Stanford Law School

FOURTEENTH ANNUAL

WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG SAR
26TH MARCH TO 2ND APRIL, 2017

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:	**AGAINST:**
Wright Ltd 232 Garrincha Street Oceanside Equatoriana	SantosD KG 77 Avenida O Rei Cafucopa Mediterraneo
CLAIMANT	**RESPONDENT**

COUNSEL FOR CLAIMANT:

KRISTINA ALEKSEYEVA • MORGAN LEWIS

ABIGAIL XU • ELIZABETH CALLAHAN

TABLE OF CONTENTS

LIST OF ABBREVIATIONS ..... **i**

INDEX OF AUTHORITIES ..... **iii**

INDEX OF CASES ..... **x**

INDEX OF ARBITRAL AWARDS ..... **xvi**

INDEX OF LEGAL TEXTS ..... **xix**

SUMMARY OF FACTS **1**

SUMMARY OF ARGUMENT **2**

ARGUMENT **3**

I. The Tribunal should not order Claimant to provide security for costs **3**

1. CLAIMANT is able to satisfy an order for security for costs because it has sufficient cash flow and readily liquefiable assets **3**

a. CLAIMANT's cash on hand can satisfy an order for security for costs 4

b. CLAIMANT's assets likewise indicate that CLAIMANT could satisfy an award for costs 5

c. RESPONDENT has only relied on circumstantial evidence and thus has not met its burden of proving that CLAIMANT will not be able to satisfy an award for costs 6

2. There was no fundamental change in Claimant's circumstances after the Agreement was signed **7**

3. It would be manifestly unfair to stifle CLAIMANT's legitimate claim **8**

a. CLAIMANT has raised a claim that has a possibility of success on the merits 8

b. CLAIMANT's actions do not justify the grant of security for costs 8

c. RESPONDENT's conduct evinces an intention to stifle a legitimate claim 9

II. Claimant's claims are admissible because they were submitted on time **10**

1. CLAIMANT's initial Request for Arbitration is valid because the contractual time bar was not triggered **10**

a. The negotiation-related time bar is too vague to be enforceable under established international practice 11

b. The 1 April 2016 e-mail cannot be reasonably read as an official end to negotiations, and thus, the sixty-day limit was never triggered 12

2. In any case, CLAIMANT's original Request was not deficient and was submitted within the sixty days afforded by Section 21 of the Agreement 13

a. The original Request for Arbitration was submitted on time 13

b. Supplementation of Request for Arbitration does not impact the date of initiation of arbitration according to CAM-CCBC Rules and international practice 13

c. The naming of the parent company did not invalidate the Power of Attorney 15

d. Payment of the Registration Fee is not a requirement for initiating arbitration 16

e. CLAIMANT complied with its contractual obligation to resolve disputes amicably and in good faith 17

III. Claimant is entitled to additional payment from the Respondent in the amount of US $ 2,285,240.00 for the blades based on the exchange rate at the time of payment 18

1. The addendum provides no evidence that the Parties intended to deviate from the plain meaning of the Agreement, which favors the exchange rate at time of payment 18

a. Subjective interpretation of the addendum under CISG Article 8(1) compels the conclusion that the exchange rate clause is only applicable to the sale of clamps 18

b. Objective interpretation of the addendum under CISG Article 8(2) likewise leads to the conclusion that the fixed exchange rate is only applicable to the sale of clamps 20

c. Interpretation of the addendum under implied terms further confirms the conclusion that the fixed exchange rate clause applies only to the sale of clamps 21

2. The addendum does not validly modify the exchange rate in the original Agreement 23

a. Modification was not valid under CISG Article 29 because it was not expressly assented to by CLAIMANT 23

b. A good faith interpretation of the Parties' actions confirms the conclusion that the fixed exchange rate clause in the addendum did not modify the original Agreement 24

3. Absent an express provision providing otherwise, the exchange rate at the time of payment (US$ 1 = EQD 1.79) must be used 25

a. Reasonableness as a general principle of CISG dictates that the exchange rate at the time of payment must be used 25

b. Principles of private international law likewise dictate that the exchange rate at the time of payment should be applied 27

i. Nominalism favors the exchange rate at the time of payment 27

ii. CISG Article 74 case law further articulates that it is RESPONDENT's duty to pay for exchange rate losses 28

c. CISG Article 55 may not be used to supply the price generally charged at the time of the conclusion of the contract 29

IV. Claimant is entitled to additional payment from the Respondent in the amount of US$ 102,192.80 for the fees deducted by the Central Bank 30

1. RESPONDENT's obligation to pay the price under CISG Article 54 includes complying with formalities required by domestic laws 30

2. RESPONDENT's obligation to pay the price extends to making an effective payment, not merely carrying out preparatory actions 31

3. UNIDROIT provisions for public permission do not affect CLAIMANT's obligations 32

4. CLAIMANT was not acting in bad faith because it had no duty to disclose publicly available information 33

REQUEST FOR RELIEF 35

LIST OF ABBREVIATIONS

&	and
%	per cent
AG	Amtsgericht, Lower Court, Germany
Ans. Req. Arb.	Answer to Statement of Claim
Art(s).	Article(s)
Aut	Austria
BG	Bezirksgericht, Distric Court, Switzerland
Bol	Bolivia
CA	Cour d'Appel, Court of Appeals, France
CC	Civil Code
CIETAC	China International and Economic Trade Arbitration Commission
CISG	United Nation Convention on Contracts for the International Sale of Goods
CISG-AC	Advisory Council for the Convention on Contracts for the International Sale of Goods
Cmt.	Comment
Deu	Germany
EQD	Equatorianian Denars
ed(s).	editor(s)
Est	Estonia
Exhibit C	Claimant's Exhibit
Exhibit R	Respondent's Exhibit
FB	Fovárosi Bíróság, Metropolitan Court, Hungary
Grc	Greece
HG	Handelsgericht, Commercial Court, Switzerland

Hof	Gerechtshof, Appellate Court, Netherlands
Hun	Hungary
ibid.	ibidem; in the same place
ICC	International Chamber of Commerce
Ita	Italy
LG	Landgericht, District Court, Germany
Ltu	Lithuania
Nld	Netherlands
OGH	Oberster Gerichtshof, Supreme Court, Austria
OLG	Oberlandesgericht, Appellate Court, Germany
Op.	Opinion
Ord. Pres.	Order of the President of CAM-CCBC
p.(p.)	page(s)
para.(s.)	paragraph(s)
PO	Procedural Order
R$	Brazilian Reals
Rec. Sec. Cost	Request for Security for Costs
Rb	Arrondissementsrechtbank, District Court, Netherlands
ULIS	Convention relating to a Uniform Law for the International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States of America
US$	United States Dollars
v.	versus
ZG	Zivilgericht, Civil Court, Switzerland

INDEX OF AUTHORITIES

Cited as	Source	Cited in ¶
AUTHOR IN: BACKSMANN	Till Alexander Backsmann , Mateus Aimoré Carreteiro , et al., *International Arbitration in Brazil: An Introductory Practitioner's Guide*, (Kluwer Law International, 2016).	54
BERGER	Klaus Peter Berger, "International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts," 46 *American Journal of Comparative Law* pp. 129-150, 1988.	102
AUTHOR IN: BIANCA/BONELL	C.M. Bianca and M.J. Bonell (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè, 1987).	112, 121
BORN I	Gary Born, *International Commercial Arbitration* (2d ed., Kluwer Law International, 2014).	12, 15, 62
BORN II	Gary Born, *International Arbitration: Cases and Materials* (2d ed., Kluwer Law International, 2015).	66
BOWLES/WHELAN	Roger Bowles and Christopher Whelan, "Law Commission Working Paper No. 80 Private International Law Foreign Money Liabilities," 45(4) *The Modern Law Review* pp. 434-446, 1982.	101
AUTHOR IN: BUSCH/	Danny Busch and Laura Macgregor (eds.), *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge Universi-	63

MACGREGOR	ty Press, 2009).	
CHITTY ON CONTRACTS	H.G. Beale (ed.), *Chitty on Contracts* (Vol. 1, Sweet & Maxwell, 2015).	101
CIARB	Chartered Institute of Arbitrators, *International Arbitration Practice Guideline; Applications for Security for Costs* (2015).	12, 15, 18, 32-35
CISG-AC OP. NO. 6	CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74, Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA.	101
CISG-AC OP. NO. 13	CISG-AC Opinion No. 13, Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa.	77
COMM. ON EUROPEAN CONTRACT LAW	Commission on European Contract Law, Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law* (Kluwer Law International, 2000), available at: http://www.cisg.law.pace.edu/cisg/text/peclcomp58.html.	96
CRÉPAU/ CHARPENTIER	Paul-A. Crépeau and Élise Charpentier, *Les Principes d'UNIDROIT et le Code Civil du Québec : Valeurs Partagées? (The UNIDROIT Principles and the Civil Code of Québec : shared values?)* (Carswell, 1998).	91
AUTHOR IN: DIMATTEO/ JANSSEN/ MAGNUS/ SCHULZE	Larry DiMatteo, André Janssen, Ulrich Magnus, Reiner Schulze (eds.), *International Sales law: Contract, Principles & Practice* (C.H. Beck, Hart, Nomos, 2016).	107

ENDERLEIN/ MASKOW	Fritz Enderlein and Dietrich Maskow, *International Sales Law* (Oceana Publications, 1992).	70, 85, 117
AUTHOR IN: FERRARI/ FLECHTNER/ BRAND	Franco Ferrari, Harry Flachtner, and Ronald Brand (eds.), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (Sellier: European Law Publishers, 2004).	91
GABRIEL	Henry Gabriel, "The Buyer's Performance under the CISG: Articles 53-60 Trends in the Decisions," 25 *Journal of Law and Commerce* pp. 273-83, 2005-2006.	111
AUTHOR IN: GAILLARD/ DI PIETRO	Emmanuel Gaillard and Domenico di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, (Cameron May 2008).	49
GILLETTE/WALT	Clayton Gillette and Steven Walt, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* (2d ed., Cambridge University Press, 2016).	84, 91, 107, 123, 124
GU	Weixia Gu, "Security for Costs in International Commercial Arbitration," 22(3) *Journal of International Arbitration*, pp. 167-205, 2005.	15, 16, 18, 39
HENDERSON	Alastair Henderson, "Security for Costs in Arbitration in Singapore," 7(1) *Asian International Arbitration Journal*, pp. 54-75, 2011.	13, 15, 29
AUTHOR IN: HUBER/MULLIS	Peter Huber and Alastair Mullis (eds.), *The CISG: A New Textbook for Students and Practitioners* (Sellier, European Law Publishers, 2007).	90, 107

JONAS VON GOELER	Jonas von Goeler, *Third-Party Funding in International Aribtration and Its Impact on Procedure* (Wolters Kluwer International, 2016).	13, 15, 26, 32
AUTHOR IN: KRÖLL/MISTELIS/ PERALES VISCASILLAS	Stefan Kröll, Loukas Mistelis, and Maria del Pilar Perales Viscasillas (eds.), *The United Nations Convention on Contracts for the International Sale of Goods: Article by Article Commentary* (C.H. Beck, Hart, Nomos, 2011).	92
LENDENMANN	Joelle Lendenmann, "The Parties' Confidentiality Obligations and their Enforcement," in Daniele Favalli et al. (eds.), *Selected Papers on International Arbitration* (Vol. 3, Stampfli Publishers, 2013).	38
MAGNUS	Ulrich Magnus, "The Remedy of Avoidance of Contract under CISG – General Remarks and Special Cases," 26 *Journal of Law and Commerce*, pp. 423-436, 2005-2006.	
MISTELIS	Loukas Mistelis, "The Unknown Factor," 25 *Journal of Law and Commerce* pp. 285-297, 2005-2006.	91
MUÑOZ	Edgardo Muñoz, "Modern Law of Contracts and Sales in Latin America, Spain and Portugal," in Ingeborg Schwenzer (series ed.), *International Commerce and Arbitration* (Vol. 6, Eleven International Publishing, 2011).	78, 88, 102
OSUNA-GONZÁLEZ	Alejandro Osuna-González, "Buyer's Enabling Steps to Pay the Price: Article 54 of the United Nation's Convention on Contracts for the International Sale of Goods," 25 *Journal of Law and Commerce* pp. 299-323, 2005-2006.	116, 117
POWERS	Paul Powers, "Defining the Undefinable, Good faith and the	92

	United Nations Convention on the Contracts for the International Sale of Goods," 18 *Journal of Law and Commerce*, pp. 333–353, 1998-1999.	
REDFERN I	Blackaby et al., *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press, 2015).	13
REDFERN II	Alan Redfern and Sam O'Leary, "Why it is time for international arbitration to embrace security for costs," 32 *Arbitration International*, pp. 397-413, 2016.	15, 17, 32, 33
SCHLECHTRIEM I	Peter Schlechtriem, Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods (Manz, 1986).	70
AUTHOR IN: SCHLECHTRIEM II	Peter Schlechtriem (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 1998).	77, 107, 109
AUHTOR IN: SCHLECHTRIEM/ SCHWENZER	Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed., Oxford University Press, 2016).	74, 83, 90, 109, 112
SCHLECHTRIEM/ BUTLER	Peter Schlechtriem and Petra Butler, UN Law on International Sales: The UN Convention on the International Sale of Goods (Springer, 2009).	92
AUTHOR IN: SCHÜTZE	Rolf Shütze (ed.), *Institutional Arbitration* (C.H. Beck, Hart, Nomos, 2013).	55, 56
SCHWARZ/ KONRAD	Franz Schwarz and Christian Konrad, "The New Vienna Rules," 23(4) *Arbitration International*, pp. 601-643, 2007.	65

SCHWENZER/ FOUNTOULAKIS/ DIMSEY	Ingeborg Schwenzer, Christiana Fountoulakis and Mariel Dimsey, *International Sales Law: A Guide to the CISG* (Hart Publishing, 2012).	70, 75, 95, 116
SCHWENZER/ HACHEM/KEE	Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee (eds.), *Global Sales and Contract Law* (Oxford University Press, 2012).	101, 102, 117
AUTHOR IN: SCHWENZER/ PEREIRA/TRIPODI	Ingeborg Schwenzer, Cesar Pereira, and Leandro Tripodi (eds.), "CISG and Latin America: Regional and Global Perspectives" in Ingeborg Schwenzer (series ed.), *International Commerce and Arbitration* (Vol. 21, Eleven International Publishing, 2016).	91, 95
SECRETARIAT COMMENTARY, ART. 29	"Guide to CISG Article 29," Secretariat Commetary, available at: http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html.	88, 91
STURINI/HUI	Andrea Sturini and Lorrain Hui, "Commentary on the Arbitration Rules of the China International Economic and Trade Arbitration Commission," 15(2) *Vindobona Journal*, pp. 267 – 288, 2011.	55
AUHTOR IN: SUMMERS	Bruce Summers (ed.), *Payment System: Design, Management and Supervision* (International Monetary Fund, 1994).	117
TIRADO	Joe Tirado et al., "Security for Costs in International Arbitration," 3 *Yearbook on International Arbitration*, pp. 163-170, 2013.	39
UN COMM. ON INTERNATIONAL TRADE LAW	United Nations Commission on International Trade Law, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 2012 available at: http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-	52

e.pdf.

