessionaire under the HSDA. For the Respondent, it amounts to Euro 475,216,040, for the Claimants to Euro 475,846,026.
881. Mr. Charlton explains this difference of Euro 629,986 as follows: “*(...) Accuracy have included this amount on the basis that it reconciles with the Concessionaire's financial statements. I place no such reliance on the Concessionaire's financial statements and therefore continue to exclude the unverified amount.*”<sup>650</sup>
882. **The value of the healthcare services:** As noted above, according to the Respondent, Accuracy’s “*high-case*” scenario of Euro 667,581,277 is inflated by two unjustified elements, namely the LSA shortfall reimbursement of Euro 19,979,484, which is still disputed by the Parties, and “*the 9.1% uplift to HSDA fees, amounting to EUR 519,031,785,*” which “*reflects costs related to the more advanced Mater Dei Hospital*”, but which may not be used as a benchmark in the present case.<sup>651</sup>
883. As also noted above, the Respondent contends that the Claimants and their experts wrongly assume that it has received full (100%) value for the payments made to the Claimants.<sup>652</sup>
884. *First*, the question is only whether the Concessionaire delivered “*healthcare services of equivalent value to the amounts paid by the GoM.*” The Claimants ignore, however, the “*numerous breaches of the [Transaction Agreements], which directly affect the value of the services.*”<sup>653</sup> In addition,

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<sup>646</sup> R-PHB, ¶ 83.

<sup>647</sup> Charlton PPT, p. 11.

<sup>648</sup> *Idem*; Charlton Report II, 2.1.17, 2.2.18.

<sup>649</sup> R-PHB, ¶ 85.

<sup>650</sup> Charlton Report II, Appendix 13, tab. 13.3; Accuracy Report III, 2.17, e.

<sup>651</sup> R-PHB, ¶ 104.

<sup>652</sup> R-PHB, ¶ 110.

<sup>653</sup> R-PHB, ¶ 112.

- given that the burden of proving that the Respondent “*received full value for all payments made*” lies on the Claimants, the Respondent submits that the latter failed to provide any evidence in this sense.<sup>654</sup>
885. *Second*, the healthcare services provided by the Claimants were “*highly deficient and warrant an 80% discount.*”
886. Mr. Charlton’s scenarios using illustrative discounts to reflect the varying degrees of the Claimants’ underperformance are for the Tribunal to decide. According to the Respondent, the 80% discount adequately captures the extent of the Claimants’ underperformance.<sup>655</sup>
887. On the one hand, the Claimants failed to achieve the Concession Milestones, which had a direct and material impact on the value of the healthcare services delivered under the Concession. “*Ignoring the Milestones when assessing performance would distort the contractual framework the Parties had agreed,*” and “*Steward’s effort to treat the pre-Completion period as exempt from these binding obligations is wholly unfounded.*”<sup>656</sup>
888. On the other hand, Claimants failed (i) largely to deliver the capital investment for the redevelopment of the Hospitals and (ii) to develop medical tourism, “*an obligation clearly established*” under the Transaction Agreements.<sup>657</sup>
889. Moreover, the Claimants failed to develop services during the transition period, which “*constituted a breach of Clauses 7.2 and 8.1.3 of the HSDA, which both require continuous service provision at or above pre-Concession levels.*”<sup>658</sup> The Claimants’ reliance on the absence of formal “*Service Failure*” notifications pursuant to Schedule 4 of the HSDA is without merit. “*Clause 19.11 of the HSDA places a continuous duty of performance, notification, and rectification on the Concessionaire, one that does not depend on any formal notification from the [GoM].*”<sup>659</sup>
890. Finally, the Respondent contends that the Claimants’ profit margin is not reflective of the value of the healthcare services. The Claimants had projected an operating profit of 10.7 to 17.13%, which according to the Respondent confirms that the GoM was “*contractually expected to pay significantly more than the actual cost of receiving healthcare services.*”<sup>660</sup>
891. Furthermore, the Claimants’ financial statements reveal unjustified expenditures, “*including EUR 6 million in director remuneration in 2017 alone, and EUR 274.8 million in unexplained ‘other income’ and ‘other expenses’ between 2016 and 2022.*”

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<sup>654</sup> R-PHB, ¶ 113.

<sup>655</sup> R-PHB, ¶¶ 114-117.

<sup>656</sup> R-PHB, ¶¶ 118-123.

<sup>657</sup> R-PHB, ¶¶ 124-127.

<sup>658</sup> R-PHB, ¶¶ 128-135.

<sup>659</sup> R-PHB, ¶¶ 136-137.

<sup>660</sup> R-PHB, ¶ 139.

892. The Respondent contends that if the Claimants had properly recorded the costs related to the Concession, it would have made profits. The latter, however, do not constitute value for the healthcare services for the GoM.<sup>661</sup>
893. Along the same lines, Mr. Charlton opined that it is unreasonable to disregard the “*alleged misappropriation of Concession funds referred to in public reports*,” although they have not yet been established through the courts.<sup>662</sup>
894. Respondent concludes that for these reasons the value of the healthcare services “*must be significantly reduced by taking into account Steward’s failures*.”<sup>663</sup>
895. **Value of Claimants’ investment in the Hospitals:** based on Mr. Charlton’s expert opinion, Respondent agrees with Claimants’ “*low-case*” assessment that the value of the investment made by the Concessionaire for the Hospitals amounts to Euro 41,480,000.<sup>664</sup> Mr. Charlton reduces however, that sum by Euro 4.3M “*to reflect the loss of value and lower remaining useful economic life between the date of [his] assessment compared to 2021*.”<sup>665</sup> By making this adjustment, the amount validated by GT is reduced to Euro 37.2 M.<sup>666</sup>
896. The Respondent, however, disputes the Claimants’ higher valuation of Euro 58.1M, arguing that the Claimants have not provided adequate evidence to support this figure. Specifically, the Respondent contends that the Claimants’ financial statements do not offer a reliable basis for determining such a higher value.<sup>667</sup>
897. **Claimants’ post-termination costs:** the Respondent rejects the Claimants’ claim to have the sum of Euro 1,685,503, related to service provided by the Claimants, included amongst the benefits received by the GoM on account of post-termination costs.
898. Initially, the Claimants’ expert assessed the costs allegedly incurred by the Claimants in relation to the operation of the Hospitals during the period of 19 March 2023 (the date after Claimants’ Termination) until 31 May 2023 (Hand-back Date) to be in the amount of Euro 2,278,597, to then reduce by Euro 593,095 in their second report.<sup>668</sup>
899. The Respondent’s expert considers the post-termination cost “*insufficiently supported, as Accuracy have only verified 6% of the claim to supporting payment evidence*.”<sup>669</sup> Mr. Charlton also takes

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<sup>661</sup> R-PHB, ¶ 142.

<sup>662</sup> Charlton, PTT, p. 10; Charlton, Tr. Day 5, 137:3-8.

<sup>663</sup> Rejoinder, ¶ 285.

<sup>664</sup> Charlton Report I, 4.4.1; Charlton Report II, Appendix 13, tab. 13.2.

<sup>665</sup> Charlton Report I, 5.4.41; Charlton Report II, 4.3.7.

<sup>666</sup> Charlton Report II, figure 4.3, p. 50.

<sup>667</sup> Charlton Report II, ¶¶ 3.4.6-3.4.10 and ¶ 4.3.6.

<sup>668</sup> Charlton Report II, ¶¶ 5.4.1-5.4.4.; Accuracy Report II, ¶ 4.117, Table 4.13.

<sup>669</sup> Charlton Report II, ¶ 2.3.8, ¶¶ 5.4.5 *et seq.*

issue with Accuracy' reliance on the FS5 from as being sufficient to for substantiating labor costs.<sup>670</sup>

## 2. The position of the Claimants

900. The Claimants contend that the benefits received by the Respondent amount, at the date of Accuracy Report II, to Euro 120,738,335 and updated with interest as of 27 June 2025, to Euro 126.7M.<sup>671</sup> They argue that their alternative claim of Euro 86,483,778 (without interest) represents the average of Accuracy's "*low-case*" (Euro 46,587,247) and "*high-case*" (Euro 126,380,308) assessment of the net benefit of the Claimants in the restoration scenario.<sup>672</sup>
901. The Claimants rely on Table 3.1 of the Accuracy Report III<sup>673</sup> to show the differences between the Parties' experts concerning the benefits received respectively by the Concessionaire and by the GoM.
902. Regarding the benefits received by the Concessionaire, the experts have divergent opinions only in respect of (i) the exact amount of HSDA payments, and (ii) the question whether to include or exclude the VAT liability (Euro 41.5M). As the Tribunal has already dealt with the second issue above, it suffices to describe here the Claimants' position regarding the first issue.
903. The Claimants reject the difference of Euro 629,986 for payments made by the GoM under the HSDA and the argument of Mr. Charlton that he could not verify this amount against the proofs of payment. Accuracy explains that it was able "*to reconcile the Covid payment records against the audited financial statements, and, as a result, do not apply the same EUR 630 thousand deduction to [its] assessment.*"<sup>674</sup>
904. Regarding, in turn, the benefits received by the Respondent, the Claimants' position on the disputed items is as follows:
905. **First, the value of the healthcare services:** In the Claimants' "*low-case*" assessment, the healthcare services are valued at Euro 604.4M or Euro 667.6M on the "*high-case*" end.<sup>675</sup>
906. For the Claimants, the amount the "*buyer*" is willing to pay for these services represents the "*minimum expected*" value of these services to the buyer. The actual value "*will only fall below the agreed price if the quality or quantity of service received is lower than the buyer expected when agreeing the price.*"<sup>676</sup>

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<sup>670</sup> Charlton Report II, ¶¶ 5.4.8 *et seq.*

<sup>671</sup> C-PHB, ¶¶ 33, 115.

<sup>672</sup> C-PHB, ANNEX: Summary.

<sup>673</sup> It is also Appendix 4 of Accuracy PTT, p. 37.

<sup>674</sup> Accuracy Report II, ¶ 5.20, N. 208; Accuracy Report III, 3.62.

<sup>675</sup> Accuracy Report III, ¶ 2.9, table 2.1.

<sup>676</sup> Accuracy Report III, ¶ 3.44; Accuracy PPT p. 20.

