IN THE MATTER OF AN ARBITRATION
IN ACCORDANCE WITH THE ASSOCIATION OF ARBITRATORS (SOUTHERN AFRICA) NPC RULES

FRAZER SOLAR GMBH

Claimant

– AND –

THE KINGDOM OF LESOTHO

Respondent

ARBITRATION AWARD

A. *Introduction*

1. The Kingdom of Lesotho adopted its energy policy published in a document titled Lesotho Energy Policy, 2015 – 2025. The energy policy seeks to confront and directly address the energy challenges the Kingdom faces, in the light of increasing demand for electricity, limited local capacity to generate sufficient electricity to meet local demand, reliance on imports of electricity from neighbouring countries, mainly from the Republics of Mozambique and South Africa, and the need to guarantee security of supply.

2. The vision of the energy policy is to promote universal access to electricity that is affordable in a sustainable manner and with minimal negative impact on the environment. The express objective sought to be achieved

through the energy policy is to contribute towards poverty alleviation by creating income generating opportunities and improving the quality of lives the people of the Kingdom; contribute towards economic growth through initiatives that emphasize efficiency in the energy sector, ensure the security of energy supply in order to meet the national energy requirements of the Kingdom from diversified sources of energy and to protect the environment through the use of energy in the manner that complies with international, regional and local protocols.

3. The energy policy places the Government at the centre to drive strategies and co-ordinated activities to realize the objectives of the energy policy. It calls upon the Government of the Kingdom, amongst others, to introduce laws, regulations, standard and guidelines to enforce programmes and implementation that are necessary to achieve the goals of the policy. In its concluding part the energy policy calls upon the Government of the Kingdom to foster an enabling environment that will attract investment and financing at all levels of the value chain in the energy sector.

4. In 2013 the Kingdom of Lesotho published its renewable energy policy to harness its renewable energy resources, reduce reliance on fossil fuels and imported electricity. The renewable energy policy also seeks to modernize access to energy for people in rural and decentralized geographic parts of the Kingdom.

5. The renewable energy resources identified in the policy include wind energy, hydro energy, geothermal energy and solar energy. In regard to the latter, the policy identifies solar photovoltaic and solar thermal technologies to harness renewable energy, in the light of the fact that the Kingdom enjoys over 300 sunny days per annum, with average insolation levels of 5.25 – 5.53 kWh/m^2/year. The policy anticipated that renewable energy resources would add generation capacity of 200 MW of energy by 2030 in the Kingdom.

6. The renewable energy policy calls for the replacement of electric geysers with Solar Water Heating Systems ("SWHs") in all existing commercial and industrial facilities that require more than 500 litres per day of hot water; installation of SWHs in existing or new buildings which have hot water requirements of more than 300 litres per day for residential or general purposes, village electrification through renewable energies products and involvement of private sector investment in the renewable energy sector.

7. The Kingdom generates approximately 60% of its energy requirement. It imports 40% of its energy requirement from Eskom in the Republic of South Africa and Electricidade de Moçambique of the Republic of Mozambique. The transmission and distribution of electricity in the Kingdom is done by Lesotho Electricity Company ("the LEC"), a Government owned entity established in 1969. The LEC recovers its revenue through annual tariffs submitted to and approved by the Lesotho Electricity and Water Authority ("the LEWA").

8. The importation of electricity is done through bulk purchases by the LEC. The price points for such purchases from Mozambique are denominated in the Dollar currency and pose a significant risk to the LEC having regard to the variation in exchange rates. The risk arising from the import of electricity is likely to continue until the Kingdom becomes self-sufficient in the generation and supply of its energy requirements.

9. In November 2017 the claimant made a proposal to officials of the Kingdom of its renewable energy project and sought to solicit the interest of the Kingdom in the proposals, in the light of the renewable energy policy of the Kingdom. There followed the conclusion of a non-binding Memorandum of Understanding ("the MoU") signed by the parties on 21 November 2017. The MoU set out the parameters of the project proposal, namely, the installation of 36 000 to 40 000 SWHs and up to 1 million LED lights in all Government buildings and homes of public servants over a period of four years. The project would be funded through a German export credit loan procured from a German financing institution to the tune of €100 million repayable over a period of 10 years.

10. Following upon subsequent negotiations between the parties, a written Supply Agreement was concluded at Maseru on 24 September 2018. The Supply Agreement was signed by Mr Robert John Frazer on behalf of the claimant and Minister Temeki Phoenix Tsolo on behalf of the Kingdom. In this arbitration the claimant contends that the Kingdom of Lesotho has failed to fulfil its contractual obligations and has thereby breached the

material terms of the Supply Agreement causing it to suffer financial loss. It seeks to recover such losses from the Kingdom.

B. ***Institution of arbitration proceedings***

11. On 30 July 2019 the claimant directed notice to the Kingdom of Lesotho in which it declared an arbitration dispute between the parties and gave notice to the Kingdom to commence arbitration proceedings pursuant to clause 24 of the Supply Agreement. In accordance with the terms of that clause the claimant invited the Kingdom of Lesotho to agree to the appointment of an arbitrator within five days in order to resolve the dispute between the parties.

12. The Kingdom did not respond to the claimant's notice within the agreed period of five days. Thereafter the claimant approached the Chairperson of the Johannesburg Bar Council to appoint an arbitrator in the light of the absence of an agreement between the parties on the appointment of an arbitrator. By letter dated 8 August 2019 the Chairperson appointed me as the arbitrator which appointment I duly accepted.

13. In terms of clause 24.1 of the Supply Agreement the parties agreed that the arbitration will be conducted in terms of the rules of arbitration in force of the South African Association of Arbitrators ("the Association") and the provisions of the Arbitration Act, 42 of 1965. At the time the claimant declared the dispute and gave notice of the arbitration the rules

for the conduct of arbitration adopted by the Association are the 2018 edition published on 1 January 2018.

14. Although clause 24.1 of the Supply Agreement expressly refers to the Arbitration Act, 42 of 1965 the claimant asserts that I should regard reference to that Act as a reference to the International Arbitration Act, 15 of 2017 because the dispute between the parties is an international commercial dispute as is contemplated in the International Arbitration Act. I deal with this contention when I address the question of my jurisdiction to determine the dispute in the absence of the Kingdom of Lesotho.

C. *Procedural orders*

15. After my appointment I convened the first meeting of the arbitration by email dated 15 August 2019. I then directed that the notice of the first meeting together with the draft agenda be sent to the Kingdom of Lesotho at the office of the Prime Minister, it being the chosen address for the giving of notices. The notice of the first meeting by Lesotho Government in terms of the Supply Agreement was sent to the office of the Prime Minister both by email and physically. I am satisfied that the office of the Prime Minister did receive the notice on 26 August 2019 having regard to the date stamp and acknowledgement of service appearing on the original of the letter sent by the claimant on 22 August 2019.

16. The first meeting took place on 4 September 2019 at the chambers of Group 621, Maude Street, Sandton. The claimant's representative attended the meeting. The Kingdom of Lesotho elected not to attend the meeting. In its absence I proceeded with the meeting, having been satisfied that the Kingdom was duly notified of the time, date and place of the meeting and had elected not to attend.

17. After the meeting I issued Procedural Order No. 1 dated 16 September 2019, setting out the timetable for the filing of statement of claim, statement of defence, discovery of documents and the date of hearing of the parties' evidence and submissions at the arbitration. I then directed that the Procedural Order No. 1 and minutes of the first arbitration meeting be served by email and hand delivery on the Kingdom at the offices of the Prime Minister.

