

IN THE MATTER OF AN ARBITRATION UNDER THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
ARBITRATION RULES (UNCITRAL RULES)

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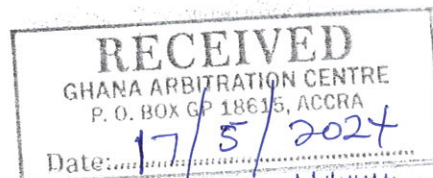
IN THE MATTER OF AN ARBITRATION AT THE GHANA ARBITRATION CENTRE

BETWEEN

ASHANTI PORT SERVICES LIMITED (APSL) - **CLAIMANT**

v.

THE MINISTRY OF TRANSPORT (MoT) ACTING THROUGH
GHANA SHIPPERS' AUTHORITY (GSA) - **RESPONDENT**



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10:37am

NOTICE OF ARBITRATION
MAY, 2024

A. INTRODUCTION

1. Ashanti Port Services Limited (APSL), hereinafter referred to as “the Claimant”, submits this Notice of Arbitration pursuant to Clause 8.7.2 of the Concession Agreement (CA) dated 25th September, 2020, between APSL and the Ministry of Transport (MoT) Acting through the Ghana Shippers’ Authority (GSA) (hereinafter referred to as “the Respondent”) for the development of the Boankra Integrated Logistics Terminal (BILT) Project on a Build Operate and Transfer (BOT) basis to Afum Quality Limited (AQL).
2. The claim revolves around the unlawful termination of the Concession Agreement (CA) between the Claimant and the Respondent **by** the Respondent pursuant to letters dated 5th July, 2023 and 21st August, 2023 for alleged failure by Claimant to cure relevant breaches and/or defaults including failure to achieve Financial Close within the Cure Period.
3. It is again the case of the Claimant that the purported termination of the Concession Agreement by the Respondent resulted in Respondent unlawfully taking possession and control of the BILT Project site infrastructure forthwith; controlling any materials, construction plant, stores etc., on the site; preventing APSL as Concessionaire from entering the site and unlawfully succeeding the Concessionaire under the BILT Project.

B. NAMES AND CONTACT DETAILS OF PARTIES TO THE ARBITRATION

1. The Claimant in this arbitration is:
Ashanti Port Services Limited (APSL)
Ground Floor, Flat 1, Providential
Court, UPSA Road, P. Box Ct 5358,
Cantonments, Accra
2. The Claimant is represented in this arbitration by:
Maame Sarpong, Esq
G. A. Sarpong & Co.

House No. C301/3

Kanfla Close

Asylum Down, Accra

Tel: 0242536576/0302223411

Email: maame@gasarpongandco.com

3. The Respondent in this arbitration is:
- The Ministry of Transport (MoT) Acting through
The Ghana Shippers' Authority (GSA)
Of 7th Floor, Ghana Shippers' House No. 12,
Cruickshank Street Ambassadorial Enclave,
West Ridge P. O. Box GP 1321,
Accra, GA-078-5940
Tel:+233(0)302-666915-7/666463
Fax: +233(0)302-668768
E-mail: info@shippers.org.gh
Website: www.shippers.org

C. THE ARBITRATION CLAUSE

The Concession Agreement dated 25th September, 2020 and executed between the Claimant and the Respondent provides as follows:

Clause 8.7.2. of the Concession Agreement at Page 71 states thus:

Arbitration

"In the event that Parties are unable to reach an amicable settlement in respect of a dispute or difference of claim of any kind such dispute or difference or claim of any kind shall finally be settled under the United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Rules"), arbitrators appointed in accordance with the said UNCITRAL Rules as provided for in Clauses 8.7.3 to 8.7.8 below."

