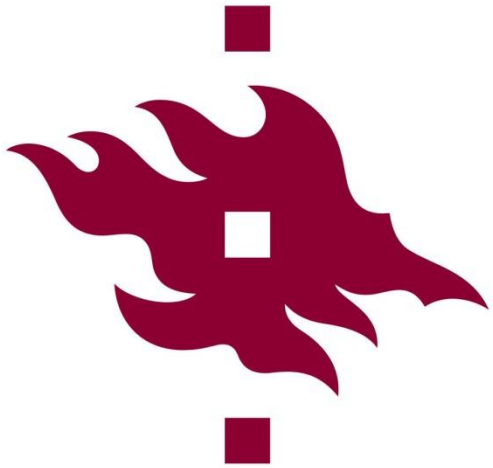
FOURTEENTH ANNUAL
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT



UNIVERSITY OF HELSINKI
HELSINGIN YLIOPISTO

On behalf of	**Against**
Wright Ltd	SantosD KG
232 Garrincha Street	77 Avenida O Rei
Oceanside	Cafucopa
Equatoriana	Mediterraneo
CLAIMANT	**RESPONDENT**

Miisa Happonen – Saramaria Kalkku – Iina Laak –

Patrick Lessmeister – Ina Rautiainen – Veera Sundberg

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

INDEX OF ARBITRAL AWARDS AND PROCEDURAL ORDERS xxiii

INDEX OF COURT CASES xxviii

TABLE OF ABBREVIATIONS xxxiii

INTRODUCTION 1

I. THE TRIBUNAL SHOULD ORDER RESPONDENT TO PAY THE OUTSTANDING PURCHASE PRICE 3

A1. The Parties implicitly agreed to apply the exchange rate at the time of payment 4

A2. In any case, the Parties did not agree to apply a fixed exchange rate 7

A2.1. The fixed exchange rate governing the sale of the clamps does not govern the sale of the fan blades 7

A2.1.1. The Agreement takes precedence over the Addendum 7

A2.1.2. The Addendum must be interpreted against its drafter, RESPONDENT 9

A2.2. The incorrect invoice does not indicate that a fixed exchange rate is to be applied 10

A2.3. The Parties are not bound by any established practice to apply a fixed exchange rate 11

A2.3.1. The Parties did not establish a practice between themselves 11

A2.3.2. In any case, an established practice would no longer be relevant 12

A3. Under the applicable law, the exchange rate at the time of payment applies by default 13

B. Respondent is liable for the bank charge deducted from the purchase price 14

B1. Under the Agreement, RESPONDENT is obligated to pay the bank charge 15

B2. Under the applicable law, RESPONDENT is obligated to pay the bank levy 16

B3. RESPONDENT had to observe all relevant regulations, of its own initiative 17

II. CLAIMANT'S CLAIMS ARE ADMISSIBLE 19

A. The arbitration was initiated on time 19

A1. The arbitration was initiated within the 60-day time limit 20

A2. In any case, the arbitration commenced within the 60-day time limit 21

B. Exceeding the time limit would not render the claims inadmissible 22

III. THE TRIBUNAL CANNOT AND SHOULD NOT ORDER CLAIMANT TO PROVIDE SECURITY FOR RESPONDENT'S LEGAL COSTS 24

A. The Parties did not agree on the Tribunal having the power to order security for costs 25
A1. The Agreement or the applicable laws do not provide for the power to order security for costs 25
A2. In any case, an order for security for costs undermines a party's access to justice and therefore should be agreed upon 27
B. The Tribunal should not order CLAIMANT to provide security for RESPONDENT's costs 28
B1. RESPONDENT would not suffer irreparable harm 29
B2. A preliminary assessment of the case prevents an order for security for costs 30
B3. No exceptional circumstances are at hand 31
B4. CLAIMANT's financial situation has not fundamentally changed since the conclusion of the Agreement 33
REQUEST FOR RELIEF 35
CERTIFICATE OF VERIFICATION 35

INDEX OF AUTHORITIES

Berger, Bernhard/Kellerhals, Franz	Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Stämpfli Verlag AG Bern, 2006. Cited as: *Berger/Kellerhals* ¶:138
Berger, Klaus Peter	Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration (Third Edition), Kluwer Law International, 2015. Cited as: *Berger 2015* ¶:116
Berger, Klaus Peter	Arbitration Interactive, Peter Lang GmbH, Europäischer Verlag der Wissenschaften, Frankfurt am Main, 2002. Cited as: *Berger 2002* ¶:90
Berger, Klaus Peter	International Economic Arbitration, Studies in International Economic Law, Vol. 9, Kluwer Law and Taxation Publishers, Deventer, 1993. Cited as: *Berger 1993* ¶:97
Bhala, Raj	International Payments and Five Foundations of Wire-Transfer Law,

	Yearbook of International Financial and Economic Law, Vol. 1, 1996, pp. 53-84. Cited as: *Bhala* ¶:74
Bianca, C.M./Bonell, M.J.	Commentary on the International Sales Law – The 1980 Vienna Sales Convention, Guiffrè, 1987. Cited as: *Author in Bianca/Bonell* ¶:76
Born, Gary	International Commercial Arbitration (Second Edition), Kluwer Law International, 2014. Cited as: *Born* ¶:126
Born, Gary/Beale, Kenneth	Party Autonomy and Default Rules, ICC International Court of Arbitration Bulletin, Vol. 21, No. 2, 2010, pp. 19-33. Cited as: *Born/Beale* ¶:112
Bout, Patrick	Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods, Pace essay submission, 1998. Cited as: *Bout* ¶:53
Butler, Allison E.	

A Practical Guide to the CISG:Negotiations Through Litigation, Aspen Publications, 2007.
Cited as: *Butler 2007*
¶:74

Brekoulakis, Stavros L.

In Brekoulakis, Stavros L., Lew, Julian M. D. et al. (eds): The Evolution and Future of international Arbitration, Kluwer Law International, 2016.
Cited as: *Brekoulakis*
¶:97

Bull, Cavinder

Commencing Arbitration in Albert Jan van den Berg (ed), International Arbitration: The Coming of a New Age?, ICCA Congress Series, Volume 17 Kluwer Law International, 2013, pp. 135 - 173.
Cited as: *Bull*
¶:97

Caron, David D.

Interim Measures of Protection: Theory and Practice in Light of the Iran United States Claims, Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, Vol. 46, 1986, pp. 104-156.
Cited as: *Caron*
¶:133

Craig, W. Laurence/Park, William W./Paulsson, Jan	International Chamber of Commerce Arbitration. Oceana Publications, Inc. / Dobbs Ferry, NY, 2000. Cited as:*Craig/Park/Paulsson 2000* ¶:116
Darwazeh, Nadia/Leleu, Adrien	Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding, Journal of International Arbitration, Volume 33, Issue 2, 2016, pp. 125 - 150. Cited as: *Darwazeh/Leleu* ¶:141
Derains, Yves/Schwartz, Eric A.	A Guide to the ICC Rules of Arbitration, Kluwer Law International, 2005. Cited as: *Schwartz/Derains* ¶:92
Erauw, Johan	CISG Articles 66-70: The Risk of Loss and Passing It, 25 Journal of Law and Commerce (2005-06) 203-217, Reproduced with permission of 11 Vindobona Journal of International Commercial Law & Arbitration, Vol 2, 2007 pp. 259-290. Cited as: *Erauw* ¶:61

Fouchard, Philippe/Gaillard, Emmanuel/Goldman, Berthold	Fouchard Gaillard Goldman on International Commercial Arbitration, Savage and Gaillard (ed). Kluwer Law International, 1999. Cited as: *Fouchard/Gaillard/Goldman* ¶¶:112, 118, 138
Fox, David	The Case of Mixt Monies: Confirming Nominalism in the Common Law of Monetary Obligations, Cambridge Law Journal, Vol. 70, Issue 1, 2011 pp. 144-174. Cited as: *Fox* ¶:61
Graffi, Leonardo	Remarks on Trade Usages and Business Practices in International Sales Law in Belgrade Law Review Year LIX no. 3, 2011, pp. 102-123 Cited as:*Graffi* ¶:49
Graske, Theodore Wesley	Law of Government Defense Contracts, Cost-plus-a-fixed-fee Contracts, New York, Baker, Voorhis & Co, 1941. Cited as: *Graske* ¶:17

Gotanda, John	CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74, Villanova University School of Law, Villanova, Pennsylvania, USA. Adopted by the CISG-AC at its Spring 2006 meeting in Stockholm, Sweden. Cited as: *Gotanda* ¶:61
Gu, Weixia	Security for Costs in International Commercial Arbitration. Journal of International Arbitration, Volume 22, Issue 3, 2005, pp. 167 - 205. Cited as: *Gu* ¶¶:118, 138, 145
Nystén-Haarala, Soili	The Long-Term Contract-Contract Law and Contracting, KAUPPAKAARI Oyj Finnish Lawyer's Publishing, 1998. Cited as: *Nystén-Haarala* ¶:34
Henderson, Alastair	Security for Costs in Arbitration in Singapore, Asian International Arbitration Journal, Vol. 7, Issue 1, 2011, pp. 54–75. Cited as: *Henderson* ¶:145

Hirschberg, Eliahu	The Nominal Principle - A Legal Approach to Inflation, Deflation and Revaluation, Bar-Ilan University Press, 1971. Cited as: *Hirschberg* ¶:*61*
Holtzmann, Howard M./Neuhaus Joseph E./Kristjánsdóttir, Edda/Walsh, Thomas W.	A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Kluwer Law International, 2015. Cited as: *Holtzmann/Neuhaus* ¶:126
Honnold, John	Honnold, John: Uniform Law for International Sales Under the 1980 United Nations Convention, KLUWER LAW AND TAXATION PUBLISHERS, 1982. Cited as: *Honnold 1982* ¶:40
Honnold, John	Uniform Law for International Sales Under the 1980 United Nations Convention, KLUWER LAW AND TAXATION PUBLISHERS, 1999. Cited as: *Honnold 1999* ¶:53

van Houtte, Hans

The UNIDROIT Principles of International Commercial Contracts, International Trade and Business Law Annual, Vol. 2, 1996, pp. 1-15.
Cited as: *van Houtte*
¶:61

Howard, Sarah Jenkins

Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles - A Comparative Assessment, Tulane Law Review, Vol. 72, Issue 6, June, 1998, pp. 2015-2030.
Cited as: *Jenkins*
¶:61

Huber, Peter/Mullis, Alastair

The CISG - A new textbook for students and practitioners, Sellier European Law Publishing, 2007.
Cited as: *Huber*
¶:40

Karrer, Pierre A./Desax, Marcus

Security for Costs in International Arbitration - Why, When and What If... in Law of International Business and Dispute Settlement in the 21st Century in Liber Amicorum Karl-Heinz Böckstiegel;

	Briner, Fortier, Berger, Bredow (Ed.), 2001. Cited as: *Karrer/Desax* ¶¶:138, 145
Kurkela, Matti/Turunen, Santtu	Due Process in International Commercial Arbitration. 2nd ed., Oxford University Press. 2010. Cited as: *Kurkela/Turunen* ¶: 118
Kröll, Stefan Michael/Mistelis, Loukas A./Verales Viscasillas, Pilar	UN Convention on Contracts for the International Sale of Goods (CISG), C.H. Beck, 2011. Cited as: *Author(s) in Kröll/Mistelis/Viscasillas* ¶¶:40, 74
Lew, Julian D. M./Mistelis, Loukas A./Kröll, Stefan Michael	Comparative International Commercial Arbitration, Kluwer Law International, 2003. Cited as: *Lew/Mistelis/Kröll* ¶¶:92, 112
López De Argumedo Piñeiro Álvaro/ Balmaseda Constanza	The disputed validity of hybrid and asymmetric clauses in Europe: a review of the decision of the High court of appeal of Madrid of 18 october 2013, Spain

Arbitration Review | Revista del Club Español del Arbitraje,Volume 2014, Issue 19, 2014, pp. 55 - 70.
Cited as: *López De Argumedo Piñeiro/Balmaseda*
¶:102

Mustill, Michael/Boyd, Steward — The Law and Practice of Commercial Arbitration in England, London Butterworths, 1982.
Cited as: *Mustill/Boyd*
¶:104

Moens, Gabriël/Luttrell, Sam — Interim Measures of Protection under the Arbitration Rules of the Australian Centre for International Commercial Arbitration, Asian International Arbitration Journal, Volume 6, Issue 1, 2010, pp. 74 - 96.
Cited as: *Moens/Luttrell*
¶:116

Nesbitt, Simon/Quinlan, Henry — The Status and Operation of Unilateral or Optional Arbitration Clauses, Arbitration International, Vol 22, No 1, 2006, pp. 133-150.
Cited as: *Nesbitt/Quinlan*
¶:102

Osuna-González, Alejandro	Buyer's Enabling Steps to Pay the Price: Article 54 of the United Nations Convention on Contracts for the International Sale of Goods, In Journal of Law and Commerce 2005-06, pp. 299-323 Cited as: *Osuna-González* ¶:80
Pamboukis, Chalarambos	The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods, Journal of Law and Commerce, 2005-06, pp. 107-131. Cited as: *Pamboukis* ¶:49
Park, William	The Arbitrator's Jurisdiction to Determine Jurisdiction, IV. Taxonomy: What is a Jurisdictional Question? p. 96-112 in Albert Jan van den Berg (ed), International Arbitration 2006: Back to Basics? ICCA Congress Series, Volume 13, 2006, pp. 96-112. Cited as: *Park* ¶:104

Paulsson, Jan	Jurisdiction and Admissibility, ICC Publishing, Publication 639 Global Reflections on Internal Law, Commerce and Dispute Resolution, November 2005, pp. 601 - 617. Cited as: *Paulsson* ¶: 104
Pinsolle, Philippe	Difficulties arising out of a contractual definition of the arbitrators' mandate, International Business Law Journal, 2002, pp. 238-244. Cited as: *Pinsolle* ¶: 104
Ramírez, David A. Wilhite	Under what conditions might a Tribunal Award security for costs to a respondent in ICSID Arbitration, in Spain Arbitration Review | Revista del Club Español del Arbitraje, Volume 2014 Issue 19, 2014, pp. 71 - 83. Cited as: *Ramírez* ¶:112
Redfern, Alan/Hunter, Martin/Blackaby, Nigel/Partasides, Constantine	Redfern and Hunter on International Arbitration (Sixth Edition), Oxford University Press, 2015.

