INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION
CASE No. 20632/MHM

between

JV MONTEADRIANO – ENGENHARIA E CONSTRUÇÃO SA/
SOCIEDADE DE CONSTRUÇÕES SOARES
DA COSTA SA (Portugal)
– Claimant –

and

THE ROMANIAN NATIONAL COMPANY OF MOTORWAYS
AND NATIONAL ROADS S.A.
(Romania)
– Respondent –

ADDENDUM TO FINAL AWARD

Pursuant to Article 35(1) (2012) ICC Rules

Sole Arbitrator:

Dr Cyril Chern

Place of arbitration: Bucharest, Romania
Dated: 16 November 2016

TABLE OF CONTENTS

This Addendum to the Final Award is made in accordance with the Rules of Arbitration of the International Chamber of Commerce ("**ICC Rules**") in force as from 1 January 2012.

I. INTRODUCTION

A. The Parties

The Claimant

1. The Claimant is **JV MONTEADRIANO ENGENHARIA E CONSTRUÇÃO SA/SOCIEDADE DE CONSTRUÇÕES SOARES DA COSTA SA** a joint venture between (i) Monteadriano – Engenharia e Construção SA and (ii) Sociedade de Construções Soares da Costa SA both incorporated under the laws of Portugal and with the JV having its address at Rua do Monte dos Burgos, No. 470/492, 1° Andar, 4250-311 Porto, Portugal; and in Romania at Intrarea Scorteni Street, No. 1, Floor 1, 3rd District 031217 Bucharest, Romania. No objections were made as to Claimant's legal standing.

2. The Claimant is represented in these proceedings by Mr Giovanni Di Folco, Mr Marius Teodorescu and Mr Razvan Rugina of Techno Engineering & Associates SRL, 22 Muzelor Street, Sector 4, 040191 Bucharest, Romania.

The Respondent

3. The Respondent is the **ROMANIAN NATIONAL COMPANY OF MOTORWAYS AND NATIONAL ROADS S.A.**[1] ("the Respondent," "the Employer," or "RNCMNR") which is a joint stock company duly organised under Romanian law, solely owned by the Romanian State under the authority of the Ministry of Transport and Infrastructure, organised in accordance with Emergency Government Ordinance No 84/2003 subsequently ratified with amendments by Law 47/2004 and registered as a Romanian Legal Entity with the Bucharest Trade Registry and having its address at 38 Dinicu Golescu Boulevard, 1st District, 010873, Bucharest, Romania. The Arbitral Tribunal notes that in it Application for Correction the Respondent indicated that it had had a name change[2] but clarified that it did not seek a correction of the Award in this regard.

---

[1] At the time of the Award the Respondent was the former Romanian National Company of Motorways and National Roads S.A. but at the time of this Application for the Correction of the Final Award it had reorganised and is now entitled the National Company for the Administration of Road Infrastructure S.A.

[2] Ibid

4. The Respondent was initially represented by Mrs Emilia Toader with Ms Ramona Voinea and Mrs Genoveva Luca of Bostina & Associates, 70 Jean Louis Calderon Street, 2nd District, Bucharest, Romania, which was later changed and the Respondent is now represented by Mr Daniel Burghelea of Mocanu & Associates SPRL (Mocanu Si Asociatii SPRL) which is also located at 70 Jean Louis Calderon Street, 2nd District, Bucharest, Romania.

5. The Claimant and the Respondent are jointly referred to herein as the "**Parties**".

B. Background

6. The Final Award was given on 23 September 2016 and received by the Parties on 29 September 2016. Thereafter on 26 October 2016 the Respondent applied pursuant to Article 35 of the ICC Rules for a Correction of the Final Award specifically the correction of Section XIII – Award, paragraph 5. This Application was timely made under the Rules.

7. Pursuant to Article 35(2) of the ICC Rules on 30 October 2016 I invited the Claimant to provide comments on the Respondent's Application, if it had any, and gave the Claimant until on or before 4 November 2016. No comments were received.

8. The facts leading up to this Application arose when, on receiving the Award, the Respondent observed that, by paragraph 5 of Section XIII - Award, The Arbitral Tribunal has decided and ordered in accordance with Article 37 of the ICC Rules, (i.e. Decision as to the Costs of the Arbitration) that the Respondent was to pay the Claimant the costs incurred in connection with the arbitration including any expenses and legal fees, which total the sums and currencies of, inter alia:

> *"(i) ONE HUNDRED TWELVE THOUSAND FIVE HUNDRED DOLLARS (USD) 112,500.00) ...- representing the payments received by the ICC from Claimant as for the costs of this arbitration; and [...]*
>
> *(ii) All administrative costs and arbitration fees and expensed fixed by the Court at USD 221,300.00 plus interest on all the above amounts at SIX per cent (6%) per annum compounded annually calculated from 23 September 2016 being the date of this Final Award until the actual date of payment as per article 4 of Government Ordinance 9/2000 and article 1089 of the Romanian Civil Code... ".*

9. However, the Respondent's Application then noted that on 26 September 2016, the ICC Secretariat also issued to Parties a Financial Table (the "Financial Table") by which it noted that an amount of USD 1,850.00 which was part of the Advance on Costs, would be reimbursed to each of the Parties of the Arbitration (i.e. including Claimant). In that sense, the Respondent points out that the last table on the bottom of the Financial Table (Reimbursement to the Parties) as well as to the note below that table: "*Reimbursements of advances on costs will be made to the parties to the case.*"

10. Thus, the final money amount representing Claimant's share of the Advance on Costs of this arbitration, that as per the Award must be compensated by Respondent as noted in paragraph 8 (i) above should properly be USD 110,650.00 and not USD 112,500.00, as the Award incorrectly states.

11. Regarding the text of the award noted under paragraph 8 (ii) above, the Respondent submitted that all the wording under the last square dot of paragraph 5 of Section XIII of the Award should be split from such paragraph 5 and rephrased, because such amount (USD 221,300.00) represents in fact the total ICC Costs of Arbitration as noted in the Financial Table, and not an amount that the Arbitral Tribunal would order Respondent to pay to Claimant, as the current wording of the Award seems to indicate. I agree.

12. Accordingly the Respondent has requested that the "*last square dot of paragraph 5 of Section XIII of the Award should be reworded and renumbered as the Arbitral Tribunal finds appropriate so that any confusion leading to the erroneous idea that Respondent is ordered to pay the amount of USD 221,300.00 to Claimant in addition to all the other amounts established by the Award, be totally removed and so that the meaning of the rule provided by Article 37 paragraph 4 of the ICC Rules (i.e. "The final award shall fix the costs of the arbitration") is observed*".

13. That the draft of this Addendum was submitted to the Court for approval and was approved on 24 November 2016.

14. Neither Party sought legal costs in relation to the Respondent's Application, that there are no additional costs attributable to this Correction and that no additional costs were fixed by the Court.

costuri arbitraj - 841.867,75 lei
110.650 USD
426,27 Euro
13.350,26 Lire
Garanț. bună Exec. 2.425.674,82 Euro

II. ADDENDUM TO THE FINAL AWARD

1. On the basis of the Application for the Correction
Tribunal agrees with the Respondent's request for correctio
as to this specific point only as shown by ~~strikeout~~ and cor
read in Section XIII of the Award Paragraph 5 as follows:

---

5. Further decides and Orders, in accordance with article 37 of the ICC Rules that the Respondent **The Romanian National Company of Motorways and National Roads S.A.** shall pay to the Claimant **JV Monteadriano – Engenharia e Construção SA/Sociedade de Construções Soares da Costa SA (Portugal)** the costs incurred in connection with this Arbitration including any expenses and legal fees, which total the sums and currencies shown of:

- **EIGHT HUNDRED FORTY-ONE THOUSAND EIGHT HUNDRED SIXTY-SEVEN RON AND SEVENTY-FIVE BANI (RON 841,867.75)** (including VAT which is comprised of RON 805,166.97 + RON 36,700.78); and additionally

- ~~**ONE HUNDRED TWELVE THOUSAND FIVE HUNDRED DOLLARS (USD $112,500.00)**~~ ***ONE HUNDRED TEN THOUSAND SIX HUNDRED FIFTY DOLLARS (USD $110,650.00)***, and additionally

- **FOUR HUNDRED TWENTY-SIX EUROS AND 27 EURO CENTS (EUR €426.27)**, and additionally

- **THIRTEEN THOUSAND THREE HUNDRED FIFTY POUNDS AND TWENTY-SIX PENCE** (GBP £13,350.26) in Party costs, and additionally shall pay

- ~~All administrative costs and arbitration fees and expenses fixed by the Court at USD $221,300~~ *[P]*plus, interest on all of the above amounts at **SIX** per cent (6%) per annum compounded annually

calculated from 23 September 2016 being the date of this Final Award until the actual date of payment as **per article 4 of Government Ordinance 9/2000 and article 1089 of the Romanian Civil Code;**

[...]

Place of arbitration: Bucharest, Romania

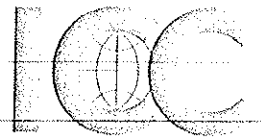
Signed on 28 November 2016

The Arbitral Tribunal

By: _____

Dr Cyril Chern
Sole Arbitrator

2 Crown Office Row
London EC4Y 7HJ
United Kingdom



INTERNATIONAL COURT OF ARBITRATION | INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

AWARD

INTERNATIONAL CHAMBER OF COMMERCE (ICC)
INTERNATIONAL COURT OF ARBITRATION
33-43 avenue du Président Wilson, 75116 Paris, France
T +33 (0)1 49 53 29 05 F +33 (0)1 49 53 29 33
E arb@iccwbo.org www.iccarbitration.org

ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 20632/MHM

JV MONTEADRIANO - ENGENHARIA E CONSTRUCAO SA /

SOCIEDADE DE CONSTRUCOES SOARES DA COSTA SA

(Portugal)

vs/

THE ROMANIAN NATIONAL COMPANY OF MOTORWAYS AND NATIONAL ROADS S.A.

(Romania)

INTERNATIONAL CHAMBER OF COMMERCE

INTERNATIONAL COURT OF ARBITRATION

CASE No. 20632/MHM

between

JV MONTEADRIANO – ENGENHARIA E CONSTRUÇÃO SA/
SOCIEDADE DE CONSTRUÇÕES SOARES
DA COSTA SA (Portugal)

Claimant

and

THE ROMANIAN NATIONAL COMPANY OF MOTORWAYS
AND NATIONAL ROADS S.A.
(Romania)

Respondent

FINAL AWARD

Sole Arbitrator:

Dr Cyril Chern

Place of arbitration: Bucharest, Romania

Dated: 23 September 2016

TABLE OF CONTENTS

This Final Award is made in accordance with the Rules of Arbitration of the International Chamber of Commerce ("**ICC Rules**") in force as from 1 January 2012.

I. INTRODUCTION

A. The Parties

The Claimant

1. The Claimant is **JV MONTEADRIANO ENGENHARIA E CONSTRUÇÃO SA/SOCIEDADE DE CONSTRUÇÕES SOARES DA COSTA SA** a joint venture between (i) Monteadriano – Engenharia e Construção SA and (ii) Sociedade de Construções Soares da Costa SA both incorporated under the laws of Portugal and with the JV having its address at Rua do Monte dos Burgos, No. 470/492, 1° Andar, 4250-311 Porto, Portugal; and in Romania at Intrarea Scorteni Street, No. 1, Floor 1, 3rd District 031217 Bucharest, Romania. No objections were made as to Claimant's legal standing.

2. The Claimant is represented in these proceedings by Mr Giovanni Di Folco, Mr Marius Teodorescu and Mr Razvan Rugina of Techno Engineering & Associates SRL, 22 Muzelor Street, Sector 4, 040191 Bucharest, Romania.

The Respondent

3. The Respondent is the **ROMANIAN NATIONAL COMPANY OF MOTORWAYS AND NATIONAL ROADS S.A.** ("the Respondent," "the Employer," or "RNCMNR") which is a joint stock company duly organised under Romanian law, solely owned by the Romanian State under the authority of the Ministry of Transport and Infrastructure, organised in accordance with Emergency Government Ordinance No 84/2003 subsequently ratified with amendments by Law 47/2004 and registered as a Romanian Legal Entity with the Bucharest Trade Registry and having its address at 38 Dinicu Golescu Boulevard, 1st District, 010873, Bucharest, Romania.