VINCZE	Andrea Vincze, "Construction and Application of United Nations Convention on Contracts for the International Sale of Goods, April 10, 1980, 1489 U.N.T.S. 3 – Global Cases Addressing Applicability," 3 *American Law Reporter International* pp. 563-775, 2010.	126
AUTHOR IN: VOGENAUER	Stefan Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2d ed., Oxford University Press, 2015).	78, 91, 103, 109, 115, 117, 119, 123, 125
WAINCYMER	Jeff Waincymer, *Procedure and Evidence in International Arbitration*, (Kluwer Law International, 2012).	13, 14
AUTHOR IN: WEIGAND	Frank-Bernd Weigand (ed.), *Practitioner's Handbook on International Commercial Arbitration* (2d ed., Oxford University Press, 2009).	52, 54, 56, 57
ZELLER	Bruno Zeller, *Damages under the Convention on Contracts for the International Sale of Goods* (2d ed., Oxford University Press, 2009).	92

INDEX OF CASES

Cited as	Full Citation	Cited in ¶
Australia		
SUPREME COURT OF QUEENSLAND 2000	Supreme Court of Queensland (*Downs Investments v. Perwaja Steel*), Civil Jurisdiction No. 10680 of 1996, 17 November 2000, available at: http://cisgw3.law.pace.edu/cases/001117a2.html.	116
Austria		
OGH 2005	Supreme Court (*Mushrooms Case*), 3 Ob 221/04b, 26 January 2005, available at: http://cisgw3.law.pace.edu/cases/050126a3.html.	82
Brazil		
PARANAPANEMA S.A. V BANCO SANTANDER S.A. 2013	Court of Appeal of the State of São Paulo (*Paranapanema S.A. v Banco Santander S.A. and Banco Pactual S.A.*), Injunctive Proceedings No. 24.483-SP, 2 May 2013.	27
Canada		
FULLER AUSTIN INSULATION INC. V. WELLINGTON INSURANCE CO. 1995	*Fuller Austin Insulation Inc. v. Wellington Insurance Co.*, Saskatchewan Queen's Bench, 15 September 1995, CanLII 5752 (SK QB).	52
France		
CA GRENOBLE 1995	Appellate Court Grenoble (*Marques Roque Joachim v. Manin Rivière*), 93/4879, 26 April 1995, available at: http://cisgw3.law.pace.edu/cases/950426f2.html.	91
CA GRENOBLE 1999	Appellate Court Grenoble (*Calzados Magnanni v. Shoes General*	82

	International), 97/03974, 21 October 1999, available at: http://cisgw3.law.pace.edu/cases/991021f1.html.	
CA PARIS 1928	Appellate Court Paris (*Société des Cirages Français*), 28 November 1928, available in: Evsey S. Rashba, "Collapsed Debts in Foreign Currencies," 54 *Yale Law Journal* 7, 1944.	97
Germany		
AG DUISBURG 1996	Lower Court Duisburg (*Textiles Case*), 45 (19) O 80/94, 17 April 1996, available at: http://cisgw3.law.pace.edu/cases/960417g1.html.	111
AG DUISBURG 2000	Lower Court Duisburg (*Pizza cartons case*), 49 C 502/00, 13 April 2000, available at: http://cisgw3.law.pace.edu/cases/000413g1.html.	82
LG HAMBURG 1990	District Court Hamburg (*Textiles Case*), 5 O 543/88, 26 September 1990, available at: http://cisgw3.law.pace.edu/cases/900926g1.html.	88
LG HEIDELBERG 1981	District Court Heidelberg, O 116/81, 27 January 1981, available at: http://cisgw3.law.pace.edu/cases/810127g1.html.	97
OLG DÜSSELDORF 1994	Appellate Court Düsseldorf (*Shoes case*), 17 U 146/93, 14 January 1994, available at: http://cisgw3.law.pace.edu/cases/940114g1.html.	105
OLG KÖLN 2007	Appellate Court Köln (*Paperboard Containers Case*), 19 U 11/07, 12 January 2007, available at: http://cisgw3.law.pace.edu/cases/070112g1.html.	92
OLG MÜNCHEN 1997	Appellate Court München (*Leather Goods Case*), 7 U 2070/97, 9 July 1997, available at:	117

	http://cisgw3.law.pace.edu/cases/970709g1.html.	
Hungary		
FB BUDAPEST 1992	Metropolitan Court (*Adamfi Video v. Alkotók Studiósa Kisszövetkezet*), 12.G.41.471/1991/21, 24 March 1992, available at: http://cisgw3.law.pace.edu/cases/920324h1.html.	82
Netherlands		
HOF LEEUWARDEN 2005	Appellate Court Leeuwarden (*Auto-Moto Styl S.R.O. v. Pedro Boat B.V.*), 0400549, 31 August 2005, available at: http://cisgw3.law.pace.edu/cases/050831n1.html.	88
RB ROERMOND 1993	District Court Roermond (*Gruppo IMAR v. Protech Horst*), 920159, 6 May 1993, available at: http://cisgw3.law.pace.edu/cases/930506n1.html.	102
Singapore		
IRCP V. LUFTHANSA 2013	Civil Court of Appeal (*International Research Coro. PLC v. Lufthansa*), No. 12 of 2013, 18 October 2013, available in: 1 Singapore Law Reports, pp. 130-163, 2014.	46
Spain		
AUDIENCIA PROVINCIAL DE CANTABRIA 2013	Audiencia Provincial de Cantabria, Sección 2, 400/2013, 9 July 2013, available at: http://cisgw3.law.pace.edu/cases/130709s4.html.	116
Switzerland		
BG ST. GALLEN 1997	District Court St. Gallen (*Fabrics Case*), 3PZ 97/18, 3 July 1997, available at: http://cisgw3.law.pace.edu/cases/970703s1.html.	70
BUNDESGERICHT 2003	Federal Supreme Court (*Wine Case*), 4C.103/2003/lma, 4 Au-	90

	gust 2003, available at: http://cisgw3.law.pace.edu/cases/030804s1.html.	
BUNDESGERICHT 2005	Federal Supreme Court (*Chemical Products Case*), 4C.474/2004, 5 April 2005, available at: http://cisgw3.law.pace.edu/cases/050405s1.html.	90
HG ZÜRICH 1997	Commercial Court Zürich (*Sunflower Oil Case*), HG 95 0347, 5 February 1997, available at: http://cisgw3.law.pace.edu/cases/970205s1.html.	105
ZG BASEL 1997	Civil Court Basel (*White Urea Case*), P4 1996/00448, 3 December 1997, available at: http://cisgw3.law.pace.edu/cases/971203s2.html.	82
TRANSPORT- EN HANDELSMAATSCHAPPIJ 'VEKOMA' B.V. V. MARAN COAL CORP 1995	Federal Tribunal (Supreme Court) (*Transport- en Handelsmaatschappij 'Vekoma' B.V. v. Maran Coal Corp*), 17 August, 1995, 1996(4) ASA Bull. 673, discussion in: Emmanuel Gaillard and Domenico di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, pp. 670-674 (Cameron May 2008).	48, 49
X. GMBH V. Y. SARL, 2011	Federal Tribunal (Supreme Court) (*X.___ GmbH v. Y.____ Sarl*) 4A_46/2011, 16 May, 2011, available at: http://www.swissarbitrationdecisions.com/sites/default/files/16%20mai%202011%204A%2046%202011.pdf.	46
X. SA V. A., B. 2003	*X. SA v. A., B., Handel/Industrie/und Gewerbekammer des Kantons Tessin* Ccia-Ti Nr. 103/00, 25 July 2003, available in: 28 ASA Bull. 2010.	35

United Kingdom

WAH V. GRANT THORNTON INTERNATIONAL LTD, 2013	High Court of Justice, Chancery Division (*Wah (Aka Alan Tang) & Anor v. Grant Thornton International Ltd & Ors)*, HC12E01608, 14 November 2012, available at: http://www.bailii.org/ew/cases/EWHC/Ch/2012/3198.html.	46
BONYTHON V. COMMONWEALTH AUSTRALIA 1950	*Bonython and Others v. Commonwealth of Australia*, AC 201, 1951, available in: 4(3) *International Law Quarterly* pp. 381-384, available at: http://www.jstor.org/stable/762951.	102
GILBERT V. BRETT 1605	*Gilbert v. Brett (Le Case De Mixt Moneyes)*, 1605 Davis 18, discussed in: D. Fox, "The *Case of Mixt Monies*: Confirming Nominalism in the Common Law of Monetary Obligations," 70(1) *Cambridge Law Journal*, p. 144, 2011.	102
SULAMERICA CIA NACIONAL DE SEGUROS SA V. ENESA ENGENHARIA, 2012	Court of Appeal, Civil Division (*Sulamerica Cia Nacional de Seguros SA and others v. Enesa Engenharia*), A3/2012/0249, 16 May 2012, available at: http://www.bailii.org/ew/cases/EWCA/Civ/2012/638.html.	46

United States

KNOX V. LEE 1870	United States Supreme Court, *Knox v. Lee (Legal Tender Cases)*, 79 U.S. 457, 1870, available at: https://supreme.justia.com/cases/federal/us/79/457/case.html.	102
PARKER V. DAVIES 1870	United States Supreme Court, *Knox v. Lee (Legal Tender Cases)*, 79 U.S. 457, 1870, available at: https://supreme.justia.com/cases/federal/us/79/457/case.html.	102

IN RE WILLING'S ESTATE 1928	*In re Willing's Estate,* 292 Pa. 51, 140 Atl. 558, 1928, discussed in: D. Fox, "The *Case of Mixt Monies*: Confirming Nominalism in the Common Law of Monetary Obligations," 70(1) *Cambridge Law Journal*, p. 144, 2011.	97

INDEX OF ARBITRAL AWARDS

Cited as	Full Citation	Cited in ¶
CIETAC 2005	CIETAC Arbitration proceeding (*Equipment case*), 21 February 2005, available at: http://cisgw3.law.pace.edu/cases/050221c1.html	82
ICC AWARD NO. 5029	ICC Arbitration Case No. 5029 of 1986, Collection of ICC Arbitral Awards: 1986-1990 (ICC Publishing 1994).	46
ICC AWARD NO. 5080	ICC Arbitration Case No. 5080 of 1985, Collection of ICC Arbitral Awards: 1986-1990 (ICC Publishing 1994).	66
ICC AWARD NO. 7197	ICC Arbitration Case No. 7197 of 1992 (*Failure to open letter of credit and penalty clause case*), available at: http://cisgw3.law.pace.edu/cases/927197i1.html.	116
ICC AWARD NO. 8240	ICC Arbitration Case No. 8240 of 1995, available at: http://www.unilex.info/case.cfm?id=629.	78, 102
ICC AWARD NO. 8324	ICC Arbitration Case No. 8324 of 1995 (*Magnesium case*), available at: http://cisgw3.law.pace.edu/cases/958324i1.html.	107, 108
ICC PRELIMINARY AWARD NO. 9984	ICC Preminary Award in Case 9984 of 1999, available in ICC International Court of Arbitration Bulletin Vol. 14 No. 1.	49

ICC AWARD NO. 11849	ICC Arbitration Case No. 11849 of 2003 (*Fashion products case*), 31 Yearbook Commercial Arbitration (2006) 148-171, available at: http://cisgw3.law.pace.edu/cases/031849i1.html.	116
ICC AWARD NO. 12732	ICC Award No. 13359 of 2006, ICC Bulletin: Security for Costs (ICC Publishing 2014).	39
ICC AWARD NO. 13359	ICC Award No. 13359 of 2006, ICC Bulletin: Security for Costs (ICC Publishing 2014).	35
ICC AWARD NO. 14020	ICC Award No. 14020 of 2006, ICC Bulletin: Security for Costs (ICC Publishing 2014).	18
ICC AWARD NO. 14433	ICC Award No. 14433 of 2008, ICC Bulletin: Security for Costs (ICC Publishing 2014).	13, 19, 24
ICC AWARD NO. 14661	ICC Award No. 14661 of 2008, ICC Bulletin: Security for Costs (ICC Publishing 2014).	18
ICC AWARD NO. 14993	ICC Award No. 14993 of 2007, ICC Bulletin: Security for Costs (ICC Publishing 2014).	15, 16, 24
ICC AWARD NO. 15218	ICC Award No. 15218 of 2008, ICC Bulletin: Security for Costs (ICC Publishing 2014).	16, 20
ICC AWARD NO. 15951	ICC Award no. 15951, Procedural Order 2 of 29 May 2009, 28 ASA Bull. (2010).	29
ICSID CASE NO. ARB/12/10.	*RSM Production Corporation v. Saint Lucia,* ICSID Case No. Arb/12/10, available at:	16, 36

http://www.italaw.com/cases/2706.