18. Pursuant to the timetable set out in Procedural Order No. 1, a procedural call was held on 25 November 2019 to discuss the further conduct of the arbitration proceedings in the light of the respondent's failure to submit a statement of defence by 21 November 2019. Notice of the procedural call was emailed to the respondent on 22 November 2019 and receipt of the hard copy thereof was acknowledged on 25 November 2019.

19. During the procedural call I directed that the arbitration hearing will commence on 2 December 2019, in accordance with the timetable set out in Procedural Order No. 1. I also directed that a copy of Procedural Order

No. 2 together with the minutes of the procedural call be served on the respondent, both by hand delivery and email. Both Procedural Order No. 2 and minutes of the procedural call were emailed to the respondent on 27 November 2019 and receipt of hard copies thereof was acknowledged on 29 November 2019.

20. On 2 December 2019 the hearing of the arbitration commenced. Representatives of the claimant and its witnesses attended the hearing. No one from the respondent's side attended the hearing. No explanation for the respondent's non-attendance was furnished to me.

21. In the light of the service of the notice of the hearing on the respondent I was satisfied that the respondent had due notice of the time, date and place of the hearing and that there was no sufficient cause shown to explain its failure to attend the arbitration proceedings. I therefore directed that the arbitration hearing should proceed in the absence of the respondent in accordance with the powers vested in me by Article 30(1)(b) of the rules of the Association.

D. *Jurisdiction*

22. At the first arbitration meeting I raised the question of my jurisdiction to resolve the parties' arbitration dispute having regard to the non-participation of the Kingdom of Lesotho in the arbitration. I invited the claimant to address that issue. The claimant has done so in a note on

jurisdiction dated 5 September 2019. In what follows I set out my conclusion and the basis thereof that I have the necessary jurisdiction to determine the parties' dispute in this arbitration, notwithstanding the lack of participation by the Kingdom of Lesotho and the reference to the Arbitration Act, 1965 in clause 24 of the Supply Agreement.

23. Clause 24.1 of the Supply Agreement expressly provides that the rules of the Association will apply to the arbitration. It does so in the context of clause 26.1 which makes it clear that the terms of the Supply Agreement will be governed and determined in accordance with South African law, notwithstanding the fact that both parties are domiciled in jurisdictions outside South Africa, and also notwithstanding the place where the parties were required to perform and fulfil their contractual obligations under the Supply Agreement.

24. The chosen domicile of the claimant is Berlin in Germany. The chosen domicile of the Kingdom of Lesotho is the office of the Prime Minister in Maseru. The Supply Agreement requires the claimant to execute its obligations in the Kingdom of Lesotho and not South Africa. Equally, it requires the Kingdom of Lesotho to assist the claimant in the execution of its obligations in Lesotho.

25. Notwithstanding the above facts the parties have chosen South African law as the law of arbitration to determine disputes relating to the Supply Agreement. They have also chosen Johannesburg as the seat of

arbitration. It follows therefore that the choice of law for the present arbitration is South African law. I therefore will determine the question of jurisdiction upon the application of the South African law relating to international commercial agreement such as the Supply Agreement.

26. For reasons that follow I am satisfied that I have the necessary jurisdiction to determine the dispute between the parties:

26.1. Article 23 of the applicable rules of the Association confers the powers on me to determine the question of my jurisdiction. The Rules in that regard are consistent with the applicable principles of the South African law relating to jurisdiction of an arbitrator, and the power of the arbitrator to determine that question.[1]

26.2. By their own agreement the parties have expressly included the application of the rules of the Association. Of necessity that includes the application of Article 23 of the applicable rules of the Association. It follows therefore that the parties have consented to my power to determine the question of jurisdiction.

27. I also conclude that the non-participation of the Kingdom of Lesotho does not deprive me of the jurisdiction to determine the dispute between the parties because:

---

1 *Zhongi Development Construction Engineering v Kamoto Cooper Company SARL* 2015 (1) SA 345 (SCA), paras 53, 58 and 59.

27.1. Article 30(1)(b) and also Article 30(2) of the rules of the Association make it clear that I am entitled to order that arbitration proceedings shall continue in the event the respondent (in this case the Kingdom of Lesotho) has failed to communicate its response to the notice of arbitration or has failed to file its statement of defence. In this case the Kingdom of Lesotho has failed to do both, notwithstanding notification by the claimant to commence arbitration proceedings, and service upon it of Procedural Order No. 1 setting out, amongst others, the timetable for the arbitration and the date of the hearing, as well as the minutes of the first meeting of the arbitration held on 4 September 2019.

27.2. Article 30(2) of the Rules of the Association provides that the hearing of the arbitration may proceed in the absence of a party who was duly notified of the date, time and place of the hearing and has failed to attend without sufficient cause.

27.3. From what I have described in section **C** above, I am satisfied that the Kingdom of Lesotho was notified of the date, time and place of the hearing of the arbitration. In addition to the service of Procedural Order No. 1, I am satisfied that notice of the hearing was served upon the Kingdom of Lesotho in terms of Procedural Order No. 2.

27.4. No response to the service of Procedural Order No. 2 was forthcoming from the Kingdom of Lesotho. I have not received any explanation why the Kingdom of Lesotho did not respond to Procedural Order No. 2. In the circumstances set out above I am satisfied that the notice of the arbitration hearing specifying the time, date and place of the hearing was reasonable, and having regards to the fact that it was served at the office of the Prime Minister in September 2019, and confirmed in the Procedural Order No. 2 also served on the Kingdom of Lesotho on 29 November 2019.[2]

28. Although clause 24.1 of the Supply Agreement refers to the Arbitration Act, 1965, it is clear that the arbitration dispute between the parties falls within the scope and application of Article 1 of the Model Law set out in Schedule 1 of the International Arbitration Act. In my view, the International Arbitration Act and not the Arbitration Act, 1965 applies to this arbitration. I say so for the following reasons:

28.1. The Arbitration Act, 1965 is a domestic law which does not enjoy extra-territorial application. It is therefore confined to domestic application in respect of which one or both parties to the arbitration dispute, or the cause(s) of action giving rise to the arbitration fall within the jurisdiction of the arbitration, on the

---

2 Compare – *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA).

well-known grounds of jurisdiction, including the ordinary residence or domicile of the parties to arbitration, or the cause of action having arose within the territorial jurisdiction of the Republic.

28.2. None of the recognised grounds of jurisdiction exist in this case to justify the invocation of the Arbitration Act, 1965: neither the claimant nor the respondent ordinarily reside or is domiciled within the Republic. In fact, their chosen *domicilia* are elsewhere abroad. The cause(s) of action relied upon by the claimant are based on the anticipated performance of the parties' obligation in the Kingdom of Lesotho and the alleged breaches of the latter's contractual obligations in Lesotho.

28.3. The fact that the parties have not expressly agreed that the subject-matter of arbitration should be governed by the International Arbitration Act is of no moment because parties specified that the place of arbitration would be Johannesburg, it being a place unconnected to the parties place of residence, domicile and performance or non-performance of obligations specified in the Supply Agreement.

29. I therefore hold that the arbitration dispute falls within the meaning and scope of Article 1(3)(a) of the Model Law referred to in Schedule 1 of the International Arbitration Act. On this basis, I am satisfied that I have

jurisdiction to determine the arbitration dispute pursuant to the provisions of the International Arbitration Act, notwithstanding reference to Arbitration Act, 1965 in clause 24.1 of the Supply Agreement. This conclusion becomes important when I consider the questions of payment or otherwise of interest on damages claimed by the claimant and costs of arbitration contended on its behalf.