4. The Respondent was initially represented by Mrs Emilia Toader with Ms Ramona Voinea and Mrs Genoveva Luca of Bostina & Associates, 70 Jean Louis Calderon Street, 2nd District, Bucharest, Romania, which was later changed and the Respondent is now represented by Mr Daniel Burghelea of Mocanu & Associates SPRL (Mocanu Si

Asociatii SPRL) which is also located at 70 Jean Louis Calderon Street, 2nd District, Bucharest, Romania.

5. The Claimant and the Respondent are jointly referred to herein as the "**Parties**".

B. Background

6. A summarised account of the main factual background, as appearing in the Parties' submissions, follows with any additional factual allegations, where relevant, in the discussion later in this Award.

7. On 3 March 2008, the Romanian National Company of Motorways and National Roads S.A. (the "**Employer**") and the Claimant (the "**Contractor**") concluded a Contract for the construction of a by-pass road around the town of Lugoj in western Transylvania, Romania (the "**Contract**"). The Employer was responsible for the design of the road, which extended for 9.6 km and included a bridge over the river Timis at km 0+920; an overpass over national road 68A at km 3+400; a rail overpass at km 8+400; and several culverts, roundabouts, cross junctions and parking areas adjacent to the road (the "**Project**"). Under the Main Contract, the Claimant undertook to execute the construction of the Employer's design.

8. The Main Contract incorporated the "*FIDIC Red Book" 1999 Edition of the "Conditions of Contract for Construction*" for building or engineering works designed by the Employer (hereinafter the General Conditions of Contract or "GCC"). In addition to this the Employer and the Contractor agreed on a number of Particular Conditions of Contract (PCC).

9. Clause 2 of the Contract Agreement provides for the following documents to be incorporated into the Contract:

a. The Contract Agreement;

b. The Memorandum of Negotiations of 26 October 2007 and 7 February 2008;

c. The Tender Form of 1 June 2007, as modified by the Employer's letter (No. 2199) of 19 June 2007, and the Contractor's letter

(No. DEP/TC/037/07//704m) of 19 June 2007, with Appendix to Tender of 26 October 2007;

d. The Particular Conditions of Contract (Part II), including Addenda No. 1-6 to the Tender Documents;

e. The General Conditions of Contract (Part 1);

f. The Technical Specifications;

g. The Design Documentation (drawings);

h. The Bill of Quantities (corrected);

i. The Technical Proposal; and

j. Any other documents forming part of the Contract.

10. The Contract was also amended by four Addenda:

a. **Addendum No. 1** of 18 March 2010 extended the Time for Completion to 820 days.

b. **Addendum No. 2** of 7 October 2010 amended the Contract with respect of VAT to make concession for changes in Romanian taxation legislation.

c. **Addendum No. 3** of 10 December 2010 increased the Accepted Contract Amount Price by EUR €1,059,197.46 to EUR €21,873,586.83. Of the increased sum, EUR €523,086.35 reflected the value of supplemental works required to comply with changes to the Romanian legislation with respect to road safety. The remaining EUR €535,111.11 represented adjustment in costs for the period March 2008–May 2009, and 77.61 per cent to the adjustment in costs for June 2009.

d. **Addendum No. 4** of 7 June 2011 to further increase the Accepted Contract Amount by EUR €2,383,161.39, representing 22.39 per cent of the adjustment of costs for June 2009 and the adjustment in costs for the period July 2009–August 2010.

11. Addendum No. 3 provides:

> *"Article 1*
> *The objective of this Addendum is to amend the Contract in order to increase the Accepted Contract Amount by the revised Contract Eligible Amount of 1,059,197.46 Euro (without VAT) out of which:*
>
> > *523,086.35 Euro represents the value of the supplemental works, resulted from change in legislation for traffic safety, approved through the Variation Order No. 3 during the contractual Time for Completion, as calculated by the Engineer;*
> >
> > *535,111.11 Euro represents the adjustments in costs for the period March 2008 – May 2009 and 77.61% of the adjustment in costs for June 2009, for the works executed under the Contract, as calculated by the Engineer according to Sub-Clause 13.8 form the General Conditions of Contract.*
>
> ***Article 2***
> *The Accepted Contract Amount (excluding VAT) as stated in Article 4 of the Contract Agreement is increased with 1,059,197.46 Euro and becomes 21,873,586.83 Euro..."*

12. And further, Addendum No. 4 specifically provides:

> *"**Article 1***
> *The objectives of this Addendum are:*
>
> > *To amend the Works Contract in order to increase the Accepted Contract Amount by the amount of 2,383,161.39 Euro (without VAT) representing 22.39% of the adjustments in costs for June 2009 and the adjustments in costs for the period July 2009 – August 2010 for the works executed under the Contract, as calculated by the Engineer according to Sub-Clause 13.8 from the General Conditions of Contract.*
> >
> > *The amount of 62,751.26 Euro (without VAT), already included in the Accepted Contract Amount, becomes a Contract Non-Eligible Amount.*
>
> ***Article 2***
> *...Through signature of the Addendum No. 4, the Accepted Contract Amount (excluding VAT) is increased with 2,383,161.39 Euro and becomes 24,256,748.22 Euro..."*

13. Additionally, paragraph 5 of Sub-Clause 13.8 provides:

> *"In the case where the "currency of index" (stated in the table) is not the relevant currency of payment, each index shall be converted into the relevant currency of payment at the selling rate established by the central bank of the Country, of this relevant currency on the above date for which the index is required to be applicable."*

II. ARBITRATION AGREEMENT AND PROPER LAW

14. The Claimant bases its principal claims and the Respondent bases its Counterclaims on the arbitration agreement contained in the Contract dated 3 March 2008, entered into by the Parties (see paragraph 7 above).

15. The General Conditions of Contract referred to in the Contract, the FIDIC Conditions of Contract for Building and Engineering Works Designed by the Employer (Red Book), provide as follows (relevant sections):

> *"20.6 Arbitration*
>
> *Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:*
>
> *(a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,*
>
> *(b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and*
>
> *(c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language].*
>
> *The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.*
>
> *Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall*

be admissible in evidence in the arbitration.

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

16. The Particular Conditions of Contract referred to, in the Contract, then amended Sub-Clause 20.6 of the General Conditions as follows:

> ***"Clause 20 Claims, Disputes and Arbitration***
>
> *Sub-Clause 20.6 Arbitration*
>
> *Delete the first sentence of the first paragraph of Sub-Clause 20.6 and replace by the following sentence:*
>
> *Unless settled amicably or through a DAB decision, any dispute arising out of or in connection with the Contract, including without limitation any dispute regarding its breach, termination or invalidity, shall be finally settled by International Arbitration Court within the Chamber of Commerce and Industry of Romania – Bucharest applying the rules of arbitration of the International Court of Commerce."*

17. As per Terms of Reference[1], Parties agreed that the ICC Rules would apply to the present Arbitration.

18. The relevant sections of the Tender Form referred to in the Contract which augment the original General Conditions and Sub-Clause 20.6 further provide as follows:

Section	Sub-Clause	Specifics
Governing Law	1.4	Romanian
Ruling language	1.4	English
Language for communications	1.4	English (with translation into Romanian)
Number of arbitrators	20.6	1
Language of arbitration	20.6	English
Place of arbitration	20.6	Bucharest

[1] See, e.g. Terms of Reference, para. 7.

III. PLACE OF ARBITRATION

19. The place of arbitration is Bucharest, Romania, pursuant to Sub-Clause 20.6 of the General Conditions of Contract.

IV. LANGUAGE OF ARBITRATION

20. English is the language of the arbitration, pursuant to Sub-Clause 20.6 of the General Conditions of Contract and Sub-Clause 1.4 of the Appendix to Tender.

V. THE ARBITRAL TRIBUNAL

21. As set out in further detail below, the Parties jointly nominated Dr Cyril Chern as sole Arbitrator (the "Arbitral Tribunal" or "Tribunal" herein) pursuant to article 12(3) of the ICC Rules and on 17 February 2015, the Secretary General of the ICC Court confirmed the appointment of Dr Chern as sole Arbitrator, pursuant to article 13(2) of the ICC Rules.

VI. THE PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL

22. The Claimant's Request for Arbitration, dated 11 November 2014, was received by the Secretariat of the ICC International Court of Arbitration on 13 November 2014, and in which the Claimant requested from the Tribunal:

> *"a) Declarations or order (or other similar relief) that:*
>
> > *(i) the Respondent is not entitled to repayment by the Claimant of amounts paid in accordance with Addenda No.3 and 4 to the Contract nor other amounts related to price adjustments for changes in cost.*
> >
> > *(ii) the Engineer's determination of 1 November 2012 is wrongful, incorrect, unfair, and in breach of Contract.* [and an]
>
> *b) Order that:*
>
> > *(i) the Respondent shall pay to the Claimant an amount of 2,425,674.82 Euro received by the Employer following the call and subsequent "drawdown" against that Claimant's Performance Security;*
> >
> > *(ii) the Respondent shall pay to the Claimant interest of 6% p.a. compounded annually and applied on the principal sum of*

2,425,674.82 Euro calculated from 9 April 2013 until actual date of payment to the Claimant;

(iii) the Respondent shall pay to the Claimant 50% of the costs incurred with the DAB proceedings amounting to Euro 13,197.25 plus interest of 6% p.a. compounded annually calculated from 30 December 2013;

(iv) the Respondent shall pay to the Claimant the costs incurred in connection with this arbitration plus interest of 6% p.a. compounded annually calculated from the date of the Final Award until actual date of payment;

(v) such further or other relief as the Sole Arbitrator may consider appropriate."[2]

The Claimant also reserved all rights and that the request for arbitration was submitted without prejudice.

23. By letter dated 20 November 2014, the Secretariat of the International Court of Arbitration acknowledged receipt of the Claimant's request for arbitration and invited the Respondent to comment on the Claimant's proposal to nominate Dr Cyril Chern to act as sole Arbitrator. On the same day the Respondent was notified of the Request for Arbitration and was requested to provide an Answer to the Request within 30 days from the day following receipt of the above referred correspondence.

24. The following events then transpired:

a. By letter dated 6 February 2015, the Secretariat of the International Court of Arbitration notified the Parties of the Case Information;

b. By letter dated 17 February 2015, the Secretariat of the International Court of Arbitration notified the Parties that the Secretary General confirmed Dr Cyril Chern as sole Arbitrator upon the joint nomination of the Parties; and

c. On 23 February 2015, the Respondent filed its Answer to the Request for Arbitration and its Counterclaim(s).

[2] See, e.g. Request for Arbitration, para. 73.

d. The Respondent, in the Answer to the Request for Arbitration dated 23 February 2015, requested the Tribunal to:

"(i) dismiss any and all claims within the Request for Arbitration submitted by the Claimant as stated under paragraph 73 of the Request for Arbitration,

(ii) dismiss Claimant's request regarding the payment of 50% of the costs incurred with the DAB proceedings amounting to EUR 13,197.25, plus interest of 6% p.a. compounded annually calculated from 30 December 2013,

(iii) dismiss Claimant's request regarding the payment of all costs incurred in connection with the arbitration plus interest of 6% p.a. compounded annually calculated from the date of the final award until actual date of payment,

(iv) order that the Respondent is entitled to receive payment of the amounts that have been overpaid to the Claimant in accordance with the Addenda No. 3 and No. 4 to the Contract and which were not contractually due by the Respondent,

(v) declare that the Engineer's Determination of 1 November 2012 is grounded, correct and in accordance with the provisions of the Contract,

(vi) compel Claimant to pay to the Respondent all relevant fees and expenses of the arbitration, attorneys at law, experts and consultants, as well as its own internal costs, and to compensate the Respondent for its costs with the preparation and performance of this arbitration and other expenses incurred by Respondent related to this arbitration proceeding."