IRAN-U.S. CT AWARD NO. 93-2-3	Iran-United States Claims Tribunal Award No. 93-2-3, 19 December 1983, 4 Iran-US CTR 96 (1983-III).	62
IRAN-U.S. CT DECISION NO. DEC 17-REF20-FT	Iran-United States Claims Tribunal Decision No. DEC 17-REF20-FT, December 8, 1982, 1 Iran-US CTR 392, 393 (1981-1982).	62
COMPROMEX 1998	Comisión para la Protección del Comercio Exterior de México (*Dulces Luisi v. Seoul International*), M/115/97, 20 November 1998, available at: http://cisgw3.law.pace.edu/cases/981130m1.html.	91
RUSSIAN FEDERATION CHAMBER OF COMMERCE AND INDUSTRY 1995	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 123/1992, 17 October 1995, available at: http://cisgw3.law.pace.edu/cases/951017r1.html.	116
LANDWIRTSCHAFTLICHE IN WIEN 1997	Schiedsgericht der Börse für landwirtschaftliche in Wien, S 2/97, 10 December 1997, available at: http://cisgw3.law.pace.edu/cases/971210a3.html.	90
YUGOSLAV CHAMBER OF COMMERCE, 2002	Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce (*Aluminum case*), T-2/00, 9 December 2002, available at: http://cisgw3.law.pace.edu/cases/021209sb.html.	91

INDEX OF LEGAL TEXTS

Cited as	Source
CAM-CCBC	Rules of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
ICAC Rules	Rules of the International Commercial Arbitration Court, Russia
ICC Rules	International Chamber of Commerce Rules of Arbitration
PELC	Principles of European Contract Law
(UNCITRAL) Model Laws	United Nations Commission on International Trade Law Model Laws
UNCITRAL Rules	United Nations Commission on International Trade Law Model Rules
UNIDROIT	International Institute for the Unification of Private Law
Vienna Rules	Rules of Arbitration and Conciliation of the Vienna International Arbitral Center of the Austrian Federal Chamber of Commerce

SUMMARY OF FACTS

1. Wright Ltd [CLAIMANT] is a highly specialized manufacturer of fan blades for jet engines, incorporated in Equatoriana. SantosD KG [RESPONDENT] is a manufacturer of jet engines, incorporated in Mediterraneo. CLAIMANT and RESPONDENT were subsidiaries of the same company until CLAIMANT was sold in **June 2010**. RESPONDENT was sold approximately one month later.

2. Around the time of the sale, CLAIMANT and RESPONDENT [the Parties] began negotiations for the manufacture of an innovative, noise-reducing fan blade for RESPONDENT's new engine. The final Development and Sales Agreement [Agreement] for this blade was signed on **1 August 2010**.

3. At the time of negotiations, CLAIMANT asserted that the production costs for this technologically advanced fan blade were not yet certain. Nevertheless, RESPONDENT insisted on fixing a maximum price because RESPONDENT wanted to contract with Earhart, a jet manufacturer, to include the new jet engine in the line of Earhart's luxury planes. Furthermore, RESPONDENT insisted on a price in US dollars [US$], despite knowing that CLAIMANT's production costs would be incurred in Equatorianian Denars [EQD]. The Agreement did not contain a provision specifying exchange rate.

4. On **22 October 2010**, RESPONDENT requested CLAIMANT to provide clamps to secure the fan blades. Since the blades and the clamps were to be delivered together, RESPONDENT suggested creating an addendum to the Agreement rather than a separate contract. This addendum provided a fixed exchange rate for the sale of clamps; however during discussion of the addendum, neither party indicated that the fixed exchange rate would extend to cover the entire Agreement.

5. On **2 January 2012** Equatoriana elected a new free-trade minded government. As a result, the exchange rate dropped from US$ 1 = EQD 2.01 to US$1 = EQD 1.79. Claimant began producing the blades on **1 May 2014**, incurring costs under the new exchange rate.

6. On **14 January 2015** CLAIMANT delivered blades and clamps to RESPONDENT. Due to a clerical error in CLAIMANT's accounting department, the invoice for the blades incorrectly applied the fixed exchange rate from the addendum, requesting an amount that was US$ 2,285,240 less than the actual price. Moreover, US$ 102,192.80 had been deducted from the payment due to a new Equatoriana law, compelling investigation for money laundering. Claimant requested the outstanding amount but RESPONDENT insisted on making no further payments. As a result, on **31 May 2016**, CLAIMANT sent a request for arbitration, in compliance with the dispute resolution clause of the Agreement.

SUMMARY OF ARGUMENT

7. CLAIMANT is determined to put the most innovative fan blades on the market, making airplane travel safer and more enjoyable. CLAIMANT entered into an Agreement with RESPONDENT despite being uncertain of its own costs in order to help RESPONDENT contract with a third party.

8. Now that a dispute arose between the Parties, RESPONDENT seeks to stifle CLAIMANT's legitimate claim by requesting security for its costs. The Tribunal should dismiss RESPONDENT's request because Claimant possesses sufficient cash and readily liquefiable assets to satisfy an order for costs. Moreover, granting security costs would be manifestly unfair in this case since CLAIMANT'S financial position was caused by the very subject matter in this dispute **(I)**.

9. CLAIMANT's submission of Request for Arbitration on 31 May 2016 was timely. RESPONDENT contends that CLAIMANT's initial submission did not formally commence arbitration since it had to be supplemented, and such supplementation was time-barred because 31 May 2016 was the last day on which CLAIMANT could submit its claims. RESPONDENT's contention is incorrect because despite supplementation, Claimant's original submission marked the date of commencement of arbitration and because the contractual time bar was not triggered in the first place **(II)**.

10. The plain language of the Agreement, as well as the Parties' pre-contractual negotiations, demonstrates that the correct exchange rate is the exchange rate at the time of payment and not one at the time of the conclusion of the contract. The addendum provides no evidence that the Parties intended to deviate from such plain meaning. Nor can the addendum be regarded as a valid modification of the Agreement since CLAIMANT did not expressly assent to such a modification. Principles of reasonableness and nominalism confirm this conclusion. Thus, CLAIMANT is entitled to additional payment of US$ 2,285.240 based on the correct exchange rate **(III)**.

11. Finally, RESPONDENT must bear the cost of the levy charged pursuant to the new Equatoriana Anti-Money-Laundering law. RESPONDENT had the duty to pay this levy because CISG Article 54 requires compliance with domestic laws even when they are not explicitly spelled out in the contract. Moreover, RESPONDENT's obligation under Article 54 includes ensuring effective payment. This obligation was not discharged because the cost of the levy was subtracted by the Equatoriana government before the money reached CLAIMANT's account. Thus, CLAIMANT is entitled to additional payment of US$ 102,192.80 to cover the cost of the levy **(IV)**.

ARGUMENT

I. THE TRIBUNAL SHOULD NOT ORDER CLAIMANT TO PROVIDE SECURITY FOR COSTS

12. The Parties have agreed that CAM-CCBC institutional rules should govern this arbitral proceeding and, accordingly, CAM-CCBC Article 8.1 grants the Tribunal the power to order security for costs. [PO 1, P. 53, PARA. 1]. Although no such specific power is evident from the plain language alone, analogous provisions in ICC Arbitration Rules and the UNCITRAL Model Law have been consistently interpreted to grant this power. [CIARB, P. 2, N. 7; BORN I, PP. 2494-2495].

13. Nevertheless, the Tribunal should dismiss RESPONDENT's request. International practice, relevant here because CAM-CCBC Rules are silent on the matter, recognizes that security for costs should be granted only in "exceptional circumstances" that are unique from other forms of interim orders. [ICC AWARD NO. 14433, PARA. 45; REDFERN I, P. 316. PARA 5.35; WAINCYMER, P. 646; GOELER, P. 336]. This holds true even in countries that have adopted the UNCITRAL Model Law, such as Danubia. [REDFERN I, P. 316, PARA 5.35; HENDERSON, P. 69-74].

14. Exceptional circumstances are required because security for costs orders "undermine the very nature of arbitration itself" as parties have agreed to arbitrate without any qualifications or preconditions in Section 21 of the Agreement. [WAINCYMER, P. 642]. Moreover, security for costs orders can be contrary to UNCITRAL Model Law since security is ordered against one party only. [IBID.]. Specifically, Article 18, which is non-derogable, provides that each party must "be treated with equality and each party shall be given a full opportunity of presenting his case." [UNCITRAL MODEL LAW, ART. 18].

15. In light of these dangers, scholars and tribunals identified requirements that must be met before security for costs can be ordered. Although some disagreements over the specifics remain [HENDERSON, PP. 67-68; GU, PP. 187-187; C.F. REDFERN II, P. 411], most sources concur that security should be not be granted when CLAIMANT has sufficient assets to satisfy an award for costs **(1)**; there has been no fundamental change in CLAIMANT's circumstances **(2)**; and when it would be otherwise unfair under the circumstances **(3)**. [CIARB, PP. 3, 6-7, 9-10; BORN I, P. 2494; JONAS VON GOELER, P. 336; HENDERSON, P. 68; REDFERN II, P. 411; ICC AWARD NO. 14993].

1. CLAIMANT is able to satisfy an order for security for costs because it has sufficient cash flow and readily liquefiable assets

16. RESPONDENT may contend that the first prong of the test – CLAIMANT's financial situation – is not

part of the current jurisprudence based on cases such as RSM. [ICSID CASE NO. ARB/12/10]. However, in such cases a party's financial situation was not discussed at length only because the tribunal has already determined that the party is insolvent. [IBID.; ICC AWARD NO. 15218]. Here, it is far from clear that CLAIMANT is experiencing sufficient financial hardship. Thus, RESPONDENT has an affirmative duty to demonstrate that there is more than a probability that CLAIMANT will be unable to satisfy an award for costs. [GU, P. 188]. To do so, RESPONDENT must prove not only that CLAIMANT is insolvent, but also that CLAIMANT lacks sufficient liquefiable assets to satisfy legal costs. [ICC AWARD NO. 14993; ICC AWARD NO. 14355]. RESPONDENT cannot prove either of these requirements.

a. CLAIMANT's cash on hand can satisfy an order for security for costs

17. Security for costs should only be granted where there is a "real possibility that the winning party will be awarded its costs." [REDFERN II, PP. 410-411]. Here, the costs might be apportioned because there is more than one claim and because the Tribunal reserved the right to consider the behavior of the parties. [TERMS OF REFERENCE, P. 43, PARA. 12.3; CAM-CCBC ART. 10.4.1]. Thus, there is a real possibility that potential costs awarded against CLAIMANT will be less than the US$ 200,000 estimated by RESPONDENT. [REC. SEC. COST, P. 46].

18. Additionally, where "many of the grounds for seeking security were known or should have been known to the Respondent" prior to the application, only costs accruing after the application should be considered. [ICC AWARD NO. 14020, PARA 16; ICC AWARD NO. 14661, PARA 4; CIARB, PP. 10-11]. RESPONDENT knew, or should have been aware, of CLAIMANT's financial situation well in advance of the application for security for costs on 6 September 2016. CLAIMANT's 2015 financial statements were publically available six months before the initial application was made. Statements indicating the results of the Xanadu proceedings were likewise available five years before the application was made. [PO 2, PP. 58-59, PARA. 28]. Scholars have explained that publicly available financial reports are the "commonly understood starting place" for determining whether another party is solvent. [GU, P. 297]. Thus, RESPONDENT should have known about CLAIMANT's financial position prior to its application. Consequently, any application costs and attorneys' fees already expended by RESPONDENT should not be considered.

19. RESPONDENT alleges that the legal costs will amount to US$ 200,000 at a minimum. [REQ. SEC. COST, P. 46, PARA. 1]. However, this estimate includes the Application Fee already paid by RE-

SPONDENT. [PO 2, P. 60, PARA. 32]. Based on the CAM-CCBC rules for calculating the Application Fee and on the exchange rate at the time the Terms of Reference were set, US$ 1 = R$ 3.38, this cost amounted to US$ 15,986,02. Subtracting this amount from US$ 200,000 results in US$ 184,013.98. The fees associated with RESPONDENT's legal services leading up to the application should likewise be subtracted. CLAIMANT's most recent financial statement indicates that CLAIMANT has US$ 199,950 of cash in its bank account. Pursuant to calculations above, this amount is sufficient to cover the potential award for costs. This fact alone enables this tribunal to dismiss RESPONDENT's application. [ICC AWARD NO. 14433].

b. CLAIMANT's assets likewise indicate that CLAIMANT could satisfy an award for costs

20. Securities for costs are usually granted against shell companies devoid of assets. In one typical example where such order was granted against a party, that party ceased operations and had a 1:13 assets to liabilities leverage ratio. [ICC AWARD NO. 15218]. Furthermore, any assets that the company did have were not easily liquefiable as they were largely consisted of claims against debtors. [IBID.].

21. By contrast, CLAIMANT has turnover in excess of US$ 60 million, nearly three times the value of the Agreement in dispute. [PO 2, PP. 58-59, PARA. 28]. In fact, JumboFly, a company that has provided more revenue to CLAIMANT than RESPONDENT, remains one of CLAIMANT's customers. [PO 2, P. 56, PARA. 9]. As a result, CLAIMANT continues to be a fully functioning, profitable enterprise. CLAIMANT also has a significant pool of liquefiable assets. These include real estate, a factory, and equipment worth US$ 37,580,000, as well as US$ 4,500,000 of intangible assets. [PO 2, PP. 58-59, PARA. 28].

22. RESPONDENT may argue that CLAIMANT will have to expend capital to cover a US$ 2,500,000 award granted against it in an unrelated CAM-CCBC proceeding as well as continued day-to-day operating costs. [PO 2, PP. 59, PARA. 30]. Given CLAIMANT's extensive assets and turnover, however, covering these expenses will not preclude CLAIMANT from also being able to satisfy a potential award for costs in the present case.

23. CLAIMANT's financial history provides further evidence that CLAIMANT will be able to cover a potential costs order. In 2010 CLAIMANT leveraged US $32,500,000 of total loans against US$ 28,987,000 worth of fixed assets. [PO 2, PP. 58-59, PARA. 28]. In 2015, CLAIMANT successfully lowered total loans to US$ 24,000,000 while it simultaneously increased tangible assets by US$ 8,593,000. [IBID]. This history shows that, should the need arise, CLAIMANT will be able to leverage its current assets to raise at least US$ 8,500,000.