D. SUMMARY OF DISPUTE

The Concession Agreement

1. Following an international bidding process, the Ministry of Transport (MOT), acting through the Ghana Shippers' Authority (GSA), awarded the Concessionaire rights for the development of the Boankra Integrated Logistics Terminal (BILT) Project on a Build Operate and Transfer (BOT) basis to Afum Quality Limited (AQL). The BOT was for 30 years to be managed by the Concessionaire; the first three (3) years for the construction of the BILT Project, and the remaining twenty-seven (27) years for Operations with a projected Profit Margin of **Three Billion, Six-Hundred and Eighty-Three Million, Seven Hundred and Twenty Thousand, Seven Hundred and Eighty-Five United States Dollars (US\$3,683,720,785)**.
2. Ashanti Port Services Limited (APSL), the Claimant herein, was formed as a Special Purpose Vehicle (SPV) to represent a consortium member of AQL, providing technical expertise and financial aid for the BILT Project.
3. The BILT Project falls under natural resource use by the State, and was approved and ratified by the Parliament of Ghana in favour of the Concessionaire (Claimant herein).
4. The Concession Agreement, signed on 25th September, 2020, aimed to create a vital infrastructure linking the ports of Tema and Takoradi to the inner parts of Ghana and the landlocked countries of Burkina Faso, Mali, and Niger.
5. After the execution of the Concession Agreement, Respondent compelled the Claimant to organize a sod-cutting ceremony, prior to fulfilling preconditions necessary for the performance of its obligations under the Concession Agreement, thus putting Claimant to huge financial expenses.
6. The Claimant undertook substantial groundwork for the sod-cutting ceremony, including expanding and graveling the road from the entrance of the project site to the Administration Block.
7. The Claimant and AQL thereafter, rigorously pursued the other necessary preconditions for the BILT Project, such as technical and engineering designs, financing, and permits.

Genesis of Interferences by Respondent

8. Unlawful interferences by Respondent commenced when the Ghana Ports and Harbours Authority (GPHA), under the directive of the Respondent, sought to acquire shares in APSL. Despite APSL's hesitation, 39% of its shares, valued at Forty-Nine Million United States Dollars (US\$49 million) were sold to GPHA. A Share Purchase Agreement or Shareholders Agreement was subsequently executed on 11th September, 2022 between the Claimant and GPHA, and with an obligation to contribute towards the shares representing the 10% carried interest of GSA.
9. After the shares were sold to GPHA upon the intervention of the Respondent, the spirit initially underlying this idea by Respondent was for the proceeds to be reinvested into the BILT Project. This, however, turned out to be the case as the Respondent has acted in bad faith and we shall demonstrate below why we say so:
10. A search at the Office of the Registrar of Companies of Ghana on 25th January, 2024 revealed that, AQL holds 64,260,000 shares in the Concessionaire and GPHA also holds 49,140,000 shares in the same.

Material Interferences by Respondent

11. The Claimant subsequently submitted to the Independent Consultant, Vision Consult, as required under the Concession Agreement, its technical and engineering designs for the project from Claimant's Design Contractors.
12. The Respondent, however, insisted and directed Claimant to assign the technical and engineering design contract of the project to the same Independent Consultant, Vision Consult, thus creating conflict and uncertainty. This was captured in minutes of stakeholders meeting on the BILT Project held on 6th July, 2022 detailed in a document of the Respondent dated 3rd August, 2022.
13. The management of Claimant initially resisted payments being made directly to GSA but grudgingly succumbed to Respondent's insistence and wrote to GPHA to release the said amount of US\$33.3 million to Justmoh Construction Limited, the Contractor and GSA herein. By letters dated 7th July, 2022 by Claimant, 1st and 5th September, 2022 by Justmoh Construction Limited, 5th September, 2022 by Vision Consult, and 29th September, 2022, the US\$33.3 million was confirmed as having been received by the Contractor.
14. Moreover, the sector minister for Respondent (**the current Minister for Transport, Honourable Kwaku Ofori Asiamah**) directed the payment of Thirty-Three Million and

Three Hundred Thousand United States Dollars (US\$33.3 million), part of GPHA's shares, directly to the Contractor, Justmoh Construction Limited, contrary to the proper payment procedure, which required the first payment of the share values to be paid into the accounts of the Claimant herein being the Concessionaire under the Concession Agreement.

15. GSA has directed payment of additional sum of Sixteen Million United States Dollars (US\$16million) from GPHA to Justmoh Construction Limited, representing the balance of the total amount for the 39% shares in APSL acquired by the GPHA contrary to Claimant's letters to GPHA not to pay the balance of its shares to any entity, save Claimant itself.
16. Till date, Vision Consult, the Independent Consultant, has failed to review the technical and engineering designs submitted by the Claimant. The Claimant by letter dated 31st July, 2023 to GSA outlined some of the specific issues that had befuddled the BILT Project until now.
17. The Claimant protested, highlighting the conflict of interest in the Independent Consultant designing and reviewing its own work, but same fell on deaf ears. In effect, the Claimant was granted extensions because Vision Consult had not completed its designs. The cumulative burden was that, the Concessionaire's majority shareholder, AQL, was sunk into further expenses in the region of Sixteen Million, Three Hundred Thousand United States Dollars (US\$16,300,000).