	Cited as: *Redfern/Hunter* ¶¶:97, 135
Redfern Alan/O'Leary, Sam	Why it is time for international arbitration to embrace security for costs, Arbitration International, Vol. 32, 2016, pp. 397–413. Cited as: *Redfern/O'Leary* ¶:133
Rubins, Noah	In God we trust, all other pay cash : security for costs in international commercial arbitration, The American review of international arbitration, Vol. 11, Issue 3, 2000, pp. 17-49. Cited as: *Rubins* ¶¶:134, 135, 138
Sabater, Aníbal	Survivals and New Arrivals in Albert Janvan den Berg (ed), International Arbitration: The Coming of a New Age?, ICCA Congress Series, Volume 17, Kluwer Law International; Kluwer Law International, 2013, pp. 96 - 111. Cited as: *Sabater* ¶:90

Sandrock, Otto	The Cautio Judicatum Solvi in Arbitration Proceedings or The Duty of an Alien Claimant to Provide Security for the Costs of the Defendant, Journal of International Arbitration, Vol. 14, Issue 2, 1997, pp. 17–37. Cited as: *Sandrock* ¶¶:129, 138, 141
Schlechtriem, Peter	Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods, Published by Manz, Vienna, 1986. Cited as: *Schlechtriem 1986* ¶:74
Author in Schlechtriem/Schwenzer 2010	Schlechtriem & Schwenzer Commentary on the Convention on the International Sale of Goods (CISG), 3rd edition, Oxford University Press, Oxford, 2010. Cited as*: Author in Schlechtriem & Schwenzer 2010* ¶¶:17, 53, 74, 76, 82
Schwenzer Ingeborg/Hachem Pascal/Kee Christopher	Schwenzer/Hachem/Kee: Global Sales and Contract Law, Oxford University Press, 2012. Cited as: *Schwenzer/Hachem/Kee 2012*

	¶¶:17, 68, 90
Smythe, Donald J.	Reasonable Standards for Contract Interpretation Under the CISG, Cardozo Journal of International and Comparative Law (JICL), September 26, 2016, pp. 1-38 Cited as: *Smythe* ¶:40
Spivack, Carla	Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse under U.C.C. Sec. 2-615 and CISG Article 79 , University of Pennsylvania Journal of International Economic, Volume 27, 2006. Pp. 757-802 Cited as: *Spivack* ¶:61
Straube, Frederico José/Finkelstein, Claudio/Filho, Napoleão Casado	The CAM-CCBC Arbitration Rules 2012: A Commentary. The Hague: Eleven International Publishing, 2016. Cited as: *Straube/Filho/Finkelstein* ¶¶:92,96
UNCITRAL Yearbook VIII	UNCITRAL Yearbook VIII (1977), A/32/17, EXCERPT FROM ANNEX I, Report of Committee of the Whole I

relating to the draft Convention on the International Sale of Goods
Cited as: *UNCITRAL Yearbook VIII*
¶:80

Von Caemmerer, Ernst/Schlechtriem, Peter — Kommentar zum Einheitlichen UN-Kaufrecht, Beck, 1990.
Cited as: *Author in von Caemmerer/Schlechtriem*
¶:82

Von Goeler, Jonas — Third-Party Funding in International Arbitration and its Impact on Procedure, International Arbitration Law Library, Volume 35, Kluwer Law International 2016.
Cited as: *von Goeler*
¶¶:116, 141

Vorobey, Dmytro — CISG and Arbitration Clauses: Issues of Intent and Validity, Journal of Law and Commerce, Vol. 31, 2012-2013.
Pp. 135-162
Cited as: *Vorobey*
¶:112

Waincymer, Jeff	Procedure and Evidence in International Arbitration, Kluwer Law International, 2012. Cited as: *Waincymer* ¶¶: 96, 97
Walters, Gretta	Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems? Journal of International Arbitration, Kluwer Law International Volume 29 Issue 6 , 2012. pp. 651 - 680. Cited as: *Walters* ¶:104
Witz in Witz/Salger/Lorenz	International Einheitliches Kaufrecht, Deutscher Fachverlag GmbH, 2015 Cited as: *Witz in Witz/Salger/Lorenz* ¶¶:53, 76
ICCA-QMUL Report 2015	ICCA-QMUL TASK FORCE ON TPF IN INTERNATIONAL ARBITRATION, Subcommittee on Security for Costs and Costs, 1 November 2015. Cited as: *ICCA TPF task force report 2015* ¶:145

INSTITUTIONAL RULES

ACICA Rules 2005

Australian Centre for International Commercial Arbitration, Arbitration Rules 2005

CAM-CCBC 2012

Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, Arbitration Rules 2012

HKIAC Rules 2013

Hong Kong International Arbitration Centre, HKIAC Administered Arbitration Rules 2013

ICC Rules 2012

International Chamber of Commerce, ICC Rules of Arbitration 2012

LCIA Rules 1998

London Court of International Arbitration, LCIA Arbitration Rules 1998

LCIA Rules 2014

London Court of International Arbitration, LCIA Arbitration Rules 2014

SCC Rules 2010

Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Rules 2010

SIAC Rules 2007

Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules 3rd Edition, 1 July 2007

Swiss Rules 2012

The Swiss Chambers of Commerce Association for Arbitration and Mediation, Swiss Rules of International Arbitration June 2012

VIAC Rules 2013

Vienna International Arbitral Centre, Vienna Rules in force as from 1 July 2013

LAWS AND REGULATIONS

Danubian Arbitration Law	Danubian national arbitration law, a verbatim adoption of UNCITRAL Model Law for International Commercial Arbitration, amended in 2006.
CISG	The United Nations Convention on Contracts for the International Sale of Goods, 1980.
ICSID Convention	Convention on the Settlement of Investment Investment Disputes between States and Nationals of Other States 1966, amended in 2006.
The New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
The UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts, 2010.
ULIS	Convention relating to a Uniform Law on the International Sale of Goods, 1964.

OTHER LEGAL SOURCES

The CIArb Guideline 2015	The Chartered Institute of Arbitrators: International Arbitration Practice Guideline: Applications for Security for Costs, 2015.
Working group report	A/CN.9/545, UNCITRAL Working Group Report, December 2003, p. 283.

INDEX OF ARBITRAL AWARDS AND PROCEDURAL ORDERS

ICC International Court of Arbitration

ICC Case 6784	Final Award in Case 6784 (Extract), Award rendered 1990. Published in ICC International Court of Arbitration Bulletin Vol. 8 No. 1, 1997, p. 53. Place of arbitration Geneva, Switzerland. Cited as:I*CC Case 6784*I ¶:96
ICC Case 10032	Procedural Order of 9 November, 1999 unpublished ICC Case No 10032. Referred to e.g. in Karrer/Desax 2001 para 42 and in Gu 2005 p. 188-189. Cited as:*ICC Case 10032* ¶:118, 145
ICC Case 10422	Arbitral Award, ICC International Court of Arbitration 2001. http://www.unilex.info/case.cfm?id=957 Cited as:*ICC Case 10422* ¶:112

ICC Case 12035	Procedural Order of 6 June 2003 in ICC Case 12035 (Extract), Published in Special Supplement 2010, Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders issued by Arbitral Tribunals acting under the ICC Rules of Arbitration (2003-2004). Cited as:*ICC Case 12035* ¶:133
ICC Case 12393	Procedural Order of 30 July 2003 in ICC Case 12393 (Extract), Published in Special Supplement 2010, Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders issued by Arbitral Tribunals acting under the ICC Rules of Arbitration (2003-2004) Cited as:*ICC Case 12393* ¶:127
ICC Case 14355	Procedural Order of January 2007 in ICC Case 14355 (Extract), Published in Special Supplement 2014, Procedural Decisions in ICC Arbitration, p. 70, under ICC Rules 1998, place of arbitration Zurich, Switzerland. Cited as:*ICC Case 14355* ¶:138

ICC Case 14433	Procedural Order of October 2008 in ICC Case 14433 (Extract), Published in Special Supplement 2014, Procedural Decisions in ICC Arbitration, p. 73, under ICC Rules 1998, Place of arbitration London, United Kingdom. Cited as:*ICC Case 14433* ¶¶:126, 133
ICC Case 14993	Procedural Order of December 2007 in ICC Case 14993 (Extract), Published in Special Supplement 2014, Procedural Decisions in ICC Arbitration, p. 77, under ICC Rules 1998, Place of arbitration Vienna, Austria. Cited as:*ICC Case 14993* ¶:138
ICC Case 15218	Procedural Order of July 2008 in ICC Case 15218 (Extract), Special Supplement 2014, Procedural Decisions in ICC Arbitration, p.79, under ICC Rules 1998, Place of arbitration Bern, Switzerland. Cited as:*ICC Case 15218* ¶:138

X S.A.R.L., Lebanon v. Y A.G., Germany	ICC Arbitration, Procedural Order No. 3, 4 July 2008 28 ASA Bulletin 37–49 (2010). Cited as:*X S.A.R.L., Lebanon v. Y A.G., Germany* ¶:138
ICC Arbitration 19.12.2003	ICC Arbitration 19.12.2003, seated in Geneva, ASA 2005, p. 685, referred to in Berger 2010. Cited as:*ICC Arbitration 19.12.2003* ¶:138
ICC Brussels 8240	Final Award in Case 8240 (Extracts), Award rendered July 1995, Published in ICC International Court of Arbitration Bulletin Vol. 10 No. 2, 1999, p. 60, Place of arbitration Brussels, Belgium. Cited as: *ICC Brussels 8240* ¶:61

International Centre for Settlement of Investment Disputes

South American Silver Limited v. the Plurinational State of Bolivia
Procedural Order No. 10,
11 January 2016
PCA Case No. 2013-15
Cited as: *South American Silver Limited v. Bolivia*
¶:134

RSM Production Corporation v. Santa Lucia
Decision on Saint Lucia's Request for Suspension or Discontinuation of Proceedings
ICSID Case No. ARB/12/10,
8 April 2015
Cited as: *RSM v. Saint Lucia*
¶: 118

Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador,
Decision on El Salvador's Application for Security for Costs,
20 September 2012
ICSID Case No. ARB/09/17
Cited as:*Commerce Group Corp. v. El Salvador*
¶:138

Plama Consortium Ltd v. Repub. of Bulgaria
Order
6 September 2005
ICSID Case No. ARB/03/24
Cited as:*Plama Consortium Ltd v. Repub. of Bulgaria*
¶:126

Victor Pey Casado and President Allende Foundation v. Republic of Chile
Decision on Provisional Measures
25 September 2001
ICSID Case No. ARB/98/2
Cited as: *Pey Casado v. Chile*
¶: 112

Economic Court of the Commonwealth of Independent States (CIS)
CIS Economic Court
Case number 01-1/6/97

Date: 23.06.1998
Cited as: *CIS 1998*
¶:61

INDEX OF COURT CASES

Austria

CISG-Online Case No. 576
Oberster Gerichtshof
13.04.2000
CISG-online 576
Cited as: *OGH 2000*
¶:82

Germany

"New Zealand Mussels Case"
Bundesgerichtshof
08.03.1995
Case No.VIII ZR 159/94
Cited as: *New Zealand Mussels Case*
¶:82

CISG-Online Case No. 511
Oberlandesgericht Dresden
27.12.1999
CISG-online 511
Cited as: *OLG Dresden 1999*
¶:17

CISG-Online Case No.282
Oberlandesgericht München

09.07.1997
CISG-Online 282
Cited as: *OLG München 1997*
¶: 74

CISG-online Case No. 479
Landgericht Frankenthal
17.04.1997
CISG-online 479
cited as: *LG Frankenthal 1997*
¶:49

ULIS Precedent O 116/81
Landgericht Heidelberg
27.01.1981
Case No: O 116/81
cited as: *Heidelberg, 27 January 1981*
¶:61

CISG-Online Case No.659
Amtsgericht Duisburg
12.04.2000
CISG-online 659
cited as: *AG Duisburg 2000*
¶:49

Russia

Arbitral Award
International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation
6.2.2013
Case No: 99/2012

Cited as: *Russian company v. Chinese company 2013*
¶:74

Switzerland

BGE 128 III 50
Schweizerisches Bundesgericht
16.10.2001
Case No. BGE 128 III 50
Cited as: *Automobiles Peugeot v. Omega Plus*
¶:104