907. The Claimants reject the Respondent’s argument that the value of the healthcare services should be substantially reduced, because of the “*partially deficient*” performance. For Claimants, “[u]nless the Respondent can prove that the Claimants failed to deliver healthcare services to the Maltese population according to the SCA, there is no basis for any reduction.”<sup>677</sup> Since the GoM “*never made any deductions from contractually-mandated payments (as it was entitled to do if services were deficient),*” the Parties understood the Claimants’ services “*to be worth the price paid for them.*”<sup>678</sup>
908. The Respondent’s reference to the redevelopment Milestones of the SCA is irrelevant, as the “*pre-Completion fees only covered operating expenses and not redevelopment.*”<sup>679</sup>
909. Mr. Charlton’s assumption that the Concessionaire undelivered services by 40% compared to pre-completion expectations is unsupported and arbitrary.<sup>680</sup>
910. In reliance on their expert witnesses, the Claimants consider that the amounts that the Respondent was willing to pay for the healthcare services should be increased by about Euro 63M, since that is the amount the GoM was willing to pay for comparable services at Mater Dei.<sup>681</sup>
911. **Second, Claimants’ investment in the Hospitals:** the Claimants’ expert “*consider it reasonable to present a range of the potential value of the investment into Malta’s hospitals using the GT Report as the lower end of the range and the financial statements at the higher end of the range,*” i.e., between Euro 41.5M and Euro 58.1M.<sup>682</sup>
912. In addition, the GT Report used by Mr. Charlton as the basis of his assessment of the investment into Malta’s hospitals captures only investments at the end of 31 December 2020, although the Claimants have “*continued to make investments into both property, plant and equipment (...) and the Contract Asset.*”<sup>683</sup>
913. According to the Claimants, the proper basis for assessing these investments is their audited financial statements, on which even Respondent’s expert, Mr. Charlton, relies for certain of his computations.<sup>684</sup> By relying on the latest audited financial statements of 31 December 2022, this approach results in a variance of Euro 16.6M in Accuracy’s “*high-end estimate compared to Mr. Charlton’s assessment, which uses the GT Report.*”<sup>685</sup>
914. **Third, Claimants’ post-termination services:** on account of such services, the Claimants contend that they are entitled to a payment of Euro 1,685,503.17, which is the corresponding benefit

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<sup>677</sup> C-PHB, ¶ 102.

<sup>678</sup> C-PHB, ¶¶ 102, 104.

<sup>679</sup> C-PHB, ¶ 103.

<sup>680</sup> Accuracy Report III, ¶¶ 2.6 *et seq.*, see also Accuracy Report II, ¶ 5.50 and Accuracy PTT, p. 18.

<sup>681</sup> Accuracy PPT, p. 21.

<sup>682</sup> Accuracy Report II, ¶¶ 5.33-5.37.

<sup>683</sup> Accuracy Report II, ¶ 5.33.

<sup>684</sup> C-PHB, ¶ 109.

<sup>685</sup> Accuracy Report III, ¶ 3.63; Accuracy Report II, 5.45 and exhibit ACC-108.

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received by the GoM after the termination date and before the Hand-back date, *i.e.* covering the period of 19 March 2023 to 31 May 2023.<sup>686</sup>

915. Since the HSDA invoice for Q.1 2023 up to 31 March 2023 was settled by the GoM, which is not disputed by the Respondent,<sup>687</sup> the Claimants have included the termination refund as a credit, thereby avoiding any double-counting.

### 3. The Tribunal's analysis

916. With respect to the benefits received by the Concessionaire, the Tribunal is required to make determinations on only two matters: the amount of the HSDA payments received by the Claimants and the VAT liability.
917. While the Respondent acknowledges HSDA payments to the Concessionaire totaled Euro 475,216,040, the Claimants maintain that the amount was Euro 475,846,026. The resulting difference of Euro 629,986 arises, according to the Respondent, from its inability to verify the higher figure against proof of payments and its reluctance to rely on the Claimants' financial statements. The Tribunal considers this to be an insufficient reason to reject the Claimants' figures, absent any evidence that the Claimants' financial statements are incorrect in that regard.
918. Moreover, the Respondent's expert has not challenged the explanation provided by the Claimants' expert regarding the reconciliation of "*the Covid records against the audited financial statements*."<sup>688</sup>
919. In addition, the Claimants would have had little incentive to report a higher amount of fees, and consequently a greater benefit received from the GoM, than what was actually obtained. The Respondent stands, in fact, to gain from accepting the Claimants' higher figure, as it increases the benefit received by the Claimants, that must be refunded.
920. Accordingly, the Tribunal accepts and determines that the HSDA payments received by the Claimants amount to Euro 475,846,026.
921. As stated above at ¶ 863, the VAT payment of Euro 41,484,224 is to be included as a benefit item of the Concessionaire.
922. Regarding the remaining four disputed items of benefits received by the GoM, the Tribunal concludes and decides as follows:

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<sup>686</sup> Accuracy Report II, ¶¶ 4.98-4.117.

<sup>687</sup> Charlton Report I, ¶ 6.24.

<sup>688</sup> See above at ¶ 90303.

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a) **The value of the healthcare services**

923. The Claimants assess the value of the healthcare services at either Euro 604,416,034 (low) or Euro 667.6M (high), whereas the Respondent, based on the Charlton Report II, assesses the value, on an undiscounted basis, at Euro 606,862,724.<sup>689</sup> The difference between Accuracy's lower amount and that of Mr. Charlton amounts to about Euro 2.5M and is therefore relatively small.
924. As mentioned above (Sub-section B.3.), the value of the healthcare services delivered by the Claimants to the Respondent constitutes a "*benefit*" to the GoM, which the latter must return. The question now is whether the value of the services should be assessed, based on what the GoM was willing to pay under the HSDA or possibly at a lower or higher rate.
925. As a starting point, the Tribunal accepts the sum of Euro 604,416,034, which is the "*low-case*" put forward by the Claimants and which corresponds to the amount that was actually paid by the Respondent according to the contractual provisions. Such choice favors the Respondent, since the latter contends that it had not received what it had paid for. The Claimants' "*high-case*" assessment, which is based on the Mater Dei benchmarking, is rejected for the reasons outlined below (¶ 965).
926. The Tribunal considers the amount of what was actually paid by the Respondent to the Claimants not just an "*important*" or "*appropriate*" benchmark,<sup>690</sup> but the most reliable one for determining the value of the healthcare services received by the GoM during the lifetime of Transaction Agreements.
927. The Parties agree with that approach.
928. At the Hearing, the Claimants stated: "*(...) the [C]ontract is a reasonable objective measure of the subjective expectation of the [P]arties, (...) and even if the Contract no longer has binding force it is evidence of what the [P]arties were paying for. (...).*"<sup>691</sup> Respondent concurred: "*Yes (...) we fully agree that even if the contract is null and void, then the [T]ribunal has to have a benchmark against which to measure the value of services, i.e; the performance by Steward.*"<sup>692</sup>
929. This leaves the Tribunal with the question whether the value of these services should be reduced by 40%, if not 80% or any other percentage point of the value of these services because of "*partially deficient*" performance, as argued by the Respondent.
930. It is to this question that the Tribunal will now turn.
931. The Tribunal rejects the Respondent's argument that a discretionary discount should be applied by the Tribunal on the grounds that the Concessionaire failed to deliver the full value of the healthcare services.

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<sup>689</sup> Accuracy Report III, ¶ 2.9, table 2.1; Charlton Report II, Appendix 13, tab. 13.2.

<sup>690</sup> C-PHB, ¶ 102; R-PHB, ¶ 108.

<sup>691</sup> Rubins, Tr. Day 6, 15:14-18.

<sup>692</sup> Darwazeh, Tr. Day 6, 16:20 and on Day 1, 184:17 – 185:8.

932. The Tribunal observes that Mr. Charlton acknowledges that neither he nor Accuracy can “*determine an appropriate discount*,” and that it is for the Tribunal to decide what, if any, discount should be applied. It is, in the words of Mr. Charlton, “*impossible for Accuracy or me to provide a precise qualitative assessment of the value of the healthcare services that the Concessionaire provided Maltese citizens (...)*.”<sup>693</sup>
933. Mr. Charlton made it clear at the Hearing that he was only providing “*an indicative range of options for the Tribunal, rather than an opinion.*”<sup>694</sup>
934. The Tribunal is not convinced that the healthcare services provided by the Claimants were substantially lacking from a quantitative or quality perspective. The Claimants rightly point out that during the lifetime of the Transaction Agreements, the GoM never claimed any deduction on the HSDA invoices.
935. For the Tribunal, there exists no compelling evidence that deductions from the payments for Claimants’ healthcare services are warranted.
936. Schedule 4 of the HSDA sets out a comprehensive and sophisticated system “*to determine how relevant deductions would apply in respect of breaches to the Transaction Agreement[s]*.”<sup>695</sup> Schedule 4 provides specific formulas for deductions depending on the type of breaches, which could be “*ordinary service failures*” or “*critical service failures.*”
937. According to Schedule 4, Clause 1.2.1, a deduction for an ordinary service failure will only apply “*when a breach has been duly flagged, notified and has not been rectified after a minimum of 30 days cure period or any additional reasonable cure period has been allowed to remedy the breach, provided that the breach may be remedied.*” In the case of critical service failures, the rectification period is reduced to 15 days.
938. Pursuant to Schedule 4, Clause 1.2.2, critical service failures require a breach resulting from
- “- *A major deterioration in the overall experience of the End-User that results in a noticeable inconvenience in the overall experience of the End-User of health services under the [HSDA] due to underperformance in Services;*
  - *Major breaches in agreed Medical Service Delivery Requirements which may increase health and safety risks to patients; or*
  - *A noticeable deterioration in the quality and integrity of the facilities, equipment and infrastructure which if prolonged could result which if left untreated could eventually lead to increased health and safety risks on patients and staff; or*
  - *Any disease outbreak that has been failed to contain within the specific area; or*

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<sup>693</sup> Charlton Report II 2.2.17.

<sup>694</sup> Tr. Day 5, 142:4-16; Charlton PPT, p. 10.

<sup>695</sup> Exhibit C-0002, Schedule 4, Clause 1.1.



- Any prolonged health & safety issues that are not followed as per the health & safety regulations;
- Availability of the number of beds drops below 75% of the total beds allotted to [GoM];
- Availability of any Service Requirements that have been interrupted for reasons beyond usual repair & maintenance or seize to exist.”<sup>696</sup>

939. The Respondent has not provided the Tribunal with any relevant evidence that would indicate the existence of ordinary, let alone critical, service failures by the Claimants. It is in fact undisputed that no Service Credits pursuant to Schedule 4 of the HSDA were ever contemplated, let alone applied.<sup>697</sup> In its third report of May 2023, the NAO had come to similar conclusions regarding potential quality issues in the Orthotics and Prosthetics Unit: “*Despite these instances of possible breach, the NAO was not provided with evidence that Government registered any rectifiable concessionaire event of default.*”<sup>698</sup>
940. At the Hearing, the Claimants’ expert, Ms. Cozar, stated on cross-examination that “*there is no evidence of underperformance.*”<sup>699</sup> Mr. Charlton did certainly not provide such evidence either; he rightly explained that this would fall outside his purview.<sup>700</sup>
941. The Tribunal has carefully examined the testimonial evidence provided by the Respondent’s fact witnesses, including the numerous exhibits submitted in support. It is clear that there were notable shortcomings and several legitimate reasons for Dr. Zarb Adami, acting as the GoM representative on the Quality Assurance Board (“**QAB**”),<sup>701</sup> to be dissatisfied with Steward’s performance under the HSDA.
942. For instance, there was a lack of participation in meetings of the Quality Board, which had been established under the HSDA,<sup>702</sup> as well as a fire incident that occurred on 25 December 2022.<sup>703</sup> Nevertheless, there is no evidence on record of serious issues concerning the treatment of patients, who are the primary beneficiaries of healthcare services. In particular, the witness statements of Dr. Zarb Adami do not substantiate the existence of such issues.
943. The Tribunal appreciated Dr. Zarb Adami at the Hearing as a serious and respected professional. His main criticism is that “*Steward did not build and operate the hospitals according to the level of services and requirements agreed under the [Transaction] Agreements. Steward merely*

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<sup>696</sup> Exhibit **C-0002**, Schedule 4, p. 145 provided also for “Surgical Operations Underperformance Adjustment”, where the Concessionaire is “*unable to meet the targeted number of surgical operations for any reason other than the demand reduction (...).*”

<sup>697</sup> Accuracy Report III, ¶¶ 3.42-3.46; Accuracy PPT, p. 22.