Conflict of Interest Directives from Respondent

18. Claimant then requested for clarity on the cost of the design contract awarded to Vision Consult, but Vision Consult and GSA failed to provide any information.
19. Despite the foregoing, Interim Payment Certificates revealed payments of US\$2 million to the Independent Consultant by GSA, breaching the following agreements between the parties concerning the BILT Project:
 - i. *The Contract for Construction of Phase 1A of the BILT Project executed between the Claimant and Justmoh Construction Limited dated 30th August, 2022;*
 - ii. *The Contract between Respondent and Vision Consult Limited, the Independent Consultant; and*

- iii. *The Concession Agreement between the MOT (acting through Respondent) and Claimant.*

In summary, MOT's interference through Respondent has disrupted the project, leading to financial losses and compromising professional integrity.

Unauthorized Earthworks

20. Justmoh Construction Limited without lawful approval initiated extensive Earth Works (Cuts and Fill) at the BILT site, after the receipt of the of Thirty-Three Million and Three Hundred Thousand United States Dollars (US\$33.3 million) which deviated from the specified scope outlined in the Contract Agreement dated August 30, 2022, between the Claimant and Vision Consult.

Contravention of Contract Scope

21. Interim Payment Certificates (IPC) 2 and 3 disclosed substantial Earth Works by Justmoh Construction Limited, inconsistent with the Contract Agreement, particularly under the Special Conditions of Contract (GCC1.1.5.8, Page 107). Further, the Independent Consultant's approval of the valuation works of Justmoh Construction Limited without the Claimant's consent, despite the significant financial implications, violated due process and the Contract Agreement dated 30th August 2022.
22. In response to an inquiry by the Claimant, the Independent Consultant cited the topography and soil conditions as reasons for the Earth Works, estimating a cost not exceeding US\$4 million. This information emerged after the unauthorized Earth Works with the apparent approval and knowledge of the Independent Consultant.
23. Further, Justmoh Construction Limited in breach of the Special Conditions of Contract (GCC 4.4 Page 108) failed to assign thirty percent (30%) of the denoted contract sum to High Brains Company Limited as stipulated in the Contract.

Discrepancies in Cost Estimates For Earth Works

24. However, contrary to the initial estimate (which was not to exceed US\$4 million), the Independent Consultant presented IPCs indicating a staggering cost of over US\$30,000,000.00 for the Earth Works. The Independent Consultant's claim that the US\$4 million was a guess estimate raises concerns about intentional financial exploitation.

Additional Costs Incurred

25. The Independent Consultant, that is Vision Consult, and Justmoh Construction Limited as Contractor with approval from GSA, incurred additional costs of Thirty-six Million, Seven Hundred and Ninety-three Thousand, Six Hundred and Forty-one United States Dollars and Fifty-four United States Cents (US\$36,793,641.54) in earth works alone per the then Progress Reports Numbers 1, 2, 3, and 4. This expenditure was without recourse to Claimant and same did not form part of the Contract Agreement between the Concessionaire and Contractor. Claimant captured these concerns in its letter to GSA dated 30th June, 2023.

Negative Financial and Investment Implications

26. Contrary to the assurances of Independent Consultant on two occasions that the Earth Works would not exceed the unbudgeted Four Million United States Dollars (US\$4,000,000), the cost that was subsequently submitted by the Contractor and Independent Consultant was more than 100% of the estimate! This negatively affected the initial investment estimated cost of One Hundred and Twenty-six Million United States Dollars (US\$126,000,000.00), and the sum of One Hundred and Eleven Million United States Dollars (US\$111,000,000.00) which was awarded to the Contractor for the Phase 1A BILT Project. This is captured in a letter to Respondent dated 30th June, 2023.