CISG-Online Case No.329
Handelsgericht des Kantons Aargau
26.09.1997
CISG-online 329
Cited as: *HGer Aargau 1997*
¶:49

CISG-Online Case No.346
Zivilgericht Basel-Stadt
03.12.1997
CISG-online 346
Cited as: *ZGer Basel-Stadt 1997*
¶:49

United Kingdom

British-American Insurance (Kenya) Ltd v Matelec SAL and another
Queen's Bench Division, Commercial Court
29 October 2013
[2013] EWHC 3278 (Comm)
Cited as: *British-American Insurance Ltd v Matelec Dal*

¶:17

Rainy Sky S.A. and others v. Kookmin Bank
United Kingdom Supreme Court
2 November 2011
[2011] UKSC 50
Cited as: *Rainy Sky v. Kookmin Bank*
¶:17

United States

MCC-Marble Ceramic Center Inc. v. Ceramica Nuova D'Agostino S.p.A.
U.S. Court of Appeals, 11th Circuit
29.06.1998
Case No: 144 F.3d 1384 (1998)
Cites as: *MCC Marble v. Ceramica*
¶:112

Bernina Distributors, Inc. v. Bernina Sewing Machine Co., Inc.
U.S. Court of Appeals for the Tenth Circuit
6.4.1981
Case No: 646 F.2d 434 (10th Cir. 1981)
Cited as: *Bernina*
¶:61

INTERNET SOURCES

International Accounting Standard 21: The Effects of Changes in Foreign Exchange Rates
EC staff consolidated version as of 18 February 2011

International Accounting Standards Board

Available at: www.ucetni-portal.cz/stahnout/ias-21-en_856.pdf

cited as: *IAS 21*

¶:22

Cambridge Dictionary at http://dictionary.cambridge.org/, cited on: 24.11.2016

Cited as: *Cambridge Dictionary*

¶:90

Merriam-Webster Dictionary at https://www.merriam-webster.com/, cited on 24.11.2016

Cited as: *Merriam-Webster*

¶:90

Oxford Living Dictionary at https://www.oxforddictionaries.com/, cited on 24.11.2016

Cited as: *Oxford Living Dictionary*

¶:90

TABLE OF ABBREVIATIONS

ACICA Arbitration	Australian Centre for International Commercial
AG	Amtsgericht (District Court in Germany)
ASA	Association Suisse de l'Arbitrage (Swiss Arbitration Association)
AtRfSfC	Answer to Request for Security for Costs
ARfA	Answer to Request for Arbitration
Art.	Article
BGer	Schweizerisches Bundesgericht (Federal Supreme Court of Switzerland)
BGH	Bundesgerichtshof (German Federal Court of Justice)
The CAM-CCBC	Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
Cl. Ex.	CLAIMANT's exhibit
CIArb.	Chartered Institute of Arbitrators
CIS	Economic Court of the Commonwealth of Independent States
CISG	United Nations Convention on Contracts for the International Sale of Goods

CISG-Online	Internet database on CISG decisions and materials, available at www.globalsaleslaw.org
Danubian Arbitration Law	Danubian national arbitration law, a verbatim adoption of UNCITRAL Model Law on International Commercial Arbitration 1985, amended in 2006
e.g.	for example (exempli gratia)
EQD	Equatorianian Denar(s)
HGer	Handelsgericht (Swiss Commercial Court)
HKIAC	Hong Kong International Arbitration Centre
IAS	International Accounting Standards
ibid.	in the same source (ibidem)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID Disputes	International Center for Settlement of Investment
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1966, amended 2006
i.e.	that is (id est)

KG	Limited Partnership *(in Germany)*
LCIA	The London Court of International Arbitration
LG	Landgericht (District Court in Germany)
Ltd.	Limited
No.	number
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (Higher Regional Court in Germany)
p./pp.	page/-s
¶/¶¶	paragraph/-s
Plc.	Public limited company
PO1	Procedural Order No.1
PO2	Procedural Order No.2
Re. Ex.	RESPONDENT's exhibit
RfA	Request for Arbitration
RfSfC	Request for Security for Costs
SA	Limited Company

SCC	Arbitration Institute of the Stockholm Chamber of Commerce
Sec.	section
SIAC	Singapore International Arbitration Centre
SP	Sole Proprietorship
the Questionnaire	Conflict of Interest and Availability Questionnaire, Arbitration and Mediation Center Brazil-Canada Chamber of Commerce (CAM-CCBC)
ToR	Terms of Reference
ULIS	Convention relating to a Uniform Law on the International Sale of Goods
UNCITRAL Law	United Nations Commission on International Trade
UNIDROIT Law	International Institute for the Unification of Private
USD	United States Dollar(s)
v.	versus
VIAC	Vienna International Arbitral Centre
ZGer	Zivilgericht (Civil Court in Switzerland)

INTRODUCTION

1 Wright Ltd ("CLAIMANT") is a highly specialised manufacturer of fan blades for jet engines, incorporated in Equatoriana.

2 SantosD KG ("RESPONDENT", jointly referred to as "Parties"), domiciled in Mediterraneo, is a medium sized manufacturer of jet engines.

3 Up until July 2010, CLAIMANT and RESPONDENT were subsidiaries to the same parent company, Engineering International SA ("Engineering International"). On 27 July 2010, CLAIMANT was sold to Skymover, now Wright Holding Plc. Meanwhile, negotiations to sell RESPONDENT had been ongoing since November 2009. Finally, in August 2010, RESPONDENT was sold to Speedrun, a private equity fund.

4 On 1 August 2010, the Parties entered into the Development and Sales Agreement (the "Agreement") to jointly develop a new fan blade for RESPONDENT's next generation jet engine. RESPONDENT agreed to order 2,000 fan blades, while at the same time expressing a firm intention of further purchases. RESPONDENT planned to sell the new engine to aircraft manufacturer Earhart SP, to showcase the new product in Earhart's latest business jet model.

5 A couple of months after concluding the Agreement, RESPONDENT made an additional order of clamps needed to connect the fan blades to the engine. RESPONDENT suggested that the Parties enter into an addendum agreement (the "Addendum") to govern the sale of the clamps. The Parties signed the Addendum on 26 October 2010.

6 On 14 January 2015, CLAIMANT delivered the goods in good order. On 15 January, after CLAIMANT received RESPONDENT's confirmation of payment, it became clear that the Parties disagreed which exchange rate should apply to the calculation of the purchase price of the fan blades. RESPONDENT alleges that the price should be calculated using a fixed exchange rate.

7 Under the Agreement, the purchase price for the fan blades is calculated based on CLAIMANT's production costs in Equatorianian Denars ("EQD") which are then converted into USD, the currency of payment. The Agreement was structured in a way that CLAIMANT's production costs would be covered, if the costs were kept under a

certain maximum price. CLAIMANT did not exceed the maximum price. Applying the fixed exchange rate would result in CLAIMANT incurring a loss of over EQD two and a half million. In CLAIMANT's view, the applicable exchange rate is the one at the time of payment, because the fixed exchange rate would undermine the purpose of the risk sharing structure agreed upon in the Agreement.

8 Additionally, Equatoriana Central Bank deducted a further amount of USD 102,192.80 from RESPONDENT's payment, due to an Equatorianian money laundering regulation. USD 20,336,367.20 was credited to CLAIMANT's account, which RESPONDENT believes to be the full purchase price. RESPONDENT refuses to pay the remaining USD 2,285,240 in spite of CLAIMANT's requests.

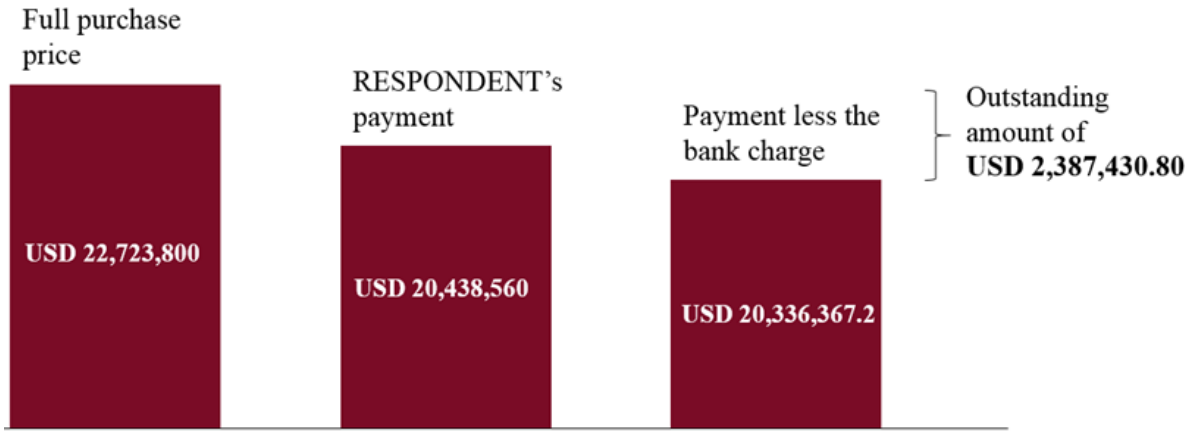
9 On 31 May 2016, after efforts to resolve the dispute amicably had failed, CLAIMANT submitted the Request for Arbitration to the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (the "CAM-CCBC"). On 7 June 2016, CLAIMANT amended the request, as ordered by the CAM-CCBC. CLAIMANT provided another power of attorney and paid the remainder of the registration fee. The Parties signed the Terms of Reference on 22 August 2016. On 6 September 2016, RESPONDENT submitted a Request for Security for Costs.

10 In this memorandum, CLAIMANT will establish the following: Firstly, the Tribunal should order RESPONDENT to pay the outstanding purchase price of USD 2,285,240 and the bank charge in the amount of USD 102,192.80, as required under the Agreement (**I**); Secondly, CLAIMANT's claims should be found admissible (**II**); Thirdly, RESPONDENT's request for an order for security for costs should be rejected (**III**).

I. THE TRIBUNAL SHOULD ORDER RESPONDENT TO PAY THE OUTSTANDING PURCHASE PRICE

11 In January 2015, CLAIMANT delivered the 2,000 fan blades ordered by RESPONDENT under the Agreement. RESPONDENT confirmed the delivery and effected payment. Upon receiving the payment, CLAIMANT noted that the amount was USD 2,387,430.80 short of what CLAIMANT had expected. It became clear that RESPONDENT had developed a different understanding of the full purchase price under the Agreement.

12 RESPONDENT did not fulfill its contractual obligation to deposit the full purchase price for the fan blades onto CLAIMANT's bank account. RESPONDENT's payment of only USD 20,438,560 was calculated using an incorrect exchange rate for the purchase price of the fan blades. Instead of USD 22,723,800 to which CLAIMANT was entitled, CLAIMANT only received USD 20,336,367.20. On top of that, an additional amount of USD 102,192.80 was deducted from RESPONDENT's payment by the Equatoriana Central Bank due to a financial investigation. Overall, the amount of USD 2,387,430.80 remains outstanding, as can be seen from the below:



13 CLAIMANT will show that RESPONDENT has not paid the purchase price in full. First, the purchase price must be calculated using the exchange rate at the time of payment [**A**]. Second, RESPONDENT must bear the bank charges deducted during the transfer of the purchase price [**B**].

A. The correct price for the fan blades is USD 22,723,800

14 The Parties drafted the Agreement in a way that would allow both of them to achieve their respective objectives. CLAIMANT wished to generate a moderate profit at a minimal risk, while also hoping to conclude further sales under the framework of the

Agreement. RESPONDENT primarily intended to use their jet engine, fitted with the new and improved fan blades, as a marketing tool. The price was to be determined based on CLAIMANT's production costs. These production costs were incurred in EQD, but RESPONDENT insisted on payment in USD.

15 CLAIMANT will show that, in order to achieve their objectives, the Parties implicitly agreed to apply the exchange rate at the time of payment [**A1**]. In any case, the Parties did not agree to apply a fixed exchange rate **[A2]** and therefore the default rule of the applicable law to apply the exchange rate at the time of payment is decisive [**A3**].

A1. The Parties implicitly agreed to apply the exchange rate at the time of payment

16 The Parties implicitly agreed to apply the exchange rate at the time of payment by including a cost plus pricing mechanism into the Agreement. The pricing mechanism reflects the Parties' commercial objectives. Applying the fixed exchange rate, as RESPONDENT suggests, would undermine the purpose of the Agreement.

17 A contract must be interpreted in a way that satisfies both parties' objectives to the fullest extent possible. The presumption is that parties intended each provision in their contract to have a purpose that reflects the parties' objectives. The interpretation of a provision must correspond to its intended purpose [*Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 8 ¶51; Schwenzer/Hachem/Kee 2012 ¶26.59; Graske, p. 128*]. When determining what a reasonable person would have understood the purpose of a provision to be, the commercial objectives of both parties must be weighed against each other and the interpretation that is most commercially reasonable for both parties should be preferred [*Arbitration Hamburg 21.06.1996; OLG Dresden 1999; Rainy Sky v. Kookmin Bank; British-American Insurance v. Matelec Dal*]. Further, when the parties have not agreed on a term that is needed to determine their obligations, the contract shall be supplemented with such a term with respect to the circumstances, including the parties' intentions [*UNIDROIT Principles Art. 4.8, Comment 3*].