<sup>698</sup> NAO Report, exhibit **Q-3**, 4.11.8, p. 211.

<sup>699</sup> Tr. Day 5, 84, 68:17-18.

<sup>700</sup> Charlton Report II, ¶¶ 3.2.18 3.4.49; 3.4.70 *et seq.*

<sup>701</sup> Zarb Adami, **RWS-3**, ¶ 8.

<sup>702</sup> Zarb Adami, **RWS-4**, ¶¶ 21 *et seq.* and **RWS-3**, ¶¶ 52, 53.

<sup>703</sup> SoD&C, ¶ 137; Reply, ¶ 61; Rejoinder, ¶ 89.

*administered the sites, while maintaining the conditions they inherited, made minor cosmetic improvements, while multiple services deteriorated.*<sup>704</sup>

944. However, this critique pertains to other matters and has little, if any, direct relevance to the provision of medical services during the transition period under the HSDA.
945. The Tribunal has also reviewed the documentary record, including the Gozo General Hospital Quality Performance Report 2022 and the Key Performance Indicators for the KGRH for the first quarter of 2023.<sup>705</sup>
946. The GGH report contains a table with “*Hospital incidents/Events reported*” and another table with “*Customer satisfaction*.”<sup>706</sup> Upon its review, the Tribunal could not detect any alarming anomalies that would suggest that there were serious issues with the healthcare services at that hospital.
947. The report for KGRH concluded that “[t]he data presented in this report show considerably improvement in most of the indicators as compared to the first quarter of 2022” and referred to a “*positive step in our efforts to improve quality and safety throughout the hospital, to involve staff and to increase patient satisfaction*.”<sup>707</sup>
948. While the Tribunal does not express an opinion on the complete accuracy of these findings or endorses the Claimants’ assertion that the “*record demonstrates consistent high-quality patient care*”,<sup>708</sup> it is evident that the Respondent has not specifically rebutted these claims.
949. Furthermore, the Tribunal’s attention has not been drawn to any particular healthcare issues that would justify a reduction in the value of these services.
950. Interestingly, the NAO in its comprehensive study of the contractual framework and performance of the Concession noted in that specific context: “*Conflicting information was obtained by the NAO regarding whether the VGH honored its obligation to sustain pre-concession service levels*.”<sup>709</sup>
951. In its executive summary, the NAO also noted that “[a] recurring theme that emerged in submissions made to the NAO by the [MFH] and several other MFH representatives was that while service quality was generally maintained, and in some instances improved, the improvement envisaged through the concession was effectively stunted due to the lack of progress registered by the VGH in terms of the contracted refurbishment and infrastructural development. The perspective put forward by the [MfH] and the MFH resonates with that of the Office.”<sup>710</sup>
952. However, even if the documents on record and witness testimony indicate that certain shortcomings existed in the healthcare services, the Tribunal finds it difficult to translate these issues into a discount rate that would warrant reducing the value of the services, *i.e.*, the fees paid by the GoM to the Concessionaire. Any such calculation would, at best, be speculative, based on a rough guess, and amount to little more than conjecture. The Tribunal considers it inappropriate to base a

<sup>704</sup> **RWS-3**, ¶ 33; see also **RWS-4**, 41 (“[During the transition period], (...) Steward only maintained the same level of services, without providing any noticeable progress toward the enhanced capabilities required by the Concession,” and ¶ 42).

<sup>705</sup> Respectively exhibits **C-0411** and **C-0413**.

<sup>706</sup> Exhibit **C-0411**, p. 24 and pp. 26 *et seq.* respectively.

<sup>707</sup> Exhibit **C-0413**, p. 40.

<sup>708</sup> CC Rejoinder, ¶ 30.

<sup>709</sup> NAO Report II, exhibit **Q-2**, ¶ 9.8.6 at p. 446.

<sup>710</sup> NAO Report II, exhibit **Q-2**, ¶ 51 at p. 25.

monetary adjustment on such arbitrary grounds, as this would not represent an equitable monetary factor in the context of the restitution scenario.

953. Furthermore, regarding the value of the healthcare services, progress, if any, towards the contractual Schedule 6 Milestones is irrelevant, as the pre-completion phase was based on pre-completion fees.<sup>711</sup>
954. The failure to meet the Schedule 6 Milestones cannot serve as a justification for discounting the fees paid for the healthcare services. Accordingly, contrary to the Respondent's position in its post-hearing submission, the Tribunal finds no need to examine "*the failure to meet Concession Milestones.*"<sup>712</sup> This appears to be an issue and source of considerable confusion in the minds of the GoM and its representatives, and where, in the Tribunal's view, the Delia Judgments have reached questionable conclusions on this matter.<sup>713</sup>
955. In light of the emphasis the Respondent has put in this arbitration on the non-achievement of the Concession Milestones, the Tribunal finds it appropriate to refer to some of the findings made by the NAO in its second report, where it stated, amongst other:

*"In the NAO's understanding, the VGH's inability to secure financing represents the pivotal shortcoming on which all subsequent failures registered in this concession by Government rested. Without financing, all commitments regarding improvements to be made in terms of infrastructure and services were rendered impossible to achieve, nothing short of empty and unachievable commitments on the part of the VGH. The failure of the VGH to deliver on its commitments was mirrored by Government's lack of necessary action in attending to the evident inadequacies of the Concessionaire. Instead, the Government's representatives provided waiver after waiver with respect to the requirement to secure financing, thereby perpetuating the failure that this concession came to represent. In effect, the origin of this situation can readily be traced to the grossly erroneous selection of the VGH as the concessionaire, whose lack of financing and technical expertise was evident at the selection stage of the concession. (...)"*<sup>714</sup>

*"The VGH's inability to secure financing was, in the NAO's understanding, the crucial shortcoming on which rested all subsequent failures registered in this concession by Government. All the VGH's commitments regarding the envisaged improvements to infrastructure and services were rendered unattainable in view of this failure. The Government's acquiescence to the evident inadequacies of the VGH reflected ineffectiveness, mirroring the failure of the VGH to deliver on its commitments. (...)"*<sup>715</sup>

*"Aside from failing to deliver an improved health infrastructure, this concession fell short of achieving another critical objective set by Government, that is, the shifting of project expenses off the Government's balance sheet."*<sup>716</sup> (Emphasis added).

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<sup>711</sup> See also Cozar, Tr. Day 5, 119:9-15.

<sup>712</sup> R-PHB, ¶ 123.

<sup>713</sup> The Tribunal says so without questioning the overall reasoning and decisions of the Delia Judgments.

<sup>714</sup> NAO Report II, exhibit Q-2, ¶ 9.3.37 at p. 404.

<sup>715</sup> NAO Report II, exhibit Q-2, ¶ 9.8.4 at p. 447.

<sup>716</sup> NAO Report II, exhibit Q-2, ¶ 9.8.11 at p. 447.

956. The HSDA fees were not to cover any CAPEX, the deployment of which was necessary to allow the achievement of the milestones under the SCA. The primary reason why the Milestones were not achieved concerns the fact that the SCA was considered not bankable, which both the NAO and the GoM had recognized at some point.<sup>717</sup>
957. It follows from Schedule 3 of the HSDA that the bed rates were to be much higher upon completion of the Milestones.<sup>718</sup>
958. As discussed at the Hearing, the GoM's calculation of the initial Euro 51.1M for the HSDA pre-development service charges were intended to cover the Claimants for any capital expenditures.<sup>719</sup> Respondent's internal "*Hospitals Operating Costs Estimate (revised), November 2017*" dated 19 November 2017,<sup>720</sup> which the Respondent disclosed during document production, would seem to confirm that understanding.
959. The Tribunal now turns to the Respondent's assertions that the Claimants' financial statements include unexplained amounts, particularly for expenses, and that there was misappropriation of funds for spying activities on public figures within the GoM.
960. As expressly discussed with the Parties on the last day of the Hearing based on the Q&A Memo,<sup>721</sup> the Tribunal was not requested to make determinations in that regard,<sup>722</sup> and the available record does not provide a sufficient basis for such findings.<sup>723</sup>
961. For that reason, the Tribunal expresses no opinion regarding the Respondent's allegations of misconduct by the Claimants, their officers, or accountants concerning company funds, except to say that it is doubtful that the use of company funds for excessive director salaries or questionable expenditures was contemplated by the HSDA.
962. Nonetheless, if such misconduct existed and can be proven, there may be other appropriate forums to seek redress against those responsible. The Tribunal recalls in that context that already in December 2021 the NAO expressed concerns "*regarding the regularity of use of funds provided by the [GoM]*", which prompted it to "*recommend further investigation by the competent authorities in terms of any possible financial mismanagement and misuse of public funds in connection with this concession awarded by the [GoM].*"

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<sup>717</sup> See above ¶ 955 and, amongst the others, exhibit **C-0098**, p. 1.

<sup>718</sup> Regarding Schedule 3, Part 1) above at ¶ 248. See also Accuracy Report II, ¶¶ 3.8-3.10.

<sup>719</sup> Tr. Day 5, 173:13-174:24.

<sup>720</sup> Exhibit **C-0253**.

<sup>721</sup> Question 23 of the Q&A Memo addressed to the Respondent reads as follows: "*Is the understanding of the Tribunal correct that Respondent is not asking it to make any independent findings about the payments for allegedly spying activities, or for the early losses through allegedly excessive payments to the directors of [Claimants] and for "other expenses" in the accounts of the Steward Group?*"

<sup>722</sup> Darwazeh, Tr. Day 6, 54:20-56:22; Rubins, Tr. Day 6, 56:25-57:12.,

<sup>723</sup> Accuracy Report III, ¶ 3.44, c) states with respect to the alleged "*misappropriation of Concession funds, we are instructed that this allegation by the GoM is contested by the Claimants, and that it is not an established fact and should not be treated as such.*" Accuracy remained, however, silent regarding the various cost items that Respondent had requested or flagged as requiring clarification.