E. *The claimant's causes of action*

30. The claimant relies several breaches by the Lesotho Government of its obligations under the Supply Agreement. These breaches were initially described in the letter of demand sent to the Office of the Prime Minister and Minister Tsolo on 11 March 2019, and repeated in the statement of claim.

30.1. The first set of breaches of the terms of the Supply Agreement is the following:

30.1.1. Clause 17.1.1 in terms whereof the Government of Lesotho warranted that the Project complies with all the laws and met the requisite approvals of the Government.

30.1.2. Clause 17.1.2 in which the Government of Lesotho warranted that the claimant was expressly authorized

to commence with the implementation of the Project without delay.

30.1.3. Clause 17.1.3 in terms whereof the Government of Lesotho warranted that it have signed and bound itself to the terms of the Finance Agreement before or contemporaneously with the execution of the Supply Agreement.

30.1.4. Clause 12.1 in terms whereof the Government of Lesotho agreed to remunerate the claimant for work done in accordance with the draw-down schedule specified in clauses 12.1.1 to 12.1.5 of the Supply Agreement.

30.1.5. Clauses 5.1.4 and 17.2 in terms whereof the Government of Lesotho acknowledged that time was of essence in the implementation of the Project and that it shall do all things necessary to ensure that the Project runs smoothly, without interruption or delay.

30.2. The second category of the breach of the Supply Agreement is founded upon the provisions of clause 18 of the Supply Agreement. In terms thereof the Government of Lesotho granted to the claimant the first opportunity to undertake all other

renewable energy or electricity generation opportunities in Lesotho for a period of 5 years from the date of commencement of the Supply Agreement. Given its importance to portion of damages I consider it important to its out its terms in full –

> *"GOL hereby grants FSG the first opportunity for all other energy, energy efficiency or electricity generation opportunities with GOL for a duration of 5 years calculated from the Commencement Date."*

31. Based upon the above alleged breaches the claimant asserts damages in the following way –

31.1. In its main claim the plaintiff seeks:

31.1.1. payment of €50 million, as liquidated damages payable to it in accordance with the provisions of clause 22.2.2 of the Supply Agreement;

31.1.2. compensation for the value of profits it would have earned had the respondent not breached clause 18 of the Supply Agreement.

32. In its alternative claim, the plaintiff asserts damages in the following way,

32.1. loss of profits suffered by the claimants as a consequence of the respondent's material breaches of the clauses of the Supply Agreement referred to in paragraphs 30.1.1 to 30.1.5 above.

32.2. loss of opportunity claim. This too is based upon the respondent's alleged breach of clause 18 of the Supply Agreement.

33. The claimant relies on the report dated 7 October 2019 prepared by FTI Consulting for the computation of damages claimed by it, both for the main and alternative claims. The report was prepared by Mr Henry Pannell and Prof Liberty Mncube. Both testified on behalf of the claimant to explain and support the calculation of damages claimed, and the basis of the calculations, as well as assumptions which underpinned them. I deal with their evidence in due course.

F. *The hearing*

Evidence of Mr Frazer

34. Mr Frazer is the founder and managing director of the claimant. He has extensive experience in the energy sector and specializes in developing and managing solar and renewable energy projects. He previously served as the General Manager International of Rheem Australia (Pty) Limited, a company that specializes in manufacturing hot water renewable energy products such as solar hot water systems. Rheem's renewable products

are sold and distributed under different brands such as Solahart in different international markets, Lesotho being one of them.

35. When he was working at Rheem, Mr Frazer saw an opportunity to develop large scale renewable energy projects in a number of countries in Africa and the Middle East, especially those countries which imported electricity at high costs. He conceived that that these projected could be rolled out without upfront costs incurred by governments of the countries involved, but would be financed through external funding sourced from Australia that would be repaid over time.

36. With the approval of Rheem's senior management Mr Frazer then developed a business strategy he described as Solahart Business Strategy to market Rheem's large scale renewable energy products directly to governments of targeted African countries, provide funding for them from an Australian Government export credit agency known as Export Finance and Insurance Corporation ("EFIC").

37. In 2015 Mr Frazer embarked upon the execution of the Solarhart Business Strategy by travelling to various countries in the Southern African region. He met several Government officials of South Africa and Lesotho to explain his vision for the development of the renewable energy projects in those countries on a large scale. One of the Lesotho officials he met is Mr Seqhebolla Letsie who invited him to Lesotho to propose a development of renewable energy project in that country.

38. In January 2016 Mr Frazer travelled to Lesotho to explore opportunities to market Rheem's business strategy. With the assistance of Mr Letsie and consular support from the Australian Government he met several officials of different Government departments in Lesotho who expressed interests in his proposals around the renewable energy projects under the Solarhart Business Strategy.

39. Events took a different turn when Rheem decided to relocate its productions facilities to Vietnam and closed down Solarhart. The implication of that decision was that the Solarhart Business Strategy could no longer be pursued and financial support for marketing of Solarhart products could no longer be sourced from EFIC. For Mr Frazer, this was not the end of his vision. He resigned from Rheem. In March 206 he established the claimant and developed a new business strategy he described as FSG Business Strategy to negotiate with governments of different countries to develop large scale renewable projects and arrange funding for them.

40. Mr Frazer approached a new supply of solar products, now that Rheem was out of the picture. He negotiated with a German manufacturer of solar technologies since 1993, KBB Kollektorbau GmbH ("KBB") who agreed to take shareholding in the claimant in exchange of granting it an exclusive supply right to distribute KBB's solar products. Mr Frazer also secured the interests of a German export credit agency, KfW IPEX-Bank GmbH ("KfW")

to fund solar projects which involved the supply and use of KBB's products.

41. Armed with the newly found support from KfW and KBB Mr Frazer re-established contact with officials of Lesotho to pursue renewable energy proposals in that country under the FSG Business Strategy. On 3 August 2017 he met with Minister Tsolo who assured him of the Prime Minister and Government's interest in the renewable energy solution proposed by the claimant under its brand strategy.

42. There followed several correspondence and meetings between the claimant and officials Lesotho Government to advance their discussions of the claimant's proposal. On 5 October 2017 Minister Tsolo wrote to KfW and informed it of a potential development of a €100 million renewable energy project in Lesotho based on the claimant's proposal and invited KfW to submit an indicative term sheet for the financing of the project.

43. On 20 November 2017 the parties signed the MoU recording their common intention to proceed renewable energy project and obtain approval of the Lesotho Government by 1 March 2018. The MoU also recorded the sourcing of project financing from KfW of €100 million. It further outlined anticipated roles and responsibilities of the parties, time frames and finalization of a complete project proposal by 31 January 2018. The MoU was signed by Mr Frazer on behalf of the claimant and by Minister Tsolo on behalf of the Lesotho Government.

44. On 13 December 2017 KfW sent a letter to Minister Moeketsi Majoro. KfW expressed its in principle interests in funding the solar energy project to the tune of €100 million subject to certain conditions specified in that letter. Whilst the letter did not constitute a binding commitment to fund the project, the interest to fund it remained valid until 31 March 2018, subject to further extension KfW may consider.