18 RESPONDENT's main commercial objective for entering into the Agreement, was to acquire a reference for marketing purposes. RESPONDENT wanted to develop a jet engine that could be displayed in Earhart's jet planes, and it was even willing to take the risk of a small loss to achieve that goal [*Re. Ex. 5, p. 31*]. CLAIMANT, on the other hand, aimed at making a profit, and at the very least did not want to incur a loss. A cost plus pricing mechanism was included in the Agreement to achieve these objectives.

19 The cost plus pricing mechanism provides that the purchase price consists of the incurred production costs and a profit margin. Most importantly, CLAIMANT's costs will always be covered. CLAIMANT's costs are incurred in EQD [*Cl. Ex. 1, p. 8*] but RESPONDENT pays in USD. In order to determine the purchase price under the Agreement, the costs in EQD must be converted into USD. After CLAIMANT receives the payment in USD, it must convert the sum back to EQD, because CLAIMANT's books are kept in EQD [*PO2, p. 57, ¶14*]. To fulfill the purpose of the agreed pricing mechanism, the paid sum converted into EQD must be at least equal to the initial production costs in EQD in CLAIMANT's books.

20 The applicable exchange rate is not explicitly mentioned in the terms of the Agreement. It is, however, vital in determining RESPONDENT's obligation to pay the total purchase price. The exchange rate must be determined based on all the relevant circumstances and interpreting the Parties' intentions. Therefore, the applicable exchange rate must be found by interpreting the Parties' objectives behind the pricing clause in the Agreement.

21 RESPONDENT asserts that the production costs should be converted into USD with a fixed exchange rate of USD 1 = EQD 2,01. However, RESPONDENT's interpretation undermines the purpose – to ensure that CLAIMANT's costs are covered – of the agreed cost plus mechanism. Applying the fixed exchange rate could result in CLAIMANT incurring a loss. Next, CLAIMANT will demonstrate that in this case, CLAIMANT suffered a loss of over EQD two and a half million.

22 RESPONDENT initiated the payment of USD 20,438,560, including profit. Originally, this amount was converted from the sum of CLAIMANT's total production costs in EQD using the fixed exchange rate of USD 1 = EQD 2,01. CLAIMANT keeps its books in EQD [*PO2, p. 57, ¶14*], and converts foreign currency transactions into EQD using the exchange rate of the date of the transaction [*see e.g. IAS 21, ¶21*]. At the date of payment, the value of EQD against USD is different than the fixed rate provides, namely USD 1 = EQD 1,79. Therefore, the following applies:

$$\underbrace{\text{EQD } 39{,}172{,}000}_{} - \underbrace{\text{EQD } 36{,}585{,}022.40}_{} = \underbrace{\text{EQD } 2{,}586{,}977.60}_{}$$

CLAIMANT's production costs	RESPONDENT's payment converted into EQD with the exchange rate of the date of payment	Loss CLAIMANT incurs from the transaction

23 This reveals that CLAIMANT would incur a significant loss, if the fixed exchange rate was to be applied as RESPONDENT suggests.

24 The exchange rate at the time of payment must be applied when converting the received payment back into the accounting currency. The only way to ensure that the costs are always covered, is to apply the same rate for both conversions, EQD → USD and USD → EQD. When the exchange rate of the day of payment is applied to both conversions, the production costs are covered:

$$\frac{\text{EQD } 39{,}172{,}000}{1{,}79} = \text{USD } 21{,}883{,}799$$

25 The original production costs in EQD divided by the exchange rate at the time of payment (without the profit margin), equate to the amount of payment in USD required to cover CLAIMANT's costs.

USD 21,883,799 x 1.79 = 39,172,000 EQD

26 The amount of payment in USD required to cover CLAIMANT's costs multiplied by the exchange rate at the time of payment (without the profit margin), equates to the original production costs.

27 In the Agreement, RESPONDENT's risk of unforeseeably high production costs was mitigated by a provision on a maximum price of USD 13,125 per blade [*Cl. Ex. 2, Sec. 4, p. 10*]. CLAIMANT's production costs were USD 10,941.90 (converted with the exchange rate at the time of payment). Therefore, CLAIMANT kept its production costs below the maximum price [*RfA, p. 5, ¶12*], but as demonstrated above, would still incur a significant loss if the fixed exchange rate proposed by RESPONDENT was applied.

28 Therefore, the only way to guarantee that both CLAIMANT's and RESPONDENT's main objectives will be achieved is to apply the exchange rate at the time of payment. That way, CLAIMANT can ensure to not operate at a loss by keeping its production

costs below the maximum price. RESPONDENT remains protected from risk by the maximum price clause. Thus, the Tribunal should conclude that in order to satisfy both Parties' commercial interests to the fullest extent possible, the purchase price must be calculated using the exchange rate at the time of payment.

A2. In any case, the Parties did not agree to apply a fixed exchange rate

29 CLAIMANT has established above that the Parties implicitly agreed on the exchange rate at the time of the payment to calculate the purchase price. Should the Tribunal reject this view, it remains clear that the Parties did not agree that an exchange rate fixed at USD 1 = EQD 2.01 should apply to the sale of the fan blades.

30 In October 2010, RESPONDENT placed an order for clamps that were to be used to attach the fan blades to the engine shaft. The terms for the sale of the clamps were fixed in the Addendum that was written by hand on the same document as the Agreement. Exclusively for the sale of the clamps, the Parties agreed to fix the exchange rate at USD 1 = EQD 2.01. CLAIMANT will show that the fixed exchange rate in the Addendum does not apply to the sale of the fan blades and that the Addendum only governs the sale of the clamps. [**A2.1**] Furthermore, CLAIMANT made an unfortunate mistake in the invoice of the fan blades, but corrected it immediately. Therefore, the mistake in the invoice does not hold any legal relevance [**A2.2**]. Finally, CLAIMANT will show that contrary to RESPONDENT's allegation, there is no established practice of the Parties that would provide for a fixed exchange rate. Even if such a practice had been established, it would have lost all relevance.[**A2.3**]

A2.1. The fixed exchange rate governing the sale of the clamps does not govern the sale of the fan blades

31 The Addendum governs the sale of the clamps. The Parties agreed to fix the exchange rate at USD 1 = EQD 2.01, exclusively with regard to the sale of the clamps.

A2.1.1. The Agreement takes precedence over the Addendum

32 The Parties entered into the Agreement in the hopes of establishing a long term supply relationship, delivering the new TRF 192-I fan blade. They developed the new blade as a joint project [*RfA, p. 4,* ¶*3*], intending to place further orders under the Agreement, essentially understanding it as a framework agreement. The order of 2,000 fan blades placed on 1 August 2010 was supposed to be only the first of many to come. Already during the negotiations of the Agreement, RESPONDENT expressed an interest in an

additional purchase of clamps [*RfA, p. 4, ¶8*]. On 26 October 2010, RESPONDENT and CLAIMANT entered into the Addendum, to govern the sale of the clamps [*Cl. Ex. 2, p. 11*].

33 The Addendum is a subsidiary contract to the Agreement. Therefore, the general terms of the Agreement apply to the Addendum, but not vice versa. Consequently, the fixed exchange rate in the Addendum does not apply to the sale of the fan blades under the Agreement.

34 Long-term joint development contracts have a framework nature [*Nystén-Haarala, pp. 26, 48-49*]. Under the framework structure, follow-up contracts can be concluded [*Ibid. p. 49*]. If it is unclear which order of precedence the parties intended their contracts to have, the intention must be derived from all the relevant circumstances, including the wording of the agreement and any negotiations leading up to it [*Art. 8(3) CISG*]. Where there is ambiguity of the intention of the parties, the understanding of a_reasonable person prevails and it must be based on all the relevant circumstances [*Art. 8(2) and (3) CISG*].

35 The Addendum explicitly states "Other terms as per main Agreement", with which the Parties expressed the nature of the Addendum as a subsidiary contract. A reasonable person would have understood the Parties' intention to draw up a framework contract also from the Agreement, where the Parties have noted that RESPONDENT is "planning to purchase within the next 5 years more than 600 further TRF 192-I fan blades in accordance with the provisions below or comparable provisions - -" and that RESPONDENT expresses "the firm intention to purchase further units" [*Cl. Ex. 2, pp. 9-10*]. The only reasonable interpretation is that the terms of the Agreement apply also to the order of clamps placed in the Addendum. The Agreement, as a framework agreement, takes precedence over the Addendum.

36 Parties employed a different pricing mechanism and a different exchange rate for the sale of the fan blades and the sale of the clamps. In the Addendum, CLAIMANT agreed to operate without a profit margin while taking on the currency risk only because of the comparatively limited size of the clamp order [*Cl. Ex. 9, p. 50*]. Naturally, these provisions of the Addendum do not apply to the Agreement, the framework contract. The Parties had different interests under the Addendum compared to the Agreement.

The interests of the Parties, which are reflected by this provision of the Addendum, are not comparable to the interests under the Agreement.

37 Further, if it was RESPONDENT's intention that the fixed exchange rate would govern the sale of the fan blades as well, it did not make that clear during the negotiations of the Addendum. Firstly, RESPONDENT introduced the Addendum stating that it would "regulate the purchase of the clamps" [*Re. Ex. 2, p. 28*]. Therefore, the terms of the Addendum govern the sale of clamps alone. Furthermore, CLAIMANT, in its final acceptance of RESPONDENT's offer, confirmed the understanding that the intention was "to link the agreement [the Addendum] in regard to the clamps to the contract [the Agreement]" [*Re. Ex. 4, p. 30*].

38 The orders of the fan blades and the clamps are two separate orders placed under the general terms of the same framework agreement. The interpretation of the wordings of both the Agreement and the Addendum reveals that the Parties only deviated from the applicable exchange rate under the law with regard to the sale of the clamps.

A2.1.2. The Addendum must be interpreted against its drafter, RESPONDENT

39 Even if the Tribunal were to find that the wording of the Addendum is not clear (which is denied), the fixed exchange rate should not be applied to the sale of the fan blades under the Agreement. RESPONDENT should bear the consequences of ambiguous formulation of the Addendum.

40 If a term is ambiguous, its meaning should be construed against the party that proposed it to be included in the contract. This principle is also recognised under the CISG. [*Zuppi in Kröll/Mistelis/Perales Viscasillas, Art. 8 ¶24; Honnold 1982, p.140; Huber p. 237]* When two interpretations of an ambiguous term are available, the interpretation other than the drafter's must prevail. [*Smythe, p. 15; Telestat Canada v. Juch-Tech, Inc.*]

41 RESPONDENT drafted the Addendum and the clause regarding the fixed exchange rate [*Re. Ex. R2, p. 28*]. The Addendum states that "[t]he exchange rate for the agreement is fixed to USD 1 = EQD 2.01". However, it is unclear what the word *agreement* refers to. There are two ways to interpret the word: either it only refers to the Addendum, or alternatively, to both the Addendum and the Agreement, as RESPONDENT alleges [*ARfA, p. 25, ¶17*]. The second option is more beneficial for RESPONDENT, as the application of a fixed exchange rate in the sale of the fan blades would result in a lower

price in total. In accordance with the principle of interpretation against the drafter, the fixed exchange rate should therefore be interpreted to govern only the Addendum.

42 Any ambiguities in the wording of the Addendum shall be interpreted to the detriment of RESPONDENT as the drafting party. Therefore, the fixed exchange rate does not apply to the sale of the fan blades under the Agreement.

A2.2. The incorrect invoice does not indicate that a fixed exchange rate is to be applied

43 Along with the delivery of the fan blades and the clamps, RESPONDENT received two invoices. The invoice concerning the fan blades accidentally applied the same exchange rate as the one for the clamps, USD 1 = EQD 2.01. This was an unfortunate, but obvious mistake, which CLAIMANT immediately rectified. RESPONDENT, however, seized the opportunity and refused to pay the full purchase price that had been agreed upon. The mistake in the invoice does not hold any legal relevance.

44 When determining the understanding a party had about a contract, conduct subsequent to the conclusion of the contract can be taken into account. Due consideration must be given to *all* circumstances i.e. *all* subsequent conduct [Art. 8 (3) CISG]. A party is bound by its conduct only if the other party could reasonably rely on that conduct. This would be the case where a mistake is not corrected in a timely manner, causing a party to develop a certain understanding of the contract [*UNIDROIT Principles Art. 1.8, Comment 2*].

45 CLAIMANT became aware of its mistake on 15 January 2015 when it received RESPONDENT's e-mail declaring that RESPONDENT had initiated payment of USD 20,438,560 for the fan blades. Without hesitation, less than two hours after receiving the e-mail, CLAIMANT corrected its mistake and informed RESPONDENT by e-mail that the wrong exchange rate had been applied [Cl. Ex. 5, p. 14]. A correction of a mistake is a stronger indicator for a party's understanding of a matter than the mistake itself. Therefore, RESPONDENT could only reasonably have interpreted CLAIMANT's e-mail as a clear expression of their understanding that the fixed exchange rate should not apply to the sale of the fan blades. Had CLAIMANT not corrected their mistake and accepted RESPONDENT's payment, CLAIMANT may have lost its right to demand the outstanding purchase price. However, as CLAIMANT never created the impression that it would accept RESPONDENT's payment, payment of the outstanding purchase price can still be demanded.

46 Therefore, due to CLAIMANT's prompt correction of the invoice, RESPONDENT cannot rely on the mistake. The incorrect use of the fixed exchange rate in the invoice does not hold any legal relevance.