963. The Tribunal was not made aware of any further investigation, which it could not have carried out itself.
964. In any event, the Tribunal cannot accept any reduction in the value of healthcare services based solely on Respondent's allegation of misconduct.
965. At the same time, the Tribunal is not impressed by Claimants' argument that the value of the healthcare services rendered under the HSDA should be increased to reflect the higher sums the GoM paid for comparable services at Mater Dei.
966. *First*, Claimants' argument is in contradiction with its primary position that the amount a buyer is willing to pay in an arms' length transaction represents the expected value, whether it is the minimum or maximum value does not matter. The Claimants have not provided any evidence that the pre-completion fees corresponded to the "*minimum*" expected value of the GoM.
967. *Second*, the Tribunal finds it difficult without precise expert evidence to compare the healthcare services provided at the Hospitals with those dispensed at Mater Dei. The latter is a newly built and more advanced hospital, which inherently offers a different and better mix of services compared to the Hospitals under review.<sup>724</sup>
968. During cross-examination, Dr. Zarb Adami, when questioned about whether the Mater Dei hospital could serve as an appropriate benchmark for evaluating the performance of GGH, candidly responded:
- "GGH could never be [Mater Dei]. [Mater Dei] has different resources and different jobs. It is not GGH. (...) MDH is a different hospital. It has much, much more resources, for example [Mater Dei] has to be available all the time to carry out emergency head surgery, emergency surgery in children, emergency cardiac surgery, traumatic surgery, which Gozo didn't (...)."725*
969. The Tribunal has also carefully reviewed the expert evidence of Accuracy,<sup>726</sup> who, as Ms. Cozar explained at the Hearing, have made "*some adjustments to make sure that we are computing the increase of Mater Dei cost relative to only the same services, similar services, in the Concession.*"<sup>727</sup>
970. Mr. Kirby in turn admitted during his examination at the Hearing, when asked whether the GoM had received "*Mater Dei value at termination*", (*i.e.*, at the end of the Concession), that he had seen

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<sup>724</sup> See Rejoinder, ¶¶ 281-283

<sup>725</sup> Zarb Adami, Day 2, 62:22-63:18; also at Tr. Day 2, 176:15-24 regarding rates at Mater Dei being higher than at GGH, "*Mater Dei having a high quality of service, which would have a higher cost than that of running [GGH].*"

<sup>726</sup> In particular Accuracy Report II, ¶¶ 3.35 *et seq.* and the "*2019 Mater Dei Benchmarking*", exhibit ACC-115.

<sup>727</sup> Tr. Day 5, 88:2-5; 92 and Kirby, 92:9-20.

no evidence “[f]or the mix of services that it was providing at the pre-completion phase” at the Hospitals, where the healthcare services were being delivered.<sup>728</sup>

971. In any event, the Tribunal has no sufficient basis to assess how the fees for healthcare services at Mater Dei ought to be assessed against those at the Hospitals during the period of 2016 to 2023.

**b) The value of Claimants’ investment in the Hospitals**

972. Both Parties have relied on the GT Report of 3 June 2021 to assess the investment in the Hospitals. Ultimately, the Respondent has accepted to use that value, *i.e.*, Euro 41,480,000.<sup>729</sup>
973. At the time of the GT Report, Steward claimed the total admissible net book value of its investment to amount to Euro 59.5M (Euro 42.7M for “*hard costs*” and Euro 16.8M for “*soft costs*”), whereas GT concluded that it amounted to Euro 41.5M only.<sup>730</sup>
974. The GT Report had been commissioned by the MfH “*to further verify the accuracy and reasonableness of the hard costs claimed to have been incurred by Steward Healthcare in the course of construction and improvement works carried out at the Sites.*”<sup>731</sup> It is a thorough report of over 350 pages, which came at a considerable cost (*i.e.*, Euro 399,202, as noted above) and which the Tribunal finds to be sufficiently reliable, also since both Parties relied on it in their arguments. Moreover, it has not been rebutted by proper evidence.
975. The Tribunal observes in that context that the Claimants have not raised any substantive criticism against that report but relied on it as having “*recognized that the Claimants spent nearly €30 million upgrading the Hospitals.*”<sup>732</sup> The Tribunal further recalls that in November 2018, the GoM reported that the Claimants had invested over Euro 24M for upgrading the Hospitals.<sup>733</sup>
976. The Tribunal further observes that the Claimants’ experts have not relied on the PWC Report “*Review of the Concession Project Costs*” dated 30 March 2021 commissioned by the Claimants,<sup>734</sup>

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<sup>728</sup> Tr. Day 5, 95:14-18.

<sup>729</sup> Charlton Report II, ¶ 3.2.16 b (“*I estimate Benefit C2 at €41,480,000*”) and Appendix 13, tab. 13.2 and 13.3.

<sup>730</sup> Exhibit **R-0079**, pp. 13 - 14

<sup>731</sup> Exhibit **R-0079**, p. 4 and pp. 30/31.

<sup>732</sup> CC Rejoinder, ¶ 224. However, Claimants also noted that these “*estimates do not even include the costs of Barts Medical School and Anatomy Centre.*”

<sup>733</sup> See above at ¶ 310.

<sup>734</sup> Exhibit **C-0168**.

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except to state that it had “*confirmed the financial statement figures through to 2019.*”<sup>735</sup> The Tribunal does therefore not need to address the findings of that report.<sup>736</sup>

977. Admittedly, in the financial statements of 31 December 2022 of Claimant No 2, the net book value (*i.e.*, after depreciation) of its non-current asset “*Property, plant, equipment*” is recorded at Euro 3.901.571.<sup>737</sup> The net book value of the Contract Asset is recorded at Euro 54,206,247.
978. The Tribunal is not persuaded that the (net) book value in the Claimants’ balance sheet reflects the true economic or market value of the benefit received by the GoM at the time of the Hand-back. To be convinced of the existence of a higher value of investment than the amount assessed by Grant Thornton, and to accept the 2022 book value as the genuine value, the Tribunal would have required, at a minimum, some form of independent external valuation evidence, rather than relying solely on Claimants’ financial statements. No such evidence was provided by the Claimants.
979. The Tribunal comes to that conclusion irrespective of the harsh criticism that Respondent has raised regarding the reliability of the Claimants’ financial statements.<sup>738</sup>
980. Finally, the Tribunal is not prepared to make a downward adjustment to account for additional depreciation, as suggested by the Respondent’s expert.<sup>739</sup> While the concept of depreciation of these assets due to the passing of time since the GT Report of March 2021 is plausible, the Tribunal has not been provided with sufficient evidence justifying the amount of Euro 4.3M.<sup>740</sup>
981. In any case, in Appendix 13, tab. 13.4 (“*My revised Rescission Counterclaim*”), the Respondent’s expert relies on the figure of Euro 41,480,000 as the value of the Claimants’ investment for the purpose of the restoration scenario.

### **c) Claimants’ post-termination services**

982. The core issue here is not whether Steward was entitled to any post-termination costs under the SCA, which the Respondent disputes,<sup>741</sup> but rather whether the GoM derived any benefits from the Claimants’ services and work during the post-termination period from 18 March to 31 May 2023, in the amount of Euro 1,685,503.
983. Regarding Accuracy’s reliance on the so-called FS5 forms, these are the financial settlement forms used by employers to report employee wages to the Maltese Inland Revenue Department.

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<sup>735</sup> Accuracy Report II, ¶ 5.34.

<sup>736</sup> See, however, the critical assessment in Charlton Report I, ¶¶ 5.4.7-5.4.22.

<sup>737</sup> Exhibit ACC-108, p. 7 and 21.

<sup>738</sup> Charlton Report II, ¶¶ 3.4.2 *et seq.*; Charlton Report I, ¶¶ 4.3.5 *et seq.*; R-PHB, ¶ 100.

<sup>739</sup> Charlton Report II, Table 4.2.

<sup>740</sup> In Charlton Report I, ¶ 5.4.41, it is simply stated that “*the GT’s depreciation approach*” was used to make that adjustment.

<sup>741</sup> Rejoinder, ¶¶ 603 *et seq.*

984. For March, April and May 2023,<sup>742</sup> these forms were attached to the Claimants' invoice, which claimed labor costs for the period of 19 - 31 March, as well as April and May 2023.<sup>743</sup> The Claimants' experts have assessed the outstanding balance of the labor post-termination costs to be Euro 841,822.<sup>744</sup>
985. While it is correct that simply filing these forms with the Maltese tax authorities "*does not mean they are free from error*,"<sup>745</sup> the Tribunal does not believe this fact is sufficient to disqualify them as standalone evidence, especially given the presumption that the Claimants would not wish to present fraudulent claims before this Tribunal.<sup>746</sup>
986. For the same reason, the Tribunal is also not impressed by Mr. Charlton's other argument that "*historical use in a commercial relationship does not mean the forms are sufficient for the level of evidence requires in a dispute*."<sup>747</sup> Whilst the Tribunal respects Mr. Charlton's opinion, it remains of the view that on its face the FS5 forms constitute sufficient evidence that has not been challenged by any specific elements.
987. Regarding the other post-termination costs, which include 34 invoices of third parties addressed to the Claimants,<sup>748</sup> the Claimants' experts have split them into two categories:
988. Category 2 covers those amounts where Accuracy has "*verified that the Concessionaire either paid, or is currently liable to pay*." Accuracy has limited the amounts to those invoices prior to 5 April 2023, which is the date at which the GoM "*assumed nearly all of the Third Party Contracts effective as of 5 April 2023*," as the Claimants remained "*liable for payments obligations prior to 5 April 2023*."<sup>749</sup> On that basis, Accuracy has assessed the cost at a total of Euro 520,198.
989. Category 1 in turn covers those amounts for which Accuracy has "*verified that a cost was incurred by reference to a supporting invoice*", but not whether the Concessionaire has paid it or is liable to pay it.<sup>750</sup>
990. As these costs were supposedly incurred between 1 and 30 April 2023, one would have expected that in the 18 months since then Claimants would have paid these invoices and/or that it has been established that they are liable to pay them. No explanation was provided by Accuracy as to why the verification of payment has not taken place, not even at the time of their third report of March 2025.

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<sup>742</sup> Exhibits **ACC-038-ACC-040**.

<sup>743</sup> Exhibit **ACC-032**, by deducting the pro rata share pre-18 March 2023 and the payments already made by the GoM.

<sup>744</sup> Accuracy Report I, ¶¶ 7.9, 7.10, reducing the invoiced amount to that some from Euro 1,198,240; Accuracy Report II, ¶ 4.117, Table 4.13; Accuracy Report III, ¶ 3.54.

<sup>745</sup> Accuracy Report II, ¶ 5.4.9.

<sup>746</sup> *Idem*.

<sup>747</sup> Charlton Report II ¶ 5.4.9.

<sup>748</sup> Accuracy Report I, ¶¶ 7.6, 7.7; exhibit **ACC-033**.

<sup>749</sup> SoD&C, ¶ 509.a.

<sup>750</sup> Accuracy Report II, ¶ 4.114, a).



991. The Tribunal is of the view that said sum is, in principle, justified and that it qualifies as a benefit to the GoM, which must be accounted for in the restoration scenario. The Tribunal has reviewed the supporting invoices in exhibit ACC-033.<sup>751</sup> They all relate to the delivery of services at the Hospitals.
992. Except for the Category 1 amount of Euro 323,482, which refers to post-termination costs allegedly occurred between 1 April 2023 and 30 April 2023 for which Accuracy has “*not verified that the Concessionaire either paid the invoice or is, as at the date of this Report, liable to pay the invoice*”,<sup>752</sup> the Tribunal is satisfied that the Claimants’ post-termination costs were incurred and shall be qualified as a benefit to the GoM.
993. Accordingly, the Tribunal sets the GoM’s benefit at the sum of (1,685,503 - 323,482 =) Euro 1,362,021.