25. Then, in its Counterclaim the Respondent requested the following from the Tribunal:

"(i) upheld the Respondent's request to file a counterclaim and to render a decision regarding the Respondent's counterclaim as detailed above;

(ii) compel the Claimant to pay to the Respondent the financing costs/interest for overpayment of Price Adjustment in the IPCs and that these should be calculated as per Particular Condition Sub-Clause 14.16 - Repayment representing financing costs for overpayment of ACCs in the IPCs 14, 17 and 18;

(iii) compel the Claimant to pay to the Respondent the penalties to which the latter is entitled given that the Claimant has not remedied the nonconformities notified by the end of the warranty period, as provided by the Contract;

(iv) compel the Claimant to pay to the Respondent the amounts representing the cost with expropriations, namely the amounts which are to be called within the patrimony of the Respondent, as per the Civil Sentence No. 1904 of 3 September 2013, ruled by Lugoj First Court in Case file No. 264/252/201134;

(v) compel the Claimant to pay to the Respondent all legal costs and any and all arbitration related fees, expenses and costs incurred by Respondent related to this arbitration proceedings."[3]

26. The Respondent also made the request in its Counterclaim that the Tribunal grant it an extension of time to specify the exact amount of the Counterclaim.[4]

27. By Procedural Order No. 1 dated 2 March 2015, the Arbitral Tribunal requested the Respondent to fully particularise, describe and quantify its Counterclaim(s) pursuant to article 5, paragraph 5 of the ICC Rules and to submit same to the Secretariat and this Tribunal on or before 5:00 pm CET on 9 March 2015 (with copies to the Claimant). In addition, the Tribunal requested the Claimant to submit its Reply to the Counterclaim(s) to the Secretariat and the Tribunal on or before 5:00 pm CET on 8 April 2015 (with copies to the Respondent).

28. Following this, on 9 March 2015, the Respondent filled its Counterclaim particularisation. As a result of which, on 19 March 2015, the International Court of Arbitration fixed the advance on costs at US $175,000 (subject to later readjustments), and on 3 April 2015, the Respondent completed its submission re the Counterclaim(s) when it submitted to the Tribunal a hard copy version of R-Exhibit 76 and R-Exhibit 77.

29. Then on 8 April 2015, the Claimant filled its Reply to the Respondent's Counterclaims as a result of which, by letter dated 10 April 2015, the Secretariat of the International Court of Arbitration extended the time limit for establishing the Terms of Reference until 30 June 2015.

[3] See, e.g. Counterclaim, para. 6.
[4] See, e.g. Counterclaim, para. 7.

30. The first Case Management Conference pursuant to ICC Rule 24(4) was then held on 8 May 2015, at 15:00 CET via telephone conference call, and followed by a second conference on 17 May 2015, at which time the Arbitral Tribunal and the Parties agreed the Terms of Reference.

31. As a result, on 23 May 2015, the Tribunal, by Procedural Order No. 2, advised the Parties on the formal admissibility of the Counterclaims filed by the Respondent and a procedural timetable. Under Procedural Order No. 2, the time limits and schedule for proceeding were established as follows:

> *"1. The Parties shall submit simultaneously the Claimant's Statement of Claim and the Respondent's Statement of Counterclaim by 15 July 2015;*
>
> *2. The Parties shall submit simultaneously the Claimant's Defence to Counterclaim and the Respondent's Statement of Defence by 15 August 2015;*
>
> *3. The Parties shall submit expert reports and/or witness statements with either of their submissions, as they consider necessary;*
>
> *4. A two day Hearing will take place during the second week of September, i.e. 7 – 11 September 2015 and a third day will be reserved should it be needed. There shall be a Case Management Conference held the first week of August 2015 at a time and date to be determined to confirm the details of the Hearing and the arrangements to be made;*
>
> *5. All submissions shall be made in both electronic format and hard copies, by e-mail and courier service. Documents too large to be submitted by e-mail shall also be transferred via a dedicated secure ftp site to be set-up and agreed by the Parties and the Tribunal."*

32. Then, on 1 June 2016, the Secretariat of the International Court of Arbitration acknowledged receipt of the Tribunal's correspondence dated 23 May 2015, enclosing the Terms of Reference signed by the Parties and the Arbitral Tribunal on 17 May 2015, and on 4 June 2015, the Secretariat of the International Court of Arbitration informed the Parties (by letter) that the Terms of Reference were transmitted to International Court of Arbitration of the International Chamber of Commerce at its session of 4 June 2015.

33. Thereafter, on 18 June 2015, the Secretariat of the International Court of Arbitration informed the Parties (by letter) that the procedural timetable was transmitted

to the International Court of Arbitration of the International Chamber of Commerce at its session of 18 June 2015.

34. Then, following what had been set out in Procedural Order No. 2, which content is quoted supra, the Claimant on 15 July 2015, filed its Statement of Claim.

35. As agreed in Procedural Order No. 2, a Second Case Management Conference was conducted, via emails, during the period 24 July–5 August 2015, the result of which was that Procedural Order No. 3, dated 6 August 2015, was issued amending the Procedural Timetable, as to dates for the Claimant's Defence to Counterclaim the Respondent's Statement of Defence; dates for the submission of expert reports and related issues (such as establishing the date for an additional Case Management Conference on 4 January 2016); and setting the dates for a two-day Hearing which was to commence on 11 January 2016, reserving a third day on 13 January 2016. And as a result of the new submission schedule the following were received by the Tribunal:

a. On 17 August 2015, the Respondent filled its Statement of Defence and a table of exhibits; and

b. On 17 August 2015, the Claimant filled its Defence to Counterclaim and a List of Exhibits.

36. Thereafter, an additional Procedural Order No. 4 was issued by the Tribunal on 5 January 2016, regarding the Hearings and their organization.

37. The Hearings were conducted over a three-day period commencing on 11 January 2016, and concluding on 13 January 2016, and were held at the Crowne Plaza Hotel located at Bulevardul Poligrafiei 1, București 013704, Romania. The first day commencing at 10:30 am and concluding at approximately 3:00 pm, with the second day's Hearing commencing at 9:00 am and concluding at approximately 4:00 pm, and the third day's Hearing commencing at 9:00 am and concluding at approximately 3:00 pm.

38. Appearing on behalf of the Claimant at the Hearings were: Mr Marius Teodorescu, Mr Clive Horridge, Ms Mara Verencuic and Mr Liam Gray, all from Techno Engineering & Associates; with Ms Alina Petrescu, from JV Monte Adriano and Mr Gaspar Gigante (Contractor) and Manuela Carare (Expert Witness) also being present.

39. Appearing on behalf of the Respondent were Mr Daniel Bughelea, Ms Laura Mocano, Ms Anca Dobrescu and Mr Petru Cirja from Mocanu & Associates.

40. Witnesses present included, in addition to Mr Gaspar Gigante (above), Mrs Elena Franculescu, Mrs Daniela Vovec and Mrs Nicoleta Danga, who were each examined and cross-examined on behalf of the Respondent and the Claimant, respectively.

41. In addition, present at the Hearings were Ms Adela Clifford, Ms Monica Sima and Ms Andrea Wisosenschi, interpreters provided by the Parties, along with Ms Susan McIntyre and Ms Leah Willersdorf of Ambassador International Reporting Ltd., London, United Kingdom, who reported and prepared a verbatim transcript of the Hearings.

42. The Hearings commenced with an Opening Statement on behalf of the Claimant, followed by an Opening Statement on behalf of the Respondent. Rebuttals from both sides' representatives took place subsequently. The Hearings then, over the next days proceeded daily with the examination and cross-examination of Mr. Gaspar Gigante by the Claimant and the Respondent, respectively. Mr. Gaspar Gigante was then further examined on behalf of the Claimant by its counsel and representatives. Following Mr Gigante, Mrs Elena Franculescu, Mrs Daniela Vovec and Mrs Nicoleta Danga were also examined and cross-examined on behalf of the Respondent and the Claimant, respectively, by their counsel.

43. Following these witnesses were Mrs Manuela Carare, who was examined by the Claimant, cross-examined on behalf of the Respondent and further examined on behalf of the Claimant. Mr Mario Guillermo Torres Cifuentes was then cross-examined by the Claimant and further examined on behalf of the Respondent.

44. Following the conclusion of the examinations of the witnesses, the Parties and the Arbitral Tribunal discussed several procedural matters and the Hearings were then concluded at approximately 3:00 pm, on 13 January 2016, after which the Tribunal issued a timetable for Closing Submissions, Rebuttal Submissions and Memorandum on Costs and this was set out in Procedural Order No. 5 dated 14 January 2016.

VII. THE PARTIES' CLAIMS AND RELIEF SOUGHT

A. Summary of the Claimant's Claims and Relief Sought

Background

45. In the Appendix to Tender the Parties agreed to a Table of Adjustment Data, the value of the indices at Base Date and the source of indices to be used in the price adjustment formula contained within Sub-Clause 13.8 of the Contract and the currency of payment was the Euro.

46. The Monthly Statistical Bulletin of the Romanian National Institute of Statistics was the agreed source of the indices. The source Bulletin published the indices in Romanian New Leu (RON). For this reason, the Parties included in the Appendix to Tender the base value of the indices in both RON and Euro and agreed an exchange rate for conversion of the indices from RON to Euro.

47. During the performance of the Contract, the Contractor was financially disadvantaged by the increase in price of key consumables required to undertake the Project, and the Engineer failed in its contractual obligation to calculate and apply the price adjustment on a monthly basis for each Interim Payment Certificate (IPC).

48. There was a lack of clarity between the Parties as to the correct application of the price adjustment formula (as contained in the Contract Sub-Clause 13.8), and as a result, the Parties discussed two possible approaches:

a. Apply a factor representing the devaluation of the RON against the Euro and apply this factor to the price adjustment formula; or

b. As the Parties agreed both RON- and Euro-based indices the method of calculation prescribed in paragraph 5 of Sub-Clause 13.8 would not apply because the Parties had agreed Euro based indices and a fixed exchange rate for the conversion thereof in the Appendix to Tender.

49. As the prices of the consumables were based in Euro the increase in the cost of the consumables was not compensated for by the devaluation of the RON against the Euro. As a result, throughout 2010, the Parties entered into negotiations in an attempt to rectify

these issues and as a consequence of the negotiations[5], on 10 December 2010 and 7 June 2011 (Addendum No. 3 and 4 respectively) the Parties agreed to apply a calculation that would compensate the Contractor for the losses incurred.

50. The Engineer then calculated the amount of the price adjustment and the agreement of the Parties to pay the amount calculated was subsequently reflected in Addenda No. 3 and No. 4.

Claimant's Primary Case

51. However, despite the agreement reached between the Parties on 10 December 2010 and 7 June 2011 (Addendum No. 3 and 4 respectively) to apply a calculation that would compensate the Contractor for the losses incurred, the Claimant asserts[6] that the Employer's claim for repayment of the sums paid pursuant to Addenda No. 3 and No. 4 is wrongful. Additionally, the Claimant asserts[7] that the Employer's "*call-back*" on the guarantee is wrongful.

52. Further, the Claimant asserts that the Engineer's Determination of 1 November 2012 is "*wrongful, flawed and invalid*"[8] on the basis that it disregards the Parties' binding agreement under Addenda No. 3 and No. 4. The Claimant submits that a binding agreement cannot be modified by an Engineer's Determination.

53. According to the Claimant[9], the Parties agreed to the combined sum of EUR €2,918,272.50 to be paid in respect of Addenda No. 3 and No. 4. The Addenda "*specifically and expressly stipulated the will of the Parties*"[10] in respect of the amount payable for price adjustment and further, the Addenda takes precedence over and modifies the existing contractual provisions.

54. The Claimant submits[11] that the Parties intended to modify the Contract with respect to the calculation of price by agreeing and executing the Addenda and that the Addenda were necessary because the provisions of the existing Contract were ambiguous.

[5] See, e.g. Claimant's Request for Arbitration, para. 35.
[6] See, e.g. Claimant's Request for Arbitration, para.54.
[7] See, e.g. Claimant's Request for Arbitration, para. 48.
[8] See, e.g. Claimant's Request for Arbitration, para. 54.
[9] See, e.g. Claimant's Request for Arbitration, para. 39.
[10] See, e.g. Claimant's Request for Arbitration, para. 55.
[11] See, e.g. Claimant's Request for Arbitration, para. 56.

55. Further, the Claimant takes the position[12] that there is no basis for the Employer's assertion that the calculations were erroneous or mistaken because the Addenda provide the only valid calculation – there is no alternative, valid calculation from which to draw a point of reference to support the Employer's contention that the calculation was erroneous or mistaken.

56. The Claimant also stresses[13] the principles of *pacta sunt servanda* and bona fides, which apply to Addenda No. 3 and No. 4. These civil law principles are codified in articles 969 and 970 of the Old Romanian Civil Code, which applies to the Contract.