45. After the conclusion of the MoU Mr Frazer hosted a workshop attended by officials of Lesotho Government to explain the benefits of the renewable energy project proposed by the claimant. They all expressed support for the project and thought that it should proceed to implementation by 1 March 2018.

46. By March 2018 little progress had been achieved to bring about the commencement of the project from the commencement date indicated in the MoU. However discussions between Minister Tsolo and KfW for the funding of the project continued. On 22 March 2018 KfW repeated its intention to finance the project in a letter addressed to Minister Tsolo. He, in turn, requested KfW to provide a detailed breakdown of the finance it was offering including timing, fees, interest rates, deposit, guarantees, so that the Lesotho Government could consider them to make a final decision on the project. On 28 June 2018 KfW issued another written intent to finance the project. The validity period of that letter would expire on 30 September 2018.

47. On 1 August 2018 Minister Tsolo wrote to Mr Frazer informing him that the Lesotho Government agreed and committed itself to proceed with the project. He expressly indicated that the Office of the Prime Minister will be the primary point of contact to ensure "*effective and efficient communication between the parties*". Minister Tsolo asked Mr Frazer to prepare and present all the necessary documents to facilitate the signing of loan and export contracts. He also indicated that the cost of the project will be included in the Government budget and that that will not happen until the relevant finance offer was received from KfW through the Development Bank of Southern Africa ("their DBSA").

48. The involvement of the DBSA was considered necessary by KfW and Mr Frazer as it was a frequent lender to the Government of Lesotho and its involvement provided some comfort to KfW as it minimized its investment risk profile by reducing its financing commitment to €85 million and the DBSA would they carry the balance of €15 million in financing the project.

49. On 8 August 2018 Mr Frazer met with the Prime Minister and Minister Tsolo to discuss a detailed presentation of the renewable project. He explained again the detailed elements of it and benefits arising from it, including energy and cost savings from it. He explained that those benefits will be achieved during phase 1 of the project and future projects would be considered in phases 2 and 3. That presentation later formed part of the schedules to the Supply Agreement upon its conclusion, on 24 September 2018.

50. After the presentation of 8 August 2018 the claimant provided Minister Tsolo with a draft agreement that it prepared, with the assistance of its legal representatives. The draft was considered by Minister Tsolo. Subject to minor amendments made by him, Minister Tsolo signed the final version of the Supply Agreement on 24 September 2018. According to Mr Frazer Minister Tsolo informed him that the Finance Agreement with the financiers would be signed by the Government of Lesotho through the Ministry of Finance.

51. After the signature of the Supply Agreement, Mr Frazer updated KfW of the parties conclusion of that Agreement. KfW updated its offer to finance the Project. The Minister of Finance did not accept that offer. In the result the Finance Agreement which was required to part of the schedule of the Supply Agreement was not signed by the Minister of Finance.

52. On 16 October 2018 Mr Frazer then contacted the Minister of Finance, Minister Majoro to establish why the execution of the Finance Agreements was delayed. Minister Majoro informed him that the project had to be led by the Minister of Energy and had to receive Cabinet support. As far as Minister Tsolo and the office of the Prime Minister were concerned the Project had received the necessary support of the Government and they did not understand why Minister Majoro refused to execute the Finance Agreements.

53. It emerged later on, from local media reports, that Minister Majoro supported a different renewable energy project that would be developed in Mafeteng in Lesotho. He had signed on that project on behalf of the Lesotho Government. The project was funded by a Chinese-Owned State Bank, EXIM Bank to the tune of CYN 700 million (Seven Hundred million Chine Yuan) which is the equivalence of M1.4 Billion (One Billion, Four Hundred Maloti).

54. The delay or failure to implement the Project was discussed publicly in a local radio station, Harvest FM on 30 November 2018. Thereafter Mr Frazer received death threats. He was advised by local colleagues with whom he worked on the Project that it was no longer safe for him to remain in Lesotho, in the light of comments made on Facebook by supporters of Minister Majoro. He then left Lesotho and returned to Australia *via* South Africa, on 7 December 2018.

55. From the evidence of Mr Frazer, as I have described it, it become immediately obvious that the Project was not implemented beyond the signature of the Supply Agreement on 24 September 2018. Whilst Minister Tsolo and the Prime Minister desired the immediate implementation of the Project, to realize its benefits, Minister Majoro thought otherwise, and obstructed its implementation by refusing to conclude the relevant Finance Agreement despite the offer of financing communicated to him by KfW. It is reasonable to accept that he refused to do so because had already committed his support to a competing

renewable energy project sponsored by the Chinese Government and funded by its State-Owned Bank.

56. On 11 March 2019 Peterson Hertog & Associates Attorneys, acting on behalf of the claimant, addressed a letter of demand to the Office of the Prime Minister and Minister Tsolo. Therein they asserted several breaches of the terms of the Supply Agreement by Lesotho, including clauses 5.1, 5.2, 17.1.2, 17.1.3, 17.1.6, 171.7 and 17.2 thereof. The Attorneys called upon the Government of Lesotho to remedy the breaches concerned within a period of 30 days from reception of the letter, or 60 days in the event 30 days was considered unreasonable.

57. The letter of demand was received by the Office of the prime Minister as it acknowledged receipt on 15 March 2019. The letter of demand was left unanswered. No remedial steps were taken by the Government of Lesotho. No explanation of the breaches asserted by the claimant was provided thereafter. In the absence of any explanation and remedial action, Mr Frazer addressed a letter dated 29 July 2019 to the Prime Minister and Minister Tsolo recording the claimant's termination of the Supply Agreement in terms of clause 23 thereof and notified them of the claimant's right to commence international arbitration in terms of clause 24 of the Supply Agreement.

58. I shall proceed to assess the claimant's case of breaches of the material terms of the Supply Agreement on the basis of the above evidence as it is

the only evidence I have received, without countervailing version from the respondent. I shall also assess the probative value of that evidence in the light of documentary evidence placed before me as part of the claimant's case.

The evidence of Prof Mncube and Mr Pannell

59. Prof Mncube and Mr Pannell jointly prepared the FTI Consulting report that accompanied the claimant's statement of claim. The former mainly contributed to the preparation of sections 3 and 4 of the report, and the latter is responsible for sections 5 to 9 of the report. Both Prof Mncube and Mr Pannell jointly presented expert evidence on 2 December 2019, explaining, amongst others, their mandate relating to the calculation of damages claimed, the methodology underpinning their computation, the instructions and assumptions they made and the evidence they relied on in arriving at their conclusion.

60. The qualifications and experience of Prof Mncube are set out in Appendix 1 of the FTI Consulting report. He is the holder of PhD degree in Economics from the University of KwaZulu Natal and an MSc in Economics from the University of York in the United Kingdom. He is a Managing Director of FTI Consulting and Associate Professor of Economics at Wits School of Economics and Business Science. He is also an Honorary Professor of Economics in the Department of Economics at the University of Stellenbosch. He presently serves as one of the Economic Advisors on

the Presidential Economic Advisory Council set up by the President of South Africa.

61. In the past Prof Mncube's experience included a service as the Chief Economist of the Competition Commission of South Africa from January 2014 to February 2019. In that capacity, he supervised competition cases, market enquiries and competition policy matters that fell within the mandate of the South African Competition Commission.

62. Prof Mncube has furnished written and oral evidence in several competition cases before the Competition Tribunal. He has also provided evidence and has served as an expert in cases involving abuse of dominance and cartel damages in competition authorities in South Africa. He has published extensively in competition policy and economic local and international journals, and has contributed in several books involving competition issues.