#### d) Summary of benefits received by Parties

994. In the table below ¶ 996, the Tribunal summarizes the Parties’ reciprocal benefits.
995. Regarding the benefits received by the Concessionaire, the Parties were mostly able to agree on them.<sup>753</sup> As noted above, there were only two items that required a decision of the Tribunal, *i.e.*, the amount of HSDA payments received by the Claimants and the VAT liability.<sup>754</sup>
996. Regarding the benefits received by the Respondent, out of seven items only three were agreed, while the other four needed the Tribunal’s determination.<sup>755</sup>

|           | The Parties’ benefits                          | EUR                                   | Basis       |
|-----------|------------------------------------------------|---------------------------------------|-------------|
| <b>A.</b> | <b>Benefits received by the Concessionaire</b> |                                       |             |
| A.1       | HSDA payments                                  | [475.8] <sup>756</sup><br>475,846,026 | AT Decision |
| A.2       | LSA Shortfall Reimbursements                   | [33.2]<br>33,240,475                  | Agreed      |
| A.3       | Other payroll amounts                          | [3.1]<br>3,076,676                    | Agreed      |

<sup>751</sup> It includes two invoices from JF Services of 31 March 2023 and 30 April 2025 for respectively Euro 247,696.12 and Euro 257,190.31; exhibit **ACC-033**, pp. 11, 12. Accuracy claims to have verified invoices for EUR 1.4M (Accuracy I, ¶ 7.6). However, the sum of all the invoices in ACC-033 is around EUR 1.9M.

<sup>752</sup> **CEX-2**, ¶¶ 2.30, 2.31.

<sup>753</sup> See Accuracy Report III, Table 3.1 at p. 64 and Charlton PPT, Appendix 1.

<sup>754</sup> See above at ¶ 91616, and below items A.1 and A.9.

<sup>755</sup> In the case of the value of the investment of hospitals (item B.6), Respondent agreed with Claimants’ “low” case; the Tribunal rejected Claimants’ high case.

<sup>756</sup> In many of their presentations, the Parties’ experts have referred solely to rounded figures in M. For ease of reference, this table therefore indicates also the rounded figures in brackets.

|           |                                                           |                        |                |
|-----------|-----------------------------------------------------------|------------------------|----------------|
| A.4.      | Settlement Agreement                                      | [5.5]<br>5,511,533     | Agreed         |
| A.5       | Autoclave                                                 | 0.0                    | Agreed         |
| A.6.      | Beneficial interest rate savings                          | [2.1]<br>2,076,507     | Agreed         |
| A.7       | Value of GoM Staff provided                               | [274.5]<br>274,541,058 | Agreed         |
| A.8       | Non-cash benefits                                         | [48.9]<br>48,868,130   | Agreed         |
| A.9       | Indirect tax liability                                    | [41.5]<br>41,484,224   | AT Decision    |
| A.10      | <b>Benefits received by the Concessionaire:<br/>TOTAL</b> | <b>884,644,629</b>     |                |
|           |                                                           |                        |                |
| <b>B.</b> | <b>Benefits received by the GoM</b>                       |                        |                |
| B.1       | Value of services provided                                | [604.4]<br>604,416,034 | AT Decision    |
| B.2       | Other income and expenditure                              | [8.6]<br>8,584,848     | AT Decision    |
| B.3       | LSA Salary reimbursement (excluding 2023)                 | [224.5]<br>224,515,829 | Agreed         |
| B.4       | LSA Salary reimbursement 2023                             | [9.1]<br>9,075,359     | Agreed         |
| B.5       | Additional payments                                       | 0.0                    | AT Decision    |
| B.6       | Value of investment in hospital                           | [41.5]<br>41,480,000   | In part agreed |
| B.7       | Post-termination services provided by Claimants           | [1.3]<br>1,362,021     | AT Decision    |
| B.8       | <b>Benefits received by the GoM: TOTAL</b>                | <b>889,434,091</b>     |                |
|           |                                                           |                        |                |
| <b>C.</b> | <b>Balance after set-off (889.4M – 884.6M)</b>            | <b>4,789,462</b>       | AT Decision    |

997. Accordingly, the Claimants are entitled to receive from the Respondent the sum of Euro 4,789,462 as part of their (alternative) rescission claim pursuant to Article 1209 MCC.

#### **D. INTEREST**

998. The Parties claim interest on their respective restoration claims.

##### **1. The position of the Respondent**

999. Under the Delia claim, the Respondent seeks interest at the default statutory rate of 8% *per annum* on the full restoration amount of Euro 487,980,032 starting from 24 May 2024, *i.e.*, from the time

the Delia claim was raised in the SoD&C.<sup>757</sup> This is consistent with Maltese law pursuant to which default interest on restitution claims arising from rescinded contracts begins to accrue from the date the claim for restitution is made.<sup>758</sup>

1000. Although the Respondent had initially claimed only Euro 245,234,943 as part of the Delia claim, it contends that the increase to Euro 487,980,032 was expressly authorized by the Tribunal at the Hearing.<sup>759</sup> It is also only in its post-hearing submission that the Respondent has indicated 24 May 2024 as being the start date for its interest claim.
1001. As of 27 June 2025, interest on the restoration amount of Euro 487,980,032 has accrued to a total of Euro 42,752,528.5, using the formula:  $\text{Euro } 487,980,032 \times 8\% \times (400 \div 365.25)$ .<sup>760</sup>

## 2. The Position of the Claimants

1002. The Claimants also claim “pre-award” interest “at the statutory rate of 8% per annum, compounded annually.” Interest starts to run “from the date at which the benefit was received by either of the Parties until the date of the Tribunals’ award (...).”<sup>761</sup> For the interest calculations concerning the benefits received, the Claimants’ experts have “assume[d] benefits accrue in the middle of each year for our interest calculations.”<sup>762</sup>
1003. The Claimants reject the Respondent’s belated change of the start date for interest to be procedurally inadmissible.
1004. The Claimants also claim “post-award interest on all sums that the Respondent is ordered to pay, at the interest rate of at least 8% per annum (...).”<sup>763</sup>

## 3. The Tribunal’s analysis

1005. The Parties agree that as a matter of Maltese law, the applicable interest rate is 8% per annum, a rate which both Parties have used in their interest calculation.<sup>764</sup>

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<sup>757</sup> R-PHB, Appendix 1.

<sup>758</sup> R-PHB, ¶ 151.

<sup>759</sup> See Respondent’s email dated 10 July 2025 to the Tribunal and the comment in the mark-up of Appendix A, p. 1.

<sup>760</sup> R-PHB, ¶ 152, N. 290.

<sup>761</sup> Reply, ¶ 506 (h).

<sup>762</sup> Accuracy Report II, ¶ 5.44, N. 223.

<sup>763</sup> Reply, ¶ 506 (i).

<sup>764</sup> This is indeed the rate fixed by Article 1139 MCC for damage claims. See SoC, 219; R-PHB, ¶ 151.

1006. The Parties take, however, different positions as to the start date for interest in the restoration scenario.

1007. Article 1141 MCC provides the following regarding interest:

*“(1) Where the obligation is of a commercial nature, or the law provides that interest is to run ipso jure, interest shall be due as from the day on which the obligation should have been performed.*

*(2) In any other case, interest shall be due as from the day of an intimation by a judicial act, even though a time shall have been fixed in the agreement for the performance of the obligation.”*

1008. In principle, the Tribunal would have to calculate interest on the start date each party received a benefit, though the Tribunal understands from Claimants’ experts that *“the precise timing is not set out in the available data”*<sup>765</sup> and, therefore, doubts that precise interest calculations would be possible.

1009. Thus, the Tribunal finds it more appropriate to assess interest on the sum of the net benefit one party is entitled to receive, after the set-off with the Parties’ respective benefits received. This appears to be also in line with the principle of equitable monetary reflection applied by Maltese courts.<sup>766</sup>

1010. Moreover, the Tribunal agrees with the Respondent that in accordance with Maltese law and Maltese jurisprudence,<sup>767</sup> the relevant date begins from the date the restitution claim is made. The Claimants raised their (alternative) claim for restitution for the first time with their Reply, *i.e.*, on 8 November 2024.

1011. Accordingly, the Tribunal determines that the sum of **Euro 4,789,462** shall carry interest at the rate of 8% *per annum* as of 8 November 2024 until payment in full by the Respondent.

1012. The Claimants’ objection to the introduction of new start date for interest in the R-PHB is therefore moot.

1013. While both Parties have claimed that interest on any sums awarded be compounded annually, neither party has specifically explained why the Tribunal should order compounded rather than simple interest. Pursuant to Article 1142 MCC, *“[t]he interest fallen due may bear interest either, in virtue of the foregoing provisions, from the day of a judicial demand to that effect, or by virtue*

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<sup>765</sup> *Idem.*

<sup>766</sup> Exhibit **RZP-80**, ¶ 38.

<sup>767</sup> Exhibits **RZP-80** and **RZP-81**; R-PHB, ¶ 152.

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*of an agreement entered into after the interest has fallen due, provided, in either case, interest be due for a period not less than one year.”*

1014. As a consequence, since the Claimants’ interest claim covers as of the date of this Award less than one year, interest will only be compounded annually for the period as of 8 November 2025.

## **IX. THE COSTS OF THIS ARBITRATION**

1015. The Tribunal will first summarize the position of the Claimants and of the Remaining AP (A.) and then that of the Respondent (B.), before discussing and deciding upon the costs of this arbitration (C.)

### **A. THE COSTS OF THE CLAIMANTS AND THE REMAINING AP**

1016. The Claimants seek to recover their costs based on the principle “*costs follow the event*” and “*considering their reasonable and cost-effective conduct throughout the proceedings.*”<sup>768</sup>
1017. However, in the (unlikely) event that the Respondent should prevail, the costs of the arbitration should be split equally, and each party should bear its own legal costs. A cost award in the Respondent’s favor would not be justified “*given its unreasonable and wasteful procedural conduct, including raising exaggerated, baseless, and constantly shifting claims.*”<sup>769</sup>
1018. The Claimants contend that the alternative costs scenario is appropriate “*where neither party wholly succeeds in the arbitration or where the prevailing party’s conduct during the arbitration makes it unfair to allocate costs in its favour.*” They cite several circumstances of a party’s unreasonable behavior, which a tribunal should consider when exercising its broad discretion in apportioning costs.<sup>770</sup>
1019. Specifically, the Claimants advance four grounds regarding the Respondent’s conduct, which the Tribunal should consider when allocating costs in accordance with PO1, ¶ 32.
1020. *First*, in relation to the Respondent’s “*unjustified*” SfC Application, the Claimants contend that it was “*untimely and disruptive,*” was “*demonstrably exaggerated*” and was “*permeated with baseless and grave accusations,*” requiring the Claimants to devote additional resources to address them.<sup>771</sup>

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<sup>768</sup> C-Cost Brief, ¶ 2.

