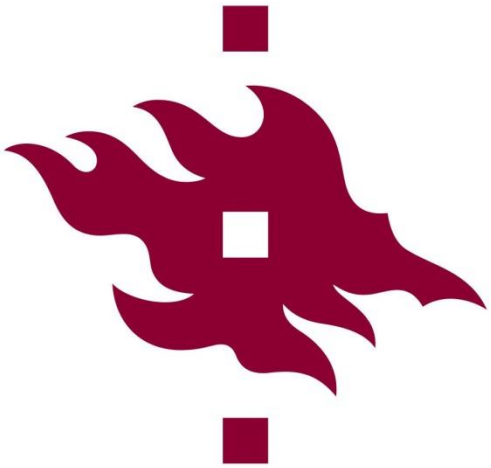
FOURTEENTH ANNUAL
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT



UNIVERSITY OF HELSINKI
HELSINGIN YLIOPISTO

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

Miisa Happonen – Saramaria Kalkku – Iina Laak –

Patrick Lessmeister – Ina Rautiainen – Veera Sundberg

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Nanjing Tianshun Shipbuilding Co Ltd and Jiangsu Skyrun International Group Co Ltd v. Orchard Tankers PTE Ltd

11 February 2011

Case No: 2011 EWHC 164

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TABLE OF ABBREVIATIONS

ACICA	Australian Centre for International Commercial Arbitration
AtRfSfC	Answer for Request for Security for Costs
ARfA	Answer to Request for Arbitration
Art.	Article
BGH	Bundesgerichtshof (German Federal Court of Justice)
CAM-CCBC	Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
CEPANI	Belgian Centre for Arbitration and Mediation
Claimant	Memorandum for Claimant, American University Washington College of Law
Cl. Ex.	CLAIMANT's exhibit
CIArb	Chartered Institution of Arbitrators
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-Online	Internet database on CISG decisions and materials,available at www.globalsaleslaw.org
DAL	Danubian arbitration law, verbatim adoption of UNCITRAL Model Law for International Commercial Arbitration with 2006 amendments
DSA	Development and Sales Agreement
e.g.	for example (exempli gratia)
EQD	Equatorianian Denar(s)

HKIAC	Hong Kong International Arbitration Center
ibid.	the same source as above (ibidem)
ICC	International Chamber of Commerce
i.e.	that is (id est)
JCAA	Japan Commercial Arbitration Association
KG	Kommanditgesellschaft (Limited Partnership in Germany)
KKO	Korkein oikeus (Supreme Court of Finland)
LCIA	The London Court of International Arbitration
Ltd.	Limited
ML/2010C	Equatorianian money laundering regulation
Model Law	The UNCITRAL Model Law of International Commercial Arbitration
NAI	Netherlands Arbitration Institute
NfC	Notice for Commencement of Arbitration Proceedings
No.	number
NZIAC	New Zealand International Arbitration Centre
PICC	UNIDROIT Principles of International Commercial Contracts 2010
p./pp.	page/pages
¶/¶¶	paragraph/paragraphs
Plc.	Public limited company
PO1	Procedural Order No.1
PO2	Procedural Order No.2

PoA	Power of attorney provided by Mr. Fasttrack on 31 May 2016 in the name of Wright Holding Plc
Re. Ex.	RESPONDENT's exhibit
RfA	Request for Arbitration
RfSfC	Request for Security for Costs
R$	Brazilian Reais
SA	Limited Company
Sec.	Section
Secreteriat Commentary	Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat
SIAC	Singapore International Arbitration Centre
SP	Sole Proprietorship
ToR	Terms of Reference
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar(s)
v.	versus

STATEMENT OF FACTS

1 The parties to this arbitration are Wright Ltd ("CLAIMANT") and SantosD KG ("RESPONDENT", together the "Parties"). RESPONDENT manufactures jet engines, and CLAIMANT has supplied RESPONDENT with jet engine fan blades since 2003. Until the late summer of 2010, the Parties were subsidiaries of the same company, Engineering International SA.

2 The Parties entered into the Development and Sales Agreement (the "DSA") on 1 August 2010, with the objective of jointly developing a new and improved fan blade model, TRF 192-I. The new fan blade was to be incorporated into RESPONDENT's new model of jet engine, JE 76/TL14b.

3 Prior to entering into the DSA, the Parties had concluded two other long-term sales contracts. In all of the contracts, the price was calculated based on CLAIMANT's production costs. The purchase price was always paid in US dollars ("USD"), even though CLAIMANT incurred its production costs in Equatorianian Denars ("EQD"). The Parties applied the exchange rate fixed to the date of contracting to convert the production costs into USD to determine the purchase price.

4 In October 2010, RESPONDENT placed an additional order of clamps, with which to attach the fan blades to the engine shafts. On 26 October 2010, the Parties signed an Addendum, where the terms for the sale of the clamps were agreed upon. The Parties agreed on an exchange rate fixed to USD 1 = EQD 2.01.

5 On 14 January 2015, CLAIMANT delivered the fan blades and the clamps and sent the respective invoices. RESPONDENT paid the purchase prices accordingly. The purchase prices in both invoices were calculated using the fixed exchange rate agreed upon in the Addendum. On 15 January 2015, CLAIMANT notified RESPONDENT that in CLAIMANT's understanding the purchase price should have been calculated with the exchange rate of the time of payment, which would result in a higher purchase price. CLAIMANT requested RESPONDENT to make this additional payment of USD 2,285,240 by 4 March 2015. RESPONDENT refused, which led the Parties to a dispute over the applicable exchange rate.