Claimant's Secondary Case

57. In the alternative, the Claimant argues[14] that the contractual formula in Sub-Clause 13.8 for price adjustment should be applied differently, depending on the pricing of the materials and commodities to which it applies.

58. The cost elements to which the Claimant refers are included in the Table of Adjustment Data in the Appendix to Tender.

59. The Claimant submits[15] its alternative argument for application of the contractual formula as follows:

a) For costs elements priced in Euro (for which the price paid by the Contractor is based on Euro) the contractual formula ought to be applied without application of the exchange rate factor provided in Sub-Clause 13.8(5).

b) For costs elements priced in RON (for which the price paid by the Contractor is based on RON) the exchange rate factor would be applied to the contractual price adjustment formula provided in Sub-Clause 13.8(5).

60. It would be erroneous to apply RON indices and the currency exchange fluctuation for commodities priced in Euro, because where the Contractor's cost was incurred in Euro the exchange rate fluctuation is already taken into account.

---

[12] See, e.g. Ibidem.
[13] See, e.g. Claimant's Request for Arbitration, para. 57.
[14] See, e.g. Claimant's Request for Arbitration, para. 65.
[15] See, e.g. Claimant's Request for Arbitration, para. 65, 66 and 67.

61. According to the Claimant[16], this interpretation is based on the Parties' agreement in the Appendix to Tender which stipulates indices in both RON and Euro and the exchange rate at base date.

62. The Claimant takes the view[17] that the provision of the Euro-value indices in the Appendix to Tender may be interpreted as a reference index for the cost elements priced in Euro. The provision of Euro indices as well as RON indices, and the exchange rate for conversion, was intended to provide for the application of the Euro indices with the exchange rate at base date to costs elements priced in Euro without any further application of the exchange rate fluctuation.

Relief Sought by the Claimant

63. The Claimant's prayers for relief as put forward in the Claimant's Statement of Claim[18] of 15 July 2015 are as follows:

a) *Declarations or order (or other similar relief) that:*

i) the Respondent is not entitled to repayment by the Claimant of amounts paid in accordance with Addenda No. 3 and 4 to the Contract nor other amounts related to price adjustment for changes in cost.

(ii) the Engineer's determination of 1 November 2012 was wrongful, incorrect, unfair, inoperative at law and in breach of Contract.

b) Order that:

(i) the Respondent shall repay to the Claimant an amount of 2,425,674.82 Euro received by the Employer following the call and subsequent "drawdown" against that Claimant's Performance Security;

(ii) the Respondent shall pay to the Claimant interest of 6% p.a. compounded annually and applied on the principal sum of 2,425,674.82 Euro calculated from 9 April 2013 until actual date of payment to the Claimant;

[16] Claimant's Request for Arbitration, para. 68.
[17] ibidem.
[18] Claimant's Statement of Claim , para. 195.

(iii) the Respondent shall pay to the Claimant 50% of the costs incurred with the DAB proceedings amounting to Euro 13,197.25 plus interest of 6% p.a. compounded annually calculated from 30 December 2013;

(iv) the Respondent shall pay to the Claimant the reasonable costs incurred in connection with this arbitration plus interest of 6% p.a. compounded annually calculated from the date of the Final Award until actual date of payment;

(v) such further or other relief as the Sole Arbitrator may consider appropriate.

Alternatively, as its Secondary Case, and only in case and to the extent that the Sole Arbitrator would reject the Claimant's Primary Case, the Claimant seeks payment of an amount of 1,997,470.39 Euro, as substantiated above, plus legal interest of 6% p.a. compounded annually and applied on the principal sum of 1,997,470.39 Euro calculated from 9 April 2013 until actual date of payment to the Claimant.

B. Summary of the Respondent's Claims and Relief Sought

Background

64. The Respondent submits that after signing Addenda No. 3 and No. 4 it realised an error regarding the calculation of the sums payable to the Contractor. Specifically, an incorrect formula was used to calculate the adjustment multiplier (Pn) in respect of Interim Payment Certificates (IPCs) 14, 17 and 18. The Works were certified in Euro as the currency for payment while RON was used as the currency of index in the derivation of the Pn formula.

65. On 4 September 2012, the Respondent requested the Engineer revise the value of the Adjustment for Changes in Cost (ACC) in all IPCs using the correct contractual formula contained in Sub-Clause 13.8. The Respondent also sought external expert advice regarding the correct application of Sub-Clause 13.8.

66. During the performance of the Contract the Employer queried the method used by the Engineer for calculating the adjustment of costs. As a consequence, the Parties engaged in correspondence regarding the correct method of calculation.

67. The Engineer was aware of the non-contractual formula used to calculate the Pn multiplier in the IPCs and, therefore, revised all ACC in the IPCs. The recalculation resulted in a negative value of EUR €205,559.59.

68. The Engineer convened consultation meetings with the Parties but thereafter on 11 October 2012, the Engineer concluded that no agreement could be reached and, as a result, on 1 November 2012, the Engineer issued its Determination and confirmed the adoption of the formula contained within Sub-Clause 13.8.

69. The Engineer's Determination also provided:

a. *"the Employer's claim is contractually correct and is entitled to deduct the amount of Eur 2,918,272.50 from the Final Payment Certificate' and 'In cases where the "currency of index" (stated in the table) is not the relevant currency of payment, each index shall be converted into the relevant currency of payment at the selling rate, established by the central bank of the Country, of this relevant currency on the above date for which the index is required to be applicable."*

b. *In reaching its conclusion, the Engineer held that the correct formula for the adjustment multiplier "Pn" in accordance with Sub-Clause 13.8 is: Pn = a + (b*Ln/Lo+c*En/Eo+d*Mn/Mo ...)*Fo/Fn*

c. *The Engineer also found that the Contractor received payment for all invoices in Euro therefore it is reasonable to assume all materials, labour, and energy have been purchased in Romania and consequently paid in RON.*

d. *Additionally, the Engineer found that the Contractor had been advantaged by the depreciation of the RON against the Euro."*

70. Whilst the Respondent accepted the Engineer's Determination, the Contractor registered its disagreement with the Determination and, pursuant to Sub-Clause 20.4 of the Contract, referred the matter to the Dispute Adjudication Board (DAB) on 19 June 2013.

71. After the necessary proceedings before the DAB, the DAB issued its Decision on 7 November 2013, in which it made the following determinations:

a. *"The Employer is entitled to recover amounts paid to the Contractor under IPCs that were issued in accordance with Addenda 3 and 4. However, the Engineer's fair determination of 1 November is not correct and shall be modified as set out below in these directions."*

b. *The Engineer's Determination of 1 November 2012 is flawed and the amounts calculated ought to be recalculated in the application for the Final Payment Certificates under Subclauses 14.11 and 14.13. Materials or commodities set out in the Appendix to Tender that are not of Romanian origin shall not be subjected to adjustments for changes in cost and shall be considered by a separate formula. The Employer has no obligation to apply Euro indices retrospectively.*

c. *The Parties shall use the following formulas:*

a. *For commodities of local origin: $Pn = a+(b \times Ln/Lo + c \times En/Eo+...) \times Fo/Fn$*

b. *For commodities of Euro zone origin: $Pn = a + (d \times Xn/Xo ...) \times 1.0$*

d. *The Employer is not entitled to recover interest/financing charges for any overpayment that results from interim payments certified by the Engineer under Sub-Clause 12.3.*

e. *The Employer's call on the Contractor's securities was wrongful and the Employer may recover amounts from the Contractor as determined by the calculations made in accordance with the DAB decision.*

f. *The Contractor is entitled to receive the Performance Certificate and Final Payment Certificate."*

72. Thereafter, on 4 December 2013, the Respondent issued a Notice of Dissatisfaction in respect of the DAB Decision.

73. The Contractor did not dispute the Engineer's calculations nor did it submit alternative calculations. The Contractor's sole argument was that Addenda No. 3 and No. 4 prevented the application of any alternative calculation.

Respondent's Primary Case

74. The Respondent is of the view[19] that Addenda No. 3 and No. 4 do not have the effect of the Parties finally and irrevocably agreeing the total amount of the Contract value and that Addenda No. 3 and No. 4 did not amend the provisions of Sub-Clause 13.8 nor the contractual formula contained therein. And further, that the Contractor's request was made in bad faith with a view to obtain undue amounts.

75. Further, the Respondent submits[20] that the Contractor has not evidenced any prejudice as a consequence of the Engineer's application of the correct contractual formula and if the Contractor were to retain the amounts, simply because they have already been paid, the consequence would be unjust enrichment of the Contractor.

76. The Respondent points out[21] that under Romanian law, any amendment of the Contract is to be made by agreement of all signatory Parties and that the "*will of the parties*" must be expressly stated within the Addendum to the Contract – the amendment must be referred to specifically and cannot be implied or presumed.

77. The Respondent also stresses[22] that the provisions of Sub-Clause 13.8 are unambiguous and the Contractor's claims of ambiguity are an attempt to mislead the Arbitral Tribunal for the Contractor was fully aware of the contractual provisions from the initiation of the public procurement procedure and, therefore, endorsed the provisions by submitting the offer without proposing any amendments to the Contract.

78. Further, the Respondent states[23] that the Engineer's Determination of 1 November 2012 is entirely valid and that the amounts determined by the Engineer have been calculated in accordance with the correct contractual formula.

79. Finally, the calling of the Performance Certificate and of the Retention Money Guarantee by the Respondent was not unlawful as it was entitled to recover the amounts

[19] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 53 and 54.
[20] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 57.
[21] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 61.
[22] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 63.
[23] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 67.

paid but not due to the Contractor in accordance with the contractual provisions (specifically Sub-Clause 4.2) and with the Engineer's Determination[24].

Respondent's Secondary Case

80. The Respondent's Secondary Case[25] introduced in the Answer to the Request for Arbitration and Counterclaim on 25 February 2015, is that the Claimant's Secondary Case falls outside the Arbitral Tribunal's jurisdiction because dispute resolution Sub-Clauses 3.5, 20.1, 20.4-20.6 of the Contract require the Parties to resolve disputes according to a multi-tier process whereby the Parties must attempt to resolve claims firstly, by referral to the Engineer for a Determination, and secondly, to a DAB for a Decision. Here, the Respondent submits that the Claimant has not previously attempted to resolve the claims raised in the Secondary Case in accordance with the contractual requirements and, therefore, the Secondary Case cannot be referred to the Arbitral Tribunal and is outside the Arbitrator's jurisdiction.

81. However, the Respondent submits[26] in the alternative, that should the Arbitral Tribunal find that it has requisite jurisdiction to determine the Claimant's Secondary Case, the Claimant's assertion that the formula for price adjustment should be applied differently depending on the pricing of the commodities to which it applies, is not in line with the Contract and, as a result, any acceptance of the Secondary Case, by the Arbitral Tribunal, would result in an amendment to the Contract – and the Claimant has not proffered any legal basis for such an amendment.

82. Further, the Respondent notes[27] that the Claimant has not proved any prejudice, and to the contrary, the Claimant has gained an advantage from the exchange rate. Additionally, under Romanian law "*prejudice must be certain, personal, and direct and to result in the achievement of a right or at least a legitimate interest,*" which the Respondent claims has not occurred.

[24] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 69.
[25] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 71.
[26] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 35.
[27] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 36 and 37.

The Respondent's Contractual Compliance

83. The Respondent's position[28] is that it has fully complied with the Contract and in doing so has correctly applied the formula for calculating the value of ACCs.

84. The Respondent acted[29] in accordance with Sub-Clauses 2.5 and 3.5 in its attempt to pursue a contractually valid adjustment and that the amended Contract Prices were based on estimates that were always subject to adjustment under Sub-Clauses 12.3, 14.10 and 14.13. Thus, in view of the application of the Appendix to Tender, the reintroduction of the provisions for adjustments to changes in costs was erroneous.

85. The values contained in Addenda No. 3 and No. 4 reflect the Engineer's estimate to supplement the Contract budget with the view of facilitating the Employer's payment for updated prices. The supplementation of the budget, affected by Addenda No. 3 and No. 4, did not alter any contractual terms. The changes that appeared in the payment of the IPCs must be adjusted until the issuance of the Final Payment Certificate.

86. Thus, according to the Respondent[30], the Claimant has failed to discharge the burden of proof in respect of any of its claims and the Claimant's assertion that the ACCs became final and irrevocable through the conclusion of Addenda No. 3 and No. 4 is unsubstantiated. Sub-Clause 13.8 allows for adjustments in the payment of IPCs until the issuance of the Performance Certificate.