24. While there exists a remote possibility that CLAIMANT will not be as successful at leveraging its assets as it was in 2010 and 2015, such possibility simply does not rise to the level of certainty RESPONDENT is required to prove. It is RESPONDENT's obligation to show that it is "unlikely, if not impossible" that CLAIMANT would satisfy a potential award. [ICC AWARD NO. 14993]. However, taken together, CLAIMANT's cash and liquefiable assets show precisely the opposite: that it is highly likely that CLAIMANT will be able to pay the US$ 200,000 estimated by RESPONDENT, even if CLAIMANT is found liable for US$ 2,500,000 in the other proceeding. This falls far short of the "exceptional circumstances" that must be met before security for costs should be granted. [ICC Award No. 14433].

c. RESPONDENT has only relied on circumstantial evidence and thus has not met its burden of proving that CLAIMANT will not be able to satisfy an award for costs

25. RESPONDENT must rely on CLAIMANT'S publically available financial statements to demonstrate that CLAIMANT is unable to satisfy a potential award for costs. Instead, RESPONDENT has based its argument solely on circumstantial evidence: a news report describing the failure of Xanadu proceedings and the search for third-party funding, as well as CLAIMANT's decision to postpone paying another arbitral award. [REQ. SEC. COST, PP. 45-47]. Read in context with financial statements, however, these documents fail to show that CLAIMANT would be unable to satisfy an award for costs.

26. First, the failure of the Xanadu proceedings to bring in US$ 100 million in and of itself does not prove that CLAIMANT is insolvent, let alone unable to satisfy an award for costs. RESPONDENT would have to prove that CLAIMANT was already insolvent and could not become solvent without such an infusion of capital. This RESPONDENT cannot do because CLAIMANT's financial statements show that CLAIMANT is indeed solvent.

27. In the same vein, there is no correlation between failure to secure third party funding and financial weakness. There are numerous examples of parties utterly devoid of assets successfully attaining third party funding. [JONAS VON GOELER, PP. 346-355]. On the other hand, there are many reasons a solvent company might not be able to secure funding. The seat of arbitration, the agreement, prospects for success, and, incidentally, the RESPONDENT's capacity to meet an award, are common examples. [JONAS VON GOELER, PP. 78-80]. Here, there is uncontested evidence that CLAIMANT failed to secure such funding simply because the size of the claim was too small. [PO 2, P. 59, PARA. 29].

28. Second, CLAIMANT's failure to pay an outstanding CAM-CCBC award likewise does not indicate

financial weakness. The CAM-CCBC Article 11.3, the New York convention Article V, and the Model Law Articles 34-36 all provide legitimate reasons for challenging an award and thus postponing its payment. Even in Brazil, orders from CAM-CCBC have been overturned by domestic courts. [PARANAPANEMA S.A. V BANCO SANTANDER S.A. 2013]. Here, CLAIMANT's decision not to comply with the award rendered against it rests on a legitimate set-off claim, and litigation is currently pending in Equatoriana. [PO 2, P. 59, PARA. 30].

29. In sum, RESPONDENT's evidence pertaining to the Xanadu proceedings and CLAIMANT's failure to comply with another arbitral award is, at best, circumstantial evidence of reduced cash flow. Without direct evidence of CLAIMANT's inability to satisfy a potential award for costs, RESPONDENT's request must be dismissed.

2. There was no fundamental change in Claimant's circumstances after the Agreement was signed

30. Even if the Tribunal finds that CLAIMANT is unable to satisfy a potential order for costs, RESPONDENT must still demonstrate that this inability resulted from a change in CLAIMANT's financial situation that could not reasonably have been foreseen at the time of contracting. [HENDERSON, PP. 68, 72]. Thus, when two parties contract knowing that one of the parties is facing financial risks, the other cannot claim that insolvency that results from this risk justifies an application for security for costs. [ICC CASE NO. 15951].

31. Being part of the jet engine industry itself, RESPONDENT must have been aware of the financial risks associated with the design of aircraft engine components at the time of contracting. In fact, RESPONDENT does not contend that companies of CLAIMANT's size experience cyclical liquidity problems during a product's design phase. It is well understood that relevant products, including fan blades, are illiquid until they are brought to market. [EXHIBIT C 9, P.50]. In fact, at the time of the negotiations of the Agreement, CLAIMANT was experiencing just such liquidity issues. [IBID]. Thus, RESPONDENT had notice of CLAIMANT's cyclical liquidity problems and cannot now rely on these problems to support its application for security for costs.

32. RESPONDENT may argue that a change in circumstances occurred when only US$ 12 million was recovered in lieu of the expected US$ 100 million in Xanadu proceedings. CLAIMANT first stated that it was expecting an award of US$ 100 million during a meeting on 9 November 2009. [PO 2, P. 60, PARA. 34]. This meeting took place two months before negotiations over the current Agreement

had even begun. When asked by RESPONDENT during the actual negotiations, however, CLAIMANT merely stated that it was "confident in receiving a substantial award in its favor." [IBID.]. RESPONDENT did not probe further and thus should not now be allowed to claim that a reduced award of US$ 12 million was fundamentally unforeseeable.

3. It would be manifestly unfair to stifle CLAIMANT's legitimate claim

33. If the Tribunal concludes that CLAIMANT is unable to satisfy a potential order for costs due to unforeseen events, the Tribunal would almost certainly have to conclude that requesting security for costs is unfair. This is because the reason for CLAIMANT's insolvency is also the subject of the claim. The amount contested in this claim is more than US$ 2,387,432.80. [TERMS OF REFERENCE, P. 42, PARA. 8.1]. Halting this claim because CLAIMANT may not be able to pay US$ 200,000 would certainly create the wrong incentive. Since smaller companies are particularly vulnerable to cash flow problems, such an award for security for costs would only serve to encourage larger companies to take advantage of their financial position. [CIARB, P. 11]. Ordinarily, security for costs is granted to protect integrity of the proceedings. [REDFERN II, P. 403; JONAS VON GOELER, P. 336]. Here, however, security for costs would simply stifle a legitimate claim.

34. The Tribunal should consider to what extent CLAIMANT has contributed to its own alleged insolvency, CLAIMANT's conduct in these proceedings, and any other of CLAIMANT's actions from which the Tribunal could draw a negative inference. [REDFERN II, P. 411; CIARB, PP. 9-11]. The Tribunal should also consider to what extent RESPONDENT's actions demonstrate an intention to stifle a legitimate claim. [REDFERN II, P. 412; CIARB, P. 11]. This inquiry favors CLAIMANT.

a. CLAIMANT has raised a claim that has a possibility of success on the merits

35. The tribunal must be "extremely careful not to prejudge" the merits of a claim before it has rendered a final order. [CIARB, P. 5]. Consequently, should this tribunal wish to consider the possibly of success before granting security for costs, it should merely identify that there is a *prima facie* case. Here, a *prima facie* case is evident since CLAIMANT has identified two viable causes of action and has provided evidence to support them.

b. CLAIMANT's actions do not justify the grant of security for costs

36. In deciding whether to grant security for costs, tribunals often inquire whether CLAIMANT's liquidity issues are caused by its own bad faith actions. [CIARB, P. 10; X. SA V. A., B. 2003]. Examples of such

actions include corporations becoming shell companies or otherwise causing their own insolvency specifically to escape an award for costs. [ICC AWARD NO. 13359].

37. In RSM, for instance, the tribunal granted security for costs because the insolvent party ignored costs orders in ICSID proceedings over the course of many years. [ICSID CASE NO. Arb/12/10, DECISION ON REQ. SEC. COSTS 2014]. Moreover, the insolvent party had failed twice before to provide any justification for not satisfying a cost order or relevant application fees. [IBID.]. The company has also failed to satisfy cost orders in other non-ICSID proceedings, had not paid the relevant applications costs for those proceeding, and had secured third-party funding. [IBID.]. Taken together, these actions justified granting security for costs.

38. Here, CLAIMANT's decision not to pay the US$ 2,500,000 award in the unrelated CAM-CCBC proceeding is premised on a legitimate decision to challenge the award by way of a set-off claim. [PO 2, P. 59, PARA. 30]. Moreover, CLAIMANT has maintained its ordinary business operations and has paid all required application fees in the current proceeding. [PO 2, P. 60, PARA. 32].

39. Furthermore, CLAIMANT did not act in bad faith when it did not disclose information about the unrelated CAM-CCBC proceeding. This is because CLAIMANT was under a duty of confidentiality in accordance with the CAM-CCBC Rules. [REQ. SEC. COSTS, P. 46; CAM-CCBC ARTS. 14.1-14.2; LENDENMANN, PP. 156-157]. Additionally, although CLAIMANT did not specifically communicate to RESPONDENT that it only received US$ 12 million in the Xanadu proceedings, CLAIMANT included that information in its publicly available financial statements. While not communicating the result of Xanadu proceedings directly to RESPONDENT may have been an oversight, CLAIMANT's actions did not amount to bad faith. Nor have CLAIMANT's actions reached the high bar established in RSM.

c. RESPONDENT's conduct evinces an intention to stifle a legitimate claim

40. RESPONDENT's failure to make use of publicly available documents to support its application undercuts its contention that it is genuinely concerned about CLAIMANT's capacity to satisfy a potential order for costs. RESPONDENT's limited efforts to substantiate its claims are suggestive of a "fishing expedition" designed to increase costs associated with legal proceedings in order to make it more difficult for the insolvent party to proceed. [GU, P. 195]. This inference is further supported by the three-month delay between the time arbitral proceedings were initiated and the time the application for security for costs was made. [TIRADO, P. 168; ICC AWARD NO. 12732].

41. The Tribunal should also take note of RESPONDENT's spurious references to the UNCITRAL Rules on Transparency when arguing that CLAIMANT should have disclosed information about the Xanadu proceedings. [REQ. SEC. COSTS, P. 46]. These Rules entered into force on 1 April 2014 and thus did not exist until nearly four years after the award was rendered. [PO 2, PP. 58-59, PARA. 28, UNCITRAL RULES ON TRANSPARENCY, ART. 1]. While RESPONDENT may argue that these Rules indicated a "general trend to transparency," CLAIMANT can hardly be held responsible for being unable to predict this trend four years ahead of time. [REQ. SEC. COSTS, P. 46].

42. The Tribunal should therefore be especially concerned that RESPONDENT's motivation here is to impede a legitimate claim where CLAIMANT's insolvency is caused by the very subject matter of the dispute. CLAIMANT, for its part, has present a valid *prima facie* case and has not acted in a way that would damage the integrity of these proceedings and Respondent should do the same.

43. For the foregoing reasons, RESPONDENT's application falls far short of the exceptional circumstances that would justify security for costs and thus the Tribunal should dismiss this application.

II. CLAIMANT'S CLAIMS ARE ADMISSIBLE BECAUSE THEY WERE SUBMITTED ON TIME

44. CLAIMANT fulfilled its contractual obligations under Section 21 of the Agreement when it submitted its Request for Arbitration on 31 May 2016. After CLAIMANT made its submission, the President of CAM-CCBC asked for it to be supplemented because the Power of Attorney was written in the name of CLAIMANT's parent company rather than CLAIMANT and the Registration Fee was in the amount of R$ 400 rather than R$ 4000. [ORD. PRES., P. 19]. CLAIMANT complied and supplemented the Request on 7 June 2016. [FASTTRACK LETTER, p. 20]. RESPONDENT claims that CLAIMANT's initial submission did not formally commence arbitration since it had to be supplemented. [ANS. REQ. ARB,. P. 25, PARA. 12]. RESPONDENT further claims that such supplementation was time-barred since 31 May 2016 was the last day on which CLAIMANT could submit its claims. [IBID., PARA. 13]. However, the original Request was submitted on time because the contractual time bar was not triggered **(1)** and the original Request was not deficient **(2)**.

1. CLAIMANT's initial Request for Arbitration is valid because the contractual time bar was not triggered

45. RESPONDENT contends that Request for Arbitration is contractually time-barred pursuant to Section

21 of the Agreement: "if no agreement can be reached each party has the right to initiate arbitration proceedings within 60 days after the failure of the negotiation." [EXHIBIT C 2, PP. 10-11]. RESPONDENT also contends that the 1 April 2016 e-mail sent by CLAIMANT is evidence of such "failure of the negotiation." [ANS. REQ. ARB., P. 25, PARA. 13]. However, the contractual time bar was not triggered because the term "failure of the negotiation" is too vague to be enforceable and because the 1 April 2016 e-mail cannot be reasonably read as an official end to negotiations.

a. The negotiation-related time bar is too vague to be enforceable under established international practice

46. The negotiations clause in Section 21 of the Agreement is not sufficiently clear to be considered binding. Here, the courts' approach to multi-tier clauses is instructive. The clause in this Agreement is not a multi-tier clause in the strict sense because its purpose is not to *require* negotiations, rather to limit the time in which CLAIMANT can commence arbitration. Yet, Section 21 clause is sufficiently similar to a multi-tier clause since it sets a condition precedent to arbitration. As such, the courts' underlying approach to multi-tier clauses is applicable because it demonstrates the level of detail required to create a binding clause that governs termination of negotiations.

47. For a multi-tier clause to be valid, it must provide sufficient certainty of how the initial tier is to be performed. [IRCP V. LUFTHANSA 2013]. For example, an English court refused to enforce a multi-tier clause because it did not establish what constituted an attempt to resolve the dispute. [WAH V. GRANT THORNTON INTERNATIONAL LTD, 2013]. Similarly, another court held that a multi-tier clause requiring mediation was unenforceable because it did not define the mediation process. Rather, it only mentioned that mediation must take place. [SULAMERICA CIA NACIONAL DE SEGUROS SA V. ENESA ENGENHARIA, 2012]. The Swiss Federal Tribunal found a clause to be void for failure to prescribe a time limit for initiation of proceedings. [X. GMBH V. Y. SARL, 2011]. Finally, an ICC tribunal found a ninety-day limit to be of no consequence because the contract did not specify whether initiating proceedings required merely notifying the other party of such intent or formally commencing arbitration. The tribunal ruled so despite the fact that the contract explicitly referenced the ICC Rules, which set out requirements for commencing arbitration. [ICC AWARD NO. 5029].