6 Furthermore, an amount of USD 102,192.80 had been deducted from RESPONDENT's payment due to a money laundering regulation ("ML/2010C") of CLAIMANT's

domicile. On 9 February 2015, CLAIMANT insisted that RESPONDENT should reimburse the deducted levy to CLAIMANT. RESPONDENT refused.

7 Over a year later, on 1 April 2016, CLAIMANT informed RESPONDENT that it will start arbitration proceedings to resolve the issue. On 31 May 2016, CLAIMANT submitted a request for arbitration to the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("CAM-CCBC"). The CAM-CCBC considered the payment of the registration fee and the power of attorney provided by CLAIMANT insufficient. CLAIMANT complied with the CAM-CCBC's order to supplement the request on 7 June 2016.

8 In the Answer to the Request for Arbitration, RESPONDENT denied CLAIMANT's claims and requested the Tribunal to find the claims inadmissible due to the exceeded time limit of the Parties' arbitration agreement.

9 On 5 September 2016, Carioca Business News reported of concerns surrounding CLAIMANT's financial situation. The next day, RESPONDENT submitted a request for security for cost to the CAM-CCBC.

INTRODUCTION TO ARGUMENTS

10 At the time the DSA was concluded, CLAIMANT feigned to be in a better financial situation than it truly was. RESPONDENT had full trust in CLAIMANT as a business partner due to their successful relationship spanning over nearly a decade. The sorry state of CLAIMANT's financial affairs was only revealed to RESPONDENT by an article in a business periodical in September 2016. RESPONDENT sought protection against CLAIMANT's imminent insolvency by filing a request for security for costs immediately after discovering the changed circumstances. The Tribunal should order CLAIMANT to provide security for RESPONDENT's legal costs [**Section I**].

11 To swiftly find out whether a dispute will escalate, the Parties agreed on a time limit of 60 days for commencing arbitration. The present dispute arose in January 2015 after RESPONDENT refused any additional payments. The dispute remained unsolved after the communication between the Parties ended in February 2015. As the silence continued, RESPONDENT gradually developed an understanding that CLAIMANT no longer insisted on its claims and that the dispute would not escalate. Hence, the

commencement of arbitration in the summer of 2016 was too late. Accordingly, the Tribunal should find CLAIMANT's claims inadmissible [**Section II**].

12 When negotiating the DSA, RESPONDENT relied on the continuity of the Parties' long-standing and close business relationship, including their practice of fixing the exchange rate to the time of contract formation. From the start of the negotiations until the performance of the contract, CLAIMANT in no way indicated disagreement with this understanding. Quite the contrary, CLAIMANT displayed the same understanding by agreeing to explicitly include the fixed exchange rate into the Addendum, as well as by preparing the invoice for the fan blades with the fixed exchange rate. Despite all this, CLAIMANT requested additional payment from RESPONDENT, now calculating the purchase price with the exchange rate of the time of payment. CLAIMANT's claim for the additional purchase price should be rejected [**Section III**].

13 In addition, CLAIMANT had insisted on adding a clause into the DSA to allocate any commercial bank charges on RESPONDENT. However, the amount levied from the purchase price by the state of Equatoriana does not fall within the scope of RESPONDENT's liabilities. The loss caused to CLAIMANT is a consequence of CLAIMANT's failure to inform RESPONDENT of regulation ML/2010C, on the basis of which the levy was deducted. RESPONDENT does not have reimburse the governmental levy to CLAIMANT [**Section IV**].

I. THE TRIBUNAL CAN AND SHOULD ORDER CLAIMANT TO PROVIDE SECURITY FOR RESPONDENT'S LEGAL COSTS

14 RESPONDENT has requested the Tribunal to order CLAIMANT to provide security for RESPONDENT's legal costs, to be protected from having to finally carry its costs despite a successful defence. If the legal costs were allocated on CLAIMANT, CLAIMANT would not be able to satisfy an adverse costs award. As expected, CLAIMANT has disputed the Tribunal's power to order security for costs and claimed that there are no grounds to order security for costs in this case.

15 CLAIMANT's objections are unfounded for the following reasons: Firstly, the Tribunal has the power to order security for costs as an interim measure under the Danubian

Arbitration Law and the CAM-CCBC Rules [**A**]; Secondly, the conditions for ordering interim measures under the Danubian Arbitration Law interpreted in line with international arbitration practice are fulfilled [**B**]; Alternatively, the Tribunal has inherent powers to order security for costs in the present circumstances [**C**].

A. The Tribunal has the power to order security for costs as an interim measure under the Danubian Arbitration Law and the CAM-CCBC Rules

16 The Parties have agreed on the CAM-CCBC Rules, and the *lex arbitri* to be the DAL, both of which provide the Tribunal the power to order security for costs as an interim measure. CLAIMANT could have disputed the Tribunal's power, even though this CLAIMANT admits that the Tribunal has the power under the DAL [*Claimant, ¶¶40, 43*]. CLAIMANT does, however, allege that security for costs is not covered by the CAM-CCBC Rules [*Claimant, ¶32*]. RESPONDENT will establish that the DAL, and the CAM-CCBC Rules interpreted in line with international arbitration practice, encompass security for costs.