87. The Respondent points out[31] that throughout the period preceding the initiation of arbitral proceedings it made attempts to determine the correct formula and that the Claimant had sufficient opportunity to satisfy itself of the correct formula.

88. The correct formula, per the Respondent, is that determined by the Engineer on 1 November 2012:

$$Pn = a + (b*Ln/Lo + c*En/Eo + d*Mn/Mo \ldots)*Fo/Fn$$

[28] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 76.
[29] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 77.
[30] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 85, 86, 88 and 89.
[31] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 90.

89. The formula applied by the Contractor for Pn involved inserting the RON index while payment was required in Euro. Therefore, the formula used in respect of IPCs 14, 17 and 18 was:

$$Pn\ (RON) = a + (b*Ln/Lo+c*En/Eo+d*Mn/Mo\ ...)*Fo/Fo$$ [32]

90. The incorrect formula was applied by the Contractor in breach of Contract and the Employer is entitled to request the adjustment.

91. The Respondent refutes[33] the Contractor's contention that the inclusion of indices in both RON and Euro in the Appendix to Tender meant that Sub-Clause 13.8 would not apply because the clause can only apply in instances where the currency of the index stated in the table is not the currency of payment.

92. According to the Respondent[34], indices in both currencies have ben included for guidance only and do not alter the application of Sub-Clause 13.8.

93. Further, the Respondent refutes[35] any breach of Sub-Clauses 11.9, 14.9 and 13.8. Compliance has been demonstrated inter alia by the documents submitted in the DAB proceedings. Additionally, the Engineer's Determination established that the formula applied to IPCs 14, 17 and 18 was incorrect.

94. The Respondent takes the view that[36] the GCC Sub-Clauses 2.5 and 13.8 have not been amended by either the Particular Conditions of Contract (PCC) or the Appendix to Tender. Therefore, the Contract requires the Contractor to pay amounts representing escalation of the IPCs, as recalculated, until the Performance Certificate is issued, and as a result, the Claimant has failed to substantiate damages and, thus, failed to prove causation thereof.

---

[32] Note this was also represented in the submissions to the Arbitral Tribunal as: Pn "(RON) = a + (b*Ln/Lo+c*En/Eo+d*Mn/Mo ...)*F0/F0"
[33] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 103.
[34] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 104.
[35] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 110.
[36] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 111 and 113.

Failure to provide adequate evidence

95. The Respondent further argues[37] that the Claimant has failed to provide any evidence in accordance with article 9.2(a) of the IBA Rules on the Taking of Evidence in International Arbitration (which the Tribunal notes were not included in the original Terms of reference nor brought up during the Hearings) and the applicable Romanian legislation, as it has not made any specific reference to documents purportedly supporting its case.

96. Respondent argues, that under Romanian legal doctrine and jurisprudence require that evidence ought to be:

a. Legal (it cannot be restricted by procedural/material law);

b. Reliable (aimed at proving real, possible and plausible facts which do not contradict the laws of nature);

c. Relevant (related to the subject of the case); and

d. Conclusive (lead to the resolution of the case).

97. Article 1169 of the Old Romanian Civil Code of 1864 enshrines the principle of "*He who asserts must prove*," and the Respondent submits that the Claimant has failed to establish its case as required by Romanian Civil Code as the documents provided by the Claimant have no probative value in supporting the Claimant's case and, therefore, cannot be accepted as evidence.

Interpretation of the Contract under Romanian Civil Code

98. The Respondent also cites articles 969 and 970 of the Old Romanian Civil Code which enshrine the principle of the binding force of the Contract:

Article 969 provides:

> *"The legal concluded agreements have the power of Law between the contracting parties."*

[37] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 115.

"They can be revoked by means of mutual agreement, or by means of causes authorised by the law."

Article 970 provides:

"The agreements must be executed in good faith. "

"They bind not only to what is expressly meant in them but to all the consequences, that equity, custom or the law gives to obligation, upon its nature."

99. The Respondent then also claims [38] that the Claimant's allegations have no contractual or legal basis and that the Claimant deliberately, and "*and with noticeable bad faith understands to ignore the provisions of the Contract – that were agreed and accepted by Claimant when entering into the Contract.*".

100. Further, on issuance of the Engineer's Determination, the Respondent claims[39] that it was entitled to recover the amounts due from the Claimant and in doing so, was entitled to call the bank guarantees – thus making the calling of the guarantees valid and in accordance with the Contract.

The correct formula applicable for the determination of the ACCs

101. The Respondent submits[40] that the interim payment is calculated by the product of the payment times the adjustment multiplier (Pn). As provided in Sub-Clause 13.8, "n" is to be derived from the formula:

$$Pn = a + b.Ln/Lo+c.En/Eo+d.Mn/Mom$$

102. The constants and variables are defined in Sub-Clause 13.8(3).

103. According to the Appendix to Tender, Sub-Clause 14.15, the currency of payment is Euro. The Currency of Index is RON.

[38] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 124.
[39] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 125.
[40] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 128.

104. The conversion of indices is applicable in the derivation of Pn. The conversion is to be applied solely to the indices. The formula contained in Sub-Clause 13.8 for Pn should be adjusted to be:

Pn = a+(b*Ln/Lo*Fo/Fn+c*En/Eo*Fo/Fn+d*Mn/Mo*Fo/Fn ...) where:

"Fo" is the Foreign Exchange Rate (Forex) RON/€ at the Contractual Base Date;

"Fn" is the Foreign Exchange Rate (Forex) RON/€ at the time of "n" (the time of ACC assessment)

105. The formula can be simplified:

106. Pn = a+(b*Ln/Lo+c*En/Eo+d*Mn/Mo ...)*Fo/Fn where Fo/Fn is the Foreign Conversion Factor.

107. The Contract Base Date is 4 May 2007, and the exchange rate at Base Date (Fo) was 1 EUR = 3.3197 RON.

108. The Respondent claims[41] that the Claimant used an incorrect formula for Pn by inserting the index in RON while the Contract stipulates payment in Euro but that the Contractual formula cannot be amended by either the Engineer or the Arbitrator.

The Legal Effects of Addenda No. 3 and No. 4

109. The Respondent then cites Romanian law[42] for the rule that an Addendum is an additional document containing ad hoc information not provided for in the initial document. An Addendum is not included in the main part of the Contract. The Addendum must follow the "legal nature" of the Contract and ought to be signed separately and attached to the initial document.

110. Under Romanian legislation and international law, a main obligation should never be considered negotiated upon unless the obligation is inserted as a contractual clause. A contractual obligation representing the main performance of the agreement cannot be implied.

[41] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 132.
[42] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 135.

111. Article 1203 of the New Romanian Civil Code provides that unusual clauses, such as implied obligations, that represent the main performance of the agreement are ineffectual unless the specific clause is expressly accepted in writing. Implied consent of a main obligation is not possible.

112. As a general principle, ambiguous contractual clauses must be interpreted in favour of the debtor and where a contractual clause imposes ambiguous requirements on the debtor, article 983 of the Old Romanian Civil Code of 1864 will apply to contractual clauses contained within the Main Contract and any Addenda.

Consent

113. Respondent further argues that, under Romanian law the following conditions are relevant to signing a contract:

a. The Parties' legal capacity;

b. Explicit consent;

c. Certain and licit object; and

d. Moral and licit cause.

114. Explicit consent is codified by article 1204 of the New Romanian Civil Code[43], which provides: "*Parties consent must be reliable, expressed freely and in full knowledge of the facts.*"

115. For consent to be reliable it must be expressed with the intention of producing legal effect. If consent is altered, for example where a Party expresses consent too vaguely or with mental reservation, the condition may not be met.

116. For consent to be freely expressed it must be a reflection of a psychological process culminating in a decision to enter a contractual relationship that provides advantages and profits. Any alteration or flaw must not affect the Parties' consent.

117. In order to establish that consent was given with full knowledge of the facts it must be shown that it was realistic for the Parties to appreciate the entire factual background of the Contract as well as the rights and obligations it stipulates.

[43] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 143.

118. Consent has two meanings:

a. A manifestation of will toward signing a contract; and

b. The agreement between two parties.

119. The conditions of consent apply to Addenda in the same way they apply to the Main Contract.

120. The fundamental elements of a civil law contract are:

a. The subjects' manifestation of will;

b. The intention to produce, modify or extinguish civil juridical relations; and

c. The nature of the juridical effects intended by the parties.

121. Consent is an essential prerequisite for the validity of any juridical act. To be considered valid, the consent must meet the following conditions:

a. Issued by a person with legal consent;

b. The legal effect of the consent must be known by the parties;

c. The rights and obligations arising from the consent must be clear; and

d. Consent must not be affected by error, vice of consent, mistake, fraud, violence or damage.

122. The Respondent again asserts[44] that in signing Addenda No. 3 and No. 4, the Parties have not irrevocably consented to the value of the ACCs. Addenda No. 3 and No. 4 reflect an agreement to adjust the Accepted Contract Amount to allow the Employer to establish a budget for the payment of updated prices. The value is not the final value of the Contract and is subject to adjustment in accordance with Sub-Clause 13.8 of the Contract.

[44] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 151.

123. The Respondent argues that he agreed on the execution of Addenda No. 3 and No. 4 because no budget for ACCs was included in the budget provisions of the Contract. The Financing Memorandum, financed by non-reimbursable ISPA funds, expired in December 2010. The Employer needed to secure additional funds from the Ministry of Transport in order to continue the Works.

124. According to Respondent, Addenda No. 3 and No. 4 did not amend the provisions of Sub-Clause 13.8. Sub-Clause 13.8 continues to have effect between the Parties. ACCs are subject to adjustment until the issuance of a Performance Certificate.

125. At the light of Respondent's Answer to the Request for Arbitration and Counterclaim, the Contract was implemented and financed in accordance with the Financing Memorandum. The applicable Procurement Law is PRAG 2006[45].

126. Article 2.10.1 of the relevant Procurement Law provides[46]: "*Major changes, such as fundamental alteration of the Terms of Reference/Technical Specifications cannot be made by means of an addendum as the addendum must not alter the competition conditions prevailing at the time the contract was awarded.*"

127. According to Respondent, accepting the sums contained in Addenda No. 3 and No. 4 as fixed amounts would have the effect of altering the "*competition conditions prevailing at the time the contract was awarded*" and would, therefore, contravene article 2.10.1 of PRAG 2006.

128. PRAG general principles[47] require that "*There must be justified reasons for modifying a contract' and 'In preparing an addendum, the Contracting Authority must proceed ... [by drafting an] explanatory note providing a technical and financial justification for making the modifications in the proposed addendum.*"

129. The Respondent asserts[48] that in order to satisfy PRAG general principles, any change to Sub-Clause 13.8 would have required the inclusion of a suitable explanatory note.

---

[45] Practical guide to Financial and Contractual Procedures Applicable to External Actions financed From the General Budget of the EU, Version 2006
[46] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 158.
[47] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 160.
[48] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 161.

130. The explanatory notes for Addenda No. 3 and No. 4 outline the grounds upon which they were concluded.

131. The Employer repeats[49] that it acted in good faith when it included the values of the ACCs in Addenda No. 3 and No. 4. The Employer later realised its mistake and sought to rectify by requesting the Engineer to make a new Determination. The Employer, acting in good faith, immediately notified all relevant Parties through issuing a Notice of Claim on 11 October 2012. The Contractor's refusal to repay sums incorrectly paid to it amounts to bad faith.

132. Whilst under the heading of Consent the Employer notes that the Claimant failed to dispute the Engineer's Determination in line with the time frames stipulated by Sub Clause 3.5 of the Contract, which states: "Each party shall give effect to each agreement or determination unless and until revised under Clause 20." Sub-Clause 20.1 provides the Contractor with 28 days in which to dispute a Determination. Sub-Clause 1.3 requires notice to be in writing.

133. Notice was issued by the Contractor on 9 January 2013, 69 days after the Determination was made. The Employer is, therefore, released from any liability in connection with the claim and that the DAB did not have requisite jurisdiction to reconsider the Engineer's Determination.