63. From what I have said above, it becomes clear that Prof Mncube has the necessary qualifications and expertise to present evidence as an expert on matters involving computation of damages such as herein in issue. I therefore accept his standing as an expert and will proceed to assess his evidence on that premise.

64. Mr Pannell is a Chartered Accountant of 13 years experience in the fields of economic and financial analysis, and also accounting and auditing. He is

an affiliate senior director for FTI Consulting's Economic and Financial Consulting practice here and in London. He previously worked in Ernst and Young as an Auditor within the Retail, Consumer and Industrial Products Assurance Division of that firm. He provided strategic and advisory services to non-governmental organization in several African countries and the United Kingdom.

65. Mr Pannell has provided evidence as an expert in Commercial Court of the United Kingdom in the well-known case of *Berezovsky v Abramovich* involving valuation of shares in a Russian oil company. He has also given advice and testified in several arbitration cases here and abroad. In particular he has provided expert report relating to calculation of losses in pharmaceutical cases before the Chancery Division and the Commercial Court of the United Kingdom.

66. From the aspects of Mr Pannell's qualifications and experience that I have described above it becomes clear that he too has the necessary expertise in the calculation of damages in matters such as those raised in the present arbitration. I therefore readily accept that he has the necessary expertise on the matters dealt in that part of the FTI Consulting report for which he is responsible, and approach his oral testimony as an expert.

G. *The methodology adopted by Prof Mncube and Mr Pannell*

67. The experts make it clear that their mandate was to calculate loss of profit asserted by the claimant from the alleged breaches of the Supply Agreement by the Lesotho Government, and also the loss of the first opportunity to provide other renewable projects in Lesotho pursuant to the terms of the Supply Agreement.[3] They also make it clear that their calculation is based on the assumption that notice of the breaches of the Supply Agreement was sent to the Government of Lesotho on 11 March 2019 and that the Agreement was terminated on 29 July 2019. On that premise they assumed that the Assessment Date for the calculation of losses claimed is 11 March 2019.

68. The expert also assumed that the claim for loss of opportunity for other renewable energy projects contended for by the claimant relates to the Mafeteng project to which Mr Frazer testified.[4] As is fairly reasonable in matters of this kind the experts make it clear that their report does not deal with matters of law or opinions beyond their expertise, and that they do not provide any evidence of fact. Theirs is simply evidence of expert nature relating to calculation or computation of damages asserted on behalf of the claimant.[5]

---

3 Page 7, paras 2.1 and 2.2 of the FTI Consulting report.

4 Page 4, para 1.21 of the FTI Consulting report.

5 Page 5, para 1.23 of the FTI Consulting report.

69. The calculation of damages performed by the experts takes into account the relevant context of the nature and extent of the renewable energy Project proposed by the claimant in the Supply Agreement, the rationale of that Project and the economic perspective thereof having regard to the energy requirements, supply and demand dynamics of the energy sector in Lesotho. Sections 3 and 4 of the FTI Consulting report for which Prof Mncube is responsible deal extensively with those matters. I do not consider it necessary to repeat what the report says in that regard, save to note the following:

69.1. The Project included the supply and installation of 34 000 to 40 000 SWHs, to replace electrical geysers and up to 1. 5 million LED lights in various Government buildings and civil servants residential homes in Lesotho, consistent with the energy policy of that country.

69.2. Had it been implemented, the Project would have saved approximately 200 million kWh per annum of electricity, on the basis that a single SWH has the capacity to save approximately 5 000 kWh per annum.

69.3. A single SWH would have been purchased at €2 500. The maximum of 40 000 SWHs contemplated in the Supply Agreement would have been purchased at total price of €100 million which is

equivalent to the value of the Project specified in the Supply Agreement.

69.4. Had the Project been implemented the claimant would have been required to provide a minimum of 300 000 and a maximum of 350 000 solar lanterns (75 000 of which would have been provided without a charge by the claimant) which would have been distributed to non-electrified households in the rural parts of Lesotho.

69.5. The calculation of the expert indicates that each solar lantern would have generated 102.2 kHw of electricity at the cost of €52 per unit, with the total cost of €13 260 00.

69.6. The benefits of the Project arising from the saving of 200 kHw per annum of electricity would have reduced Lesotho's dependence on imported electricity and thus reduce the costs associated with the importation of electricity from South Africa and Mozambique.

69.7. The use of lanterns would also have eliminated the use of paraffin and candle lights in households where there would have been installed.

69.8. The Project would not have involved an upfront payment of the purchases of the renewable energy products by the Government

of Lesotho as it would have been funded from loans provided by KfW and the DBSA, repayable from positive cash-flows generated by the Project over a short payback period.

70. The experts also make it clear that their approach to the calculation of damages is based on the instruction that, as a matter of law, the award of damages for breach of contract is ordinarily intended to restore the innocent party to the financial position it would have been, had the contract been properly performed. I accept that the approach is correct, and is supported by South African general principle discussed in case law placed before me on behalf of the claimant.[6]

71. Based on that approach the experts considered the financial position the claimant would have been had the Project proceeded as planned (described as the counterfactual position) and the financial position the claimant is actually in, as a result of the breaches and the Project not proceeding (described as the actual position).[7] It is the difference between the two positions that represent the damages calculated by them.

72. In assessing the claimant's counterfactual position the experts assessed the profits the claimant would have earned as at the assessment date had

---

6 *Trotman v Edwick* 1951 (1) SA 443 (A), at 449B-C;
Food & Allied Workers Union v Ngcobo NO and Another 2013 (5) SA 378 (SCA), para 55;
Cirano Investments 307 (Pty) Ltd v Execujet Aviation (Pty) Ltd (10831/12) [2014] ZAGPJHC 207 (22 March 2014), para 7.

7 Page 41, para 5.3 of the FTI Consulting report.

the Project proceeded, in terms of the Supply Agreement.[8] They also concluded that the factual position is that the claimant received nil profits.[9]

G. *The experts' assessment of damages based on the main claim*

73. The first part of the assessment relates to liquidated damages asserted by the claimant. The experts concluded that the liquidated damages suffered by the claimant as at the assessment date is in the order of €50 million. That calculation is based on the draw downs and direct transfer of funds from the funders the claimant would have received from the date of commencement of the Project, 1 October 2018 to the first date of the sixth month after the commencement date, i.e. 1 April 2019.

74. On the commencement date of 1 October 2018 the claimant would have received 30% of the Project value, i.e. €30 million, had the Project proceeded. On the first day of the sixth month after the commencement date the claimant would have received 20% of the Project value, i.e. €20 million had the Project proceeded.

75. The period of six months calculated from the date when the Project would have commenced to the date the claimant gave notice of breach to the Lesotho Government to remedy that breach, it being 11 March 2019. For

---

8 Page 41, para 5.4 of the FTI Consulting report.

9 Page 42, para 5.6 of the FTI Consulting report.

the above period the claimant would have drawn down and received direct payments from the finance providers in the sum of €50 million. Thus, the amount of €50 million represent liquidated damages which the claimant contends that it is entitled to pursuant to the provisions of clause 22.2.2 of the Supply Agreement.

76. The second part of the experts' calculation of the claimant's damages is based on the value of profits claimed on the basis of the loss of opportunity to provide other renewable energy projects to Lesotho Government within a period of five years of the Supply Agreement. That loss is based on the alleged breach of clause 18 of the Supply Agreement by the Lesotho Government.