17 Pursuant to Art. 17(2)(c) DAL, interim measures "*provide a means of preserving assets out of which a subsequent award may be satisfied*". Art. 8.1 CAM-CCBC Rules provides for a power to order provisional measures, "*both injunctive and anticipatory*".

18 The DAL provision on interim measures quoted above covers security for costs. According to the UNCITRAL Working Group II, the UNCITRAL Model Law and the UNCITRAL Arbitration Rules provisions on interim measures encompass security for costs. [*A/CN.9/641, ¶48; see UNCITRAL Arbitration Rules Art. 26(2)(c)*]. The Working Group II is the authoritative interpreter of the Model Law, of which the DAL is a verbatim adoption [*Holtzmann/Neuhaus, p. 3–5; see also Lewis, p. 50–51; PO2, p. 60, ¶37*].

19 CLAIMANT has claimed that the Tribunal should refrain from ordering security for costs, because international arbitration practice and scholarly opinion take an adversarial stance on the matter [*Claimant, ¶¶35–37*]. RESPONDENT is unaware of any court or arbitral cases or legal scholars arguing that security for costs is not an interim measure. On the contrary, many authorities, including the very same authorities CLAIMANT has relied upon [*Claimant, ¶¶35–37*], agree that security for costs can be ordered as an interim measure [*Yesilirmak 2005, p. 234, ¶5-119; Lew/Mistelis/Kröll, ¶¶23-35, 23-53; Kee pp. 275–276; Tirado/Stein/Singh, p. 164; Rubins, p. 319; Petrochilos, p. 884; Gu, p. 167*]. Security for costs is an anticipatory measure to

facilitate the enforcement of a costs award by preserving assets for that purpose, which makes it an interim measure [*Born pp. 2449, 2496; Redfern/O'Leary, pp. 397, 402–403; Gu, p. 167*; *Holtzmann/Neuhaus, pp. 226–227; Menon/Chao, pp. 5, 25, Marchac, p. 123; Heilbron, pp. 244–245*].

20 The Parties have agreed that the proceedings shall be conducted in line with international arbitration practice [*Cl. Ex. 2, p. 10–11, sec. 21*]. This practice for ordering security for costs as an interim measure is reflected and generated by, for example, the rules of several arbitration institutes [*Redfern/Hunter, ¶6.19*], such as Art. 25 LCIA Rules, Art. 33.2(e) ACICA Rules, Art. 27.1 CEPANI Rules, Art. 35.3 NAI Rules, Art. 1.9 and 29.2(e) NZIAC Rules and Art. 27j SIAC Rules. Even under the rules that do not explicitly provide for security for costs, security for costs can be ordered as an interim measure. For example Art. 28 ICC Rules and Art. 26 Swiss Rules on interim measures grant the tribunal the power to order security for costs, even though it is not explicitly mentioned [*Derains/Schwartz, p. 297; Craig/Park/Paulsson, p. 468; Zuberbühler/Müller/Habegger, p. 232–233; see also A/CN.9/641, ¶48 on UNCITRAL Arbitration Rules Art. 26(2)(c)*].

21 Moreover, the power to order interim measures must be excluded if parties do not want a tribunal to have such power. [*Art. 8.1 CAM-CCBC Rules; Art. 17 DAL*]. The Parties did not in any way exclude interim measures nor security for costs from their proceedings [*Cl. Ex. 2, p. 10–11, sec. 21*].

22 In short, security for costs is an interim measure covered by the DAL and the CAM-CCBC Rules for the above-mentioned reasons. Thus, the Tribunal has the power to order security for RESPONDENT's legal costs.

B. The conditions for ordering security for costs set out in the Danubian Arbitration Law, interpreted in line with international arbitration practice, are fulfilled

23 Although the CAM-CCBC Rules bestow the power to order security for costs on the Tribunal, the rules do not offer any guidance on under which circumstances the power should be exercised. Instead, the Tribunal should turn to Art. 17 A DAL, which provides the conditions for ordering interim measures. Following the Parties arbitration agreement, the conditions must be interpreted in line with international arbitration practice on security for costs.

24 RESPONDENT will show that the conditions are fulfilled. Firstly, CLAIMANT is both unable and unwilling to satisfy an adverse costs award. Thereby, harm not adequately reparable by a costs award is likely to occur to RESPONDENT [**1**]. Secondly, the harm that would be caused to RESPONDENT outweighs CLAIMANT's unwarranted concerns for its right to access to justice. It would be unfair for RESPONDENT to bear the consequences of CLAIMANT's unforeseeable insolvency [**2**]. Thirdly, there is a reasonable possibility that RESPONDENT will succeed on the merits of the case [**3**].

1. RESPONDENT will encounter irreparable harm if the request for security for costs is not granted

25 The first condition under the DAL, the prospect of irreparable harm, is fulfilled in the case at hand. CLAIMANT is both unable and unwilling to satisfy adverse costs awards. CLAIMANT has alleged that RESPONDENT has not demonstrated that it would suffer irreparable harm [*Claimant, ¶45*]. RESPONDENT will now establish that it would suffer irreparable harm due to CLAIMANT's inability to pay.