A2.3. The Parties are not bound by any established practice to apply a fixed exchange rate

47 Formerly, as sister companies under Engineering International, the Parties' strived for the benefit of the whole group. Mediterraneo, RESPONDENT's domicile, had a more favourable tax regime than CLAIMANT's domicile. Engineering International took advantage of this in their tax optimisation strategy. The sole reason the Parties applied the exchange rate more beneficial for RESPONDENT was Engineering International's orders. The Parties have effectively applied the exchange rate more favourable for RESPONDENT only once, and therefore a legally binding practice did not form between the Parties [**A2.3.1**]. What is more, RESPONDENT cannot rely on this reasoning now that the divestments of Engineering International have fundamentally changed the Parties' relationship [**A2.3.2**].

A2.3.1. The Parties did not establish a practice between themselves

48 Contrary to RESPONDENT's allegations, a legally binding practice to apply a fixed exchange rate was not established between the Parties. The exchange rate has only been effectively applied once, which cannot constitute a practice.

49 For a practice to become binding under Art. 9(1) CISG, the parties must have applied it at a certain frequency and duration [*HGer Aargau 1997; LG Frankenthal 1997*]. To apply the practice only once or twice is not sufficient to constitute a practice [*ZGer Basel-Stadt 1997; AG Duisburg 2000; Graffi p. 107*]. Additionally, a practice should be "applied only when the condition of the unquestionable common knowledge is met", in other words it must be unquestionable that both parties understood that they were bound by the practice [*Pamboukis, p. 113*].

50 The Parties have carried out two transactions, where one currency had to be converted into another. In the sale of TRF 155-II fan blades, the exchange rate at the time of contracting was applied. However, in the second transaction, the matter was not even discussed as the exchange rate had not changed between the time of contracting and the time of performance. [*PO2, p. 54*, ¶5] Therefore, the exchange rate at the time of contracting effectively prevailed over the rate at the time of payment only once. Using

a practice only once certainly does not constitute an established practice by which the Parties are bound. It is unreasonable to assume CLAIMANT would have understood from applying the rate once that it could be bound by that.

51 CLAIMANT has demonstrated that the threshold of frequency and duration are not met and, thus, RESPONDENT could not rely on the binding effect of the practice. Therefore, the practice did not become a part of the Agreement.

A2.3.2. In any case, an established practice would no longer be relevant

52 Contrary to RESPONDENT's position, the fixed exchange rate cannot be applied because the circumstances, under which the alleged practice was employed, had fundamentally changed at the moment of contracting.

53 Pursuant to Art. 9(1) CISG, parties are bound by established practices, but if there is a change in the parties' original relationship, the practice may end [*Schmidt-Kessel in Schlechtriem/Schwenzer , Art. 9 ¶9; Witz in Witz/Salger/Lorenz, Art. 9 ¶17*]. A change is significant enough to end a practice, if one or both parties cannot reasonably be expected to continue to adhere to the past practice [*Bout, II.E; Honnold 1999, p. 125*].

54 Engineering International allocated profits of intra group transactions to companies with more favourable tax regimes. During the Parties' previous transactions, RESPONDENT's domicile had a lower tax rate than CLAIMANT's. [*PO2, p. 54,* ¶5] However, before the conclusion of the Agreement, CLAIMANT was sold to Skymover, now Wright Holding Plc [*PO2, p. 54, ¶1*]. Naturally, this had a significant impact on the business relationship of CLAIMANT and RESPONDENT. The Parties, under the directions of Engineering International, previously aimed at maximising the profits of their group, but now CLAIMANT had its own commercial interests to protect. RESPONDENT could not reasonably expect CLAIMANT to adhere to the previous practice of sacrificing its economic interests for the good of RESPONDENT. Any reliance on the continuation of this practice by RESPONDENT was no longer justified.

55 Consistent with this logic, RESPONDENT could neither rely on Engineering International's order to "de-risk" RESPONDENT in intra group contracts [*ARfA, p. 24, ¶9, Re. Ex. 1, p. 27*]. As CLAIMANT was no longer part of Engineering International at the time of contracting, there was no reason to assume that the de-risking order should have any influence on the Agreement. The de-risking order, or any issue regarding the exchange rate, was not addressed during the negotiations between the Parties [*PO2, p.*

54, ¶*3*]. If RESPONDENT had wanted to include the order into the Agreement, they should have brought it up during the negotiations.

56 Further, the Agreement presented no risk to RESPONDENT that had to be mitigated in the first place. The risk of an uncertain price up until the limit of USD 13,125 was already accounted for by RESPONDENT's contract with Earhart [*Re. Ex. 2, p. 28*].

57 The divestment of CLAIMANT before the conclusion of the Agreement significantly changed the circumstances. Any prior practice became irrelevant at that point, because it would not be reasonable to expect CLAIMANT to adhere to the practice. Therefore, CLAIMANT is not bound by any practice to use the exchange rate of the time of payment.

A3. Under the applicable law, the exchange rate at the time of payment applies by default

58 Even if the Tribunal were to find that the Parties have not agreed on the exchange rate at the time of payment, the same rate of payment date prevails under the applicable laws. As demonstrated above, the Parties did at the very least not agree to apply a fixed exchange rate. A specific agreement on the exchange rate was not necessary, as the applicable laws provide for a reasonable risk sharing structure by default. The Parties have agreed that the applicable laws are the CISG and, for issues not dealt with by the CISG, the UNIDROIT Principles [*Cl. Ex. 2, p. 10, Sec. 20*]. Both of these instruments provide for the same default currency risk allocation between the Parties.

59 In the absence of any agreement to the contrary, CLAIMANT always bears the risk of EQD depreciation and RESPONDENT for EQD appreciation. Either Party's currency risk could materialise. The purchase price can only be calculated at the moment when the debt is due i.e. when the currency risks materialise.

60 Under the CISG and the UNIDROIT Principles, the default rule is that each party must carry their own risk of currency fluctuations [*ICC Brussels 8240; Gotanda, ¶3.7; Spivack, p. 783; Jenkins, p. 2010; under ULIS, see Heidelberg, 27 January 1981*]. The currency risk does not pass, i.e. the seller carries the risk of its currency depreciating and the buyer carries the risk of the seller's currency strengthening in value. One of these risks materialises at the time the debt is due. In other words, the debt remains in its nominal value in the seller's books until its due date, when the conversion is performed.

[*Erauw, II.B.; Hirschberg, p. 37; Fox, p. 144; Bernina Distributors v. Bernina Sewing Machine; CIS 1998*] The buyer's primary obligation is to pay the converted amount, which corresponds with the due date value of the seller's currency of account [*Arbitral Tribunal Hamburg, 2 May 1977; van Houtte, p. 15*].

61 In the present case, seller's currency EQD has appreciated relative to USD during the time from contracting to payment. RESPONDENT, as the buyer, carries this risk of EQD strengthening in value against the currency of payment, USD.

62 The Parties agreed that RESPONDENT pays in USD, based on the production costs CLAIMANT incurs in EQD. Prior to preparing the invoice and converting the amounts for the purchase price, the production costs are marked into CLAIMANT's books as expenses, in CLAIMANT's accounting currency EQD [*PO2, p. 57, ¶14*]. RESPONDENT, as the buyer, must pay the equivalent of this amount. Therefore, under the applicable laws and, as the Parties have not agreed otherwise, the exchange rate at the time of payment must be applied.

_____

63 **To conclude**, the Parties implicitly agreed to the exchange rate at the time of payment in connection to the pricing clause in the Agreement. Even if the Tribunal should reject the implicit agreement, the fixed exchange rate only applies to the sale of the clamps under the Addendum. The Addendum is essentially a subsidiary contract to the Agreement, and does not affect the terms therein. Furthermore, CLAIMANT would never have agreed to extend the fixed rate to the Agreement, because this would have invalidated the purpose of the agreed pricing mechanism and risk sharing structure. As there is no agreement on the fixed exchange rate, at the very least the applicable laws provide that the applicable exchange rate is the one prevailing at the time of payment. Therefore, the Tribunal should order RESPONDENT to pay the outstanding purchase price.

B. Respondent is liable for the bank charge deducted from the purchase price

64 In addition to the USD 2,285,240 missing from the full purchase price due to the erroneous exchange rate, another part of the purchase price was withheld due to an Equatorianian bank levy. Under Regulation ML/2010C every payment into Equatoriana exceeding USD two million are routed via the Equatoriana Central Bank to be

investigated to detect money laundering attempts. The Financial Investigation Unit of the Central Bank deducted a 0,5 % levy from the transferred purchase price to cover the costs of this investigation, amounting to USD 102,192.80. [*PO2, p. 55, ¶7*].

65 RESPONDENT should pay the part of the purchase price under the Agreement that remains outstanding due to the bank levy. Under the Agreement, RESPONDENT agreed to bear all bank charges related to the transfer of the amount, including the bank levy. [**B1**] In any case, RESPONDENT must pay the outstanding amount as part of its obligation to ensure payment of the full purchase price as part of the buyer's obligations under the CISG. RESPONDENT was under an obligation to observe, of its own initiative, all the laws and regulations related to the transfer of the amount [**B2**].

B1. Under the Agreement, RESPONDENT is obligated to pay the bank charge

66 The Tribunal should order RESPONDENT to pay the amount deducted from the purchase price by the Equatoriana Central Bank. The Parties' Agreement includes a specific provision governing bank charges, which are exclusively allocated to RESPONDENT.

67 The starting point of contract interpretation is always the wording of the agreement. If there is no indication that the parties intended to deviate from the usual meaning of the expression, the usual meaning shall apply [*see Schwenzer/Hachem/Kee 2012, ¶26.14, 26.16, Federal Supreme Court of Switzerland 2003*].

68 Pursuant to the Agreement "[t]he bank charges for the transfer of the amount are to be borne by the BUYER" [*Cl. Ex. C2, Sec. 4*]. The usual meaning of "bank charges for the transfer of the amount" is a sum charged by a bank in connection with the transfer of the amount. The levy deducted by the Equatoriana Central Bank is a sum charged by the bank in connection with the transfer of the amount, i.e. a bank charge.

69 There is no indication that the Parties intended to deviate from the usual meaning of the expression "bank charges". Therefore, RESPONDENT's allegation that the bank levy deducted is not part of the "ordinary bank charges for payments" [*ARfA, ¶18*] lacks merits. RESPONDENT is in fact admitting that they also understand the levy to be a bank charge. Nothing indicates that a distinction between "ordinary" and "special" bank charges is justified under the Parties' Agreement.

70 Furthermore, the same section of the Agreement that addresses bank charges, also provides that "[t]he BUYER will *deposit* the purchase price *in full* into the SELLER's

account" (emphasis added) [*Cl. Ex. 2, p. 10, Sec. 4*]. The obligation to deposit the full purchase price includes carrying out all necessary actions to ensure that the full purchase price is credited to CLAIMANT's bank account.

71 RESPONDENT has not complied with their payment obligation under the Agreement and consequently, CLAIMANT has not received the full purchase price it is entitled to under the Agreement. Therefore, RESPONDENT should pay the amount of the deducted levy to CLAIMANT.

B2. Under the applicable law, RESPONDENT is obligated to pay the bank levy

72 Even if the Tribunal were to find that the Agreement did not require RESPONDENT to bear the costs of the bank levy, RESPONDENT was under an obligation to pay, of its own initiative, the bank charges pursuant to its obligations as the buyer under the CISG.

73 In accordance with Art. 54 CISG, the buyer's main obligation to pay the price includes taking all necessary steps to enable payment to be made that are required under the law. Pursuant to Art. 57 CISG, the buyer is responsible to bear any costs associated with the payment of the purchase price to the seller's bank account, if the place of payment is the seller's place of business [*Butler/Harindranath in Kröll/Mistelis/Viscasillas, Art. 57 ¶¶12-13; Mohs in Schlechtriem/Schwenzer, Art. 57* ¶20*; OLG München 1997; Butler 2007, ¶4.05*] The obligation to pay is only discharged when the money is credited to the seller's account [*Butler/Harindranath in Kröll/Mistelis/Viscasillas, Art. 57 ¶12; Russian company v. Chinese company 2013; Schlechtriem 1986, p. 81; Bhala, p. 61-62*], unless the Parties specifically placed a certain obligation on the seller [*Secretariat Commentary, Art. 50 ¶2*].

74 The Parties determined the place of payment to be CLAIMANT's place of business, by agreeing that the purchase price had to be deposited into CLAIMANT's account at the Equatorianian National Bank [*Cl. Ex. 2, p. 10, Sec. 4*]. Consequently, RESPONDENT was required to bear any costs associated with the payment of the purchase price. This includes the levy of USD 102,192,80 that was deducted by the Equatoriana Central Bank [*PO 2, p. 56, ¶10*]. As the full purchase price never reached CLAIMANT's account, RESPONDENT did not fulfill its obligation to pay the purchase price.

75 Furthermore, the buyer must observe any and all laws and regulations, domestic or otherwise, that may have any effect on the payment [*Mohs in Schlechtriem/Schwenzer, Art. 54, ¶3; Witz in Witz/Salger/Lorenz, Art. 54* ¶5]. It is generally understood that the

buyer's standard of observation and compliance with such regulations is rather high: only obligations *impossible* to fulfill by the buyer shall fall upon the seller [*Maskow in Bianca/Bonell, Art. 54 ¶2.7*]. Even the laws and regulations in the country of the seller's place of business must be observed and complied with [*Mohs in Schlechtriem/Schwenzer, Art. 54 ¶4*].