77. The evidence relied upon by the experts of their calculation relates to Mafeteng Project which is the Chinese Government sponsored project, funded by a Chinese State-Owned Bank. The project related to the implementation of a 70 MW solar farm energy project in Mafeteng to the equivalent of €120 million. They relied in that regard on the evidence of Mr Frazer and newspaper articles reporting on the Mafeteng Project.[10] They also relied on a quotation obtained on 10 September 2019 by Mr Frazer from Coronium for the costs of installation of rooftop Solar PVs for a plant capacity of 7 000Mw.

---

10 Page 44, para 5.19 and footnote 104 of the FTI Consulting report.

78. Taking into account the sale price per unit of each rooftop PV, the installation costs, the overheads per Watt for each unit, the finance structure, the project period of 12 months and the discount rate of 3.5% for financing of a project similar to Mafeteng Project, the experts concluded that the value of the profits the claimant would have earned from that project is €52.1 million (rounded off).[11]

79. In the result, the experts have arrived at the sum of €102 million as the damages suffered by the claimant under its main claim.[12]

I. *The experts' assessment of damages based on the alternative claim*

80. Here too, the experts calculated the damages claimed in two parts. The first part relates to calculation of the value of profits the claimant would have earned had the Project continued. The second part relates to the calculation of damages arising from the loss of opportunities to provide other renewable energy project to the Lesotho Government in terms of clause 18 of the Supply Agreement.

81. As to the first part the experts took into account each of the product mix of the renewable energy components the claimant would have supplied and quantities thereof. Table 6-1 of the report summarises the relevant

---

11 Page 64, para 8.7 to page 65, para 8.14 of the FTI Consulting report.

12 Page 64, paras 9.1 and 9.2 of the FTI Consulting report.

quantities of each product mix. It then proceeds to describe the sale price per unit of each of the product mix. It concludes that for the total quantities of SWHs the claimant was required to supply, it would have earned revenue of €77.24 million; for the total solar lanterns the claimant would have supplied (excluding the quantities it was required to provide without charge) the claimant would have earned €13.26 million; for the solar PVs the claimant would have earned revenue of €8.5 million; and for the LED lights the claimant would have earned revenue of €1 million. Thus the total revenue earned would have amounted to €100 million.[13]

82. Next, the experts analyzed the Project overheads associated with the earning of the above revenue. They rely on estimates provided by Mr Frazer. The total and extent of the costs concerned are set out in table 6.2 of the report. The experts concluded that the total Project overheads would have amounted to €2.1 million.[14]

83. Thereafter, the experts proceeded to analyze the estimated cost per unit of each SWH the claimant was required to supply. They had regard to the cost of manufacturing of each unit at KBB's factory in Tunisia, the shipping costs to assemble the final product in Germany and thereafter transportation to Lesotho before installation. All of the above Ex-works cost per unit amount to €811. The additional cost the experts took into account include the claimant's cost per unit of €24, freight and insurance

13 Page 48, para 6.10 to para 6.12 of the FTI Consulting report.

14 Page 49, paras 6.14 to 6.17 of the FTI Consulting report.

cost of €195, installation cost of €123 and proportional allocation of overhead per unit of €53. They then arrived at the total cost of per unit of €1 206.[15]

84. Taking into account the sale price of €2 500 and the total cost per unit to supply each SWH of €1 206, the experts concluded that the margin of profits per unit the claimant would have earned would be in the order of €1 294 per unit which represents a margin of 51.8% of the Project cost of SWHs the claimant was required to supply.

85. Having regard to the total of 30 896 quantities of SWHs the claimant was required to supply, the profits it would have earned for the supply thereof at €1 294 per unit amount to €39.98 million.[16]

86. For the solar lanterns the experts have identified the sale price of a lantern at €52 per unit in terms of the Supply Agreement. They then took into account the net quantities of the total quantities of solar lanterns the claimant was required to supply, 255 000 (being the maximum of 330 000 minus 75 000 solar lanterns supplied without charge). They then concluded that the total revenue the claimant would have earned for the

---

15 Page 50, para 6.18 to page 51, para 6.26 of the FTI Consulting report.

16 Page 52, para 6.29 to 6.30 of the FTI Consulting report.

supply of the total quantities of the lanterns would have been €40.18 million.[17]

87. The experts analyzed the costs associated with the purchase and supply of solar lanterns on a unit basis. They identified the purchase cost price of €16.10 per unit, based on the estimation furnished to them by Mr Frazer. They then identified the cost of freight and insurance per unit per of €1.10, the distribution costs per unit of €0.38 and the proportional overhead allocation of overheads per unit of €0.84. Taking into account all of these costs, the experts concluded that the profit per unit the claimant would have earned is €18.42.[18]

88. Thereafter, the experts deducted the total cost of €18.4 million from the total revenue of €40.2 per solar lantern, and arrived at a profit margin per unit of €21.8, which represents 54.1% of the Project value for the supply of solar lanterns. Having regard to the total quantities of the solar lanterns the claimant was required to provide the experts concluded that the total amount the profit the claimant would have earned for the supply of solar lanterns is €7.18 million.

89. Next, the experts considered the profits arising from the supply of rooftop solar PV. They relied on the evidence obtained by Mr Frazer from

---

17 Page 55, paras 6.40 to 6.43 of the FTI Consulting report.

18 Page 53, para 6.31 to page 54, para 6.39 of the FTI Consulting report.

Coronium. Elsewhere in this award, I have dealt with that evidence, in the context of the experts' assessment of the calculation of the claimant's asserted damages for loss of opportunities to provide other renewable energy projects to the Government of Lesotho, more specifically the Mafeteng Project. The experts' analysis is the same in that regard except that the quantities of the rooftop unit of relevance to the computation of the claimant's damages is far less, being 5 000 rooftop solar PVs. The total amount of profit assessed by the experts in this regard is €4 million which represents 47% of the Project value of the rooftop PVs the claimant was required to supply in terms of the Supply Agreement.[19]

90. Next, the experts assessed the profits the claimant would have earned in respect of the supply of the solar LED lights. Table 6-8 of the FTI Consulting report summarizes the relevant revenue per unit as against the cost per unit. It concludes that the claimant would have earned profits of €0.48 million (rounded off as €0.5 million) had the Project proceeded.[20]

91. Finally, the experts summarized the profits that claimant would have earned from all the product mix of renewable energy products the claimant would have supplied in table 6-19 of the FTI Consulting report. The total sum arrived at is €51.6 million, which represents 51.6% of the

---

19 Page 55, para 6.43 to page 57, para 6.50 of the FTI Consulting report.

20 Page 57, para 6.51 to page 58, para 6.53 of the FTI Consulting report.

value of the Project.[21] It is that loss of profit the claimant asserts as the first part of its alternative claim.

92. The second part of the damages contended by the claimant in its alternative claim is the value of the profits it would have earned from the Mafeteng Project had the respondent not breached the Supply Agreement. In paragraphs 76 to 78 above I have explained the methodology adopted by the experts, the assumptions they made based on instructions to them and the evidence they considered, as well as the amount they arrived at. It is the same amount which is claimed in the alternative claim. I therefore do not repeat what I have said in that regard, save to emphasize that the amount claimed here too is €52.1 million.

93. In summary, the total amount of damages calculated by the experts in respect of the alternative claim is the sum of €103.7 million.