<sup>769</sup> C-Cost Brief, ¶ 3.

<sup>770</sup> C-Cost Brief, ¶ 6.

<sup>771</sup> C-Cost Brief, ¶ 12.

1021. *Second*, in relation to the document production phase, the Claimants contend that the Respondent “*requested documents after the deadline, made unjustified claims of public interest immunity, insisted on obtaining unredacted documents without basis, and failed to produce a complete set of documents as ordered by the Tribunal.*” The Respondent “*needlessly complicated and prolonged that phase*” and thereby increased the Claimants’ costs.<sup>772</sup>
1022. *Third*, the Respondent “*failed to conduct proper due diligence before filing its request for joinder*” and thus advanced claims against non-existing entities (Initial AP 5, 6 and 8), “*causing the Claimants to waste time and resources on unnecessary procedural exchanges.*”<sup>773</sup>
1023. *Fourth*, the Claimants contend that the Respondent “*advanced exaggerated, unfounded and ever-changing claims for damages.*” This conduct required Claimants to “*re-evaluate and re-analyze the new claims which consumed significant legal and expert resources,*” unnecessarily increasing the Claimants’ and the Tribunal’s time and cost.<sup>774</sup>
1024. At ¶ 33 of the C-Cost Brief, the Claimants and the Remaining AP request that the Tribunal:
- (a) ORDER the Respondent to pay the Claimants all the fees and expenses they and the APs have incurred, or will incur prior to the issuance of the arbitral award, in relation to the arbitration, including:
    - (i) the full costs and administrative fees of the ICC proceedings and fees and expenses of the Tribunal, as determined by the ICC, amounting to US\$762,500, in addition to any further advance to be requested by the ICC; and
    - (ii) the Claimants’ and APs’ legal fees and expenses, expert fees and expenses, and other costs, in an amount of €6,678,129.26 and £28,221.85;
  - (b) ORDER the Respondent to pay interest of 8%, compounded annually from the date of the Tribunal’s award until payment is made in full in relation to each of the amounts set out in paragraph 33(a);
  - (c) DISMISS any claim for costs by the Respondent; and
  - (d) ORDER such further and other relief as the Tribunal may deem appropriate.
1025. The breakdown of the costs incurred by the Claimants for this arbitration is as follows:

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<sup>772</sup> C-Cost Brief, ¶¶ 13-18.

<sup>773</sup> C-Cost Brief, ¶ 19.

<sup>774</sup> C-Cost Brief, ¶¶ 20-24.

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- (i) ICC advance on costs: USD 762,500
  - (ii) Hearing costs:
    - Delos Hearing Center: Euro 35,009.40
    - Epiq: GBP 28,221.85
    - Boostle SAS (IT equipment): Euro 460
  - (iii) Cost of legal representation:<sup>775</sup>
    - Freshfields:<sup>776</sup> Euro 4,078,441 (fees) + Euro 154,368.97 (disbursements)<sup>777</sup>
    - Mamo TCV Advocates: <sup>778</sup> Euro 138,077.46 (fees) + Euro 4,389.02 (disbursements)
    - Latham & Watkins: Euro 447,934.14 (fees + disbursements, excluding fees charged for Emergency Arbitrator proceedings)
  - (iv) Cost of expert witnesses:
    - Accuracy: Euro 840,505.25 (fees + expenses)
    - Shepperd Mullin Richter & Hampton: Euro 391,601.22 (fees + expenses)
    - Oxera Consulting: Euro 200,000 (fees + expenses)
    - Dr. Fenech: Euro 269,659.92 (fees + expenses)
  - (v) Claimants' and APs' additional hearing related costs: Euro 25,990.68.

1026. The Claimants maintain their cost submission of 2 October 2024 regarding the SfC Application in the amount of Euro 91,692.20.<sup>779</sup>

## B. THE COSTS OF THE RESPONDENT

1027. The Respondent contends that, although Article 38(4) and (5) of the ICC Rules grant the Tribunal discretion in the allocation of costs, there are three key factors that should guide this decision, as outlined in the 2015 ICC Commission Report on Decisions on Costs:

- a) the “*costs follow the event*” rule (*i.e.*, awarding costs to the successful party) as one of the “*principal factors to be considered when allocating costs*;”
- b) the conduct of the party that initiated the arbitration; and

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<sup>775</sup> By email of 10 September 2025, Claimants provided the hourly rates of the relevant timekeepers.

<sup>776</sup> Excluding VAT.

<sup>777</sup> Comprising € 142,622 for data hosting and review platforms from 2023-2025 as per Claimants' email of 10 September 2025.

<sup>778</sup> Including VAT.

<sup>779</sup> C-Cost Brief, ¶ 12 and its Appendix 1, N. 55.

- c) whether the parties conducted the arbitration in an expeditious and cost-effective manner.<sup>780</sup>

1028. To assist the Tribunal in assessing the relative success and failure of parties, the Respondent quotes the following statement from the ICC Commission Report:

*“Arbitrators may take into account the relative success of the prevailing party by: (i) assuming that if a claimant or respondent succeeded in its core or primary claim or outcome, then it is entitled to all of its reasonable costs.”*<sup>781</sup>

1029. On that basis, the Respondent considers that it should be awarded all its costs, and advances primarily three grounds to that effect:

1030. *First*, the Claimants initiated this arbitration “*without any valid legal or factual basis*,” the Claimants bringing “*a frivolous and vexatious emergency arbitration*,” of which they have not yet satisfied the cost order.<sup>782</sup>

1031. The Respondent contends that “[t]his conduct epitomises Steward’s broader strategy: initiating proceedings to apply pressure, irrespective of merit. The Emergency Arbitration served no legitimate purpose, save to escalate the dispute and saddle the Government with needless cost” and that this holds true for the present arbitration.<sup>783</sup>

1032. The Respondent further contends that “[b]y framing the present Arbitration around the [GoM’s] alleged ‘failures to honour contractual obligations’, Steward pursued claims that it knew, or ought to have known, could not lawfully exist given the nullity of the Concession and the Related Instruments. This was nothing short of an abuse of the arbitral process, a calculated attempt to circumvent a binding national judgment of the court of final instance, in manifest disregard for the principle of *res judicata*.”<sup>784</sup>

1033. *Second*, the Respondent contends that in order to allow the Tribunal to decide the case fully, it had “*to engage with the entire factual and legal matrix of the dispute*.” Respondent further asserts that “[w]ithout being aware of the Counterclaims, the Tribunal could not form a complete picture of Steward’s conduct or determine the scope of restitution due.”<sup>785</sup>

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<sup>780</sup> R-Cost Brief, ¶¶ 7-10.

<sup>781</sup> R-Cost Brief, ¶ 11.

<sup>782</sup> R-Cost Brief, ¶¶ 14-18.

<sup>783</sup> R-Cost Brief, ¶¶ 19 *et seq.*

<sup>784</sup> R-Cost Brief, ¶¶ 23, 24.

<sup>785</sup> R-Cost Brief, ¶ 28.



1034. The Respondent also explains that it was “*legally required to raise the issues of State aid.*”<sup>786</sup>
1035. The Respondent further contends that its counterclaims were “*inseparable from Steward’s claims*” and “*essential to reveal the true implications of the Delia Judgment and to shed light on the consequences of the nullity of the Concession and Related Instruments ab initio and the restoration of the Parties to the status quo ante.*”<sup>787</sup> The Respondent explains that “*the ‘legal issue of the effect of the Delia Judgment’ could not be determined in a vacuum,*” and that “*before analysing the effect of the Delia Judgment, the Tribunal necessarily had to decide whether it has jurisdiction over the Claimants and Additional Parties, which turned on their conduct before and throughout the Concession (...).*”<sup>788</sup>
1036. *Third*, the Respondent contends that the Claimants’ procedural conduct “*significantly and unnecessarily increased the costs borne by the GoM.*”
1037. In that context, the Respondent refers to (i) the EA proceedings; (ii) the fact that the arbitration was brought by three Claimants that are “*shell entities*”, requiring the GoM “*to spend time and dedicate resources to unmasking the true actors behind these nominal Claimants;*” (iii) the Chapter 11 proceedings initiated by former AP 4 and AP5 “*forced the GoM to instruct specialist US bankruptcy counsel*” and the costs the GoM incurred in that connection are “*directly attributable to Steward’s maneuvers;*” (iv) Claimants’ document production was “*belated, partial and stretched over several months, requiring repeated follow-ups to Steward and formal applications by the [GoM] to the Tribunal;*” and (v) “*Steward repeatedly altered its case*” (as regards the factual narrative, the Delia Judgement and EU State aid).<sup>789</sup>
1038. Finally, the Respondent asserts that “*Steward’s procedural behaviour multiplied the costs of this arbitration, with no benefit to the resolution of the dispute. These tactics, ranging from frivolous proceedings to opacity, delay and shifting positions, are precisely the kind of conduct that justifies a full costs award in the Government’s favour.*”<sup>790</sup>
1039. Accordingly, the Respondent concludes that should it “*prevail on either of its primary claims (i.e., Delia and/or EU State aid), Steward, as the party that initiated this dispute must bear the entirety of the [GoM’s] costs. The subsequent calculation of the restitution to be awarded is a matter of accounting; it does not diminish the fact that Steward’s claims were devoid of merit from the outset and that the [GoM] should accordingly be entitled to all of its costs.*”<sup>791</sup>

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<sup>786</sup> R-Cost Brief, ¶ 27.

<sup>787</sup> R-Cost Brief, ¶ 28.

<sup>788</sup> R-Cost Brief, ¶ 30.

<sup>789</sup> R-Cost Brief, ¶¶ 32- 36; R-Cost Rebuttal, ¶¶ 4-11.

<sup>790</sup> R-Cost Brief, ¶ 37.

<sup>791</sup> R-Cost Brief, ¶ 38.

1040. At ¶ 55 of the R-Cost Brief, as updated by R-Cost Rebuttal, ¶ 2.c.), the Respondent requests an order from the Tribunal that:

- a) Steward shall pay the Government the amount of GBP 203,101.65, EUR 66,693.60 and USD 1,237.50 pursuant to the Emergency Arbitrator's Order, with interest at the rate of 8% per annum, compounded annually, from the date of the Emergency Arbitrator's Order dated 14 April 2023, until the date of payment in full;
- b) Steward shall be liable for all of the arbitration costs and therefore reimburse the Government the amount of USD 762,000 and EUR 71,071.08;
- c) Steward shall be liable for all of the Government's costs of legal representation and therefore reimburse the Government the amount of USD 157,433.00 and EUR 10,149,201.66.
- d) Steward shall pay interest at the rate of 8% per annum, compounded annually, on the sums due to the Government pursuant to paragraphs 55 b.-c. above from the date of the Award until the date of payment in full.