76 The Equatorianian Regulation ML/2010C covers all payments over USD two million, and it was therefore clear that the regulation would apply to RESPONDENT's payment of USD 20,438,560. Information and details of the Regulation ML/2010C were widely covered by the Equatorianian media, before the Parties concluded the Agreement [*PO 2, p. 55, ¶7*]. Therefore, all the necessary information was readily available. It was by no means impossible for RESPONDENT to observe Regulation ML/2010C, comply with it and pay CLAIMANT in full. At the latest, RESPONDENT became aware that they had neglected to observe some regulations or to take other necessary steps on February 9, 2015, when CLAIMANT informed that a part of the purchase price was missing [*Cl. Ex. 6, p. 15*]. RESPONDENT should have rectified their negligence at that time.

77 RESPONDENT had the means and opportunity to fulfill their obligation as the buyer under the CISG and failed to do so. Thus, the Tribunal should order RESPONDENT to pay the amount of the levy deducted to CLAIMANT.

B3. RESPONDENT had to observe all relevant regulations, of its own initiative

78 RESPONDENT alleges that CLAIMANT was under an obligation to inform RESPONDENT of the laws and regulations in Equatoriana [*ARfA, p. 26, ¶19*]. RESPONDENT bases its understanding on Art. 35 CISG, which RESPONDENT believes to provide that the seller is not expected to know all public law regulations at the buyer's place of business. RESPONDENT further alleges that this rule applies to the buyer's obligation to pay the purchase price as well. However, RESPONDENT's understanding is incorrect as the same considerations cannot be applied to the buyer's obligation to pay the price. The buyer's obligations are separate and not comparable to the seller's. CLAIMANT, as the seller, did not have to inform RESPONDENT, the buyer, about the public law regulations in Equatoriana.

79 Seller's and buyer's obligations are fundamentally different and cannot be interpreted interchangeably. During the drafting of what is currently Art. 54 CISG, it was expressly

pointed out that the obligations of the buyer and the seller are not parallel [*UNCITRAL Yearbook VIII, Art. 35, ¶318*]. As the seller already has a substantially larger amount of obligations to fulfill [*Osuna-González, p.299*], it would be unreasonable to require the seller to observe if its product complies with all the public law requirements in the country of any given buyer. For a buyer it is less burdensome to inform itself of public law requirements that could impact the payment of the purchase price.

80 Even if one would apply the logic of Art. 35 CISG, RESPONDENT would still have to observe and adhere to the public law regulations in CLAIMANT's place of business due to the Parties' long-standing business relationship.

81 In the New Zealand Mussels Case the German Federal Court of Justice stated that seller does not have to observe the public law regulations in the country of the buyer [BGH 1995; see also OGH 2000]. Therefore, it would be the buyer's obligation to inform the seller of any relevant regulations. However, this rule does not apply in a variety of situations [Schwenzer in Schlechtriem/Schwenzer, Art. 35 ¶17]. If the buyer could reasonably assume that the seller would know about the public law requirements in the buyer's country because of a long standing business relationship, the seller would be expected to inform himself of any regulations that could influence their transactions [Schwenzer in von Caemmerer/Schlechtriem, Art. 35 ¶17].

82 CLAIMANT and RESPONDENT have been involved in a business relationship since 2003. Parties have only entered into three separate contracts during this time. However, this is to be expected, considering the nature of the business relationship. The Parties develop and manufacture aircraft machinery components, which may take multiple years to complete. Consequently, the Parties have been in a contractual relationship nearly constantly since their first contract was concluded [*PO 2, ¶5*]. Therefore, the business relationship between the Parties is a long standing one.

83 Therefore, CLAIMANT could rely on RESPONDENT carrying out its obligation of being aware of any regulations in Equatoriana that could impact the fulfillment of RESPONDENT's obligations. CLAIMANT did not have to inform RESPONDENT about any such regulations.

84 **To conclude**, the bank levy must be borne by RESPONDENT. This obligation follows not only from the Parties' explicit agreement, but also from the applicable laws. Therefore, the Tribunal should order RESPONDENT to pay the amount deducted in the form of the levy, USD 102,192.80, to CLAIMANT.

II. CLAIMANT'S CLAIMS ARE ADMISSIBLE

85 As all efforts to find an amicable solution failed, CLAIMANT was forced to submit the dispute to arbitration. On 31 May 2016, CLAIMANT initiated the arbitration proceedings by submitting the Request for Arbitration to the CAM-CCBC. The arbitration was initiated within 60 days from the failure of negotiations on 1 April 2016. The CAM-CCBC requested CLAIMANT to amend the Request for Arbitration. On 7 June 2016, CLAIMANT submitted a duly signed power of attorney and paid the remainder of the registration fee. Now, RESPONDENT is trying to portray these submissions as legal necessities only to prevent CLAIMANT from pursuing its legitimate claims.

86 CLAIMANT has met the time limit set out in the Agreement. The Agreement only requires initiation, which is different from commencement as per the CAM-CCBC Rules. In any case, in order to commence arbitration CLAIMANT only had to identify the dispute, which it has done. [**A**] Even if CLAIMANT did not meet the time limit for arbitration, the claims remain admissible. The Parties' dispute resolution clause is optional, and CLAIMANT could have brought the claims to court even after the deadline for arbitration had passed. Instead, CLAIMANT brought the claims to arbitration even though the Tribunal may not have had jurisdiction at the time. However, the Tribunal's lack of jurisdiction was cured when RESPONDENT, in its Answer to the Request for Arbitration, waived its right to object to arbitration. Therefore, the Tribunal can hear the claims. [**B**]

A. The arbitration was initiated on time

87 RESPONDENT alleges that the arbitration was not commenced in the agreed manner, as required by the CAM-CCBC Rules. However, RESPONDENT fails to notice that the Parties agreed on initiation rather than commencement. CLAIMANT will show that mere initiation of arbitration meets the requirements of the Agreement, and consequently the 60-day time limit had not passed at the time CLAIMANT submitted

its claims [**A1**]. In any case, CLAIMANT has complied with the essential requirements of international arbitration practice to commence arbitration [**A2**].

A1. The arbitration was initiated within the 60-day time limit

88 The Tribunal should find the claims admissible as the arbitration was initiated within 60 days of the failure of negotiations.

89 The word *to initiate* means to begin the proceedings by submitting a request for arbitration [*Sabater, p. 108; Berger 2002, p. 41,¶3-14*]. The established meaning of the expression *to initiate* is "to cause or facilitate the beginning of" [*Merriam-Webster*] or "to cause (a process or action) to begin" [*Cambridge Dictionary; Oxford Living Dictionary*]. Therefore, initiation is a one-sided action. Initiation does not require a started action to reach an end. An expression in an agreement must be interpreted in accordance with its literal meaning, unless the parties have given it a different meaning [*Schwenzer/Hachem/Kee 2012, ¶26.14, ¶26.16; Federal Supreme Court of Switzerland 2003*].

90 The Agreement provides that "each party has the right to initiate arbitration proceedings within sixty days" [*Cl. Ex. 2, p. 11*]. No evidence suggests that the Parties deviated from the literal meaning of the expression *to initiate* [*PO2, p. 57, ¶21*]. CLAIMANT caused the proceedings to begin when CLAIMANT submitted the Request for Arbitration on 31 May 2016. Consequently, the CAM-CCBC took over the management of the case, requested further information and assigned the case a case number [*Order of the President of the CAM-CCBC, p. 19*]. With regard to initiation, it is irrelevant whether CLAIMANT submitted all the documentation asked by the arbitration institute. The Agreement only requires CLAIMANT to take the first step, i.e. inform the CAM-CCBC of CLAIMANT's intent to begin the arbitration proceedings, within 60 days.

91 The Parties agreed on a 60-day window to start arbitration proceedings [*Cl. Ex. 2, p. 11, Sec. 21*]. Hence, the option to arbitrate is available for a limited time. For the sake of fairness and certainty, there has to be an unambiguous way to determine which action stops the running of the 60-day time limit and on which day it is considered stopped. [*see Lew/Mistelis/Kröll, p. 508, ¶20-15; Schwartz/Derains, p. 43*] Art. 4 of the CAM-CCBC Rules does not stipulate how the exact date of commencement of the arbitration is determined [*Straube/Filho/Finkelstein, p. 66*]. The Parties had to determine this moment in their Agreement. Therefore, the Parties deviated from *commencement* under

the Art. 4 of the CAM-CCBC Rules by adopting the term *initiate* to their dispute resolution clause. Initiating the arbitration stops the 60-day time limit from running.

92 In conclusion, the Parties agreed that initiation is the action that stops the time limit from running. CLAIMANT has initiated the arbitration within 60 days by submitting the Request for Arbitration. Therefore, CLAIMANT complied with the contractual time limit and the Tribunal should find CLAIMANT's claims admissible.

A2. In any case, the arbitration commenced within the 60-day time limit

93 In any case, the claims are admissible, because CLAIMANT has complied with the essential requirements to commence arbitration within the set time limit. Pursuant to international arbitration practice, commencement of arbitration does not require submitting a power of attorney nor payment of registration fee at the time of filing the request for arbitration.

94 The Parties agreed to arbitration under the CAM-CCBC Rules and for the procedure to be conducted in line with international arbitration practice [*Cl. Ex. 2, p. 11*]. Therefore, the Agreement calls for the CAM-CCBC Rules to be supplemented with international practice.

95 The CAM-CCBC Rules do not provide that failure to meet one of the requirements of Art 4.1 would prevent the commencement of arbitration [*Straube/Filho/Finkelstein, p. 66*]. If the applicable rules do not expressly stipulate the consequences of failure to fulfill technical requirements of commencement, no such consequences should arise [*Waincymer, p. 225; ICC Case 6784*].

96 In international arbitration practice, including various established sets of international arbitration rules [*Redfern/Hunter, ¶6.19*], arbitration commences when the essential information of the dispute reaches the arbitration institute [*Bull, p. 160; Berger 1993, p. 380*]. Proper identification of the parties, articulation of claims and relief sought are the only pieces of information needed [*Waincymer, p. 223*]. Several influential arbitration institutions have, in their respective rules, established that arbitration commences at the receipt of the request for arbitration by the institution [*ICC Rules 2012 Art. 4 (1), Swiss Rules 2012 Art. 3(2), VIAC Rules 2013 Art. 7(1), SCC Rules 2010 Art. 4, HKIAC Rules 2013 Art. 4.2; Brekoulakis ¶1.19*]. In any case, the institution sets a time limit for rectification in case a party does not submit other, not essential, documents or take other action listed in the rules in connection with commencement. If that time limit is

complied with, delay does not affect the commencement of arbitration. [*E.g. Swiss Rules 2012 Art. 3(5), HKIAC Rules 2013, Art. 4.7*].

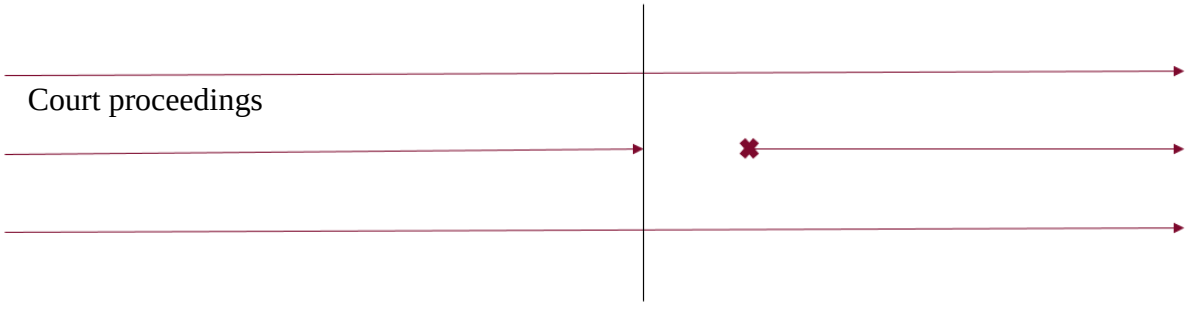
97 On 31 May 2016, CLAIMANT submitted the Request for Arbitration identifying the Parties, the claims and the relief sought [*RfA pp. 3-7*]. Therefore, CLAIMANT provided the information the institute needs to start the proceedings.

98 CLAIMANT did not enclose a duly signed power of attorney nor pay the full registration fee in connection with submitting the Request for Arbitration. On 1 June 2016, the CAM-CCBC noted these shortcomings and set a time limit for providing the missing documentation and payment. [*Order of the President of the CAM-CCBC, p. 19*]. CLAIMANT complied promptly [*Fasttrack's letter of 7 June 2016, p. 20*]. Therefore, this delay does not affect the commencement of arbitration.

99 As the CAM-CCBC Rules do not provide for any consequences of failure to submit all listed documents or take listed action, no negative consequences should arise. Neither a duly signed power of attorney nor the full payment of the registration fee are required to commence arbitration, as the arbitration proceedings shall be conducted in line with international arbitration practice. CLAIMANT has submitted all the essential information to commence arbitration. Thus, CLAIMANT commenced the arbitration proceedings within the 60-day time limit of the Agreement.