26 Pursuant to Art. 17 A(1)(a) DAL, harm not adequately reparable by the award of damages must be likely to occur, if the interim measure is not granted. Harm not adequately reparable would occur if a claimant was unable to pay an adverse costs award and a successful respondent did not have its legal costs reimbursed. A claimant is considered to be unable to pay an adverse costs award when it has serious cash-flow problems [*Gu, p. 189; ICC 14661; CIArb comment (a) to Art. 3*]. Moreover, a claimant's past reluctance to pay adverse costs awards justifies granting security for costs [*RSM v. Saint Lucia, ¶86; von Goeler, p. 352; Redfern/O'Leary, p. 411; Darwazeh/Leleu, p. 142–143*].

27 CLAIMANT is short of liquid funds. CLAIMANT's cash assets were USD 199,990 in the end of 2015. [*PO2, p. 59, ¶28; Cl. Ex. 6, p. 15*] CLAIMANT's parent company provided the assets to finance the costs related to this arbitration [*PO2, p. 59, ¶29*], which reveals that CLAIMANT is unable to pay even its own costs. Moreover, contrary to CLAIMANT's assertions [*Claimant, ¶37*], RESPONDENT is not responsible for CLAIMANT's financial issues, because the DSA does not entitle CLAIMANT to additional payments in the first place. For further elaboration, RESPONDENT invites the Tribunal to refer to sections III and IV of this Memorandum [*¶¶82–159*].

28 CLAIMANT has shown reluctance to pay costs awards. CLAIMANT has lost an arbitration against one of its suppliers and refuses to pay the sum awarded relying on a

set-off claim [*Claimant, ¶46*]. The set-off claim is currently being litigated between CLAIMANT's parent company and CLAIMANT's supplier [*ARfSfC, p. 49*]. CLAIMANT's reliance on the uncertain outcome of the litigation raises serious doubts as to whether CLAIMANT is willing to comply with an adverse costs award.

29 In conclusion, the first condition under Art. 17 A DAL is fulfilled. As demonstrated above, CLAIMANT is unable and unwilling to pay any adverse costs awards. RESPONDENT is likely to suffer irreparable harm without the order.

2. The irreparable harm caused to RESPONDENT without an order for security for costs outweighs CLAIMANT's due process concerns

30 CLAIMANT has alleged that its right to access to justice would be violated by an order for security for costs [*Claimant, ¶¶36–37*]. However, RESPONDENT's need for security for costs outweighs the harm caused to CLAIMANT by the order, because no harm will be caused to CLAIMANT. Moreover, contrary to CLAIMANT's allegations [*Claimant, ¶47*], the unexpected deterioration of CLAIMANT's financial standing is not a part of RESPONDENT's normal commercial risk. Thus, the second condition under the DAL is fulfilled.

31 Pursuant to Art. 17 A (1)(a) DAL, the harm that would be caused to the requesting party by not granting the measure has to substantially outweigh the harm that is likely to result to the party against whom the measure is directed. The harm that would be caused to a claimant by an order for security for costs is that its right of access to justice may be put at risk, because proceedings can be stayed or the case can be dismissed with prejudice. Claimant would only face this harm if it chose not to comply with an order for security for costs. [*Gu, p. 167; Lynch, p. 25; Redfern/O'Leary, p. 399; Kirtley/Wietrzykowski, p. 20; see Art. 25.2 LCIA Rules*]

32 Although CLAIMANT has alleged that the harm caused to it by an order would be more substantial than that caused to RESPONDENT, CLAIMANT has failed to provide any grounds to support its allegation [*Claimant, ¶46*]. RESPONDENT has established above [*¶¶25–29*] that it would face irreparable harm without an order for security for costs. CLAIMANT's access to justice is, however, not put at risk by a security for costs order. Namely, CLAIMANT's chairman has undertaken to provide the security, should it be ordered by the Tribunal [*PO1, p. 52*]. There is no risk of the proceedings being stayed or the case being dismissed with prejudice, because the security will be provided for. As CLAIMANT's chairman will provide the security [*PO1, p. 52*], CLAIMANT

does not have to tie its assets to the security. Hence, the order would not harm CLAIMANT's business.

33 Moreover, a respondent does not have to carry the burden of the commercial risk of a claimant's insolvency, when the financial situation of a claimant has substantially deteriorated since the arbitration agreement was entered into [*Henderson, p. 72; ICC 10032 and 14993; Karrer/Desax, ¶36*]. If the deterioration of a claimant's financial situation was commercially unforeseeable, the weighing of the harm caused to each party favours respondent [*von Goeler, p. 356; Sandrock, p. 37*]. A respondent's knowledge of claimant's situation is taken into account in the evaluation of foreseeability [*Schwarz/Konrad, ¶¶22–106; ICC 7047; CIArb comment (c) to Art. 3*].

34 CLAIMANT created an impression that it would have around USD 150 million in assets, when the DSA was negotiated and entered into [*RfSfC, p. 46, ¶4; PO2, p. 59, ¶28; PO2, p. 60, ¶34*]. Only after the arbitration proceedings were initiated, RESPONDENT learned that CLAIMANT had substantially exaggerated the amount it was going to be awarded in an arbitration with the government of Xanadu [*RfSfC, p. 46; Re. Ex. 6, p. 47*]. In truth, CLAIMANT's financial statement of 2015 only included assets in the total amount of USD 42,757,950 [*PO2, p. 59, ¶28*], which is a mere fraction of the assets RESPONDENT justifiably thought CLAIMANT would have had at the time of conclusion of the arbitration agreement.