1041. The breakdown of the cost incurred by the Respondent for this arbitration is as follows:

- (i) ICC advance on cost: USD 762,500<sup>792</sup>
- (ii) Hearing costs (including VAT): Euro 71,071.08
- (iii) Cost of legal representation<sup>793</sup>: Euro 7,930,536.09 + USD 157,433
  - Clyde & Co: Euro 6,321,573.10<sup>794</sup> + 25,421.03.<sup>795</sup>
  - Ganado Advocates: Euro 1,349,168.75
  - LRS Law Firm: Euro 267,420.52
  - Alston & Bird: USD 157,433.
- (iv) Cost of expert witnesses: Euro 2,218,655.58
  - HKA (Anthony Charlton + Chris Williams): Euro 1,760,245.16<sup>796</sup>
  - Conor Quigley: Euro 292,379.14
  - Roderick Zammit Pace: Euro 148,090

<sup>792</sup> As confirmed by the ICC Secretariat with its letter of 10 September 2025 and Respondent's Corrected Cost Submission of same date.

<sup>793</sup> By email of 10 September 2025, the Respondent provided the hourly rates of the relevant timekeepers.

<sup>794</sup> As per Respondent's corrected Cost Submission of 10 September 2025.

<sup>795</sup> Amount added as of 18 September 2025 as per R-Cost Rebuttal.

<sup>796</sup> As per the Respondent's corrected Cost Submission of 10 September 2025.

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- Alex Torpiano: Euro 10,325.<sup>797</sup>

1042. The Respondent further asserts that it is “*generally recognized that parties in arbitration proceedings may recover their internal costs*” and that in the present case “*numerous [GoM] officials had to devote substantial time and effort to this Arbitration, time that should have been dedicated to their core public functions.*” The Respondent has refrained from capturing and submitting “*the exact hours spent by its officials,*” as being too burdensome, and is therefore not claiming any internal cost.

1043. Yet, the Respondent contends that “*their work, and the diversion of public resources it entailed, should not be ignored by the Tribunal when assessing costs.*”<sup>798</sup>

### C. THE TRIBUNAL’S ANALYSIS

1044. Neither the Arbitration Agreements nor the Terms of Reference address the issues of costs. The Tribunal is therefore left with Article 38 of the ICC Rules for deciding upon the Parties’ respective requests for awarding their costs.

1045. Article 38(1) reads as follows: “*The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.*”

1046. Thus, pursuant to that provision, the Tribunal’s decision on costs comprises two main items pursuant to Article 38 of the ICC Rules:

1047. *First*, the cost of arbitration, as determined by the ICC Court, for which the Tribunal needs simply to decide which party, and in which proportion, should bear these costs.

1048. *Second*, the Tribunal must decide upon the Parties’ costs, by determining the amount that was reasonably incurred by the Parties, and thereafter by deciding who should bear these costs, and in which proportion.

1049. Pursuant to Article 38 (4) of the ICC Rules, “*the final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.*”

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<sup>797</sup> All amounts in Euro are inclusive of VAT, R-Cost Brief, N. 28.

<sup>798</sup> R-Cost Brief, ¶¶ 49-51.

1050. In making decisions on costs, Article 38 (5) of the ICC Rules in turn authorizes arbitral tribunals to “take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.”
1051. As was observed by the ICC Commission some ten years ago in its report “*Decisions on Costs in International Arbitration*”, to which both Parties have referred to in their cost submissions,<sup>799</sup> “[d]espite the fact that the ICC and at least half of the other major institutional rules contain no presumption in favor of the recovery of costs by the successful party, it appears that the majority of arbitral tribunals broadly adopt that approach as a starting point, thereafter adjusting the allocation of costs as considered appropriate.”<sup>800</sup>
1052. Indeed, pursuant to the well-known principle “*cost follow the event*,” the outcome of the arbitration is an important factor guiding the allocation of costs of arbitration. However, both Parties agree that it is not the sole factor for determining costs and that the Tribunal has (broad) discretion in deciding on costs.<sup>801</sup>
1053. Regarding the relative success and failure of the parties, the ICC Commission explains that:

“59. (...) determining relative success is not necessarily straightforward, particularly in complex disputes involving multiple causes of action, counterclaims, set-off, multiple contracts and multiple parties. As claims are added, withdrawn, modified or merged in the course of proceedings, it may become increasingly difficult to track what was originally claimed against what is ultimately awarded.

60. The general approach is to assess the degree and scope of success and, where relevant, the timing of that success. A successful party may prevail in some, but not all claims brought, and/or recover some but not all damages sought. In the case of less-than-full recovery, different approaches have been taken by arbitrators.

61. Arbitrators may take into account the relative success of the prevailing party by: (i) assuming that if a claimant or respondent succeeded in its core or primary claim or outcome, then it is entitled to all of its reasonable costs; (ii) apportioning costs on a claim-by-claim or issue-by-issue basis according to relative success and failure; or (iii) apportioning success against the amount of damages originally claimed or the value of the property in dispute. Other approaches may be used as well (and in all cases there might be an additional assessment based on conduct). Whatever approach is used, it is important to take into account differences in the complexity and importance of different issues.

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<sup>799</sup> C-PHB, N. 3,5, 6 and 9; R-PHB, ¶ 10.

<sup>800</sup> Exhibit **CL-0123** (= **RL-0127**), ¶ 13, p. 6.

<sup>801</sup> C-PHB, ¶ 5; R-PHB, ¶ 7.

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62. *Any apportionment of costs may involve consideration of some, or all of the factors discussed above, as well as bad faith or improper conduct by the parties as discussed below in paragraphs 78 to 85. Any costs so apportioned must nevertheless be reasonable.*<sup>802</sup>

1054. These considerations are relevant to this case, as overall, no clear winner emerges from this arbitration.
1055. In its post-hearing brief, the Respondent observes astutely that “*the real crux of this arbitration is not for the [T]ribunal to determine a question of liability, but rather to determine the restitution of the Parties, i.e., how to restore the parties back to their original position (...).*”<sup>803</sup> Once the Tribunal determined that restitution was required, it is difficult to characterize either party as the definitive “winner” simply based on the amount to be restored. While the outcome under the restitution scenario may, in part, resemble an “*accounting*” exercise, as suggested by the Respondent, it is not purely so, as demonstrated by the discussion of the Parties’ respective restitution claims in Sections VIII.B. and C. above.
1056. The Respondent was, however, successful with its primary defense, pursuant to which the Transaction Agreements were null *ab initio* and that therefore restitution was required. In principle, the successful outcome on the merits is to be given some weight, irrespective of the outcome on the quantum side. In the present case, this does, however, not seem to be warranted, for several reasons:
1057. *First*, the Respondent was also unsuccessful with its request to have the Tribunal exercise jurisdiction over the Additional Parties. While at the end, the Tribunal had to make that determination only in respect of the Remaining AP, considerable amount of time and money was devoted to that issue, including to the release of three non-existing AP.
1058. Regarding the non-existence of the former AP 5, AP 6 and AP 8,<sup>804</sup> both Parties can be blamed for lack of proper due diligence. However, the joinder by the Respondent of these (non-existing) companies in the first place indicates Respondent’s “broad catch” approach regarding the Initial AP, without seeking to attribute a specific conduct or measure to a specific entity. This approach was also prevalent regarding the Remaining AP and did not persuade the Arbitral Tribunal that on this basis the Arbitration Agreements could be extended to them.

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<sup>802</sup> Idem, ¶¶ 59-62 at p. 13.

<sup>803</sup> R-PHB, ¶ 5 and above at ¶ 386.

<sup>804</sup> See above at ¶¶ 45, 46.

1059. In any case, the Tribunal does not find that the alleged existence of the non-existent Parties has significantly increased the workload for either side in this arbitration. Purely from a cost standpoint, this remains a relatively minor consideration, all other things being equal.
1060. Besides, the fact that the former AP 4 and AP 5<sup>805</sup> became part of Chapter 11 proceedings and were ultimately released from the arbitration is part of the risk the Respondent took by joining these Parties in the first place. The costs the Respondent incurred by instructing US counsel (Alston & Bird) to advise it in that respect are not costs for which the Claimants could be burdened in any way.
1061. *Second*, the Respondent was unsuccessful with its PO 1 ¶ 34 Application, which the Tribunal dismissed with PO 5 of 2 August 2024.<sup>806</sup> Pursuant to PO 5, ¶¶ 33, 34, the Tribunal had reserved its costs.
1062. *Third*, the Respondent was also unsuccessful with its SfC Application.<sup>807</sup> PO 6 of 11 September 2024 reserved the costs in the following terms: “*As to the costs of this Application, while Respondent has been unsuccessful in its application, the eventual outcome of these proceedings is far from clear, and it cannot be said that Respondent’s Application was without any foundation. Accordingly, the Arbitral Tribunal reserves its decision on costs for the Final Award.*”<sup>808</sup>
1063. As noted above, both Parties made separate cost submissions in that respect in October 2024.<sup>809</sup>
1064. *Fourth*, the Tribunal is also not impressed by the Respondent’s argument that the Claimants committed an abuse of process by starting this arbitration. It is true that the Claimants invoked, amongst other, the existence of the Delia proceedings to justify the termination of the Transaction Agreements.<sup>810</sup> It is, however, equally true that neither the Claimants nor the Respondent had instigated the Delia proceedings, which both Parties initially opposed before the Civil Court, First Hall.<sup>811</sup>
1065. If the Claimants had been successful with their termination claim, they would *prima facie* have been entitled to Schedule 7 Payments under the SCA. Although the Tribunal did not have to decide whether it would eventually have upheld such payments, and whether it would have reduced their

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<sup>805</sup> See above ¶ 11 regarding their release from this arbitration; AP 5 was initially referred to as AP 7, see above at p. 6.

<sup>806</sup> See above at ¶ 38.

<sup>807</sup> See above at ¶ 45.

<sup>808</sup> PO 6, ¶ 57.

<sup>809</sup> See above at ¶ 47.

<sup>810</sup> See above at ¶ 342, 343.

<sup>811</sup> See above at ¶ 337.

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amount, and if so by how much, it cannot be said that the Claimants abused the process by seeking to enforce a contractual agreement.

1066. Furthermore, it is inconsistent for the Respondent to criticize the Claimants for pursuing contractual claims as “*a calculated attempt to circumvent a binding national judgment of the court of final instance, in manifest disregard of the principle of res judicata*,”<sup>812</sup> when the Respondent itself advanced a massive contractual counterclaim (albeit on an alternative basis) amounting to over Euro 890M with major written submissions and expert reports in support thereof.
1067. In its cost submission, the Respondent has referred to this contractual arrangement as “*an agreement reportedly concluded as a result of collusion and without any consideration*.” The Tribunal is not convinced by that argument, since if there were collusion and lack of consideration, on which the Tribunal has formed no view, it does not seem *prima facie* that the Respondent could simply absolve itself of any responsibility for the very existence of such agreement.
1068. *Fifth*, by raising alternative claims, in particular the one about the alleged unlawful EU State aid, Respondent has rendered the arbitration much more costly. Without expressing any blame regarding the Respondent’s decision to pursue such claim in this arbitration, suffice to say that the Tribunal is not swayed by the Respondent’s argument that it was legally obliged to pursue it. After all, EU State aid was an alternative argument. If the Respondent was to be successful with its primary claim, the Delia II Defense, the alleged EU State aid issue would fall away (as it did).
1069. In any case, it remains a fact that having on each side two sets of experts deal with EU State aid issues and devoting more than a day at the Hearing on EU State aid issues, has considerably increased the Parties’ costs. It has also increased the overall amount in dispute by Euro 79,343,529 (without interest).<sup>813</sup>
1070. Here again, without in any way seeking to blame the Respondent for its legal strategy and choices, it is difficult to simply consider them to be neutral when it comes to the decision on costs.
1071. *Sixth*, with respect to the document production process, both Parties have accused each other of “*disruptive conduct*.” The Tribunal considers it unproductive to attempt to assign responsibility for this, as it would not be feasible to quantify the additional costs incurred by each Party as a result. What is clear, however, is that the numerous requests submitted by both Parties significantly increased the time the Tribunal was required to dedicate to the arbitration, often within short timeframes.