48. Section 21 of the Agreement merely states that "each party has the right to initiate arbitration proceedings within 60 days after the failure of the negotiation." [EXHIBIT C 2, PP. 10-11]. Just as the void clauses above, this clause does not explain how the initial tier is to be performed. First, the clause does not define the term "failure of the negotiation." For example, it is not clear if only one

or both parties must agree that negotiations have failed. Second, the clause does not define the term "initiate." It is ambiguous if "initiate" refers to formal commencement requirements under CAM-CCBC Rules or simply requires providing notice to RESPONDENT. Therefore, the negotiations clause should be held unenforceable, or at the very least, should be interpreted liberally.

b. The 1 April 2016 e-mail cannot be reasonably read as an official end to negotiations, and thus, the sixty-day limit was never triggered

49. RESPONDENT claims that the 1 April 2016 e-mail sent by CLAIMANT triggered the time bar because it ended negotiations. [ANS. REQ. ARB., P. 25, PARA. 13]. The e-mail cannot be so construed. One ICC tribunal held that a communication may only be interpreted as ending negotiations, and thus triggering the time bar, if the other party responds to this communication. [TRANSPORT- EN HANDELSMAATSCHAPPIJ 'VEKOMA' B.V. V. MARAN COAL CORP 1995]. In that case, Maran wrote a letter to Vekoma stating that unless the latter agreed to a proposed accommodation within eight days, Maran would initiate arbitration. The contract provided for a thirty-day limitation on initiation of proceedings. More than eighty days after its first letter to Vekoma, Maran wrote another letter. It was only then that Vekoma responded. The ICC tribunal held that Vekoma should have answered the first letter, and that the thirty-day period only started running after Vekoma had made its position clear in answering the second letter. Here, RESPONDENT likewise did not respond to CLAIMANT's 1 April 2016 e-mail. [PO NO. 2, P. 58, PARA. 23]. Thus, the sixty-day time bar found in Section 21 of the Agreement was not triggered.

50. TRANSPORT- EN HANDELSMAATSCHAPPIJ 'VEKOMA' B.V. V. MARAN COAL CORP was appealed to the Swiss Federal Tribunal, which ruled that the thirty-day limitation started running after the first letter. The Tribunal based its decision on the fact that the first letter contained the eight-day expiration period. [SILVERIRA/LÉVY IN: GAILLARD/DI PIETRO, P. 671]. Other cases likewise highlight the importance of expiration periods in determining whether a contractual time bar is triggered after a unilateral declaration ending negotiations. [ICC PRELIMINARY AWARD NO. 9984]. Here, the e-mail contained no such expiration period. Rather, CLAIMANT specifically told RESPONDENT that it "remain[s] open for any meaningful negotiation." [EXHIBIT R 3, P. 29]. RESPONDENT claims that the fact that CLAIMANT "instructed [its] lawyer to take the necessary steps to initiate arbitration" suggests that negotiations officially failed. [IBID.]. While this language suggests that negotiations were not going well, this sentence cannot be construed to formally end negotiations given that CLAIMANT was explicit about "remain[ing] open" to further discussions.

2. In any case, CLAIMANT's original Request was not deficient and was submitted within the sixty days afforded by Section 21 of the Agreement

51. Regardless of whether the 1 April 2016 e-mail constituted an official end to the negotiations, CLAIMANT's submission of the Request for Arbitration was timely. CAM-CCBC Rule 4 states that commencement of arbitration is accomplished by sending a Request to the President of CAM-CCBC. CLAIMANT did so on the last day of the sixty-day period. The fact that CLAIMANT then had to supplement the Request does not affect the date of commencement of arbitration.

a. The original Request for Arbitration was submitted on time

52. In international arbitration, internal procedures are not specifically detailed, but are "instead left almost entirely to the parties' agreement and the tribunal's discretion." Pursuant to Section 21 of the Agreement, arbitration should be initiated within 60 days of failed negotiations. [EXHIBIT C 2, P. 10-11]. CLAIMANT complied with this provision when it submitted a Request for Arbitration on 31 May 2016 because 31 May 2016 is the sixtieth day since 1 April 2016 pursuant to CAM-CCBC Article 6 rule for counting time periods.

53. RESPONDENT may contend that to initiate arbitration, Request for Arbitration must be received by RESPONDENT and not solely by CAM-CCBC pursuant to UNCITRAL Model Law Article 21. This is so because Danubia adopted UNCITRAL Model Law verbatim. [PO NO. 2, P. 60, PARA. 37]. However, parties are free to derogate from any non-mandatory provisions of the Model Law. And Article 21 is not mandatory as it includes the words "unless otherwise agreed by parties." [UNCITRAL MODEL LAW ART. 21]. Parties need not derogate from Article 21 separately. It is sufficient to include a reference to the rules of an arbitral institution. [ROTH IN: WEIGAND, P. 1057, PARA. 14.386; UN COMM. ON INTERNATIONAL TRADE LAW, ART. 21, P. 105, PARA. 2; FULLER AUSTIN INSULATION INC. V. WELLINGTON INSURANCE CO. 1995]. Here, the Agreement provides that "arbitration shall be conducted under the Rules of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada." Thus, the Parties have successfully derogated from Model Law Article 21. Under CAM-CCBC Article 4.1, arbitration commences when CLAIMANT notifies the President of CAM-CCBC. Therefore, the 31 May 2016 Request was timely.

b. Supplementation of Request for Arbitration does not impact the date of initiation of arbitration according to CAM-CCBC Rules and international practice

54. RESPONDENT next argues, in the alternative, that even if the initial request was submitted on time, the initial request was incomplete because the Power of Attorney and the Registration Fee were in-

correct. Because the request was supplemented on 7 June 2016, this is the true date of commencement of arbitration. [ANS. REQ. ARB., P. 25, PARA. 12]. As such, the claim is time barred because 7 June 2016 falls outside the 60-day period specified in Section 21 of the Agreement. This interpretation of CAM-CCBC Article 4 is improper for three reasons. First, the President of CAM-CCBC himself recognized that the original document constituted proper "Request for Arbitration" in his 1 June 2016 letter. [ORD. PRES., P. 19]. According to CAM-CCBC Article 2.6, the President has the power to "apply these Rules" and to "decide on the extension of time periods." [CAM-CCBC ART. 2.6]. Thus, determining whether an initial submission qualifies as a formal Request, and thus signals the commencement of arbitration, is within the President's power.

55. Second, international practice confirms that original Request marks commencement even if it must be supplemented. The arbitration proceedings administered by CAM-CCBC are confidential and so far CAM-CCBC has not disclosed redacted arbitral awards to guide users. [CARRETEIRO IN: BACKSMANN]. Thus, it is proper to turn to other arbitration rules widely used in international practice. ICC Rules, for example, have a similar provision with regards to commencement of arbitration. Just like CAM-CCBC Article 4, ICC Articles 4(1) and 4(2) establish that a request must be filed with the Secretariat to commence arbitration. Commentary on these articles reveals that the failure to comply with formal requirement "does not hinder the commencement of the arbitration proceedings." [BÜHLER/JARVIN IN: WEIGAND, P. 1177, PARA. 15.224]. This holds true even where such incompleteness causes a "significant lapse of time between the ICC's receipt of the Request and its notification to the RESPONDENT." [IBID., P. 1177, PARA. 15.222]. Similarly, where a request is sent by telefax, it is the day of receipt of telefax that denotes the commencement "even where the exhibits to the Request . . . and the payment of the administrative expenses have not been received on the same day." [IBID., P. 1177, PARA. 15.225].

56. CEITAC Rules also identify the date of commencement of arbitration as the date on which the Request was first received. [CEITAC ART. 11]. If the formal requirements of Article 11 have not been met, CIETAC can request an amendment. It is only "if the request is not complied with [that] CLAIMANT is deemed to not even have submitted a case." [STRICKER-KELLERER/MOSER IN: SCHÜTZE, P. 588, PARA. 82]. Thus, as long as CLAIMANT amends the Request, the date of the initial Request remains to be the date of commencement of arbitration. [STURINI/HUI, p. 274].

57. Crucially, "There seem to be no instances in which a national court or an arbitral tribunal considered

that a limitation period (contractual or statutory) had expired notwithstanding the prior submission of an 'incomplete' Request." [BÜHLER/JARVIN IN: WEIGAND, P. 1179, PARA. 15.233; REINER/ASCHAUER IN: SCHÜTZE, P. 46, PARA. 104].

58. Third, invoking a time bar to prevent supplementation of the Request for Arbitration may be a violation of UNCITRAL Model Law Article 18. *Travaux préparatoires* of the Model Law reveal that there was a strong view in favor of deleting all limitations on the parties' right to submit amendments or supplements, as any limitation in that respect would be contrary to Article 18 obligation to allow each party a "full opportunity" to present its case. [ROTH IN: WEIGAND, P. 1063, PARA. 14.409]. Because Article 18 is a mandatory provision of the Model Law, and thus the law of Danubia, the parties could not have derogated from it by invoking CAM-CCBC Rules.

59. Thus, despite the fact that the original Request for Arbitration required supplementation, the date of the original Request nevertheless marked the commencement of arbitration proceedings.

c. The naming of the parent company did not invalidate the Power of Attorney

60. Even if the Tribunal decides that supplementation of the Request for Arbitration was not submitted on time, the first shortcoming – naming of the parent company in the power of attorney – did not make the original Request defective. This is because the parent company, Wright Holding Plc., had the right to bring this claim pursuant to UNIDROIT Article 2.2.2.

61. In both Danubia and Equatoriana, power of attorney is governed by the general law on agency, which is a verbatim adoption of the relevant rules in the 2010 UNIDROIT Principles. [PO NO. 2, P. 58, PARA. 24]. UNIDROIT Article 2.2.2 states that "[t]he principal's grant of authority may be express or implied." [UNIDROIT ART. 2.2.2]. The Official Comment on the Article further states that an "implied authority exists whenever the principal's intention to confer authority on an agent can be inferred from the principal's conduct (e.g. the assigning of a particular task to the agent) or other circumstances of the case (e.g. the terms of the express authorisation, a particular course of dealing between the two parties or a general trade usage)." [UNIDROIT ART. 2.2.2. CMT.].

62. Here, CLAIMANT's conduct and relationship with its parent company justifies the finding that CLAIMANT gave its parent company implied authority over this claim. It was the parent company that originally approached the attorney, Mr. Fasttrack, asking him to prepare a claim for arbitration. [EXHIBIT C, P. 20]. Moreover, the parent company has effective control over CLAIMANT: the parent

company owns 88% of CLAIMANT's shares [PO NO. 2, P. 54, PARA. 2], the funds are transferred freely between CLAIMANT and parent company [IBID., P. 59, PARA. 29], and the parent company approves all the important decisions taken by CLAIMANT. [IBID., P. 54, PARA. 2].

63. Furthermore, the substitution of a new CLAIMANT, even if the new CLAIMANT was not party to the agreement, is allowable when it is clear from the original claim that the party is bound by the claim. For example, the Iran-U.S. Claims Tribunal, applying UNCITRAL, allowed for substitution of a wholly owned subsidiary for its parent company in a claim, considering it a clarification rather than an amendment. [IRAN-U.S. CT*,* DECISION NO. DEC 17-REF20-FT]. Such substitutions are acceptable as they do not "change the amount sought or the factual or legal basis of the claim and cannot be said to prejudice the Respondent." [IRAN-U.S. CT AWARD NO. 93-2-3; BORN I, PP. 2259-2261]. Furthermore, parties often choose to and indeed bargain for the ability to adjudicate their claims through international arbitration specifically because of arbitration's relative flexibility. [BORN I, P. 2261]. Here, the substitution of parent company for CLAIMANT did not change the facts of the claim or it's legal basis, and was in no way prejudicial to RESPONDENT.

64. Finally, even if CLAIMANT's parent company did not have authority to initiate arbitration proceedings, the original Request was still not defective because the corrected Power of Attorney applied retroactively: "The grant of this Power of Attorney shall thereby approve any actions already undertaken by the Lawyer." [EXHIBIT C, P. 21]. UNIDROIT specifically sanctions such retroactive authorization: "An act by an agent that acts without authority or exceeds its authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority." [UNIDROIT ART. 2.2.9(1)]. As one commentator has noted, "there can be no objection to an application of ratification in relation to representation of companies in appropriate cases." [BUSCH IN: BUSCH/MACGREGOR, P. 373]. This case could not be more appropriate since ratification was made in relation to a parent company with effective control over CLAIMANT and without prejudice to RESPONDENT. Thus, CLAIMANT's counsel had the Power of Attorney required to initiate arbitration and the 31 May 2016 Request was not defective.

d. Payment of the Registration Fee is not a requirement for initiating arbitration

65. The second shortcoming of the original Request for Arbitration – payment of R$ 400 instead of R$ 4000 for the Registration Fee – likewise did not make the Request defective. This is because the payment of the Registration Fee is not part of the Request itself. CAM-CCBC Article 4(1) lists the

documents that must be enclosed in the notice to the President of CAM-CCBC to commence arbitration. The Registration Fee, by contrast, is found in Article 4(2), which states that "[t]he party will attach proof of payment of the Registration Fee *together with the notice*." [CAM-CCBC ART. 4(2)].

66. The same format is followed by other arbitration rules, such as the ICC Arbitration Rules in Article 4.4 and the Vienna Arbitration Rules in Article 10(4). Both the ICC and the Vienna Rules explicitly state that the Secretariat may set a time limit by which the Claimant can pay the fee before the case will be closed without prejudice. In fact, the last amendment of the Vienna Rules specifically abandoned the sanction of former Article 22(4), which called for deletion of the claim from the list of pending cases if the Registration Fee is not paid. [SCHWARZ/KONRAD, P. 623, N. 114]. In contrast, institutions that condition formal commencement of arbitration on the payment of the Registration Fee make this provision explicit. [ICAC RULES, ART. 18.1]. CAM-CCBC Rules are designed to work similarly to ICC and Vienna Rules, as evidenced by the fact that the provisions are included in separate articles. Additionally, CAM-CCBC Rule 2.6(i) allows the President to extend time periods. Thus, the Registration Fee is an administrative requirement and does constitute part of the Request for Arbitration. As a result, CLAIMANT's clerical error does not impact the date of the commencement of arbitration.

e. CLAIMANT complied with its contractual obligation to resolve disputes amicably and in good faith

67. Section 21 of the Agreement mandates that all disputes must be settled "amicably and in good faith." [EXHIBIT C 2, PP. 10-11]. Shortcomings as to the Power of Attorney and the Registration Fee were minor clerical errors that did not prejudice RESPONDENT or alter CLAIMANT's allegations. And when the President of CAM-CCBC allotted ten days for their correction, CLAIMANT complied in five. [FASSTRACK LETTER, P. 20]. Scholars observe that, particularly with regard to the scope of the Power of Attorney, principle of good faith plays an important role. [BORN II, P. 566]. Similarly, an ICC tribunal noted that "even if [counsel] had only an apparent power of attorney rather than an actual one, this appearance was largely sufficient under the principle of good faith." [ICC AWARD NO. 5080]. Thus, CLAIMANT has substantively, if not literarily, complied with the contract and CAM-CCBC formalities, and clerical errors should not stifle its legitimate claim.