The Nature of Material Variation

27. With the additional costs of Thirty-six Million, Seven Hundred and Ninety-three Thousand, Six Hundred and Forty-one United States Dollars and Fifty-four United States Cents (US\$36,793,641.54) incurred as a result of the unauthorized Earth Works, the initial investment of One Hundred and Twenty-six Million United States Dollars (US\$126,000,000.00) amongst other factors, could not be sufficient to undertake the BILT Project. This posed and poses serious impact on the Concession Agreement. By letter dated 30th June, 2023, Claimant notified GSA a second time about the variation which had serious impact on the Concession Agreement.

Submission of Design with Inflated Costs

28. The Independent Consultant had submitted IPCs for technical designs and Earth Works (Cuts and Fill) in the sum of US\$74 million, rendering the US\$111 million Contract approved by the Parliament of Ghana for Phase 1A unattainable. The Respondent directed the payment of IPCs, threatening termination if the Claimant refused. Claimant however refused to pay the said IPC's as there was the absence of

a Variation of the Agreement as stipulated under the Agreement (GCC 13.3) to cater for the drastic increase in the contract sum, which exacerbated the illicit nature of the actions of Justmoh Construction Limited.

29. Claimant further stated that the inflated prices quoted in the IPC's would substantially impact the financial model and profitability of the BILT Project and as such caution was warranted in matters related to Financial Close, given the discrepancies in reported costs.

Termination Attempt by Respondent

30. GSA by letter dated 5th July, 2023 to Claimant served a Preliminary Notice of Termination of the Concession Agreement alleging failure of Claimant to achieve Financial Close within the Cure Period.
31. Despite the Claimant's insistence on achieving Financial Close, Respondent, through GSA, purportedly terminated the Agreement on 21st August, 2023 on grounds that Claimant had not achieved Financial Close and subsequently proceeded to take over the management and control of the BILT Project.
32. Claimant by letter dated 30th August, 2023 to GSA objected to the Notice of Termination of the Concession Agreement stating that Financial Close had been achieved.
33. Claimant asseverates that on the issues of Financial Close, the Respondent's attitude and interferences have contributed to its complications. Nonetheless, the majority shareholder of APSL, that is AQL, secured a partnership arrangement with IIB Development Group of USA to facilitate the reaching of Financial Close. Afum IIB DG Limited, a special purpose vehicle was thus established and IIB Development Group Limited subsequently initiated a transfer of 300,000,000 Euros into the accounts of Afum IIB DG Limited to facilitate reaching Financial Close. AQL as majority shareholder of the Concession Agreement on 16th August, 2021 irrevocably undertook to apply the sum of 300,000,000 Euros or part thereof to meet the required sum of \$330,000,000 on or before the set date of 31st August, 2021.
34. Afum IIB DG Limited on 7th September, 2021 by letter requested its bankers, GCB Bank Limited to confirm to GSA the Letters of Credit opened with it by its partner, IIB Development Limited as evidence of the achievement of Financial Close.
35. Since GSA as the representative of the Government of Ghana exercises contractual supervisory role to ensure compliance or performance of the Concession Agreement,

GSA was duly notified by GCB Bank Limited (the Bank) on 10th September, 2021 that Afum IIB DG Limited was a registered company operating in Ghana, and in business relationship with the Bank.

36. The Bank also confirmed to GSA that Afum IIB DG Limited had in its favour two separate Irrevocable Standby Letters of Credit (SBLCs) issued totaling (€) 600,000,000 far in excess of the Financial Close figure of US\$330,000,000. Having met Financial Close, Afum IIB DG Limited on 17th September, 2021 by letter instructed the Bank to credit AQL's account with the Bank's Kumasi Main Branch with the cash in the sum of €50,000,000 on account of the two separate SBLC's to commence the First Phase of the Boankra Project on or before 24th September, 2021.
37. Contrary to the hard efforts of AQL, GSA did not act on the confirmations of the Bank to it on time, creating undue delays, eventually leading the Bank to cancelling the SBLCs from its banking system. Regrettably, this was in defiance of the confirmation given by the Bank to GSA about our Client having the sum far in excess to meet Financial Close.
38. What more, African Export-Import Bank ("Afreximbank") by their Term Sheet dated 17th October, 2023 agreed to a USD300 Million Project Finance Facility in favour of the Concessionaire, being APSL, the Claimant herein for the BILT Project. GPHA requested for a Zoom meeting with Afreximbank to ascertain the willingness of Afreximbank to provide the USD300 Million for the BILT Project which answer was in the affirmative. Afreximbank in line with its policies requested GPHA as a shareholder to provide its affirmation to fund the project and responses to the questions asked by Afreximbank during the Zoom meeting via electronic mail dated 27th December, 2023. GPHA has to date refused and failed to respond to the questions of Afreximbank under the pretext that the Honourable Minister for Transportation, Mr. Kwaku Ofori Asiamah, had terminated Claimant's contract under the Concession Agreement. Without cogent reasons or a sense of urgency, GPHA has to date refused to allow APSL and its consortium member (AQL) to sign the Term Sheet submitted to it as a shareholder notwithstanding the unlawful termination. The logical deduction is that, the Financial Close requirement has time without number been frustrated by GPHA and its major cronies, i.e., the Respondent, GSA and with the tacit support of the Honourable Minister for Transportation, Mr. Kwaku Ofori Asiamah.
39. Further, the Independent Consultant, (Vision Consult Limited), was imposed on the Concessionaire to assign the technical and engineering design contract of the project to the same Independent Consultant, thus creating conflict of interest and uncertainty. This was captured in minutes of the stakeholders meeting on the BILT Project held on 6th July, 2022 detailed in a document of the MOT dated 3rd August,