Unjust Enrichment

134. Respondent argues that, under Romanian law[50] unjust enrichment occurs when one party is enriched by another party without legal grounds to justify the enrichment. Unjust enrichment gives rise to the legal obligation to reimburse the other within the limits of the enrichment. The legal action to obtain the reimbursement is called *actio de in rem verso*. *Actio de in rem verso* will be awarded where no other legal remedy is deemed appropriate.

135. To bring an *actio de in rem verso* under Romanian law, the following formal requirements must be met:

a. Enrichment of one party;

[49] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 167.
[50] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 170 and 171.

b. To the detriment of another party; with

c. A connection between the enrichment of one party and the impoverishment of the other. The enrichment and detriment must arise as a consequence of the same event.

136. Unjust enrichment is also an international principle[51]. Under international law, it too involves the enrichment of one party to the detriment of another without justification where no alternate remedy is available.

137. As such, if all conditions are met the injured party is entitled to restitution in the form of the returning of property or the payment of compensation equivalent to the enriched amount.

138. According to Respondent, articles 992, 993 and 994 of the Old Romanian Civil Code stipulate that, in the case of unjust enrichment, the debtor must repay up to the level of the enrichment.

139. Article 992 provides *"The one receiving what is not due to him, whether he receives it through error or knowingly, shall be bound to return it to the person from whom he has wrongly received it."*

140. Article 993 provides *"The one who in error considering himself a debtor paid a debt, it entitled to claim its value from the creditor."*

141. Article 994 provides *"If the creditor acted in bad faith, he shall be obliged to reimburse both the principal amount and the interest or accruals from the date of payment."*

Respondent's Response to the Relief Sought by the Claimant

142. The Respondent's prayers for relief in relation to the Claimant's Statement of Claim of 15 July 2015[52] as put forward in Respondent's Statement of Defence of 17 August 2015[53] are as follows:

> *"(i) dismiss any and all claims within the Request for Arbitration submitted by the Claimant as stated under paragraph 73 of the Request for Arbitration;*

[51] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 189.
[52] See, e.g. Claimant's Statement of Claim, para. 195.
[53] See, e.g. Respondent's Statement of Defence, Para. 249.

(ii) dismiss Claimant's request regarding the payment of 50% of the costs incurred with the DAB proceedings amounting to EUR 13,197.25, plus interest of 6% p.a. compounded annualy [sic] calculated from 30 December 2013;

(iii) dismiss the Claimant 's request regarding the payment of all costs incurred [sic] in connection with the arbitration plus interest of 6% p.a. compounded annually [sic] calculated from the date of the final award until actual date of payment;

(iv) order that the Respondent is entitled to receive payment of the amounts that have been overpaid to the Claimant in accordance with the Addenda No. 3 and No. 4 to the Contract and which were not contractually due by the Respondent;

(v) declare that the Engineer's Determination of 1 November 2012 is grounded, correct and in accordance with the provisions of the Contract;

(vi) compel Claimant to pay to the Respondent all relevant fees and expenses of the arbitration, attorneys at law, experts and consultants, as well as its own internal costs, and to compensate the Respondent for its costs with the preparation and performance of this arbitration and other expenses incurred by Respondent related to this arbitration proceedings."

VIII. RESPONDENT'S COUNTERCLAIM

A. Summary of the Respondent's Counterclaim and Relief Sought

143. The Respondent's Counterclaim[54] is based upon its view that the Claimant did not pay the amounts due to the Employer in accordance with Sub-Clause 13.8 and that Sub-Clause 13.8 is clear and without ambiguity.

144. As a result, it claims that the Respondent is entitled to be reimbursed for the amounts agreed in Addenda No. 3 and No. 4 and also for related damages incurred as a consequence of the Claimant's failure to comply with its obligations under the Contract. Should the amounts not be reimbursed, the Claimant will be unjustly enriched.

145. As stated by Respondent: standard form FIDIC Contract provides standard terms of the Contract. One of the objects of FIDIC contracts is to provide protection from the risk

[54] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 1 and 2.

of currency instability or variable inflation[55]. Sub-Clause 13.8 is intended to prevent damages by currency instability or variable inflation.

146. Where the currency of payment is EUR the Claimant cannot register damages due to currency instability/inflation as the risks are minimal. Given the Claimant received all payment in EUR, and all costs incurred were paid in RON for services purchased on Romanian territory, no damages occurred.

147. There is a real possibility for the Claimant to have gained an advantage from the Rate of Exchange, which underwent a series of changes throughout the performance period of the Contract.

148. The amount calculated by the Engineer, as per the Engineer's Determination of 1 November 2012 is correct and the formula for the adjustment multiplier, Pn, as provided in Sub-Clause 13.8 should be adjusted when there is a difference between the currency of payment and currency of index to read:

$$Pn = a + (b*Ln/Lo + c*En/Eo + d*Mn/Mo \ldots \ldots)*Fo/Fn$$

149. The Employer is entitled to recover from the Claimant the amount of EUR €3,123,832.09.

150. The Employer is entitled to recover from the Claimant the amounts representing the interest/financing costs for overpayment of the Price Adjustment in the IPCs. These amounts should be calculated as per the Particular Condition Sub-Clause 14.16 – Repayment.

151. Sub-Clause 14.6 provides:

> *"The Contractor undertakes to repay to the Employer any amounts paid in excess of the final sum due within 45 days of receiving a request to do so. Should the Contractor fail to make payment within the deadline set by the Employer, the Employer may increase the amounts due by adding interest:*
>
> *At the discount rate applied by the central bank of the country of the Employer if payments are in the currency of that country;*

[55] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 3.

At the set rate applied by the European Central Bank to its main refinancing transactions in euros where payments are in euro, on the first day of the month in which the time-limit expired, plus three and a half percentage points. The default interest rate shall be incurred over the time limit which elapses between the date of payment and the date on which payment is actually made (inclusive). Any partial payments shall first cover the interest thus established.

Amounts to be repaid to the Employer may be offset against amounts of any kind due to the Contractor. This shall not affect the Parties' right to agree on payment in instalments. Bank charges incurred by the repayment of amounts due to the Employer shall be borne entirely by the Contractor."

152. The Respondent is entitled [56] to recover amounts incurred with respect to expropriations as per Civil Sentence No. 1904 of 3 September 2013, ruled by Lugoj First Court in Case File No. 264/252/2011.

153. The estimated costs associated with the expropriations amounts to the sum of EUR €23,461[57].

154. The sum of EUR €23,461 represents the total amount of EUR €7,261[58] plus EUR €16,200. These figures represent the estimates costs as follows:

Category of Use	No. of plots	Surface	Value as per registrations (EUR)	Value of compensations (15%)	Total (EUR)
Arable unincorporated area	24	4214	1264	190	1454
Unincorporated grass land	7	2814	591	89	680
Unincorporated vineyard	19	2356	1413	212	1625
Unincorporated hayfield	2	228	55	8	63

[56] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 6.
[57] See, e.g. Respondent's Submission of 9 March 2015, para. 14.
[58] This amount per the Terms of Reference

Incorporated peripheral land	2	230	2990	449	3439
Total	**54**	**9842**	**6313**	**948**	**7261**

155. The amount of EUR €7,261 is to be added to EUR €16,200. EUR €16,200 is calculated according to the formula[59]:

> *"An estimated number of minimum 54 plots * 300/plot"*
>
> *"representing real estate register related service plus valuations plus legal services necessary for the expropriations in accordance with Law No.255/2010 on the expropriation for public utility necessary to achieve the objectives of national, country and local interest."*

156. The Respondent's prayers for relief put forward in its Counterclaim particularization of 9 March 2015 are as follows[60]:

> *"The Respondent seeks ...the Arbitral Tribunal to:*
>
> *a. Upheld* [sic] *the Respondent's request to file a counterclaim and to render a decision regarding the Respondent's counterclaim as detailed above;*
>
> *b. Compel the Claimant to pay to the Respondent the amount of EUR 3,123,832.09, in accordance with Sub-Clause 13.8 of the Contract;*
>
> *c. Compel the Claimant to pay to the Respondent the financing costs/interest for overpayment of Price Adjustment in the IPCs and that these should be calculated as per Particular Condition Sub-Clause 14.16 - Repayment representing financing costs for overpayment of ACCs in the P/Cs 14, 17 and 18;*
>
> *d. Compel the Claimant to pay the Respondent the penalties to which the latter is entitled give that the Claimant has not remedied the nonconformities notified by the end of the warranty period, as provided by the Contract;*
>
> *e. Compel the Claimant to pay to the Respondent the amounts representing the cost with expropriations, namely the amounts which are to be called within the patrimony of the Respondent, as per the Civil Sentence no 1904 of 3 September 2013, ruled by Lugoj First Court in Case file No.*

[59] See, e.g. Respondent's counterclaim particularisation, para. 14.
[60] See, e.g. Respondent's Submission of 9 March 2015, para. 15.

264/252/2011 amounts that are preliminary estimated to the value of EUR 23,461;

f. Compel the Claimant to pay to the Respondent all legal costs and any and all arbitration related fees, expenses and costs incurred by Respondent related to this arbitration proceedings."

B. Summary of the Claimant's Response to the Counterclaim and Relief Sought

The amount claimed under the Counterclaim is wrong

157. The Claimant takes the position[61] that the Respondent received the amount of EUR €2,425,674.82 when it called back the Performance Security and that the Respondent has not taken this into account when quantifying its Counterclaim, potentially allowing the Respondent to receive in excess of what it would be owed in the event its claim was accepted by the Adjudicator in full.

The interpretation of Addenda No. 3 and No. 4

158. Then, as to Addenda No. 3 and No. 4 it is the Claimant's position[62] that they were intended to establish and settle the amount the Claimant was entitled to for adjustment for changes in costs under the Contract and the Parties agreed therein the amounts payable to the Claimant.

159. According to Claimant, an Addendum is intended to modify the Contract. If the Parties did not intend to derogate from the Contract, no Addendum would have been entered into. Therefore, the Respondent's claim that *"by signing the Addenda No. 3 and No. 4 the Parties have not finally and irrevocably agreed the total amount of the Contract value,"* and that the Addenda *"did not amend in any way the provision of the Subcontract,"* is wrong.

160. Claimant is of the opinion, that the wording of the Addenda does not support the Respondent's assertion that the sums contained therein are merely "*Engineer's estimates.*"

161. According to Claimant, the Respondent's assertion[63] that the purpose of the Addenda was to increase the Respondent's budget contradicts the statement of objective

[61] See, e.g. Claimant's Reply to the Counterclaims, para. 7.
[62] See, e.g. Claimant's Reply to the Counterclaims, para. 11.
[63] See, e.g. Claimant's Reply to the Counterclaims, para. 18.

in each Addendum, which reads "*The objective of this Addenda is to amend the Contract in order to increase the Accepted Contract Amount.*" It is clear from this statement that the Parties intended to modify the Contract and this is shown in the Respondent's Answer.[64] And the Claimant further submits that other parts[65] of the Respondent's argument of its Answer demonstrates confusion in mounting an argument that contradicts the clear wording of the Addenda.

162. The Claimant stresses[66] that the Respondent's argument that the amounts agreed in Addenda No. 3 and No. 4 would have formed part of the normal adjustment mechanism under Sub-Clause 13.8, making the sums open to "*rectification*" by the Engineer, is incorrect. The mechanism under Sub-Clause 13.8 does not require an Addendum to the Contract. The Parties chose to agree the amounts payable as adjustments to costs by agreeing Addenda No. 3 and No. 4. The Parties intended to modify the Contract through Addenda No. 3 and No. 4; otherwise there would have been no need to depart from the contractual mechanism.

163. The following words in both Addenda: "*...calculated by the Engineer according to Sub-Clause 13.8 from the General Conditions of Contract*" demonstrate that the Parties were aware the Addenda may depart from Sub-Clause 13.8 and that the application of Sub-Clause 13.8 was unclear due to the Parties including indices in Euro in the Table of Adjustment Data of the Appendix to Tender.

164. Claimant stresses, that both Parties were aware, at the time of concluding Addenda No. 3 and No. 4, of the formula applied by the Engineer in reaching the sums contained therein and that the formula used did not give effect to paragraph 5 of Sub-Clause 13.8. Therefore, there is no question of a "non-contractual" or "incorrect" formula. Once the Addenda were concluded there were only agreed amounts and the Claimant is entitled to be paid these amounts regardless of any other possible calculations under Sub-Clause 13.8.