35 CLAIMANT's business or access to justice are not at risk, whereas RESPONDENT would suffer irreparable harm without the order for security for costs. RESPONDENT could not have foreseen the credibility of CLAIMANT's financial standing deteriorating. The risk of the change in CLAIMANT's situation is not RESPONDENT's to bear. Thus, RESPONDENT's need for security outweighs CLAIMANT's interests. The Tribunal should conclude that the second condition under the DAL is fulfilled.

3. RESPONDENT has a reasonable possibility to succeed on the merits of the case

36 The third condition for interim orders under the DAL is fulfilled, because RESPONDENT has a reasonable possibility to succeed on the merits of the case. CLAIMANT is concerned that a pre-assessment of the merits would lead to prejudging the case [*Claimant, ¶¶35–36*]. RESPONDENT will show that assessing the merits does not force the Tribunal to prejudge the case.

37 Pursuant to Art. 17 A(1)(b) DAL, the requesting party must have a reasonable possibility to succeed on the merits of the claim for the interim measure to be ordered.

The merits of the claim for a respondent are the legal costs together with the rejection of a claimant's material claims [*ICC 15218; Redfern/O'Leary, p. 410; Waincymer, p. 648*]. The Tribunal has the power to allocate legal costs [*Art. 10.4.1 CAM-CCBC Rules; ToR, p. 43, ¶12.3; see ICC Commission Report 2015, pp. 9–10*]. In arbitration under Danubian law, costs follow the event [*PO2, p. 58, ¶26*].

38 CLAIMANT has alleged that RESPONDENT's case does not meet the threshold required by the provision [*Claimant, ¶49*]. CLAIMANT is relying on case *Safe Kids in Daily Supervision Ltd v. McNeill*, which, however, only sets the threshold to *"a real possibility of success"* on the merits of the case [*Safe Kids in Daily Supervision Ltd v. McNeill, ¶31*]. The more popular interpretation is that the Tribunal's task is limited to establishing that the claims are not groundless [*Interim Award in NAI Case No. 1694; Gu, p. 197; CIArb Guidelines*]. RESPONDENT will establish in sections III and IV of this Memorandum [*¶¶82–159*]. that it is likely to win on the merits of the case.

39 In addition, a tribunal must not prejudge the case when carrying out a pre-assessment of the merits [*Art. 17 A(1)(b) DAL; Yesilirmak 2000, p. 34; ICC 6632 and 8113*]. Prejudgment is not an inevitable consequence of pre-assessing the merits, because a tribunal merely needs to establish that the claims of both parties meet the threshold of not being obviously bound to fail. For that purpose, a thorough assessment of the material issues which could compromise the neutrality of the tribunal is not needed. [*Henderson, p. 71; Bühler/Stacher in Arroyo, p. 1382; X. S.A.R.L., Lebanon v Y. AG, Germany, ¶14; CIArb comment (a) to Art. 2*]

40 The third condition for an interim order is fulfilled. RESPONDENT has a reasonable possibility to succeed on the merits of the case. Contrary to CLAIMANT's claims, to arrive at that conclusion, the Tribunal merely has to carry out a superficial pre-assessment, and therefore, no risk of prejudgement is at hand. RESPONDENT has established that all conditions in Art. 17 A DAL are met. The Tribunal should order CLAIMANT to provide security for RESPONDENT's legal costs.

C. In any case, the Tribunal should invoke its inherent powers to order security for costs in the present circumstances

41 RESPONDENT requests the Tribunal to find that it has inherent powers to order security for costs, even if the provisions on interim measures in the CAM-CCBC Rules and the DAL would not expressly grant such power. Under the present circumstances

the Tribunal should invoke its inherent powers. CLAIMANT has raised an unfounded objection to the Tribunal's inherent powers to order security for costs [*Claimant, ¶32*].

42 Pursuant to Art. 7.8 CAM-CCBC Rules, the tribunal can *"adopt the necessary and convenient measures for appropriate conduct of the proceedings"*. The same holds true pursuant to Art. 19(2) DAL, when the parties' agreement lacks explicit guidance on a procedural issue. The provisions on tribunal's wide discretion to determine the appropriate proceedings reflect the same idea as inherent powers. Inherent powers are non-express powers that are needed for a tribunal to be able to perform its judicial function [*Wachter, pp. 67–68; Kolo, p. 45; Born, pp. 2453, 1986–1988*; *KKO 2005:14, ¶7; BGH 3 July 1975; ILA Washington Report 2014, p. 828–829*].

43 A tribunal has inherent powers to order security for costs in exceptional circumstances, when deemed necessary to uphold the integrity of the proceedings, even if there is no support for such power in the applicable provisions [*e.g. ICC 7489, 7047 and 6697; Craig/Park/Paulsson, p. 467*; *El Salvador; Victor Pey v. Chile; Brown, pp. 12–14*].

44 By their arbitration agreement, the Parties have granted the Tribunal full power to resolve disputes in connection with or arising out of the DSA [*Cl. Ex. 2, pp. 10–11, sec. 21*]. RESPONDENT has established above in section I.B [*¶¶25–29*] that CLAIMANT does not have liquid assets and has provided RESPONDENT with misleading information about its financial standing. RESPONDENT is forced to defend its claims in a situation where it cannot have its costs reimbursed, even if it won the case.

45 RESPONDENT is in urgent need of legal protection in these exceptional circumstances. The Tribunal should uphold the fairness and integrity of the proceedings by ordering CLAIMANT to provide security for RESPONDENT's legal costs.