2022. Vision Consult Limited however failed to provide the detailed designs and technical specifications on time for the BILT Project and this remains a grave concern in the grand scheme of things. Due to the delay from GSA and Vision Consult Limited, the BILT Project was delayed in its operations.

40. Vision Consult Limited have further complicated the construction process as the absence of signed-off Contract Drawings, technical specifications, and bills of quantities have hindered the audit and approval process which in effect have wrought negative effects on the BILT Project.
41. Against the backdrop of the challenges largely orchestrated by the unlawful interferences and unhealthy demands by the Respondent, same have destabilized the BILT Project.
42. Claimant also stated in the letter dated 30th August, 2023 that the factors such as delays in submission of designs by the Independent Consultant have largely contributed to the delays in the progress of the BILT Project.

Failure of Mediation

43. On 19th September, 2023, mediation proceedings commenced under Clause 8.7.1 of the Concession Agreement but same was fraught with challenges, including conflict of interest issues with the appointed mediator (Vision Consult).
44. The Independent Consultant in charge of the designs was one and the same entity appointed as the Mediator to mediate the dispute amongst the Parties to the Concession Agreement. The mediation proceedings then became a wild goose chase as the Mediator was bound to be biased.
45. The Claimant by a letter dated 5th December, 2023 to GSA indicated that mediation had failed due to lack of timely responses, prompt and decisive dates by the Mediator for the continuation of the mediation process after well over a month of adjournment of the mediation proceedings.
46. The Claimant proceeded under Clause 8.7.1 (b) of the Concession Agreement. By letter dated 5th December, 2023 requested GSA to provide the name of its authorised representative to meet with the Board Chairman of the Board of Directors of the Claimant, to attempt a resolution of the issue of termination under the Concession Agreement, within 7 days upon receipt of the said letter. However, same was not complied with.

47. In effect, on 5th December, 2023, the Claimant notified GSA that Mediation had failed and would have no option than to proceed to Arbitration if Respondent failed to comply with Clause 8.7.1(b) under the Concession Agreement.

Petition To Ministry of Justice and Attorney General

48. Claimant, to forestall possible legal tussle that may saddle the State of Ghana with a judgment debt, after a meeting with the Attorney General in his office submitted a Petition to the Ministry of Justice and Attorney General on 14th November, 2023 outlining its case and issues arising from the Concession Agreement.
49. Claimant thereafter sent a reminder and a follow up letter to the Ministry of Justice and the Attorney General, dated 3rd January, 2024 and 16th February, 2024, respectively. The letters to date have received no attention. The State has thus failed to bring one of its institutions to order by refusing to direct GSA to remedy the breaches under the Concession Agreement.