68. For the foregoing reasons, CLAIMANT requests that Tribunal finds that CLAIMANT submitted its claims on time and that the claims are thus admissible.

III. CLAIMANT IS ENTITLED TO ADDITIONAL PAYMENT FROM THE RESPONDENT IN THE AMOUNT OF US $ 2,285,240.00 FOR THE BLADES BASED ON THE EXCHANGE RATE AT THE TIME OF PAYMENT

69. CLAIMANT respectfully requests the Tribunal to find that the proper exchange rate under the Agreement is the exchange rate at the time of payment, US$ 1 = EQD 1.79, and to award CLAIMANT payment of US$ 2,285,240.00 based on that exchange rate. The plain language of the Agreement, as well as pre-contractual negotiations, demonstrates that the exchange rate at the time of payment must be used. The addendum provides no evidence that the Parties intended to deviate from this plain meaning **(1)**. Nor can the addendum be regarded as a valid modification of the Agreement since CLAIMANT did not expressly assent to such a modification **(2)**. Finally, because CISG does not supply a default provision for determining exchange rate, general principles of CISG or, alternatively, principles of private international law govern the dispute. Under either set of principles, the exchange rate at the time of payment must be used **(3)**.

1. The addendum provides no evidence that the Parties intended to deviate from the plain meaning of the Agreement, which favors the exchange rate at time of payment

70. RESPONDENT contends that the fixed exchange rate clause in the addendum is evidence of the Parties' original intent to fix the exchange rate for the entire Agreement. However, whether the addendum is examined from the subjective point of the view of CLAIMANT or from an objective point of view of a "reasonable person," the language in the addendum is not sufficiently clear to convey such intent. Additionally, RESPONDENT can point to no relevant negotiations, trade usages, or prior practices between the Parties that would demonstrate implied intent.

a. Subjective interpretation of the addendum under CISG Article 8(1) compels the conclusion that the fixed exchange rate clause is only applicable to the sale of clamps

71. Contract interpretation under CISG begins with a determination of the parties' intent. [ART. 8(1) CISG]. RESPONDENT claims that it intended to establish a fixed exchange rate in the original Agreement but simply forgot to add a provision to this effect. [ANS. REQ. ARB., P. 25, PARA. 10]. RESPONDENT further claims that it then intended to specify the fixed exchange rate in the addendum in order to reiterate the exchange rate agreed upon during original negotiations. [IBID.]. Whether or not RESPONDENT intended to fix the exchange rate in the main Agreement is immaterial, however, as RESPONDENT's intent "must have been known by or, in any case, recognizable" to CLAIMANT.

[SCHLECHTRIEM I, P. 38]. Moreover, RESPONDENT bears the burden of proving that CLAIMANT knew or must not have been unaware of the RESPONDENT's intent. [SCHWENZER/FOUNTOULAKIS/ DIMSEY P. 60; ENDERLEIN/MASKOW, P. 63, PARA. 3.1; BG ST. GALLEN 1997].

72. RESPONDENT has not met this burden. First, RESPONDENT can point to no specific discussions regarding the exchange rate. [PO NO. 2, P. 57, PARA. 15]. In fact, the only evidence RESPONDENT puts forth regarding CLAIMANT's understanding of RESPONDENT's intent is that CLAIMANT did not object to the fixed exchange rate clause in the addendum and that CLAIMANT's CEO attended a meeting during which the Parties discussed "de-risking" of RESPONDENT. [ANS. REQ. ARB., P. 25, PARAS. 10, 9].

73. However, CLAIMANT's silence upon receipt of the addendum does not prove CLAIMANT's understanding of RESPONDENT's intent. Rather, given how much risk a fixed exchange rate provision would shift onto CLAIMANT, CLAIMANT's silence is strong evidence that CLAIMANT thought the fixed exchange rate only applied to the clamps. As for the "de-risking," its explicit purpose was to make RESPONDENT more attractive to potential buyers. [ANS. REQ. ARB., P. 24, PARA. 9]. By the time the Agreement was signed, however, RESPONDENT had already been sold. Thus, while RESPONDENT claims that it was "obvious" that RESPONDENT intended for "de-risking" to apply to contracts going forward [ANS. REQ. ARB, P. 24, PARA. 9], such intent was by no means obvious to CLAIMANT, given that the purpose for the de-risking was no longer germane.

74. Second, it was RESPONDENT who suggested that the addendum be inserted at the end of the main Agreement, declaring that this should be done for "pure convenience" only, since blades and clamps would be delivered together. [PO NO. 2, P. 57, PARA. 16]. Thus, CLAIMANT had no reason to suspect that any clause in the addendum would impact any clause in the main Agreement.

75. Finally, it was RESPONDENT who wrote the addendum and thus the principle of *contra proferentem* applies. [SCHMIDT-KESSEL IN: SCHLECHTRIEM/SCHWENZER, ART. 8, P. 168, PARA. 49; UNIDROT ART. 4.6]. RESPONDENT failed to include any explicit language indicating that the addendum alludes to the supposed pre-Agreement negotiations. Moreover, the e-mail in which RESPONDENT first proposed the addendum does not explain RESPONDENT's supposed intent to apply the fixed exchange rate to the Agreement. [EXHIBIT R 2, P. 28]. Thus, if the Tribunal still believes that two interpretations of the exchange rate clause are possible – one pointing to modification and the other pointing to restricted usage in the addendum – the Tribunal should adopt the interpretation that fa-

vors CLAIMANT's position.

b. Objective interpretation of the addendum under CISG Article 8(2) likewise leads to the conclusion that the fixed exchange rate is only applicable to the sale of clamps

76. Because RESPONDENT failed to provide any evidence that CLAIMANT knew or could not have been unaware of RESPONDENT's intent, CISG Article 8(2) must be applied to interpret the Agreement. Article 8(2) reflects the general principle of reasonableness governing CISG: "one has to ask how a reasonable person in the shoes of the other party would have understood the statement." [SCHWENZER/FOUNTOULAKIS/DIMSEY P. 60]. The main Agreement contains no provision regarding the exchange rate. Thus, from reading the Agreement alone, no reasonable person would find that the Parties intended to agree to a fixed exchange rate.

77. The addendum does not affect this conclusion. When referring to the entire Development and Sales Agreement, the addendum names it "the main Agreement" [EXHIBIT C 2, P. 11]. By contrast, when fixing the exchange rate, the addendum only references "the agreement." [IBID.]. Given this juxtaposition, a reasonable person would read "the agreement" as referring solely to the contract on the order of clamps.

78. Moreover, the term "Agreement" with a capital "A" is a standard term. The CISG Advisory Council explains that "it is reasonable to assume that where the standard terms have been used in previous dealings between the parties that they were available to the other party at the time of the negotiations or of contracting." [CISG-AC OP. NO. 13, CMT. 3.6]. The term "Agreement" with a capital "A" was used in the initial contract referring to that contract. [EXHIBIT C 2, P. 10]. Thus, at the time of the negotiation of the addendum, RESPONDENT was or should have been aware that "Agreement" was a standard term for the original contract. By contrast, "agreement" was not a standard term and thus CLAIMANT was reasonable to assume that it referred to the addendum only. "[H]idden deviations from usual meanings . . . do not form part of the declaration." [JUNGE IN: SCHLECHTRIEM II, ART. 8, P. 72, PARA. 8A].

79. Finally, UNIDROIT Articles 2.1.20 and 4.4 compel the interpretation that the fixed exchange rate clause is only applicable to the sale of clamps. Article 2.1.20 prohibits surprising terms. A commentary on the Principles provides the following illustration to demonstrate that a term may be surprising in view of the heading: "An exclusive supply clause in a contract headed 'Loan Agreement' may be surprising as the heading creates the impression that it relates to a loan agreement alone." [NAU-

DÉ IN: VOGENAUER, P. 401, PARA. 8]. Article 4.4 likewise directs that headings may not be ignored since the terms of the contract must be interpreted in light of the purpose of the contract. [VOGENAUER IN: VOGENAUER, P. 600, PARA. 3; ICC AWARD NO. 8240]. In this case, the addendum did not have a heading. Yet, the addendum was first sent via e-mail, which did contain a subject line: "Clamps." [EXHIBIT R 2, P. 28]. Because traditional rules must be adjusted to electronic communication [MUÑOZ, P. 120], the subject line should be treated similarly to a heading. Thus, the application of the exchange rate to the main Agreement is surprising and inappropriate given that the purpose of the addendum was to govern the sale of clamps.

80. In sum, RESPONDENT alleges that at the time of the negotiations of the original Agreement, it intended to establish a fixed exchange rate but simply forgot to insert the clause to that effect. However, RESPONDENT has provided no evidence, save for the discussion of "de-risking" of the RESPONDENT prior to its sale, that CLAIMANT understood this supposed intent. RESPONDENT further alleges that the fixed exchange rate clause in the addendum demonstrates the Parties' pre-contractual understanding. However, once again, RESPONDENT can point to no negotiations at the time of the writing of the addendum that proves its contention. Rather, by juxtaposing "the main Agreement" with "the agreement," the text of the clause itself favors CLAIMANT's understanding that the Parties indented for the fixed exchange rate to apply only to the sale of clamps.

c. Interpretation of the addendum under implied terms further confirms the conclusion that the fixed exchange rate clause applies only to the sale of clamps

81. CISG Article 8(3) provides the following criteria that should be considered when interpreting contracts: "negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." [CISG ART. 8(3)]. Similarly, CISG Article 9(1) states that parties are bound by any usage to which they have agreed and any practices they have established among themselves.

82. First, as stated above, there were no negotiations of the exchange rate either before the signing of the main Agreement or before the signing of the addendum. [PO NO. 2, P. 57, PARA. 16].

83. Second, there are no relevant practices that the Parties have established between themselves. RESPONDENT contends that the practice of fixing exchange rates has been established through two previous projects on which the Parties cooperated. However, most courts applying Articles 8(3) and 9(1) require "several" repeated contracts [FB BUDAPEST 1992] as well as "long-standing practices."

[CA GRENOBLE 1999]. One tribunal inferred the existence of practices from more than 100 previous contracts. [CIETAC 2005]. And the survey of case law and arbitration awards revealed that the smallest number of previous contracts held to have amounted to "established practices" was four. [OGH 2005]. In fact, two courts specifically held that two precious contracts did not establish a practice between the parties. [ZG BASEL 1997; AG DUISBURG 2000].

84. Two instances are particularly insufficient to establish "prior practice" if they occurred "within a constellation which was atypical for the business relationship." [SCHMIDT-KESSEL IN: SCHLECHTRIEM/SCHWENZER, ART. 9, P. 185, PARA. 8]. Both of the instances to which RESPONDENT refers occurred while CLAIMANT and RESPONDENT belonged to the same company. By RESPONDENT's own admission, that legal relationship meant "there had been no need for the parties to regulate explicitly the exchange rate." [ANS. REQ. ARB., P. 24, PARA. 8]. The change in the Parties' legal relationship had drastically altered the relevant circumstances.

85. Moreover, parties' prior performances do not always signal that the parties intend such performances to constitute a tool for interpretation of subsequent agreements. [GILLETTE/WALT, P.129]. Sometimes a party does something merely wants to accommodate the other party. [IBID., P. 120]. Thus, in the past CLAIMANT acquiesced to the exchange rate at the time of contracting because the exchange rate did not fluctuate severely.

86. Third, there is no fixed trade usage for exchange rates in aircraft industry contracts one way or the other. [PO NO. 2, P. 56, PARA. 13]. There is also no evidence that the parties explicitly agreed to any trade usages, as required by Article 9(1). [ENDERLEIN/MASKOW, P. 68, PARA. 2].

87. Finally, subsequent conduct of the Parties indicates that CLAIMANT had no subjective intent to agree to a fixed exchange rate and that no reasonable person in the shoes of the CLAIMANT would have had such an understanding. By January 2012, a new government was elected in Equatoriana. In March 2014, when it became clear that Equatoriana would join a free trade zone, the exchange rate dropped to US$ 1= EQD 1.76. [PO No. 2, p. 56. para. 12]. CLAIMANT began production of blades on 1 May 2014. Thus, CLAIMANT began incurring costs after the exchange rate had experienced a significant shift. CLAIMANT knew that the new exchange rate would significantly impact the cost of production and could even lead CLAIMANT to operate at a loss. Nevertheless, CLAIMANT did not enter into new negotiations with RESPONDENT, demonstrating that CLAIMANT did not believe it was operating under a fixed exchange rate. Thus, implied principles of interpretation do not provide any

grounds for deciding that the addendum was intended to refer to some prior understanding that a fixed exchange rate was to govern the main Agreement.

2. The addendum does not validly modify the exchange rate in the original Agreement

88. RESPONDENT argues in the alternative that even if the exchange rate clause in the addendum did not reflect the initial intent of both parties, the addendum modified the main Agreement: "When we negotiated the addendum the agreement on the fixed exchange rate pertained not only the clamps but the whole contract." [EXHIBIT C 7, P. 16]. However, such modification was not valid because it was not expressly assented to by CLAIMANT. Moreover, a good faith interpretation of the Parties' actions confirms that the addendum did not modify the original Agreement.

a. Modification was not valid under CISG Article 29 because it was not expressly assented to by CLAIMANT

89. While successful modification of a contract does not require consideration, it nevertheless requires assent by all parties to the contract. [SECRETARIAT COMMENTARY, ART. 29, PARA. 3; MUÑOZ, P. 163]. Sometimes, assent can be implied through failure to object. For example, a German court ruled that the buyer impliedly accepted a relevant provision in a bill of exchange because the provision was present at the handover of that instrument and the buyer did not object. [LG HAMBURG 1990]. However, in that case, modification consisted of a new date of payment and was thus obvious at the time of the handover. This ruling should not apply to cases where a modification is not self-evident. Rather, in such cases, express assent should be required. Moreover, in order to obtain proper assent, the party proposing modification must communicate relevant information about its own intent. [HOF LEEUWARDEN 2005].