J. *Evaluation of the claimant's case*

94. On the facts Mr Frazer is the only witness who testified. He presented the claimant's version based on personal discussions and negotiations he had with relevant officials of the Lesotho Government, when he made the proposal to them, and negotiated the Project with them, concluded the preceding MoU and finally concluding the Supply Agreement.

---

21 Page 59, para 6.54 of the FTI Consulting report.

95. I have no reason to doubt the evidence of Mr Frazer. Quite apart from the fact that his was the only version before me, his evidence derives corroboration and is supported by documentary evidence of a contemporaneous nature, and generated over a reasonably long period of time from the moment he conceived of the Project, proposed and negotiated it with the officials of the Lesotho Government.

96. I also take into account and place emphasis on the fact that the proposal by Mr Frazer, and ultimately conclusion of the Supply Agreement, were consistent with and sought to promote some of the preeminent objectives of the energy and renewable energy policies of the Lesotho Government, to reduce costs of electricity imports, add self-sufficiency to its energy requirements, broaden access to affordable energy and ultimately contribute to the alleviation of poverty in that country. All of these benefits can no longer be attained, at least via the Project concluded in terms of the Supply Agreement.

97. I also do not lose sight of the fact that there was placed before me contemporaneous tripartite correspondence that had passed between Mr Frazer, Minister Tsolo and KfW regarding the commitment by KfW to fund the Project in principle, and the request by Minister Tsolo to KfW to provide a formal offer to the Lesotho Government for the financing of the Project.

98. Furthermore, the Supply Agreement was signed by Minister Tsolo in his capacity as the Minister in the office of the Prime Minister, and acting on behalf of the Government of Lesotho. Mr Frazer explained at length circumstances leading to the signature of the Supply Agreement. Again, I have no reason to doubt his evidence. There is no suggestion at all that the signature of Minister Tsolo on the Supply Agreement is not his or amounts to fraud.

99. More disconcerting about the attitude of the respondent, is the fact that the notice of arbitration, the claimant's statement of claim, Mr Frazer's witness statement and the FTI Consulting report were served at the Office of the Prime Minister. All of these documents set out at length the case of the claimant and the version of Mr Frazer asserting not only the conclusion of the Supply Agreement but also the breaches thereof by the Government of Lesotho. That case has been left unanswered by the Government of Lesotho.

100. Insofar as the evidence of the breaches of the warranty provisions described in clause 17 of the Supply Agreement, I accept that the Government of Lesotho did provide the warranties referred to in clauses 17.1.1 to 17.1.3, 17.1.5 to 17.1.7, and that its conduct was inconsistent with and in breach of those warranties.

101. I accept that the implementation of the Project had to take place soon after the conclusion of the Supply Agreement, having regard to the following considerations:

101.1. The Supply Agreement was negotiated over a long period. It was concluded on 24 September 2018 and provided for the commencement date of 1 October 2018, few days after its conclusion.

101.2. Secondly, clause 17.2 of the Supply Agreement expressly communicated to the parties that time was of essence to the implementation of the Project, and that the Government of Lesotho will ensure that the Project was implemented smoothly without interruption and undue delays. Other parts of the Supply Agreement including 5.1.4 repeat a similar acknowledgement by the Government of Lesotho that time was of essence to the implementation of the Project.

102. I also accept that the Project was not implemented because Minister Majoro, in his capacity as the Minister of Finance refused to execute the necessary Finance Agreement that were required to give effect to the Project. The evidence of Mr Frazer in this regard is that both the Prime Minister and Minister Tsolo wanted the Project to proceed, and when he confronted Minister Majoro about the delay in executing the Finance

Agreements, the latter intimated that the Project had to be sponsored by the Minister of Energy and had to receive the approval of Cabinet.

103. Whatever the explanations Minister Majoro may have given, it is quiet clear that the Supply Agreement had already been concluded by the time he conveyed his reservations to Mr Frazer. The terms of the Supply Agreement, especially clause 17.1.3 made it clear that the Government of Lesotho had warranted that it would have concluded the Finance Agreement prior to or simultaneously with the execution of the Supply Agreement. The terms of the Supply Agreement, more particularly clause 17.1.1 also made it clear that the Government of Lesotho had warranted that the Supply Agreement complied with all the laws of that country in respect of the procurement of renewable energy products referred to in the Project.

104. On the evidence of Mr Frazer it is reasonable to conclude that Minister Majoro was not prepared to executive Finance Agreement because he had by then expressed preference and committed his support to a competing renewable energy project in Mafeteng.

105. I therefore conclude that the Government of Lesotho has committed a material breaches of clauses 5.1.4 read with 17.2, and also clauses 17.1.1 to 17.1.3 as well as 17.1.6 and 17.1.7. These clauses were crucial to the implementation of the Project and their breaches went to the root of the Supply Agreement.

106. In argument, it was emphasized on behalf of the claimant that the Government of Lesotho also breached clause 12.1 of the Supply Agreement, in that it failed to ensure payment of the claimant in accordance with the draw down schedule set out in that clause. I accept that contention, as it is the necessary and logical consequence of the failure to execute the Finance Agreement pursuant to clause 17.1.3 of the Supply Agreement. I therefore conclude that the claimant was entitled to terminate the Supply Agreement in July 2019 having afforded the Government of Lesotho a prior opportunity to remedy the breaches within 60 days but had failed to do so.

107. I now turn to consider the evidence of Mr Frazer relating to the alleged breach of clause 18 of the Supply Agreement. I have referenced the express terms of clause 18 in paragraph 30.2 of this award. The operative part of that clause which would have entitled the claimant to the contractual right of the first opportunity to execute additional renewable projects with the Government of Lesotho is that those opportunities must form part of "*all other renewable energy ... opportunities*". The question which arises is whether the Mafeteng renewable project falls within the scope of other renewable projects.

108. Even on the most generous consideration of Mr Frazer's evidence, I cannot conclude that the Mafeteng Project is such other renewable energy opportunity within the contemplation of clause 18 of the Supply

Agreement. I come to this conclusion based on the following considerations:

108.1. Supply Agreement failed because Minister Majoro refused to sign the Finance Agreement. The explanation of his refusal by Mr Frazer is that Minister Majoro had committed himself to the Mafeteng Project which was competing with that of the claimant.

108.2. In his evidence Mr Frazer regarded the Mafeteng Project as the competing project. He expressly says so in his written statement, particularly in paragraph 87 of that statement. His complaint in that regard is that the Mafeteng Project was higher in cost than what the claimant would have offered to compete with it.

108.3. There is no suggestion, and there was no evidence emanating from Mr Frazer, that the Mafeteng Project was decided upon by the Lesotho Government, and supported by Minister Majoro, as a further project in addition to what the Government of Lesotho had committed itself to implement the Project under the Supply Agreement.

108.4. Far from it, both Projects competed with one another, and the survival of the Mafeteng project meant the demise of the claimant's under the Supply Agreement.

108.5. Finally, the substantive factual basis of the other breaches of the Supply Agreement which gave rise to the cancelation of the Supply Agreement is the Mafeteng Project.

109. In sum, I conclude that the claimant has not made out a case for the breach of clause 18 of the Supply Agreement by the Lesotho Government.

K. *The quantum of damages*

110. From what I have set out above the damages which the claimant is entitled to recover relate to the breaches of the provisions of the Supply Agreement described above other than the breach of clause 18 thereof. In other words is entitled to recover only that part of the damages described as liquidated damages in its main claim or loss of profits in its alternative claim.