Unlawful Termination Attempts by Justmoh Construction Limited

50. Justmoh Construction Limited has also attempted to terminate the Contract Agreement between Claimant and Justmoh Construction Limited without proper authority pursuant to letters dated October 18, 2023, and November 2, 2023, violating the terms of the Contract Agreement dated August 30, 2022.
51. Claimant on 19th December, 2023 filed Notice of Arbitration at Ghana Arbitration Centre against Justmoh Construction Limited praying the stated reliefs therein:
- “a. Recovery of the sum of Forty-Nine Million United States Dollars (US\$49,000,000.00) being the monetary value of Claimant’s shares paid to the Justmoh Construction limited, Respondent herein.*
 - b. Interest on the said US\$49,000,000. at the prevailing Bank of Ghana interest rate till date of final payment.*
 - c. An Order directed at the Respondent to assign thirty percent 30% of the denoted contract sum to High Brains Company Limited.*
 - d. Interim Injunction restraining the Respondent from carrying on any works at the BILT project site pending the hearing and determination of the Arbitration pursuant to Section 38 of the Alternative Dispute Resolution Act, 2010 Act 798.*
 - e. Damages for breach of the Contract Agreement dated August 30, 2022 by the Respondent.”*

The said Arbitration between Claimant and JUSTMOH are ongoing.

Works Continued During Mediation

52. Despite the requirement for the suspension of work on the BILT Project site during the period of Mediation, GSA, Justmoh Construction Limited, and GPHA have unlawfully continued works, circumventing the Concessionaire's consent.
53. GSA, Justmoh Construction Limited, and GPHA have unlawfully prevented Claimant from operating as Concessionaire on the BILT Project. They have failed to address the various breaches stated by the Claimant against them.
54. GSA, Justmoh Construction Limited, and GPHA **continue** to exercise management and control of the BILT Project without lawful authority. Recently in 2024, publications have been circulated in the Ghanaian social media, both online and offline; YouTube in particular, in celebration of BILT Project against the interest of the Concessionaire.

BILT Project Approved By Parliament of Ghana

55. The BILT Project which falls under natural resource use by the State was unilaterally terminated by the Respondent through GSA without lawful mandate. Material Constitutional breaches have been occasioned by the termination of the BILT Project with the Concessionaire without lawful basis.
56. The BILT Project which was approved and ratified by the Parliament of Ghana in favour of the Concessionaire has ostensibly been awarded to Justmoh Construction Limited by MOT through GSA without approval and ratification by the constitutional body which approved same for Claimant. Works and activities are ongoing on the BILT site without the consent and approval of the Concessionaire contrary to the Concession Agreement.

ARBITRATION

57. The Claimant asserts that the GSA together with Justmoh Construction Limited and Vision Consult Limited (Independent Consultant) persist in their unlawful works at the BILT Project site, necessitating intervention by the Arbitral Tribunal as stipulated in the Agreement between the Parties.
58. Claimant thus initiates these arbitration proceedings to address the disputes arising from the breaches under Clause 8.7.2 of the Concession Agreement dated 25th September, 2020.

F. RELIEFS SOUGHT IN THIS ARBITRATION

- a. A Declaration that the unilateral termination of the Contract by GSA is unlawful.
- b. A Declaration that the unlawful interferences of the Respondent acting through GSA were material breaches which contributed to GSA erroneously considering Claimant as having failed to meet Financial Close.
- c. Interim Injunction restraining the GSA from carrying on any works at the BILT Project site pending the hearing and determination of this Arbitration.
- d. General Damages for breach of the Concession Agreement dated 25th September, 2020 by the Respondent.
- e. Special Damages of the expenses incurred by Claimant in the region of Sixteen Million, Three Hundred Thousand United States Dollars (US\$16,300,000) with interest.
- f. An Order for a refund of the additional sum of Sixteen Million United States Dollars (US\$16million) paid by GPHA to Justmoh Construction Limited, representing the balance of the total amount for the 39% shares in APSL acquired by the GPHA.
- g. An Order for the refund of Forty-Nine Million United States Dollars (US\$49 million) representing 39% of Claimant's share value sold to GPHA.
- h. An Order for payment of Three Billion, Six-Hundred and Eighty-Three Million, Seven Hundred and Twenty Thousand, Seven Hundred and Eighty-Five United States Dollars (US\$3,683,720,785) being the projected income for the BILT operations period of 27 years.
- i. An Order for restoration of the contract in favour of Claimant as Concessionaire.
- j. Costs including legal fees.

Respectfully Submitted.

DATED AT G. A. SARPONG & CO. HOUSE NO. C301/3, KANFLAH CLOSE, ASYLUM DOWN, ACCRA THIS 17TH DAY OF MAY, 2024.