46 **To conclude,** the Tribunal should find that it has the power to order security for costs as an interim measure under the applicable law and rules. The conditions for interim measures set in the DAL are met while interpreted in light of international arbitration practice on security for costs. In any case, the Tribunal has inherent powers to order security for costs due to the exceptional circumstances at hand. Therefore, CLAIMANT should be ordered to provide security for RESPONDENT's legal costs.

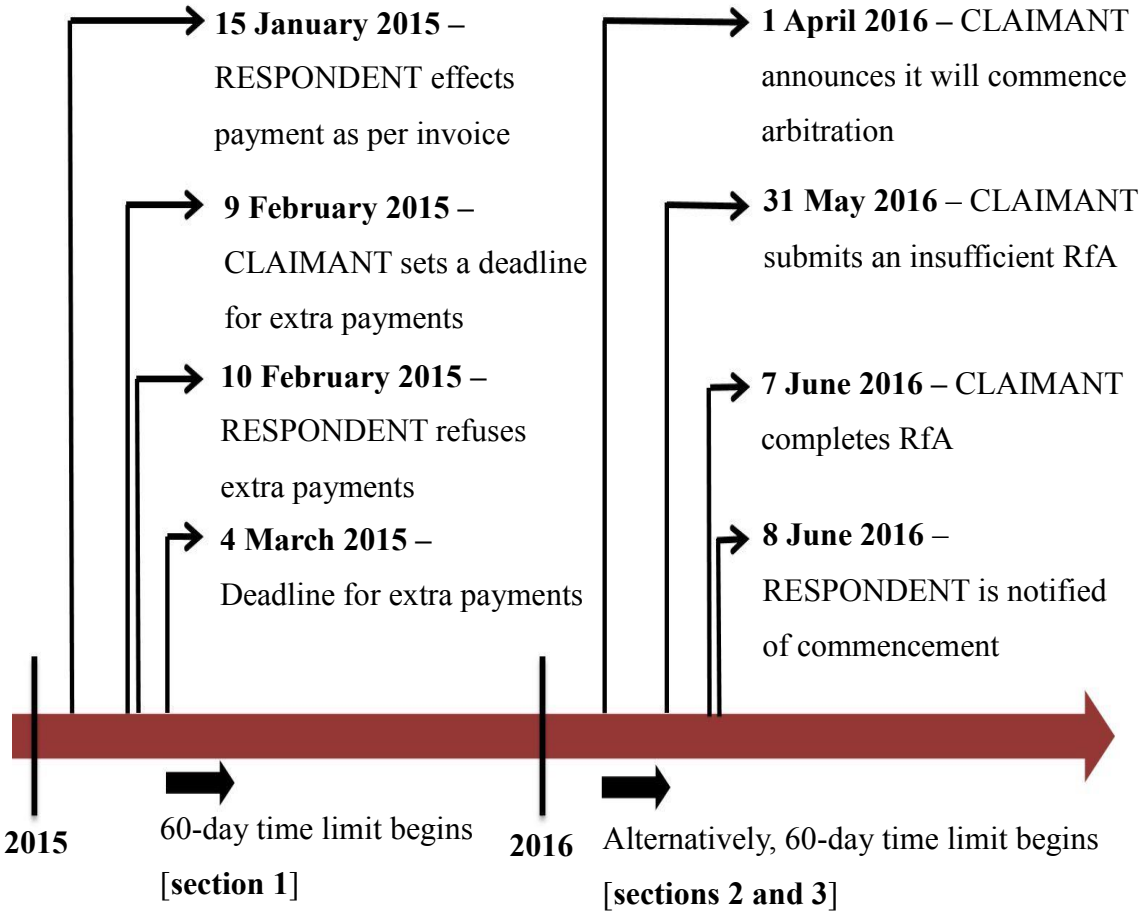
II. THE TRIBUNAL SHOULD REJECT CLAIMANT'S CLAIMS AS INADMISSIBLE

47 The Parties have agreed on a 60-day time limit for commencing arbitration proceedings. The arbitration agreement stipulates: *"[e]ach party has the right to initiate arbitration proceedings within sixty days after the failure of the negotiation to have the dispute decided by an arbitrator"*. [*Cl. Ex. 2, pp. 10–11, sec. 21*]

48 CLAIMANT has commenced the arbitration after the expiry of the time limit, and thus, breached the arbitration agreement. RESPONDENT has objected to the late commencement by claiming that the claims are inadmissible. RESPONDENT has a right to rely on the time limit, and the arbitration agreement must be upheld.

49 RESPONDENT will show that CLAIMANT has not complied with the contractual time limit the Parties agreed upon [**A**]. CLAIMANT's claims are inadmissible due to CLAIMANT exceeding the agreed procedural time limit [**B**].

A. CLAIMANT has exceeded the agreed 60-day time limit for commencing arbitration



50 The present dispute arose in January 2015, when CLAIMANT insisted on additional payment after RESPONDENT had paid the purchase price. The time limit started running in March 2015 when the negotiations had inevitably failed. The time limit expired in May 2015 and in any case, a year of silence followed without further communication. CLAIMANT's attempt to commence arbitration on 31 May 2016 was out of time [**1**].