90. RESPONDENT puts forth no evidence that CLAIMANT understood or could not have been unaware of RESPONDENT's intent to modify the main Agreement. RESPONDENT first proposed the fixed exchange rate clause in the addendum in the 22 October 2010 e-mail. The first three lines of the e-mail read: "As already discussed we think the easiest way to regulate the purchase of the clamps is to sign an addendum to our Development and Sales Agreement and not to enter into a separate contract for the clamps." [EXHIBIT R 2, P. 28]. The e-mail did not explain the relationship of the fixed exchange rate to the main Agreement, and there were no additional negotiations between the time the e-mail was sent and the time the addendum was added to the Agreement. [PO NO. 2, P. 57, PARA. 15]. Because CLAIMANT (or a reasonable person in CLAIMANT's shoes) did not understand that RESPOND-

ENT was attempting to modify the Agreement, CLAIMANT could not have expressly assented to the modification as required under CISG Article 29.

91. RESPONDENT may argue that this reasoning is undercut by the fact that Mr. Lee from CLAIMANT's accounting department initially calculated the price based on the fixed exchange rate. In other words, Mr. Lee was such a reasonable person and he believed the exchange rate clause to apply to the entire Agreement. However, the proper "reasonable person" is one who stands in the shoes of the CLAIMANT – one who is privy to the Parties' prior negotiations as well as general principles of international law. [SCHMIDT-KESSEL IN: SCHLECHTRIEM/SCHWENZER, ART. 8, P. 155, PARA. 25; HUBER IN: HUBER/MULLIS, P. 304; BUNDESGERICHT 2003; BUNDESGERICHT 2005; SCHIEDSGERICHT DER BÖRSE FÜR LANDWIRTSCHAFTLICHE IN WIEN 1997]. Mr. Lee, on the other hand, has never taken part in the negotiations or even worked on this transaction. [EXHIBIT C 4, P. 13]. Nor is Mr. Lee aware of the general business strategies of CLAIMANT or the legal principle of nominalism. Moreover, Mr. Lee was under considerable time pressure and was working on the last day before his holiday. [IBID.]. Thus, a genuine mistake made by Mr. Lee is not evidence of rational interpretation of the contract made by a "reasonable person" in CLAIMANT's shoes.

b. A good faith interpretation of the Parties' actions confirms the conclusion that the fixed exchange rate clause in the addendum did not modify the original Agreement

92. A substantial majority of courts and arbitral tribunals have ruled that good faith not only serves as a way to interpret the CISG but also as a standard of conduct for the contracting parties. [GILLETTE/WALT, P. 133; YUGOSLAV CHAMBER OF COMMERCE 2002; COMPROMEX 1998; CA GRENOBLE 1995; VOGENAUER IN: VOGENAUER, P. 203, PARA. 1; CRÉPAU/CHARPENTIER, P. 53]. This is because good faith makes "the internal social function of the contract real." [NALIN IN: SCHWENZER/PEREIRA/TRIPODI, P. 365]. Some remain skeptical that the principle of good faith applies to contractual dealings between the parties because this principle is articulated in CISG Article 7(1), not in Article 8. [GILLETTE/WALT, P. 136]. While this interpretation of Article 7(1) may be correct, Article 7(2) nevertheless makes the principle of good faith to applicable to the conduct of the contracting parties. This is because the question of good faith is not expressly settled in the Convention and good faith is one of the general principles on which CISG is based. The principle of good faith can be extrapolated from Arts. 16(2), 21(2), 29(2), 37, 40, 46, 47(2), 64(2), 80, 82, 85-88. [GILLETTE/WALT, P. 134; SECRETARIAT COMMENTARY, P. 408; FERRARI IN: FERRARI/FLECHTNER/BRAND, ARTS, 1-13, P. 537; MAGNUS, P. 429].

93. Additionally, the Parties agreed that for any "issues not dealt with by the CISG, the UNIDROIT Principles are applicable." [EXHIBIT C 2, P. 10]. UNIDROIT Principles provide that the parties are always obliged to "act in accordance with good faith and fair dealing in international trade." [UNIDROIT ART. 1.7(1)]. In any case, CISG Article 7(1) calls for a uniform interpretation of the Convention, which has been called the "most important characteristic of any methodology applied to gap filling." [ZELLER, 30]. Because a substantial majority of courts and tribunals already use the principle of good faith in their decisions, CLAIMANT requests the Tribunal to do the same. The principle of good faith imposes an obligation on the parties to act honestly and fairly when performing their contractual duties. [POWERS, P. 334]. In particular, each party is required to respect the interests of its counterparty. [PERALES VISCASILLAS IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 7, P. 121, PARA. 25; SCHLECHTRIEM/BUTLER, P. 48; OLG KÖLN 2007].

94. Good faith interpretation of the Parties' actions confirms the conclusion that the fixed exchange rate clause in the addendum should not be used to modify the Agreement. A contrary interpretation would suggest that RESPONDENT insisted on the addendum, as opposed to a separate agreement, only so that RESPONDENT could protect itself from wavering exchange rates. Until October 2010, the exchange rate between EQD and US$ was stable. [PO NO. 2, P. 56, PARA. 12]. However, on 1 October 2010, the Equatorianian Prime Minister unexpectedly resigned and the exchange rate dropped to US$ 1 = EQD 1.98 due to fears that the new Prime Minister would be more free trade oriented. [IBID.]. RESPONDENT proposed to fix the exchange rate in the addendum on 22 October 2010, just 21 day after the resignation. [EXHIBIT R 2, P. 28].

3. Absent an express provision providing otherwise, the exchange rate at the time of payment (US$ 1 = EQD 1.79) must be used

95. As discussed above, the fixed exchange rate clause in the addendum does not demonstrate Parties' original intent to apply a fixed exchange rate to the main Agreement. Moreover, the fixed exchange rate clause in the addendum did not validly modify the original Agreement. Absent any provision on the exchange rate, the general principles of CISG as well as the principles of private international law dictate that the exchange rate at the time of payment must be used.

a. Reasonableness as a general principle of CISG dictates that the exchange rate at the time of payment must be used

96. "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based." [CISG ART. 7(2)].

CISG does not expressly address exchange rate; thus general principles of CISG are needed to resolve the issue. One of the most widely accepted general principles is reasonableness, which is evident from Articles 8, 16, 18, 25 and 33. [SCHWENZER/FOUNTOULAKIS/DIMSEY, P. 52]. Reasonableness means "common sense": it represents what is rational, balanced, and sensible under the circumstances. [ROSADO IN: SCHWENZER/PEREIRA/TRIPODI, P. 76].

97. Many scholars endorse examining the reasonable outcome in view of the entire contract. For example, in comparing CISG with the European Principles of Contract Law, the Commission on European Contract Law highlighted that "the debtor's right of conversion must not be allowed to diminish the extent of its monetary obligation. Consequently, the rate of exchange for the conversion into the currency of payment must be that prevailing at the due place of payment at the date of maturity." [COMM. ON EUROPEAN CONTRACT LAW, ART. 7:108, P. 345].

98. This principle has also been recognized by the courts since the early twentieth century. In one early case, an American court ruled that conversion from francs to dollars must be based on the intention of the testatrix, who wanted to provide a stable income to her beneficiaries. [IN RE WILLING'S ESTATE 1928]. In another case, a French court found that the question of the proper exchange rate must be based not on the fact that payment was stipulated in rubles, but on the fact that the intention was to secure a retired employee adequate means of subsistence. [CA PARIS 1928]. Recent cases continue to look to the purpose of the contract. For example, a German court explained that a different exchange rate should be used "if a drastic depreciation of the currency disrupted the principle of equivalence of the parties' obligations, that is, if the nominal value of the debt was incompatible with the purpose of the contract." [LG HEIDELBERG 1981].

99. One of the basic purposes of any contract is for the seller to make a profit. This purpose is clearly expressed by the cost-plus-profit formula established in Section 4 of the Agreement. Section 4 explicitly states that CLAIMANT is to recover profit as long as the cost of production per blade does not exceed US$ 13,125. [EXHIBIT C 2, P. 10]. The actual cost of production that CLAIMANT incurred was EQD 19,586 per blade. CLAIMANT began production in May 2014, after the exchange rate plummeted in March 2014. Thus, all the costs CLAIMANT incurred were incurred under the new exchange rate. Objectively, therefore, CLAIMANT spent US$ 10,941.90 per blade. If RESPONDENT is allowed to use the old exchange rate, however, CLAIMANT will only be compensated US$ 10,219.28 per blade. Thus, not only would CLAIMANT fail to make a profit from developing a technologically superior

blade, rather CLAIMANT would actually suffer a loss.

100. Furthermore, the Agreement has an explicit provision that describes the circumstances under which CLAIMANT would foreseeably operate at a loss. Section 4(1) of the Agreement reads: "should the production costs per fan blade exceed US$ 13,125 due to extraordinary circumstances and result in unbearable hardship for the Seller the Parties will enter into good faith negotiations to determine a price which is financially acceptable to both parties." [EXHIBIT C 2, P. 10]. Thus, the parties explicitly contemplated that only if the cost per blade exceeded US$ 13,125 would the CLAIMANT have to endure a loss. However, the actual cost incurred by the CLAIMANT was only US$ 10,941.90 per blade. Thus, the only reasonable conclusion that reflects the purpose of the Agreement is that CLAIMANT must be compensated under the current exchange rate.

b. Principles of private international law likewise dictate that the exchange rate at the time of payment should be applied

101. If the Tribunal does not believe that the general principle of reasonableness governs here, CISG Article 7(2) dictates that principles of private international law must be used to interpret questions not expressly settled by CISG. Two principles of private international law are relevant: nominalism and the Article 74 duty to pay for exchange rate losses.

i. Nominalism favors the exchange rate at the time of payment

102. Lord Denning expressed the modern principle of nominalism in 1961: "So long as sterling is regarded as stable whilst other currencies go up and down, it would seem that justice is best done by taking the rate of exchange at the date of breach." [BOWLES/WHELAN, P. 435]. This principle was reiterated in the CISG Advisory Opinion no. 6, Comment 3.7 as well as many scholarly works. [SCHWENZER/HACHEM/KEE, P. 461, PARA. 36.26; CHITTY ON CONTRACTS, PARA. 21-068].

103. Most courts and tribunals rule that a dollar is a dollar: the seller bears the risk of currency depreciation, while the buyer bears the risk of currency appreciation. [GILBERT V. BRETT 1605; KNOX V. LEE 1870; PARKER V. DAVIES 1870; BONYTHON V. COMMONWEALTH AUSTRALIA 1951]. As one court explained, "nominalism is the cornerstone of an economic order that strives to preserve the value of the currency." [LG HEIDELBERG 1981]. This ruling was corroborated in ICC Award No. 8240, where the arbitrator ruled that the debtor must pay its debts at the nominal value. [BERGER, p. 139]. A Dutch court likewise supported this principle absent either party's fault. [RB ROERMOND 1993]. Furthermore, many legal systems recognize the principle of nominalism. [MUÑOZ, P. 337, CITING

BOL ART. 319 CC; SCHWENZER/HACHEM/KEE, P. 461 CITING AUT § 905A(2) CC; DEU § 244(2) CC; EST § 93 CO; GRC ART. 291 CC; HUN ART. 231 CC; ITA ART. 1277 CC; LTU ART. 6.36 CC; NLD ART. 6.121(1) CC].

104. UNIDROIT Principles also confirm this principle. Article 6.1.9(3) states that "payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due." [UNIDROIT ART. 6.1.9(3)]. This Article is not directly applicable to the case at hand because the currency of payment is that of a third country. Nevertheless, the underlying rationale is telling: as the obligee must have the possibility to convert the currency without suffering a loss. [ATAMER IN: VOGENAUER, P. 771, PARA. 11]. The rationale is applicable here since CLAIMANT must convert the payment into EQD, the currency in which CLAIMANT does business. [PO NO. 2, P. 57, PARA. 14].

105. The reason parties specify currency in the contract is to ensure dealings in a stable currency. Typically, problems with exchange rates arise when a local currency depreciates in relation to the stable currency chosen and the tribunal must choose whether to follow the reasonableness argument or the principle of nominalism. This case is unusual, however, as the local currency appreciated in relation to the U.S. dollar. Thus, any reservations the courts express about following the nominalism principle do not apply since both the reasonableness argument and the nominalism argument point in the direction of using the exchange rate at the time of the payment.

ii. CISG Article 74 case law further articulates that it is RESPONDENT's duty to pay for exchange rate losses

106. Although there is no case law on the issue of exchange rates under CISG Article 8, there is analogous case law under CISG Article 74 that establishes the duty to pay for exchange rate losses suffered as a consequence of breach. [HG ZÜRICH 1997]. One seminal case ruled that currency devaluation should be compensated if it leads to actual damages. The court reasoned that if the creditor usually conducts his money transfers in a third currency, and therefore always converts currencies upon receipt, currency depreciation has an unfavorable effect. [OLG DÜSSELDORF 1994]. Although in the case at hand the currency appreciated rather than depreciated, the basic principle that the creditor should not lose money due to currency fluctuations stands.

107. These cases deal with the question of damages, which is not directly applicable to the question at hand. However, underlying these cases is a notion that the seller should be compensated for ex-

change rate loss. Moreover, none of Article 74 cases even consider using the exchange rate at the time of the conclusion of the contract. Rather, they solely explored the difference between exchange rate at the time of breach and the exchange rate at the time damages were to be paid.

c. CISG Article 55 may not be used to supply the price generally charged at the time of the conclusion of the contract

108. Finally, RESPONDENT may contend that CISG Article 55 should apply in this case and thus the price – and by extension the exchange rate – at the time of the conclusion of the contract should be used. This contention is not proper because it misstates the scope of Article 55. Article 55 applies "[w]here a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price." [CISG ART. 55]. However, Article 55 is in tension with Article 14, which states that a proposal constitutes an offer if it is sufficiently definite. To be sufficiently definite, in turn, a proposal must "explicitly or implicitly fix[] or make[] provision for determining . . . the price." [CISG ART. 14]. These seemingly conflicting provisions can be reconciled by assuming that Article 14 recites a sufficient but not a necessary condition. [GILLETTE/WALT, P. 107]. "As such, the sentence states a safe harbor": Article 55 is not applicable when a contract makes a provision for determining the price. [IBID.]. The prevailing opinion is that implicit agreement on the price under Article 14 should be construed liberally, considerably reducing the scope of Article 55. [HUBER IN: HUBER/MULLIS, P. 304; HAGER IN: SCHLECHTRIEM II, ART. 55, P. 462; PARA. 7; BUTLER/HARINDRANATH IN: DIMATTEO/JANSSEN/MAGNUS/SCHULZE, ART. 55, P. 813, PARA. 4; MISTELIS, P. 295]. For example, one ICC Tribunal held that the price if sufficiently definite if it can be ascertained from prior practices or general industry usages. [ICC AWARD NO. 8324].