111. The liquidated damages claimed and computed by the expert, with reference to clause 12 of the Supply Agreement is €50 million. The value of the loss of profits calculated in the alternative claim is €51.6 million. Although the latter amount is higher the Claimant elected to proceed with the recovery of the liquidated damages and made it clear that the amount of the value of the lost profit calculated in its alternative reflected the reasonableness of the quantum of liquidated damages agreed to and recoverable in terms of clause 12 of the Supply Agreement.

112. In the light of the claimant's election, the fact that the amount of liquidated damages sought to be recovered is reasonably and clearly quantifiable from the terms of clause 12, and that the parties' Agreement thereon is clear and unambiguous, I conclude that the claimant is entitled to recover liquidated damages in the sum of €50 million.

113. I have already expressed the conclusion that the claimant has not made out a case for the breach of clause 18 of the Supply Agreement. It follows therefore that the claimant is not entitled to recover damages for the value of the profits it would allegedly have earned from the Mafeteng Project, which he experts have calculated as €52.1 million. I therefore dismiss that part of the claimants' claim, in its main and alternative formulations.

114. The damages claimed are in foreign currency, namely the Euros. Our Courts have long accepted that damages may be awarded in foreign currency in an appropriate case.[22] I consider the present case to be a fitting one for the award of damages in Euros because of the following factors:

114.1. The value of the Project was fixed in terms of Euros, despite the parties' election of the South African law as the law of arbitration.

---

22 *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A), at 774F-H.

114.2. Although performance of the Project by the claimant would have been in Lesotho the claimant would have been compensated in Euros as was agreed to in clause 12 of the Supply Agreement, had the Agreement been implement to its conclusion.

114.3. Compensation in Euros would place the claimant, as far as is reasonably possible, in the same position as it would have been had the respondent not breached the terms of the Supply Agreement, and in the light of the breaches that the claimant has shown. It would not expose the claimant adversely or beneficially to the variation of the exchange rate between the Euros and Malotis.

L. *Interest*

115. The claimant seeks payment of interest on the damages awarded in two ways. The first is interest that accrues before the arbitration award, the so-called pre-award interest. The second is interest that accrues after the award until the date of payment of the damages awarded, the so-called post-award interest. The claimant asks that I should grant the interest claimed pursuant to the discretion conferred in Article 31(5) of the Model Law incorporated in the International Arbitration Act because there is agreement between the parties as to the payment of interest and the rates thereof.

116. The claimant also contends that the interest claimed should be awarded in the Euro currency and at the rate of 2% per annum, being the Euribor rate utilized by the European banks for inter-bank lending transactions. The basis of the contention, as I understand it is that the damages are claimed in the Euro currency, it being a currency that has been fixed and agreed upon by the parties in terms the Supply Agreement.

117. The experts have calculated the quantum of the interest claimed at the rate of 1.7% per annum in respect of liquidated damages and 1.64% per annum in respect of damages for the value of profits that would have arisen from the lost opportunity arising from the alleged breach of clause 18 of the Supply Agreement. For the present purposes I shall ignore the interest rate calculated at the rate of 1.64% per annum as it is not relevant in the light of my conclusion that the claimant is not entitled to recovery of damages in terms of clause 18 of the Supply Agreement. I shall therefore consider the interest rate urged in respect of liquidated damages.

118. The experts have calculated that the daily amount of the interest claimed in respect of liquidated damages at the rate of 1.7% per annum would be €2 328 per day. They then considered the period of the pre-award damages to be the date of the breach communicated to the Government of Lesotho on 11 March 2019 to the date of the delivery of the award. Because the experts were not certain of the date of the delivery of the award, they calculated the pre-award interest as follows:

118.1. The first is from the date on which the breach of the Supply Agreement was communicated to the respondent, 11 March 2019 to the date of the hearing, 2 December 2019. For this period they experts arrived at the value of the pre-award interest of €621 577.

118.2. The second is the period after the hearing, to the date of the delivery of the award. They assumed that the award would be delivered within a period of 60 days contemplated in the rules of the Association. For that period the experts arrived at the amount of €280 560.

119. I accept that I have a discretion to award interest in terms of Article 30(5) of the Model Law. I consider that it is appropriate and fair in the circumstances of the present case to award interest for the damages that accrues to the claimant in respect of the liquidated damages. I have come to this conclusion on the basis that the respondent's breach of the Supply Agreement was communicated to it on 11 March 2019, was afforded a period of 30 to 60 days to remedy the breach but failed to do so, and has not explained its failure to remedy the breach. In these circumstances the claimant ought not to be prejudiced. The award of interest would place the claimant in monetary terms, in respect of the liquidated damages, in a position it would reasonably have been had the respondent not breached the Supply Agreement.

120. I accept that the payment of interest in the Euro currency is also appropriate and fair, in the light of the fact that the damages claimed are based on the liquidated damages calculated in accordance with clause 12 of the Supply Agreement which required payment in terms of the Euro. I have awarded damages in that currency and interest should be awarded in that currency.

121. I accept that the Euribor rate as calculated by the experts is appropriate and fair. Insofar as the first part of the pre-award interest calculation is concerned, I accept the calculations of the experts and will award interest for that portion in the amount of €621 577. In respect of the second part of the pre-award interest I would reduce the period because the experts assumed that a period of 60 days, for the delivery of the award, when in fact it took 57 days to do so. I would therefore allow the interest for that period for 57 days multiplied by the daily amount of €2 328. On that basis I arrived at the interest in the sum of €132 696.

122. In sum, my award will allow payment of pre-award interest in the total amount of €754 273, and payment of the post-award interest at the rate of 1.7% per annum in the Euro currency.

M. *Costs*

123. The claimant contends that I should exercise the discretion conferred upon me in terms of Article 30(6) of the Model Law to award costs of the

arbitration to it. The extent of the costs claimed are set out in the schedule attached to the claimant's note on the submissions on costs under cover of its letter dated 19 December 2019.

124. I accept that I do have that discretion to award costs. I believe that I should exercise that discretion in favour of the claimant because it has succeeded in recovery of portion of the damages claimed by it. The normal rule that the costs should follow the result should apply in the present arbitration, it being an international commercial arbitration.

125. I also accept that the costs set out in the schedule to the claimant's note on submissions on costs are fair and reasonable, as they include the recovery of the fees and expenses of the claimant's legal representatives, including the travelling disbursements. They also include the costs of employment of the claimant's experts which are justified. I also direct that the costs recoverable should include the fees of the arbitrator in accordance with the final invoice I shall submit to the claimant's legal representatives.

N. *Conclusion*

126. The award I make is the following:

126.1. The respondent is directed to pay the claimant liquidated damages in the sum of €50 million.

126.2. The respondent is ordered to pay pre-award interest on the above sum of €50 million in the amount of €754 273.

126.3. The respondent is also ordered to pay the post-interest award in the sum of €50 million calculated at the rate of 1.7% per annum from the date of the award to date of payment, and payable in the Euro currency.

126.4. The respondent is ordered to pay the costs of the arbitration as are described in the schedule attached to the claimant's note on submission of costs signed by the claimant's legal representatives, Withers LLP, on 19 December 2019.

126.5. In addition, the respondent shall pay the costs of the fees of the arbitrator in accordance with the final invoice submitted ~~to~~ by the arbitrator to the claimant's legal representatives.

DATED AT SANDTON ON THIS THE 28TH DAY OF JANUARY 2020.

VINCENT MALEKA SC
ARBITRATOR