51 Even if the time limit started running on 1 April 2016, as CLAIMANT claims, CLAIMANT commenced the arbitration too late. The arbitration should have been commenced latest on 31 May 2016. However, the arbitration was only commenced on 8 June 2016, when RESPONDENT was notified of the proceedings. [**2**]

52 Even if the notification of RESPONDENT was not considered a prerequisite for commencement, CLAIMANT did not fulfil the requirements of CAM-CCBC Rules for commencing arbitration by 31 May 2016. The arbitration was commenced only on 7 June 2016. [**3**]

1. The time limit had run out a year before CLAIMANT commenced arbitration

53 CLAIMANT has alleged that the negotiations ended on 1 April 2016 [*Claimant, ¶17*]. In reality, the negotiations failed and the time limit started running on 4 March 2015. CLAIMANT's attempt to commence arbitration in May 2016, instead of May 2015, was thus out of time.

54 Pursuant to the Parties' arbitration agreement the time limit starts running when *"no agreement can be reached"* or after a *"failure of the negotiation"*. The Parties' dispute resolution clause provides an obligation to negotiate amicably, but does not stipulate any time limits for the negotiations or explicitly determine when the negotiations end. [*Cl. Ex. 2, pp. 10–11, sec. 21*]

55 Where an arbitration agreement contains an obligation to negotiate before arbitration can be commenced, the point in time when the negotiation period ends must be determined by interpretation [*Savola, pp. 44, 46*]. If no point in time is provided by the arbitration agreement, it must be derived from the parties' conduct. The commencement period is triggered when a party indicates that the matter is closed by staying silent after a unilaterally imposed deadline for settlement [*Vekoma B.V. v. Maran Coal; Várady/Barceló III/von Mehren, pp. 759, 761; Paulsson, pp. 601–602*].

56 The negotiations failed in early 2015, after CLAIMANT had unexpectedly insisted on a higher purchase price [*Cl. Ex. 5, p. 14*]. RESPONDENT indicated its final stance on

10 February 2015 by refusing any extra payments [*Cl. Ex. 7, p. 16*]. CLAIMANT had set a payment deadline for RESPONDENT to 4 March 2015 [*Cl. Ex. 6, p. 15*]. The deadline passed by, and RESPONDENT stayed silent. Thereafter, CLAIMANT did not react for a year, even though RESPONDENT unequivocally refused to pay any extra sums [*Cl. Ex. 6, p. 15; Cl. Ex. 7, p. 16; PO2, p. 58, ¶23*]. CLAIMANT attempted to commence arbitration on 31 May 2016 [*RfA, p. 3*].

57 Furthermore, the obligation to negotiate cannot be interpreted to allow a party to unilaterally keep the negotiations ongoing in order to prevent the time limit from being triggered [*Paulsson/Rawding/Reed, p. 116–117; Vekoma B.V. v. Maran Coal; Várady/Barceló III/von Mehren, p. 761*].

58 The contractual time limit was triggered in early 2015, because no further negotiations took place until March 2016. After over a year of silence, CLAIMANT attempted to revive the negotiations in a meeting on 31 March 2016 [*PO2, p. 58, ¶23*]. CLAIMANT should not be allowed to artificially breathe life into the negotiations. Otherwise, the 60-day time limit would be ineffective as one party could unilaterally stop the time limit clause being triggered forever.

59 In conclusion, the time limit started running on 4 March 2015, after RESPONDENT indicated its final stance on the dispute. CLAIMANT did not commence arbitration in May 2015 when the 60-day time limit expired. In any case, CLAIMANT stayed silent for a year and the negotiations did not continue. CLAIMANT's attempts to reopen the negotiations in the end of March 2016 should not be deemed successful. Therefore, the request to commence arbitration on 31 May 2016 was filed incurably late.

2. Even if the time limit ran out on 31 May 2016, the arbitration was not commenced until CLAIMANT filed a complete request for arbitration to the CAM-CCBC

60 Even if CLAIMANT's attempt to revive the negotiations in March 2016 was considered successful, CLAIMANT was late in submitting the dispute to arbitration. CLAIMANT alleges that the negotiations failed on 1 April 2016 [*Claimant, ¶17; Re. Ex. 3, p. 29*]. Pursuant to the CAM-CCBC Rules, the arbitration commences when the requirements in the rules are met. Accordingly, CLAIMANT commenced arbitration only on 7 June 2016 when it submitted a complete Request for Arbitration, which fulfilled the set requirements. Contrary to CLAIMANT's assertions [*Claimant, ¶¶21, 24–25*], a power of attorney and payment of full registration fee are required to commence arbitration.

61 As a preliminary note, CLAIMANT has alleged that initiation as per the arbitration agreement and commencement as per the DAL hold different meanings [*Claimant,* ¶¶*19–20*]. RESPONDENT contends that this view is erroneous. The Parties agreed that an arbitration between them would start when *initiated* within the agreed time limit [*Cl. Ex. 2, p. 10, sec. 21*]. The arbitration agreement does not define initiation and a term must be interpreted in the way a reasonable person would have understood it [*see Art. 8(2) CISG*]. Initiation and commencement are synonyms [*Black's Law Dictionary*] and both mean the point in time when the proceedings begin. The words are used interchangeably in international commercial arbitration [*see e.g. Rule 14 JCAA; Art. 4 HKIAC, Roughton, pp. 174–175; Sabater, pp. 107–108; Girsberger/Voser,* ¶¶*858–871*]. Initiation must be understood to mean the same as commencement under the DAL and the CAM-CCBC Rules.