B. Exceeding the time limit would not render the claims inadmissible

100 Even if the Tribunal should find that the agreed time limit for initiating arbitration was exceeded, CLAIMANT's claims would be admissible. The Parties have opted for an optional dispute resolution clause that allows their claims to be presented in either national court or arbitration. After the 60 days have passed, the claims can still be resolved_in national courts. Therefore, the claims cannot be rendered finally and bindingly inadmissible in arbitration. The consequences of exceeding the time limit should rather be described jurisdictional. However, the lack of jurisdiction of the arbitration Tribunal was cured when RESPONDENT waived its right to object to the Tribunal's jurisdiction.



Arbitration proceedings Waiver

Admissibility

60-day time limit

101 Parties can include hybrid dispute resolution clauses allowing for optional forums. When a dispute arises, the parties can decide on a suitable forum. At that point, they are best equipped to select the most appropriate forum to resolve their conflict [*López De Argumedo Piñeiro/Balmaseda, p. 55*]. Specialised commercial fields may call for special expertise that can be best arranged in arbitration. In turn, some simpler or smaller disputes may also arise and national courts would, for example, have the power to grant summary judgments against a defaulting party [*Nesbitt/Quinlan p. 144*].

102 CLAIMANT and RESPONDENT both operate in a highly specialised field of aircraft engineering [*RfA p. 3*]. Deciding e.g. on conformity of aircraft equipment might require special expertise [see *the Questionnaire, p. 36, ¶11*], which national courts do not necessarily provide. Therefore, the Parties agreed on a hybrid arbitration clause, which allows the Parties to choose between national court and arbitration. The wording of the dispute resolution clause indicates the choice: "each party has the right to initiate arbitration proceedings within sixty days after failure of the negotiations to have the dispute decided by an arbitrator" [*Cl. Ex. 2, p. 11, §21*]. The wording *right to* initiate arbitration gave the Parties an additional choice to arbitrate instead of taking away their option to present their claims in national court. The expression *right to* cannot rule out any options.

103 Furthermore, RESPONDENT has alleged that the Tribunal cannot hear CLAIMANT's claims because they are not admissible. This allegation is incorrect. CLAIMANT's claims are admissible because the dispute resolution clause does not restrict CLAIMANT's right to present its claims in a national court. The expiry of the time limit is rather an issue of jurisdiction. In other words, it is a question of *where* claims can be brought (jurisdiction), not *whether* certain claims can be brought in the first place (admissibility) [*Mustill/Boyd p. 170; Park 2006 p. 100-102; Paulsson p. 601; Pinsolle 2002 p. 241; Walters 2012 p. 660*]. However, RESPONDENT has admitted the Tribunal's jurisdiction [*ARfA, p. 24, ¶3*]. This should be deemed a waiver of any

potential objections to the jurisdiction of the Tribunal [see *Automobiles Peugeot v. Omega Plus*]. Therefore, the Tribunal can hear and decide on CLAIMANT's claims.

104 CLAIMANT has demonstrated that RESPONDENT's allegations of inadmissibility are incorrect. Even if the time limit for initiating arbitration had passed when CLAIMANT submitted its claims, the claims are not inadmissible. Therefore, the Tribunal should hear CLAIMANT's claims.

---

105 **To conclude**, CLAIMANT has initiated arbitration within the agreed 60-day time limit, as initiation means starting the proceedings. The proceedings were initiated, i.e. started, when CLAIMANT submitted the Request for Arbitration. Should the Tribunal consider the word *initiate* to mean the same as commence within the meaning of the CAM-CCBC Rules, the arbitration was in any case commenced already at the time CLAIMANT submitted the Request for Arbitration, which properly identified the dispute. A duly signed power of attorney and the payment of the full registration fee are not prerequisites for commencement of arbitration in international arbitration practice.

106 Even if CLAIMANT did not initiate arbitration on time, the claims are admissible. The Parties' dispute resolution clause is optional, and CLAIMANT could have brought the claims to court even after the window to arbitrate had closed. Instead, CLAIMANT brought the claims to arbitration even though the Tribunal may not have had jurisdiction at the time. However, the Tribunal's lack of jurisdiction was remedied when RESPONDENT, in its Answer to the Request for Arbitration, admitted the Tribunal's jurisdiction. Therefore, the Tribunal should find the claims admissible.

III. THE TRIBUNAL CANNOT AND SHOULD NOT ORDER CLAIMANT TO PROVIDE SECURITY FOR RESPONDENT'S LEGAL COSTS

107 CLAIMANT was forced to initiate this arbitration due to RESPONDENT's refusal to pay the outstanding purchase price under the Agreement. RESPONDENT has filed an unexpected request for security for costs to hinder and disrupt the proceedings. However, the Parties did not agree on security for costs being part of their customised proceedings. Neither the dispute resolution clause nor the chosen laws or rules provide

for security for costs. Furthermore, an order for security for costs is likely to destabilise CLAIMANT, a financially stable company whose capital, however, is mostly in non-liquid form. CLAIMANT would by no means have agreed on such a financially burdensome measure.

108 Therefore, CLAIMANT will establish that the Tribunal does not have the power to order security for costs as the Parties' agreement does not grant the Tribunal that power [**A**]. Furthermore, RESPONDENT has requested security for costs in the form of an interim order. In order to grant such relief, the prerequisites for both interim measures and the special requirements for security for costs, found in international arbitration practice, must be fulfilled. CLAIMANT will demonstrate that the circumstances at hand do not meet these preconditions [**B**].

A. The Parties did not agree on the Tribunal having the power to order security for costs

109 The Parties did not grant the Tribunal the power to order security for cost [**A1**]. In any case, the Parties should have expressly agreed on such power, because it constitutes an indirect waiver of the right to access to justice [**A2**].

A1. The Agreement or the applicable laws do not provide for the power to order security for costs

110 The Tribunal cannot order CLAIMANT to provide security for RESPONDENT's legal costs. This power is not conferred to the Tribunal by the Parties' dispute resolution clause, nor by any applicable rules or laws.

111 Party autonomy governs the arbitral procedures, no matter how simple the parties' agreement is [*Fouchard/Gaillard/Goldman 1999, ¶45; Lew/Mistelis/Kröll, p. 4, ¶¶1-11; Born/Beale, pp. 31-32*]. If neither the rules nor the dispute resolution clause expressly provide for security for costs, it establishes a presumption against the power to order security for costs. In *Pey v. Chile*, neither the ICSID Convention nor the bilateral treaty provided for security for costs. [*Pey v. Chile, ¶86; on the relevance of ICSID cases in connection with security for costs, see Ramírez, p. 79*] When a question is not explicitly addressed in a dispute resolution clause, the parties' intent or at least the reasonable understanding of what the parties must have intended, is based on all the circumstances surrounding the dispute resolution clause [*Art. 8 CISG; Vorobey, p. 144-145; MCC Marble v. Ceramica*]. In such a case, the parties' knowledge of international

arbitration and its instruments must be taken into account [*Vorobey, p. 147; ICC Case 10422*].

112 The dispute resolution clause does not expressly mention security for costs [*Cl. Ex. 2, pp. 10-11, Sec. 21*]. The Parties exercised their autonomy by choosing the seat of arbitration and the relevant rules. The arbitration shall be conducted in Danubia, under the CAM-CCBC Rules and in line with international arbitration practice [*Cl. Ex. 2, p. 11, Sec. 21*]. None of them grant the power to order security for costs. The lack of express provisions establishes a presumption against power to order security for costs.

113 Due to the lack of express provisions, the Parties' intentions must be looked into. In the aircraft industry, extensive development projects restrain liquidity and CLAIMANT does not have large reserves of liquid assets available [*RfA, p. 4 ¶3; PO2, pp. 58-59, ¶28*]. Liquidating their assets on short notice would be both difficult and destructive for their business. However, in case a final award on costs is rendered against a Party, the liquidation of these assets would be possible. It would have been unreasonable for the Parties to agree on a procedural tool such as security for costs. Furthermore, the Parties dispute resolution clause was the standard clause used in all contracts within the Engineering International group. The Parties did not negotiate the contents of the clause [*PO2, p. 57, ¶21*]. Had the Parties had knowledge of security for costs in international arbitration, which is unlikely, it would have been commercially sensible for them to exclude that option.

114 If the Parties intended the Tribunal to have the power to order security for either Party's costs, they could have opted for an institution that offers a tribunal the power to order security for costs [*see for example LCIA Rules 1998 Art. 25.2; ACICA Rules 2005 Art. 28.2 (e), SIAC Rules 2007 24.1 (m)*]. Instead, the Parties agreed that the arbitration shall be conducted under the CAM-CCBC Rules [*Cl. Ex. 2, p. 11, Sec. 21*]. Art. 8 CAM-CCBC Rules only provides for provisional measures, and does not mention security for costs. Furthermore, Art. 12 CAM-CCBC Rules includes a costs regime, which covers the fees for the Tribunal's administration and for arbitrators, but leaves out security for costs. The relevant articles in the CAM-CCBC Rules do not provide for power to order security for costs.

115 The Parties agreed to conduct the proceedings in line with international arbitration practice [*Cl. Ex. 2, p. 11, Sec. 21*], which does not grant the Tribunal the power to order

security for costs. There can hardly be an international practice as security for costs is granted only in rare and exceptional cases [*Craig/Park/Paulsson 2000, pp. 467-468; Berger 2015, ¶21-7*]. Furthermore, security for costs is peculiar to Commonwealth jurisdictions and is not universally recognised [*Moens/Luttrell, p. 82; von Goeler, p. 338*]. Even if one were to find some basis from international practice granting the power, a mere reference to international practice cannot constitute consent to the Tribunal having the power to order security for costs.

116 The Parties have not expressed a will to allow security for costs to be used in their arbitral proceedings. The dispute resolution clause and any relevant circumstances do not form a sufficient basis for power to order security for costs. Similarly, the institutional rules and the law of the seat of arbitration are silent on the issue of security for costs. Nothing indicates that the Parties granted the Tribunal the power to order security for costs.

A2. In any case, an order for security for costs undermines a party's access to justice and therefore should be agreed upon

117 In any case, the Tribunal cannot order security for costs, because such a measure limits CLAIMANT's right to access to justice. The Parties did not expressly grant the Tribunal the power to order security for costs. Security for costs must be expressly agreed upon as it constitutes an indirect waiver of access to judicial remedies.

118 In order to validly waive their right to access to judicial remedies, the parties have to agree on and understand the consequences of the waiver [*Kurkela/Turunen, p. 43*]. If security for costs is ordered and a claimant does not provide the security, the proceedings will be suspended or dismissed by an award [*RSM v. Saint Lucia, ¶46-47, 53; LCIA Rules 2014, Art. 25.2; Gu, p. 167*]. Consequently, a claimant is deprived of its right to access to justice. By agreeing to a tribunal having the power to order security for costs, a party accepts the consequence of losing its right to access to justice. [*ICC Case 10032 (ii)(a); Fouchard/Gaillard/Goldman, p. 687, ¶1256*]

119 Even though CLAIMANT is a financially stable company, most of its capital is in non-liquid form. CLAIMANT does not have sufficient cash reserves to provide for security for costs. [*PO2, pp. 58-59, ¶28*] Consequently, order for security for costs would set a barrier to CLAIMANT's access to arbitration. As established above in Section II, the

Parties have an optional dispute resolution clause [*Cl. Ex. 2, p. 11, Sec. 21*] which allows the Parties to choose on which forum, arbitration or national court, they want to resolve their disputes. In the present circumstances it is likely that regardless of the forum RESPONDENT will request for security for costs. Therefore CLAIMANT's right to access to justice is systematically obstructed. As the Parties' agreement does not grant the Tribunal the power to order security for costs.

120 The Parties have not agreed on the power to order security for costs. Therefore, CLAIMANT has not consented to waive its right to access to arbitration. The Tribunal should find that it cannot order security for costs.

B. The Tribunal should not order CLAIMANT to provide security for RESPONDENT's costs

121 RESPONDENT has requested an interim order for security for costs. Should the Tribunal find that it has the power to grant an order for security for costs, this request must be granted as an interim order, as per RESPONDENT's request.

122 Art. 17 Danubian Arbitration Law sets out cumulative criteria for ordering interim relief. CLAIMANT will show that the prerequisites of Art. 17 are not met in the case at hand. First, RESPONDENT will not suffer any harm not adequately reparable by a costs award, because CLAIMANT, although limited in liquidity, has assets that can be used to satisfy a costs award [**B1**]. Second, a preliminary assessment of the merits of the case will lead to the conclusion that RESPONDENT does not have a reasonable possibility to succeed on the merits [**B2**].

123 Furthermore, the Parties have agreed to conduct the arbitration in line with international arbitration practice. Consequently, not only must all the general requirements for interim measures be met but also the requirements for security for costs in international practice. No exceptional circumstances that would justify granting the request are at hand [**B3**]. Further, CLAIMANT's financial situation has not changed fundamentally and unforeseeably since the Agreement was concluded [**B4**]. Every single requirement, concerning both interim measures and security for costs, needs to be fulfilled to grant RESPONDENT's request.

B1. RESPONDENT would not suffer irreparable harm

124 RESPONDENT must show that it is likely to suffer irreparable harm, if its request is not urgently ordered. Additionally, RESPONDENT's potential harm must outweigh that of CLAIMANT's. The present circumstances do not support RESPONDENT's request.