[64] Paragraphs 20-21 of its Answer.
[65] See paragraph 61 of its Answer.
[66] See, e.g. Claimant's Reply to the Counterclaims, para. 20.

Addenda No. 3 and No. 4 in relation to Sub-Clause 13.8 of the Contract

165. The Claimant, then, also submits[67] that Addenda No. 3 and No. 4 are Settlement Agreements and have been concluded as an expression of the Parties' mutual agreement on the amount payable to the Claimant under Sub-Clause 13.8.

166. Claimant also submits that the purpose of Addenda No. 3 and No. 4 was to agree the amount payable to the Claimant under Sub-Clause 13.8; therefore, the Addenda do not modify Sub-Clause 13.8. Accordingly, Addenda No. 3 and No. 4 are *lex posteriori* to the Contract and, therefore, supersede Sub Clause 13.8.[68]

167. Claimant argues that Respondent cannot escape liability by arguing "mistake" or "error" in the calculations. Neither Party may unilaterally rescind a valid agreement by later arguing it was mistaken in entering that agreement or by arguing "errors" in the agreement[69].

168. The Respondent's Engineer made the calculations and the Respondent cannot blame the Claimant for its mistake[70]. Nor can the Respondent claim that the amounts agreed in Addenda No. 3 and No. 4 are subject to subsequent adjustments under Sub-Clause 13.8 because the amounts are already the consequence of adjustments pursuant to Sub-Clause 13.8. Additionally, the Respondent and its Engineer have not adjusted the agreed amount but simply unilaterally rescinded the binding agreements concluded between the Parties.

Jurisdiction of the Arbitral Tribunal over the Claimant's Secondary Case

169. The Claimant's Secondary Case[71] is not a different dispute but is an argument within the same dispute. In accordance with Sub-Clause 20.6 the Arbitral Tribunal has jurisdiction to deal with the Claimant's Secondary Case, which is not a different dispute but an alternative argument. Additionally, the DAB have considered aspects of the Claimant's Secondary Case.

[67] See, e.g. Claimant's Reply to the Counterclaims, para. 33.
[68] See, e.g. Claimant's Reply to the Counterclaims, para. 35.
[69] See, e.g. Claimant's Reply to the Counterclaims, para. 40.
[70] See, e.g. Claimant's Reply to the Counterclaims, para. 43.
[71] See, e.g. Claimant's Reply to the Counterclaims, para. 50 and 51.

170. The Claimant refutes the Respondent's assertions[72] regarding the Arbitral Tribunal's jurisdiction over the Claimant's Secondary Case because the Claimant is not requesting additional payment but merely the return of money wrongly taken by the Respondent in calling the bank guarantee.

171. As such, according to Claimant, the present case is a defence against the Respondent's claim under Sub-Clause 2.5 and not a Claimant's claim under Sub-Clause 20.1[73].

Unjust Enrichment

172. Claimant argues that he has not been unjustly enriched as a consequence of being paid the sums agreed in Addenda No. 3 and No. 4[74].

173. The doctrine of unjust enrichment[75] can only be applied where no other remedy exists. Therefore, in order to invoke unjust enrichment, the Respondent must acknowledge that no other remedy is applicable to its case. The Respondent cannot make a claim under the Contract and a claim of unjust enrichment; it must "choose a path" – *electa una via*.

174. Unjust enrichment is applicable where there is no legal cause between the enrichment of the Party and the impoverishment of the other Party. As the Claimant received the amount based on a Contract, unjust enrichment is not applicable.

Claim for penalties related to the alleged "non-conformities"

175. The Respondent's claim for penalties to be paid for the Claimant's alleged failure to remedy non-conformities within the warranty period[76] is inadmissible because the Respondent has failed to comply with article 5, paragraph 5, of the ICC rules in respect of the submission of the Counterclaim. In particular, the Respondent failed to particularise its claim and failed to indicate whether the Counterclaim relates to the Contract or stems from another contract or circumstances[77].

---

[72] See, e.g. Claimant's Reply to the Counterclaims, para. 46.
[73] See, e.g. Claimant's Reply to the Counterclaims, para. 47.
[74] See, e.g. Claimant's Reply to the Counterclaims, para. 52.
[75] See, e.g. Claimant's Reply to the Counterclaims, para. 53.
[76] Paragraph 15(iv) of the Respondent's Submission of 9 March 2015.
[77] See, e.g. Claimant's Reply to the Counterclaims, 64.

176. The Respondent's submission of 9 March 2015 did not quantify, particularise or describe its head of claim with respect of "*non-conformities*" and, therefore, the Respondent failed to comply with the Arbitrator's Order to particularise its Counterclaim as set out in Procedural Order No. 1[78].

Claim for expropriation of costs

177. In respect of its request that the Arbitrator "*Compel the Claimant to pay to the Respondent the amounts representing the cost with the expropriations, namely the amounts which are to be called within the Patrimony of the Respondent, as per the Civil Sentence No. 1904 of 3 September 2013...amounts that are preliminary estimated to the value of EUR 23,461*," the Respondent fails to provide a description of the nature and the circumstances of the dispute giving rise to this Counterclaim, and the basis upon which this Counterclaim is made, as required by article 5, paragraph 5 of the ICC Rules[79].

178. The Respondent's submissions of 9 March 2105 do not provide a copy of, nor specific references to, the civil sentence to which it refers nor does the Respondent indicate what costs it claims or why the Claimant should pay these costs. As a result, the Arbitral Tribunal is asked to dismiss this head of claim as inadmissible. In the alternative, if the claim is admissible, the Claimant is not liable under the Contract to pay the costs incurred by the Respondent with respect to expropriations[80].

The Respondent failed to follow the mandatory dispute resolution procedure

179. According to Claimant, the Arbitral Tribunal does not have jurisdiction over the Respondent's Counterclaims contained within paragraphs 6(iii) and (iv) of its Answer and Counterclaim because these matters have not been referred to a Dispute Adjudication Board in accordance with the contractual dispute resolution mechanism, specifically Sub-Clause 20.6[81]. Further, the Respondent has not issued a Notice of Claim in relation to these issues as required by Sub-Clause 2.5.

[78] See, e.g. Claimant's Reply to the Counterclaims, 65.
[79] See, e.g. Claimant's Reply to the Counterclaims, 67.
[80] See, e.g. Claimant's Reply to the Counterclaims, 69-72.
[81] See, e.g. Claimant's Reply to the Counterclaims, 74.

180. Thus, the contractual multi-tier dispute resolution mechanism has been frustrated and breached by the Respondent[82].

IX. ISSUES FOR DETERMINATION

181. Based upon the evidence presented and the submissions of the Parties, the Issues for Deterrmination are as follows:

a. **Issue No. 1**: Legal Nature and Binding Force of the Contractual Addenda No. 3 and No. 4.

b. **Issue No. 2**: Interpretation of Addenda No. 3 and No. 4 and FIDIC Sub-Clause 13.8.

c. **Issue No. 3**: Whether Claimant has Failed to Provide Any Evidence in Accordance with Article 9.2(A) of the IBA Rules of Evidence.

d. **Issue No. 4**: Whether Respondent Consented to the Alterations to the Contract.

e. **Issue No. 5**: The Legitimacy of the Engineer's Determination of 1 November 2012 to Unilaterally Change Addenda No. 3 and No. 4.

f. **Issue No. 6**: The Lawfulness of Calling Back Performance Security No. 13837/13839 for the sum of EUR €2,425,674.82 Issued by Barclays Bank PLC, Portugal, for the Performance of All of the Contractor's Obligations Under the Contract.

g. **Issue No. 7**: Jurisdiction of the Tribunal over Claimant's Secondary Case.

h. **Issue No. 8**: Whether The Amount Claimed Under the Counterclaim is Wrong.

i. **Issue No. 9**: Whether Unjust Enrichment has Occurred

j. **Issue No. 10**: Whether the Respondent Can Claim for Penalties to be Paid for the Claimant's Alleged Failure to Remedy Non-Conformities

[82] See, e.g. Claimant's Reply to the Counterclaims, 79.

k. **Issue No. 11**: Whether the Respondent is Entitled to Amounts Representing the Cost with Expropriations

l. **Issue No. 12**: Whether the Respondent Failed to Follow the Mandatory Dispute Resolution Procedures

X. DISCUSSION

182. A review of all of the issues follows but it should be noted that the central issue of the present Arbitration concerns the application of FIDIC Sub-Clause 13.8 and the interpretation of Addenda No. 3 and No. 4 of 10 December 2010, and of 7 June 2011 ("Addenda No. 3 and 4"), respectively, which were incorporated in the Contract for the construction of a by-pass road around the town of Lugoj in western Transylvania, Romania, and in consequence, determine whether or not the Claimant is entitled to the amounts paid by the Respondent under Addenda No. 3 and No. 4.

183. Here, the Parties chose to use "FIDIC Red Book" the 1999 Edition of the "*Conditions of Contract for Construction for building or engineering works designed by the Employer*" ("The FIDIC Contract") issued by Fédération Internationale des Ingénieurs-Conseils (FIDIC).

184. The Tribunal determines that:

A. Issue No. 1: Legal Nature and Binding Force of the Contractual Addenda No. 3 and No. 4

185. The first issue to be decided by the Tribunal concerns the legal nature and binding force of Addenda No. 3 and No. 4, of 10 December 2010, and of 7 June 2011, respectively, which were incorporated in the Contract for the construction of a by-pass road around the town of Lugoj in western Transylvania, Romania. For the reasons set below the Tribunal finds that Addenda No. 3 and No. 4 are binding upon the Parties.

186. As stated above, Addenda No. 3 and No. 4 were signed on 10 December 2010, and 7 June 2011, respectively.

187. On 1 November 2012, one year and five months after signing the Addenda, the Engineer issued a Determination finding that the method of calculation used in respect of

the Addenda was erroneous and requiring the Contractor to pay the Employer EUR €3,123,832.09.

188. Paragraph 26 of the Answer to the Request for Arbitration and Counterclaim reads as follows: "*After signing the Addenda No. 3 and No. 4, the Respondent realized that there had been an error regarding the increased amounts. The Employer noted that with reference to the provisions of Sub-Clause 13.8 Adjustments for Changes in Cost (ACC), an incorrect and thereby noncontractual formula for the adjustment multiplier, Pn, has been used in the IPCs No. 14, 17 and 18.*"

189. Since the signature of the first Addendum in 2010, until 10 November 2012, the Parties raised no issue regarding the binding force and contractual nature of the Addendum.

190. After finding an alleged error in the Addenda, "[s]*pecifically, an incorrect formula was used to calculate the adjustment multiplier (Pn) in respect of IPCs 14, 17 and 18. The works were certified in Euro as the currency for payment while RON was used as the currency of index in the derivation of the Pn formula.*"[83] the Respondent questions the binding force, purpose and interpretation of the Addenda.

191. Respondent argues[84] that the Addenda are unusual clauses and accordingly under article 1203 of the *The Romanian Civil Code " unusual clauses such as implied obligations that represent the main performance of the agreement remain without effect, unless the specific clause is expressively accepted in writing by the other party. Therefore, the implied consent of a main obligation is not sufficient and the contractual clauses must be identified and accepted adequately.*"

192. Conversely, Claimant is of the opinion[85] that the Respondent failed to indicate that the invoked articles are included in the New Romanian Civil Code, not in the Old Civil Code (which is applicable to the present dispute) and that Article 1203 regarding unusual clauses, relates to "presumptions" without any relevance to the Respondent's argument and to the present case.

[83] See, e.g. Terms of Reference, para. 57.
[84] See, e.g. Answer to the Request for Arbitration and Counterclaim, para. 138.
[85] See, e.g. Claimant's Statement of Claim, para. 172.

193. Claimant further argues that in relation to Article 1203, Respondent's assertions in paragraphs 138 and 143 – 150 of its Answer to the Request for Arbitration and Counterclaim should be rejected by the Sole Arbitrator because they are erroneously based on legal provisions that are not applicable to this case.

194. Firstly, the Tribunal notes that although not specified by Respondent in its Answer to the Request for Arbitration and Counterclaim, the New Romanian Civil Code, in force since October 2011, is not applicable to the Contract signed by the Parties on 3 March 2008.

195. The Tribunal reminds that according to the generally accepted principle of Law, "*ex prospicit non respicit* ", the law looks forward, not backward.