109. Here, the Parties made an explicit provision for determining the price using the cost-plus-profit formula in Section 4 of the Agreement. Similarly to the ICC Award No. 8324, the absence of the exchange rate clause does not make this formula deficient since the principle of nominalism provides the default exchange rate. The application of Article 55 is thus precluded and, as a result, the exchange rate at the time of the conclusion of the contract is not applicable.

110. The same conclusion is reached from examining the principles behind CISG Article 55. The article intends to prevent the seller from benefiting from a rise in price and the buyer from a fall in price. [MOHS IN: SCHLECHTRIEM/SCHWENZER, ART. 55, P. 849, PARA. 15; HAGER IN: SCHLECHTRIEM II, ART. 55, P. 462, PARAS. 8-9; VOGENAUER IN: VOGENAUER, P. 638, PARA. 8]. Here, the production began after the new exchange rate had already set in. Thus, it is the exchange rate at the time of con-

clusion of the contract that would create a windfall for RESPONDENT, while the exchange rate at the time of payment would only give CLAIMANT the profit it has bargained for.

IV. CLAIMANT IS ENTITLED TO ADDITIONAL PAYMENT FROM THE RESPONDENT IN THE AMOUNT OF US$ 102,192.80 FOR THE FEES DEDUCTED BY THE CENTRAL BANK

111. RESPONDENT must bear the cost of the levy charged by the Financial Investigation Unit. CISG Article 54 dictates that it is the obligation of the buyer, i.e. RESPONDENT, to pay the price and to comply with any public laws and regulations in so doing **(1)**. Obligation to pay the price extends to making an effective payment, not merely carrying out preparatory actions **(2)**. This obligation is not affected by the UNIDROIT provision for public permission since this provision is not sufficiently analogous to the duty to comply with public laws **(3)**. Finally, CLAIMANT did not act in bad faith because it had no duty to disclose publicly available information **(4)**.

1. RESPONDENT's obligation to pay the price under CISG Article 54 includes complying with formalities required by domestic laws

112. In a contract governed by CISG, the buyer has only two obligations: to pay the price and to take delivery of the goods. [ART. 53 CISG]. The obligation to pay the price includes "taking such steps and complying with such formalities as may be required under the contract *or* any laws and regulations to enable payment to be made." [ART. 54 CISG]. It is widely recognized that the costs of these obligations fall on the buyer. [GABRIEL, P. 274; AG DUISBURG 1996].

113. Article 54 obligation is twofold: to comply with banking procedures and to comply with domestic laws. [MOHS IN: SCHLECHTRIEM/SCHWENZER, ART. 54, P. 841, PARAS. 3-4]. The distinction between banking procedures and laws is crucial because only the banking procedures must be specifically agreed to in the contract. [IBID., P. 5]. The *travaux préparatoires* of CISG confirm this interpretation. CISG Article 54 is modeled on the ULIS Article 69, which included examples of steps a buyer would have to take: "acceptance of a bill of exchange, the opening of a documentary credit or the giving of a banker's guarantee." The drafters of CISG agreed to delete these examples to demonstrate that compliance with *banking procedures* is not a default obligation and must be agreed to in the contract. [IBID.]. The "omission of these examples now makes it even clearer" that *domestic laws*, unlike banking procedures, need not be explicitly spelled out in a contract. [MASKOW IN: BIANCA/BONELL, ART. 54, P. 394, PARA. 1.1].

114. The plain meaning of CISG Article 54 confirms this drafting history. Article 54 employs a disjunctive "or" to distinguish compliance with formalities required by contract, such as banking procedures, from compliance with laws and regulations: "complying with such formalities as may be required under the contract *or* any laws and regulations to enable payment to be made." [CISG ART. 54]. Thus, the buyer must comply with domestic laws even when they are not explicitly mentioned in the contract.

115. Here, the bank levy was deducted because of a domestic law of Equatoriana. Because the payment exceeded US$ 2 million, the Financial Investigation Unit investigated the payment in regard to money laundering under Section 5 Regulation ML/2010C. Under Section 12 Regulation ML/2010C, the Financial Investigation Unit subtracted a 0.5% levy from the money investigated. [EXHIBIT C 8, P. 17]. Thus, because the bank levy was a result of a law rather than a banking procedure, it is RESPONDENT's duty to pay the levy even without explicit mention in the Agreement.

116. If the Tribunal decides that CISG Article 54 is not expressly clear on the matter, recourse to the UNIDROIT Principles would become appropriate pursuant to Section 20 of the Agreement. [EXHIBIT C 2, P. 10]. Application of the Principles would lead to the same conclusion. UNIDROIT provides that "[e]ach party shall bear the costs of performance of its obligations." [UNIDROIT ART. 6.1.11]. And costs of performance are "certainly all costs arising in the sphere of each obligor in order to finalize the acts required for performance." [ATAMER IN: VOGENAUER, P. 776-77, PARAS. 2, 6]. In the case of the buyer, these costs would include customs duties, taxes, and fiscal charges. [IBID.; BUTLER/HARINDRANATH IN: BECK/HART/NOMOS, ART. 53, P. 799, PARA. 7 with regard to taxes]. The Anti-Money-Laundering regulations in question are akin to a tax, since they impose a payment of 0.5% on all transactions over US$ 2 million. Because the buyer is typically responsible for payment of taxes, Respondent here must bear the cost of the levy.

2. RESPONDENT's obligation to pay the price extends to making an effective payment, not merely carrying out preparatory actions

117. On its face, CISG Article 54 is not expressly clear whether the obligation of the buyer ends after carrying out preparatory actions (obligation de moyen) or whether the obligation extends to ensuring that the payment becomes effective (obligation de résultat). [SCHWENZER/FOUNTOULAKIS/DIMSEY P. 424]. Scholars have suggested that the proper obligation is the obligation de résultat. [IBID., P. 424-426; OSUNA-GONZÁLEZ, P. 306-307]. Several courts and tribunals have also recognized this general principle. [SUPREME COURT OF QUEENSLAND 2000; ICC AWARD NO. 7197; ICC AWARD NO. 11849;

AUDIENCIA PROVINCIAL DE CANTABRIA 2013]. In the most analogous case, the tribunal decided that sending instructions to the bank to transfer money to the seller did not amount to making an effective payment. [RUSSIAN FEDERATION CHAMBER OF COMMERCE AND INDUSTRY 1995]. Rather, the buyer had to ensure that a successful transfer reached the seller's bank, since the bank is deemed to be its agent. [IBID.; OSUNA-GONZÁLEZ, P. 319].

118. UNIDROIT confirms this conclusion: "In case of payment by a transfer the obligation of the obligor is discharged when the transfer to the obligee's financial institution becomes effective." [UNIDROIT ART. 6.1.8(2)]. Thus, RESPONDENT's obligations cease only when money is actually credited to CLAIMANT's account. [OSUNA-GONZÁLEZ, P. 317; OLG MÜNCHEN 1997; ATAMER IN: VOGENAUER, P. 778, PARA. 7; ENDERLEIN/MASKOW, P. 206, PARA. 3; SCHWENZER/HACHEM/KEE, P. 463, PARA. 36.34]. "The concept of discharge is tricky in two senses. First, its legal importance is not always clearly understood. The crucial point is that until a wire transfer is completed, which occurs when the beneficiary's bank accepts a payment order for the beneficiary, the originator is legally liable on this obligation – it is not discharged." [BHALA IN: SUMMERS, P. 58].

119. Here, CLAIMANT's bank – the one specified in the Agreement – is the Equatoriana National Bank. It was not CLAIMANT's bank that applied the levy. Rather, the Equatoriana Central Bank is the one that oversees the Financial Intelligence Unit. The payment first passed through the Equatoriana Central Bank, where the levy was applied by the Financial Investigations Unit, a government agency. Thus, the full payment never reached the CLAIMANT's bank as specified in the Agreement. Pursuant to CISG Article 53 as well as Section 4(3) of the Agreement, it was RESPONDENT's duty to deposit the full price into the bank account chosen by CLAIMANT. Because the full payment was never deposited into CLAIMANT's account, RESPONDENT is liable for the additional US$ 102,192.80.

3. UNIDROIT provisions for public permission do not affect CLAIMANT's obligations

120. RESPONDENT may request the Tribunal to come to the opposite conclusion under UNIDROIT Article 6.1.14(a). This article states that if only one party has its place of business in the state in question, then that party is responsible for obtaining the public permission. This provision is inapplicable for three reasons. First, a bank levy is not conceptually similar to a public permission. It is true that the *content* of a public permission is understood broadly: "it includes all permission requirements established pursuant to a concern of a public nature, such as health, safety, or particular trade policies." [UNIDROIT PRINCIPLES, CMT. 1(a)]. However, this content is irrelevant since a regulation can only

result in a need for public permission if that regulation can "cause the contract to be invalid or performance impossible." [ATAMER IN: VOGENAUER, P. 796, PARAS. 20-21]. Here, paying the levy does not impact validity or performance of the Agreement in any way.

121. Second, the rationale behind the public permission is that the party whose place of business is in the state in question will be more familiar with application requirements. [UNIDROIT PRINCIPLES, CMT. 3(a)]. Yet, in this case, no application was necessary. All that RESPONDENT had to do was pay the bank levy. Thus, there was no reason for CLAIMANT to take over the obligation.

122. Third, UNIDROIT Principles cannot be used to supplant CISG; they are applicable only in so far as there is a gap in CISG under Section 20 of the Agreement. [EXHIBIT C 2, P. 10]. But, CISG Article 54 already regulates public permission since it obliges the buyer to comply with governmental formalities. [MASKOW IN: BIANCA/BONELL, ART. 54, P. 397, PARA. 2.6]. Only formalities that are "impossible to fulfill" are transferred to the seller. [IBID., P. 398, PARA. 2.7]. Payment of the levy is certainly possible for RESPONDENT to fulfill without assistance of CLAIMANT.

4. CLAIMANT was not acting in bad faith because it had no duty to disclose publicly available information

123. RESPONDENT contends that it should not be liable for the bank levy because it arose out of a specific regulation in Equatoriana and RESPONDENT did not have knowledge of that regulation. [ANS. REQ. ARB., P. 26, PARA. 18]. First, this Anti-Money-Laundering regulation was a matter of public record. The general contours of this regulation were even available in the Mediterraneo press. [PO NO. 2, P. 55, PARA. 7].

124. Second, Claimant had no additional duty to disclose under CISG or UNIDROIT Principles. In fact, some commentators claim that duty to disclose may be contrary to CISG Article 8(3), which only requires due regard to be given to statements made during negotiations. [GILLETTE/WALT, P. 135]. If the drafters intended to go beyond interpreting statements made during negotiations, they would have included such a provision. [IBID., P. 136]. Similarly, the UNIDROIT Principles do not include a general duty to disclose. [ATAMER IN: VOGENAUER, P. 795, PARA. 18]. While there is a duty to cooperate, that duty extends only in so far as the parties must give each other information needed for a successful outcome of the application for a government permit. [IBID.].

125. Nor can RESPONDENT rely on two other instances where CLAIMANT paid the levy to show bad faith. Only prior dealings that the two contracting parties "established between themselves" are relevant.

[ARTS. 8(3), 9 CISG]. The two contracts RESPONDENT references were between CLAIMANT and a third party. Moreover, sometimes a party does something merely as an accommodation of the other party, not as an understanding of a contractual duty. [GILLETTE/WALT, P.120]. In the first instance, CLAIMANT chose not to claim the additional amount because that contract was entered into the same month when the new Anti-Money-Laundering regulations went into effect. [PO NO. 2, P. 55, PARA. 8]. Additionally, the amount CLAIMANT lost during that payment was substantially smaller than the current amount: US$ 31,500 as compared to US$ 102,192.80. [IBID.]. Similarly, in the second instance, CLAIMANT chose not to claim the additional amount from the buyer because it had just concluded a contract on very favorable terms, making a profit of 8%, as opposed to the current profit of 4% [IBID., P. 56, PARA. 9]. Moreover, the amount of the bank levy in this second instance was also relatively small: US$ 26,500. [IBID.]. Therefore, in both instances, CLAIMANT believed it had the legal right to claim additional amounts from its buyers but chose not to do so to accommodate the other parties.

126. Finally, the burden of proving the state of mind is on the party that alleges bad faith. [VOGENAUER IN: VOGENAUER, P. 225, PARA. 44]. RESPONDENT cannot do so because the persons negotiating the Development and Sales Agreement had no knowledge about the specific provisions of the Anti-Money-Laundering regulations. Nor were they aware of the deduction of the levy arising from the previous instances to which RESPONDENT refers. [PO NO. 2, P. 55, PARA. 8].

127. "The concept of good faith should not be interpreted too narrowly. The lack of good faith does not necessarily mean 'bad faith,' and there is a gray area in between the two that must be carefully evaluated by the arbitral tribunal." [VINCZE, P. 609 § 9]. Here, even if the parties negotiating the contract had wanted to inform RESPONDENT of the new law, they could not have done so because they did not have the requisite knowledge themselves. While this may have constituted an oversight error on the part of CLAIMANT's management, it simply does not amount to bad faith.

128. For the foregoing reasons, CLAIMANT requests that the Tribunal orders RESPONDENT to pay US$ 102,192.80 for the fees deducted by the Central Bank.

REQUEST FOR RELIEF

For the above reasons, CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal should not order CLAIMANT to provide security for RESPONDENT's costs;
2. CLAIMANT's claims have been submitted on time and are thus admissible;
3. CLAIMANT is entitled to the additional payments from RESPONDENT in the amount of US$ 2,285,240.00 for the blades based on the present exchange and US$ 102,192.80 for the fees deducted by the Central Bank.

Kristina Alekseyeva

Morgan Lewis

Abigail Xu

Elizabeth Callahan