125 The first condition for ordering an interim measure is that in case the relief is not granted, a party would likely encounter harm not adequately reparable by a costs award [*Danubian Arbitration Act Art. 17 A (1)(a)*]. For harm to be irreparable, a party should demonstrate that it cannot be repaired by a final award. Such harm could occur due to effective insolvency of the claimant or when the final award cannot be satisfied out of claimant's assets [*Born, pp. 2470-2471; Plama Consortium Ltd v. Repub. of Bulgaria, ¶46*]. Moreover, when considering the occurrence of irreparable harm, the requested measure must be deemed urgent. Urgency would require that a securing order cannot wait until the final award. [*Born, p. 2474*; *Holtzmann/Neuhaus, p. 170; ICC Case 14433 ¶47*].

126 A costs award in RESPONDENT's favour could be satisfied from CLAIMANT's assets of over USD 42 million [*PO2, pp. 58-59, ¶28*]. RESPONDENT may seek enforcement of a costs award under the New York Convention [*see ICC Case 12393, ¶¶37-39*] because the domiciles of the Parties, Equatoriana and Mediterraneo, are contracting states. Same holds true for the seat of arbitration, Danubia. [*PO2, p. 60*]

127 Moreover, no insolvency or bankruptcy proceedings have been initiated against CLAIMANT [*PO2, p. 60, ¶31*], which further indicates that there is no risk of irreparable harm under the present circumstances. Furthermore, RESPONDENT filed the request only after signing the Terms of Reference [*ToR, p. 43; RfSfC, p. 45*], despite having had access to CLAIMANT's balance sheets for six years [*PO2, p. 58*]. RESPONDENT does not seem to be in an urgent need for security.

128 In addition, a harm not adequately reparable has to substantially outweigh the harm that would likely occur to the party against whom the measure is ordered [*Danubian Arbitration Law Art. 17 A (1)(a), similar provision on U.S. Federal Arbitration Act, referred to in Sandrock, p. 32*].

129 RESPONDENT has requested a security for its costs in the amount of USD 200,000 or even higher [*RfSfC, p. 46*]. CLAIMANT's cash balance is less than the requested

amount [*PO2, p. 59, ¶28*]. Emptying its cash assets would harm CLAIMANT's everyday business and lead to an unbearable strain in liquidity. CLAIMANT's assets mainly consist of properties, plant and equipment [*PO2, p. 59, ¶28*]. If CLAIMANT were to be ordered to provide security, it could be forced to liquidate its assets. Liquidating this kind of assets would severely disrupt CLAIMANT's business. Now that CLAIMANT is at the home stretch in its development phase of the TRF-305 fan blade [*PO2, p. 58, ¶27*], albeit obtaining sufficient assets to pay an award, the harm caused to CLAIMANT's business would outweigh that of RESPONDENT's. Even if the Tribunal would find potential harm to take place, it does not substantially outweigh the harm that would occur to CLAIMANT.

130 In the present circumstances, RESPONDENT would not undergo irreparable harm if the request was not granted. Furthermore, any harm RESPONDENT would undergo does not outweigh the harm caused to CLAIMANT by having to liquidate its assets to satisfy the request. Hence, the Tribunal should not grant the request.

B2. A preliminary assessment of the case prevents an order for security for costs

131 CLAIMANT will demonstrate that a preliminary assessment on the merits would be in its favour. In any case, a preliminary assessment of RESPONDENT's payment obligation would lead to a pre-judgement on the substantive dispute.

132 The second cumulative requirement for ordering interim measures is that the requesting party has a reasonable possibility to succeed on the merits of the case [*Danubian Arbitration Law Art. 17 A (1)(b); CIArb Guideline Applications for Security for Costs Art. 2; Caron, p. 490; Redfern-O'Leary p. 410; ICC Case 12035, ¶48, ¶51; ICC Case 14433, ¶47*]. A preliminary assessment of the case would lead the Tribunal to conclude that CLAIMANT is entitled to the full purchase price pursuant to the governing laws. Firstly, CLAIMANT is entitled to the full purchase price based on exchange rate at the time when the payment is made. Secondly, RESPONDENT has to bear the bank charges deducted from the purchase price. [*Cl. Ex. 2, p. 10, Sec. 4*] For further elaboration, CLAIMANT invites the Tribunal to refer to section I of this memorandum.

133 Even though the tribunal shall take a preliminary view on the merits, it should not make any subsequent determination or prejudgement that could compromise its discretion in the proceedings [*Danubian Arbitration Law Art. 17 A (1)(b), CIArb Guideline*

Applications for Security for Costs Art. 2; UNCITRAL December 2003 Working Group Report, A/CN.9/545, p. 283 ¶32]. Security for costs cannot be ordered if, while deciding on the request, the tribunal is forced to take a stand on an issue that is also relevant in deciding on the merits of the case as this would constitute a prejudgement on the merits [*South American Silver Limited v. Bolivia, ¶55; Rubins, p. 370*].

134 The material issue in this dispute is whether RESPONDENT has paid the full purchase price under the Agreement [*ARfA, p. 25*]. In addition, CLAIMANT's defence against the request for security for costs relies on RESPONDENT's failure to fulfill its contractual obligation. RESPONDENT has partially withheld its payment for the fan blades and thus strained CLAIMANT's liquidity. In international arbitration practice, a respondent causing the financial problems of a claimant by the acts that led to the dispute is grounds for rejecting the request for security for costs [*Redfern/Hunter, ¶5.35; Rubins, p. 375*]. When deciding on security for costs and assessing CLAIMANT's argument, the Tribunal would have to decide if RESPONDENT has caused CLAIMANT's lack of funding [*AtRfSfC, p. 49*]. By assessing CLAIMANT's argument against the order for security for costs the Tribunal would, therefore, be forced to prejudge whether CLAIMANT is entitled to the full purchase price.

135 It is highly unlikely that RESPONDENT would succeed in its defence. Therefore, this second condition of ordering security for costs as interim measures under Danubian Arbitration Law is not fulfilled. Furthermore, the Tribunal should not order security for costs because making a preliminary assessment for security for cost would lead to a prejudgement on the merits of the case.

B3. No exceptional circumstances are at hand

136 In addition to the requirements for interim measures under the Danubian Arbitration Law, the Tribunal should follow the requirements for security for costs found in international arbitration practice. The Tribunal should deny RESPONDENT's request for security for costs, as no exceptional circumstances are at hand. Firstly, CLAIMANT has a sufficient amount of assets and is not insolvent. Secondly, no third party funding is present in the case. Contrary to RESPONDENT's assertions, the fact that CLAIMANT sought third party funding is irrelevant.

137 A claimant's insolvency is the primary requirement for ordering security for costs and is considered to constitute exceptional circumstances where security for costs might be

deemed appropriate [*Karrer/Desax, ¶34; Gu p. 190; Rubins p. 373; Sandrock p. 34*]. However, pursuant to international arbitration practice, even if a party is manifestly insolvent that alone does not constitute exceptional circumstances [*X S.A.R.L., Lebanon v. Y A.G., Germany; ICC Arbitration 19.12.2003; Commerce Group Corp. v. El Salvador, ¶¶48-49; ICC Case 15218 ¶16; ICC 14355 ¶3; Fouchard/Gaillard/Goldman p. 688*]. Only where bankruptcy is suspended for the lack of assets or a defendant has a temporal or definite certificate of loss, such manifest insolvency might be at hand [*Berger/Kellerhals p. 518; ICC Case 14993 ¶7; ICC Case 15218 ¶19*].

138 The concerns over CLAIMANT's limited liquidity can be traced back to RESPONDENT's actions. In January 2015, RESPONDENT unexpectedly withheld a part of the purchase price for the TRF 192-I fan blades despite CLAIMANT informing RESPONDENT about the correct price [*Cl. Ex. 6, p. 15; Cl. Ex. 7, p. 16*]. Additionally, RESPONDENT's request for security for costs threatens to cause further strain on CLAIMANT's liquidity. Granting RESPONDENT's request would drive CLAIMANT to the brink of insolvency. However, no insolvency or bankruptcy proceedings have been initiated against CLAIMANT [*PO2, p. 60*]. CLAIMANT is more than able to satisfy a costs award amounting to the requested USD 200.000 due to its total assets amounting to USD 42,757,950 [*PO2 p. 59*].

139 CLAIMANT has explored the possibility to obtain outside funding for arbitral proceedings. RESPONDENT contends that this raises doubts as to CLAIMANT's financial situation. This view is erroneous and based on a misunderstanding of third party funding.

140 Third party funding can constitute an exceptional circumstance [*Sandrock, p. 34*], because it may put claimants in a more favourable position than respondents [*Darwazeh/Leleu, p. 142*]. Namely, third party funding tends to create an incentive for claimants to exaggerate the amounts claimed or pursue claims lacking in merit, and thus the costs are unfair for respondents. Therefore, third party funding does not indicate a lack of liquid resources but rather may put the counterparty in an unfair position. Furthermore, seeking litigation funding is not a sign of lack of funds but rather shows that companies reserve their liquid assets for running their business [*von Goeler, p. 341*].

141 CLAIMANT does not receive third party funding [*PO2, p. 59*] and the fact that CLAIMANT sought funding is irrelevant. CLAIMANT's claims are genuine and the amount claimed is reasonable.

142 The Tribunal should find that it should not order security for costs because no exceptional circumstances are at hand and CLAIMANT is not funded by a third party. CLAIMANT has sufficient assets to comply with any costs award against it.

B4. CLAIMANT's financial situation has not fundamentally changed since the conclusion of the Agreement

143 The financial situation of CLAIMANT has not changed fundamentally and unforeseeably compared to the time of conclusion of the Agreement. Without such a change, a request for security for costs cannot be granted, pursuant to international arbitration practice.

144 Security for costs can be ordered only if there has been a fundamental change in circumstances compared to the time of the conclusion of the arbitration agreement [*ICC Case 10032 ¶45, referred to in Karrer/Desax ¶¶ 33, 42 and in Gu p. 188-189; Henderson p. 69*]. In addition, a change in circumstances should be commercially unforeseeable to be considered a fundamental change [*ICCA TPF task force report 2015, p. 17*]. If the other party had financial difficulties already at the time the initial agreement was concluded, the other party will be deemed to have knowingly accepted this risk, and therefore, is not in need of legal protection.

145 CLAIMANT's financial situation has not changed substantially between the conclusion of the dispute resolution clause and the current moment. Firstly, CLAIMANT's way of conducting business includes periods when its resources are allocated to developing a new product [*Cl. Ex. 9, p. 50*]. The changes in liquidity are a natural part of CLAIMANT's business and as a close partner RESPONDENT was already well aware of this at the time the Agreement was concluded. As RESPONDENT was aware of CLAIMANT's business model, it accepted the risk of CLAIMANT's occasionally strained liquidity. RESPONDENT does not merit legal protection as it took the risk knowingly.

146 Secondly, RESPONDENT alleges that CLAIMANT has not complied with an arbitral award rendered in another CAM-CCBC arbitration dating back to January 2016. In that dispute, the opposing party owes a substantial amount to CLAIMANT's parent

company as damages due to a non-conforming delivery. CLAIMANT is awaiting the result of the litigation in Ruritania. Any awarded sum will be set off against the award. [*AtRfSfC, p. 49*] Therefore, RESPONDENT has assumed wrongly that said award would seriously endanger CLAIMANT's liquidity and constitute a fundamental change.

147 Thirdly, RESPONDENT is painting a misleading picture of another arbitration between CLAIMANT and the government of Xanadu. The arbitration proceedings took place in 2010 and an award of USD 12 million was rendered in favour of CLAIMANT. A realistic estimate of the award was publicly available in CLAIMANT's balance sheet since April 2010 [*PO2, p. 58*]. Thus, RESPONDENT had the means to assess CLAIMANT's financial situation at the time the Agreement was concluded in August 2010. It would be incorrect to state that CLAIMANT's financial situation had fundamentally changed based on a successful claim.

148 As established above, CLAIMANT's financial standing has not changed fundamentally from the time when the Parties entered into the Agreement. The Parties have been close business partners and thus RESPONDENT could not have been unaware of the way CLAIMANT conducts its business. Neither do RESPONDENT's other allegations establish a fundamental, let alone unforeseeable change.

---

149 **To conclude**, the Parties did not grant the Tribunal the power to order security for costs in their arbitration proceedings. However, even if the Tribunal reached a finding to the contrary, the present circumstances would need to meet all the requirements set in applicable law and international arbitration practice. CLAIMANT has shown that the prerequisites for interim measures set in Danubian Arbitration Law and specific requirements for security for costs deriving from the international arbitration practice are not met. Therefore, the Tribunal should deny RESPONDENT's request for security for costs.

REQUEST FOR RELIEF

Counsel for CLAIMANT respectfully requests the Tribunal to:

1) Reject RESPONDENT's request for an order for security for costs;

2) Find CLAIMANT's claims admissible;

3) Order RESPONDENT to pay to CLAIMANT, immediately after the issuance of an award, the outstanding purchase price of USD 2,285,240 and the bank charge in the amount of USD 102,192.80, as required by the Agreement concluded between CLAIMANT and RESPONDENT on 1 August 2010;

4) Order RESPONDENT to bear CLAIMANT's costs arising out of this arbitration.

Helsinki, 8 December 2016
Counsel for CLAIMANT

CERTIFICATE OF VERIFICATION

We hereby confirm that this Memorandum was written only by the persons who signed this certificate.



Miisa Happonen | Saramaria Kalkku | Iina Laak



Patrick Leßmeister | Ina Rautiainen | Veera Sundberg