196. Hence, Laws are generally deemed or presumed not to have retroactive effect.

197. Secondly, although the Tribunal has found that the New Romanian Civil Code is not applicable to the present dispute, it must highlight the fact that under Romanian Law an Addedum, is not consider "an unusual clause" as designated in article 1203 of the New Romanian Civil Code. According to Bazil Oglind[86] "*Uncommon clauses mean those categories of standard clauses which present significant derogations from the usually applicable regulations." And thus, uncommon clauses are those standard clauses which provide to the benefit of the proponent party: the limitation of liability; the right to terminate unilaterally the contract; the right to suspend the performance of obligations; clauses which provide to the detriment of the other party a waiver of rights or a waiver concerning a term; which provide for the limitation of the right to raise exceptions (defences) against the other party, which limit the freedom to contract with third parties, which provide for the silent renewal of the contract, which establish the applicable law, and arbitration clauses which derogate from the rules.*"

198. The Tribunal notes that, as the name implies, an Addendum is a legal document that supplements the original Contract with binding requirements that both Parties to a Contract agree to adhere to and, further, an Addendum is generally accepted as constituting a modification or an amendment to a Contract.

[86] Bazil Oglind, Bazil, Contractual balance in the context of the post-economic crisis and the new Romanian Civil Code. Bucharest University of Economic Studies, Law Department.

199. As it is stated in the Addenda itself: "*The objective of this Addendum is to amend the Contract in order to increase [...] The objectives of this Addendum are: To amend the Works Contract in order to increase the Accepted Contract Amount by the amount of 2,383,161.39 Euro (without VAT) ...*"

200. By increasing the Accepted Contract Amount it would appear that the Parties intended to increase the budget allocated to the Contractor's work and this increase was achieved in the Addenda.

201. An Addendum is, thus, an integral part of the Contract and as such must be observed and honoured by the Parties. Indeed, contracts are an outcome of process of mutual commitment for a certain period of time and conceived mainly as an instrument of cooperation between Parties; they are a device, designed first and foremost, to manage and allocate risk.

202. A contract is an expression of the Parties' free will or choice. It is an exercise of the Parties' freedom and autonomy, and as such it must be honoured in respect of the security of economic transactions.

203. The Tribunal notes that the Romanian Law prohibits inconsistent behaviour of the Parties in particular during the execution of the Contract.

204. According to Stefan Dinu[87], "*Some authors consider that the parties are also bound by an obligation of contractual consistency, which requires for one party to act within the reasonable expectations of the other, once a certain conduct has been established.Non-compliance with this obligation is described as venire contra factum propriumin civil law jurisdictions or as estoppel in the common law world. In Romanian law a breach of this obligation may amount to an abuse of contractual rights, whichusually gives a right to claim damages.*"

205. The principle of the prohibition of inconsistent behaviour is widely accepted in international arbitration[88] and corresponds to what it is acknowledged in civil law systems under the concept of *venire contra factum proprium*.

[87] Dinu, Stephan, Lawyer, MA student, King's College London, Implied terms in English and Romanian law. Available at www.tribunajuridica.eu
[88] Berger, K.P., The Creeping Codification of the Lex Mercatoria, p. 221.

206. By virtue of this principle Parties are bound by their own acts; they should act in good faith, and consequently cannot set themselves in contradiction to their previous conduct vis-à-vis the other Party particularly when those acts have enabled a Party legitimately to acquire rights.

207. Moreover, under Romanian Law, a breach of this obligation may amount to an abuse of contractual rights, which usually gives a right to claim damages.[89]

208. In conclusion, the Tribunal is of the opinion that the Respondent is not in a position to assert legal rights, in particular, in circumstances, as here, where to do so would be acting inconsistently with its own previous conduct.

209. For the reasons stated above, and in view of the principle of the protection of acquired rights, legal certainty and the protection of legitimate expectations, the Tribunal considers that Addenda No. 3 and No. 4 of the Contract for the construction of a by-pass road around the town of Lugoj in western Transylvania, Romania, are binding upon the Parties.

B. Issue No. 2: Interpretation of Addenda No. 3 and No. 4 and FIDIC Sub-Clause 13.8

210. The second issue to be decided by the Tribunal concerns the interpretation to be given to Addenda No. 3 and No. 4, of 10 December 2010, and of 7 June 2011, respectively, which were incorporated in the Contract and for the reasons set below the Tribunal finds that by signing Addenda No. 3 and No. 4 the Parties only intended to increase the Accepted Contract Amount and not the mechanism of Sub-Clause 13.8.

211. Addendum No. 3 reads as follows:

> *"Article 1*
> *The objective of this Addendum is to amend the Contract in order to increase the Accepted Contract Amount by the revised Contract Eligible Amount of 1,059,197.46 Euro (without VAT) out of which:*
>
> *523,086.35 Euro represents the value of the supplemental works, resulted from change in legislation for traffic safety, approved through the*

[89] Dinu, Stefan. Lawyer, MA student, King's College London, citing Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, Curs de drept civil: obligațiile (Civil law: the law of obligations) (Universul Juridic 2015) p. 111.

Variation Order No. 3 during the contractual Time for Completion, as calculated by the Engineer;

535,111.11 Euro represents the adjustments in costs for the period March 2008 – May 2009 and 77.61% of the adjustment in costs for June 2009, for the works executed under the Contract, as calculated by the Engineer according to Sub-Clause 13.8 form the General Conditions of Contract.

Article 2
The Accepted Contract Amount (excluding VAT) as stated in Article 4 of the Contract Agreement is increased with 1,059,197.46 Euro and becomes 21,873,586.83 Euro..."

212. And further, Addendum No. 4 provides:

"***Article 1***
The objectives of this Addendum are:

To amend the Works Contract in order to increase the Accepted Contract Amount by the amount of 2,383,161.39 Euro (without VAT) representing 22.39% of the adjustments in costs for June 2009 and the adjustments in costs for the period July 2009 – August 2010 for the works executed under the Contract, as calculated by the Engineer according to Sub-Clause 13.8 from the General Conditions of Contract.

The amount of 62,751.26 Euro (without VAT), already included in the Accepted Contract Amount, becomes a Contract Non-Eligible Amount.

Article 2
...Through signature of the Addendum No. 4, the Accepted Contract Amount (excluding VAT) is increased with 2,383,161.39 Euro and becomes 24,256,748.22 Euro..."

213. The Tribunal observes first that the language and terminology utilized in the Addenda are simple and clear and must be applied literally, and further, that the language and terms inserted in the Addenda are not ambiguous, nor redundant. It is also noted that both Parties signed the Addenda, without any duress or undue influence and apparently both intended to be legally bound by the Addenda, by voluntarily and freely signing them. Thus, by signing the Addenda, the Parties intended to increase the Accepted Contract Amount only.

214. The Tribunal notes that under the FIDIC Red Book, the Contractor is paid on a measurement basis and the Accepted Contract Amount, which is a price estimate, is based on estimated quantities.

215. And that:

> *"[d]epending on the FIDIC form of Contract used the price which is to be paid by the Employer (the Contract Price) is not yet fixed at the moment of contract execution. At this stage all that is known and agreed is that the Employer shall pay the Contract Price (Sub-Clause 14.1), which is either composed of the remeasured Accepted Contract Amount and any adjustments made under the rules of the Contract (Red Book) or composed by the lump sum Accepted Contract Amount as adjusted in accordance with the Contract (Yellow Book). Even under the Silver Book, where the parties agree to a Lump Sum Contract Price adjustments are not generally excluded. Thus all FIDIC Books do not provide for an overall lump sum price or fixed lump sum price, which is not intended to be adjusted in any way either by variation or remeasurement".*[90]

216. The "*Accepted Contract Amount*" is, therefore, a **fixed and predetermined** initial estimate or budget, which includes all provisional sums specified in the Letter of Acceptance agreed by the Parties, which later is converted into the Contract Price.

217. Basically, "*the "Accepted Contract Amount" is the sum of money for which the Contractor has satisfied himself that the Works can be properly executed and completed, based on the data, information and the like as contemplated in Sub-Clause 4.10 [Site Data].*"[91]

218. Understandably, the Accepted Contract Amount or estimate does not necessarily coincide with the actual payment to be made to the Contractor. However, under the FIDIC Contract, the determination of the amounts to be paid by the Employer to the Contractor must follow certain procedures that take in consideration the actual work done by the Contractor through a mechanism outlined in Sub-Clauses 14, 12.3 and 13.8.

219. Here, this mechanism stands and has not been altered by the Addenda. Further, however, even without any Addenda to the Contract, i.e. without any increase of the

---

[90] Idem, p. 179.
[91] Ben Mellors, Ellis Baker, Anthony Lavers, and Scott Chalmers, "The FIDIC Contracts: Law and Practice", Informa Law, 2010), p. 160.

Accepted Contract Amount, this mechanism would still apply and, thus, the Contractor's entitlement for payment is determined by the above referred procedure rather than the Accepted Contract Amount or budget.

220. Conversely, the Contract Price will potentially change by regular progress of the Contract, and as mentioned above, the "*Contract Price" (Sub-Clause 14.1), is composed of the re-measured Accepted Contract Amount."*

221. In this case, the Tribunal reiterates that, the Parties utilised an incorrect formula to re-measure the Accepted Contract Amount and the DAB noted that, "*the Parties made a fundamental error with this Agreement,*"[92] when they stipulated in the Memorandum agreed between the Parties on 26 October 2007 that "*The Appendix to Tender is updated as regards the "table of adjustment data". The date of 4th May 2007 is the Base date. Therefore the indices published for the month of May 2007 will be considered for calculating the value of the adjustments in cost. The Parties have agreed the "base value at Base date RON" and also the "base value at Base date Euro taking into account of the exchange rates published by the National Bank of Romania for the Base Date, namely 3.3197 Ron for 1 Euro.*"

222. The Tribunal emphasizes that according to the erroneous agreement supra, "*Three Interim Payment Certificates were then issued in accordance with the Engineer's evaluations and paid by the Employer. It was only later when the Employer became aware of the provision of Sub-Clause 13.8 that deals with currencies of indices and payments that adjustments became necessary. It is indeed regrettable that the nature and the substance of the adjustments were such as to give rise to a dispute.*"[93]

223. The Respondent, however, expresses a different view, and according to the Respondent:

> a) "*The values contained in Addenda 3 and 4 reflect the Engineer's estimate to supplement the Contract budget with the view of facilitating the Employer's payment for updated prices. The supplementation of the budget, effected by Addenda 3 and 4, did not alter any contractual terms. The changes that appeared in the payment of the IPCs must be adjusted until the issuance of the Final Payment Certificate.* Therefore, "*[a]ddenda*

[92] See, e.g. Referral No. 1 to the Single Member Dispute Board of 7 November 2013, para. 85.
[93] Idem, para. 103.

3 and 4 do not have the effect of the Parties finally and irrevocably agreeing the total amount of the Contract value and that Addenda 3 and 4 did not amend the provisions of Sub-Clause 13.8 nor the contractual formula contained therein."[94]

b) *"The Claimant has not made any specific reference to documents purportedly supporting its case."*

c) *"Romanian legal doctrine and jurisprudence require that evidence ought to be:*

1. *Legal (it can not be restricted by procedural/ material law)*
2. *Reliable (aimed at proving real, possible and plausible facts which do not contradict the laws of nature)*
3. *Relevant (related to the subject of the case)*
4. *Conclusive (lead to the resolution of the case)."*[95]

d) *Under Romanian law the following conditions are relevant to signing a contract:*

a. *The parties' legal capacity;*
b. *Explicit consent;*
c. *Certain and licit object; and*
d. *Moral and licit cause."* [sic]

224. The Tribunal disagrees with the Respondent for the reasons that follow.

225. As it was already decided by the Referral No. 1 to the Single Member Dispute Board of 7 November 2013, *"Parties made a fundamental error with this Agreement."*

226. Although there was a fundamental error with the Agreement, the Parties' expectations were, however, founded on that Agreement and the moment the Agreement was settled and signed became Law between the Parties.

227. The Tribunal firstly observes that under Romanian Law:

*"Contracts shall be construed according to the common intention of the parties which is given priority rather than the literal meaning of the terms (Art. 1156 Code civil). **When a common intention cannot be established, reference is made to the understanding, which a reasonable man would***

[94] See, e.g. Terms of Reference, para. 81 and 67.
[95] See, e.g. Terms of Reference, para. 93 and 94.