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<sup>812</sup> See above at ¶ 1032.

<sup>813</sup> Rejoinder, ¶ 367. With interest, the Respondent was claiming Euro 87,575,990 at the time of the Rejoinder, see above at ¶ 122.f.ii.

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1072. It is worth noting in this context that arbitral tribunals may take into account other factors for their cost allocation, such as “*aggressive conduct by a party or its representatives, or professional discourtesy.*”<sup>814</sup> While some tension between counsel was occasionally apparent, in particular during the document production phase - which is almost inevitable -, this does not change the fact that counsel for both Parties conducted themselves with a very high degree of professionalism throughout the arbitration. The Tribunal commends this conduct.
1073. *Seventh*, in its cost submission, Respondent rightly recalled that both Parties objected to the Tribunal’s proposal made prior to, and at, the CMC of 5 June 2024 to bifurcate the proceedings to “*address as a preliminary matter the legal issue of the effect of the Delia Judgment.*”
1074. Pursuant to Article 22(2) of the ICC Rules, “[i]n order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties. Such measures may include one or more of the case management techniques described in Appendix IV.” (Emphasis added).
1075. In the present case, the Tribunal was bound by the Parties’ agreement not to bifurcate, although it considered this to be an efficient measure. Even with the benefit of hindsight, the Tribunal still believes that this would have been the preferable course of action. While the bifurcation would have prolonged the overall duration of the arbitration it would have allowed the Parties to considerably reduce their written submissions as well as the scope of factual and expert evidence, and thereby to save a lot of the very high costs of this arbitration.
1076. The Delia II Defense raised legal issues, as the discussion in Section VI.B above has shown; it required no factual determination.
1077. Accordingly, if the proceedings had been bifurcated, the Tribunal could have addressed the merits of the Delia II Defense on a standalone basis, while postponing the consideration of other matters - such as the potential extension of the Arbitration Agreements and the Claimants’ performance of healthcare services obligations and value thereof (as part of the quantum analysis) - to a later phase of the arbitration. This approach would have addressed the Respondent’s legitimate concern that the overall dispute should not be resolved in a “*vacuum*” or in isolation of these broader issues.
1078. The Tribunal wishes to make clear that it does not cast blame on the Parties for their decision to oppose bifurcation. The Tribunal understands that, even for experienced and sophisticated counsel - as is the case here -, the decision whether to bifurcate entails weighing complex considerations, and that such deliberations do not always yield an obvious course of action. The fact that, in

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<sup>814</sup> ICC Commission Report, exhibit **CL-0123**, ¶ 85 at p. 18.



hindsight, bifurcation may have been preferable does not, in the Tribunal's view, reflect adversely on the Parties' judgment in declining the Tribunal's earlier suggestion.

1079. However, this leaves the Tribunal with the question whether the decision to oppose bifurcation should remain entirely neutral when it comes to exercising its discretion in apportioning the costs of arbitration.
1080. Considering that Delia II supervened during the arbitration,<sup>815</sup> and that, at that point in time, it would have been possible for the Parties to simplify rather than to complicate the arbitration, the Tribunal finds that both Parties should take responsibility for their procedural choices. This suggests that it is not unfair to have the Parties bear their own legal fees and expenses.<sup>816</sup>
1081. The financial outcome of these proceedings does not justify a different exercise of the Tribunal's discretion in awarding costs. The Claimants are being awarded just over ten percent of their alternative claim ("*low-case*" scenario),<sup>817</sup> and an even smaller proportion (slightly over 3%) relative to their primary contractual claim for termination and other monetary relief.
1082. The Respondent, by prevailing on the Delia II Defense, succeeded in defeating the Claimants' primary contractual claims as advanced in the Request for Arbitration, which at the time of the Claimants' post-hearing submission amounted, exclusive of interest, to Euro 155,983,863.<sup>818</sup> For the same reason, namely, the success of the Delia II Defense, the Respondent's other substantial counterclaims have become moot.
1083. Considering the above, the Tribunal decides the costs of arbitration as follows:
- The ICC costs of arbitration, which the ICC Court has fixed at USD 1,525,000, and which the Parties had advanced in equal shares (i.e., each party paid USD 762,5000) shall be borne by the Parties in equal shares.

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<sup>815</sup> See Exhibit **C-0216**, filed by the Claimants with the SoC on 16 February 2024.

<sup>816</sup> The Tribunal observes that the Respondent is not seeking to recover its internal costs, as it could not quantify them. In any event, such costs are often considered a party's own "*in any event*" costs, or parties' "*normal operating expenses*". Although the time devoted to the arbitration by the Respondent's officers and employees might arguably have been put to more productive use, and as such undoubtedly came at a cost, these costs are inherently difficult to assess in monetary terms. The Respondent has not provided any basis that would permit such quantification. See Fry/Mazza/Greenberg, *The Secretariat's Guide to ICC Arbitration* (2012), exhibit **RL-0128**, ¶ 3-1491, at p. 72,

<sup>817</sup> As indicated above at 900, it amounts to Euro 46,587,247.

<sup>818</sup> See above at ¶ 3811 (e) - (g). With interest, as of 27 June 2025, the Claimants primary claim amounted to Euro 174,241,398, see above at ¶ 384.

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- Each Party shall bear its own costs of arbitration, including costs of its legal representation, experts, and related expenses claimed in this arbitration.
1084. This decision on costs suffers, however, two exceptions with respect to the Parties' legal costs:
1085. *First*, regarding the cost decision of the Emergency Arbitrator's Order dated 14 April 2023, the Claimants advised the Respondent in an email of 8 May 2023, that "*pursuant to Article 29(4) of the ICC Rules, the costs of the emergency arbitration proceedings are subject to re-allocation by the arbitral tribunal. Our clients will be applying for the reallocation of the costs of the emergency arbitration proceedings before the arbitral tribunal and will therefore not be making payment of such costs at this juncture.*"<sup>819</sup>
1086. While it is true that pursuant to Article 29(4) of the ICC Rules, the Tribunal has the power of reallocating the cost decision of the Emergency Arbitrator's Order, it sees no reason for doing so in the present case. Accordingly, it hereby confirms that decision and orders the Claimants to pay the corresponding sums to the Respondent, *i.e.*, as per item 3 of the Emergency Arbitrator's Order: "*the amounts of GBP 203,101.65 (...), Euro 66,693.60 (...) and USD 1,237.50 (...).*"<sup>820</sup>
1087. The Tribunal accepts the date of the Emergency Arbitrator's Order as the date as of which interest started to accrue, and since that claim is older than one year, accepts to award compound interest thereon, at the rate of 8% *per annum*, until payment in full.
1088. *Second*, regarding Respondent's unsuccessful SfC Application, the Tribunal also considers it appropriate to apply the "*costs follow the event*" principle.
1089. In Claimants' "*Cost submission: security for costs*" dated 2 October 2024, the Claimants have identified their legal costs in dealing with the application to be Euro 91,692.20. Considering the schedule of timekeepers provided in that cost submission, the total sum in legal fees does appear reasonable to the Tribunal, not the least when compared to the Respondent's cost for the application, which amounted to Euro 107,552.<sup>821</sup>

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<sup>819</sup> Exhibit **R-0291**.

<sup>820</sup> Exhibit **R-0026**, X.3, p. 51.

<sup>821</sup> Respondent's letter of 2 October 2024 to the Tribunal with a breakdown of costs incurred by Respondent, reiterated in C-Cost Brief, 12, as noted above at ¶ 1026.

1090. The Claimants' legal costs for defending the SfC Application are therefore awarded to Claimants in full, with interest at 8% *per annum* thereon, compounded annually, as per Claimants' request from the date of this Award until payment by the Respondent in full.<sup>822</sup>

## X. THE ARBITRAL TRIBUNAL'S HOLDINGS

1091. For the above reasons and findings, the Arbitral Tribunal hereby:

- (i) **Declares** that it has no jurisdiction over the Remaining AP.
- (ii) **Orders** the Respondent, as part of the restoration pursuant to article 1209 MCC, to pay the Claimants the sum of Euro 4,789,462 with simple interest thereon at the rate of 8% *per annum* from 8 November 2024 until 7 November 2025, and to be compounded annually from 8 November 2025 until the date of payment in full, it being understood that the aforementioned amount includes the set-off of the sum of Euro 41,484,224 representing the Respondent's indirect tax liability claim pursued by the Commissioner of Revenue against Claimant No 2.
- (iii) **Decides** that the ICC costs of arbitration in the amount of USD 1,525,000 are to be borne by the Parties in equal shares.
- (iv) **Decides** that each Party shall bear its own costs of legal representation, of its experts and related expenses claimed in this arbitration, except as stated in subparagraphs (v) and (vi) below.
- (v) **Orders** the Claimants to pay to the Respondent the amounts of GBP 203,101.65, Euro 66,693.60 and USD 1,237.50 pursuant to the Emergency

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<sup>822</sup> For the reasons given above at ¶ 1013, the conditions for granting compound interest are met, since the claim for the costs of the SfC Application was made on 2 October 2024; see above ¶ 1026.

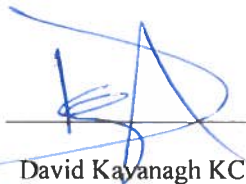
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Arbitrator's Order, with interest thereon at the rate of 8% *per annum*, compounded annually, from 14 April 2023 until the date of payment in full.

- (vi) **Orders** the Respondent to pay to the Claimants the amount of Euro 91.692.20, with interest thereon at the rate of 8% *per annum*, compounded annually, from the date of this Award until the date of payment in full.
- (vii) **Dismisses** all other claims and requests of the Parties as being either unfounded or moot.

Place of Arbitration: Valletta, Malta

Date: 3 November 2025



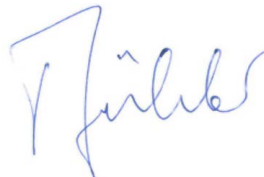
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David Kavanagh KC  
Co-arbitrator



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Dr. Cecilia Carrara  
Co-arbitrator



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Dr. Michael W. Bühler  
President of the Arbitral  
Tribunal