62 CLAIMANT has further alleged that commencing arbitration in accordance with the CAM-CCBC Rules refers to a multi-step process with several deadlines covering the whole chapter of the rules titled "commencement of arbitration" [*Claimant,* ¶*21*]. For this reason, CLAIMANT believes that initiation as per the DSA cannot mean the same as commencement under the CAM-CCBC Rules. This is, however, an unreasonable interpretation of the CAM-CCBC Rules. Commencement of arbitration holds important legal consequences such as stopping statutes of limitations running [*Lew/Mistelis/Kröll,* ¶*20-9*]. Therefore, the exact date of commencement must be determinable. Commencement cannot mean a lengthy multi-step process the end of which cannot be predicted. Instead, commencing must be interpreted to take place at the moment the requirements under Art. 4.1 and 4.2 CAM-CCBC Rules are fulfilled [*Straube/Finkelstein/Filho, p. 66*].

63 By choosing a set of arbitration rules, the parties agree on which documents are needed for commencing the arbitration process [*Girsberger/Voser,* ¶¶*866–867*]. In order to commence arbitration under the CAM-CCBC Rules, the registration fee must be paid by the time a request for arbitration is submitted [*Art. 4.2 and Art. 12.5 CAM-CCBC*]. It is customary in institutional arbitration that the payment of the registration fee is a prerequisite for commencing arbitration [*see Art. 1.1(vi) LCIA; Art. 3.1(k) and 3.3 SIAC; Rule 14.5 JCAA*].

64 On 1 April 2016, CLAIMANT declared that it is *"not possible to find an amicable solution"* [*Re. Ex. 3, p. 29*]. The last possible date to commence arbitration was 60 days later, on 31 May 2016.

65 On 31 May 2016, Mr. Fasttrack tried to commence arbitration, but did not pay the registration fee in full: R$ 3,600 was still missing out of the R$ 4,000 required by the CAM-CCBC [*Order of the President, p. 19*]. Over a week later, CLAIMANT paid the remaining fee [*Order of the President, p. 19; Email by H. Fasttrack on 7 June 2015, p. 20*].

66 CLAIMANT has further alleged that this arbitration was validly initiated by CLAIMANT's parent company [*Claimant, ¶26*]. CLAIMANT asserts that Wright Holding Plc is a party to the arbitration agreement and is represented by CLAIMANT [*Claimant, ¶28*]. CLAIMANT's allegation lacks merits.

67 In order to commence arbitration under the CAM-CCBC Rules, the required documentation includes *"a power of attorney for any lawyers providing for adequate representation"* [*Art. 4.1(b) CAM-CCBC*]. A third party to an arbitration agreement cannot commence arbitration without becoming a party to it [*Hanotiau, pp. 51, 55*].

68 The power of attorney, submitted on 31 May 2016, was in the name of Wright Holding Plc, the parent company of CLAIMANT [*PoA, p. 18*]. Interestingly enough, CLAIMANT has admitted that Wright Holding Plc is not a party to this arbitration [*Claimant, ¶1; Email by H. Fasttrack on 7 June 2015, p. 20*]. This arbitration is ongoing in the name of Wright Ltd [*ToR, p. 41, ¶1.1; Email by H. Fasttrack on 31 May 2016, p. 2*].

69 CLAIMANT's request for arbitration submitted on 31 May 2016 was insufficient to commence arbitration. The arbitration was commenced pursuant to the CAM-CCBC Rules on 7 June 2016 when CLAIMANT provided the correct power of attorney and paid the registration fee in full. Therefore, CLAIMANT commenced the arbitration after the agreed 60-day time limit had already passed.

3. Even if the time limit ran out on 31 May 2016, the arbitration was not commenced until RESPONDENT was notified of the proceedings

70 Should the Tribunal find that the CAM-CCBC Rules do not set an exact date on which arbitration commences, the date of commencement must be determined in accordance with the DAL. Applying the DAL, arbitration commenced on 8 June 2016. Even if the negotiations ended on 1 April 2016, the time limit had run out on 31 May 2016.

71 If the arbitral rules selected in the arbitration agreement do not address a commencement date, Art. 21 DAL applies [*on Model Law, see Holtzmann/Neuhaus, p. 610; Girsberger/Voser, ¶¶863–864*]. Pursuant to Art. 21 DAL, the arbitration proceedings

commence on the date on which the respondent receives the request for arbitration [*on Model Law: A/40/17, ¶187 and Holtzmann/Neuhaus, p. 626; see also Born, p. 2216*].

72 Neither the Parties' agreement nor the chosen institutional rules provide for a specific date when arbitration commences. RESPONDENT received the notification of the request for arbitration on 8 June 2016 [*NfC, p. 22*].

73 As the Parties have not agreed on a date of commencement, the date when RESPONDENT receives the request marks the commencement of the arbitration. Even if the negotiations failed only on 1 April 2016, CLAIMANT exceeded the contractual 60-day time limit to commence arbitration, because RESPONDENT was notified only on 8 June 2016.

B. Exceeding the contractual time limit for commencing arbitration renders CLAIMANT's claims inadmissible

74 CLAIMANT's claims are inadmissible, because CLAIMANT exceeded the agreed 60-day time limit for commencing arbitration. CLAIMANT did not clearly claim, but nevertheless hinted, that the agreed time limit restricts the Tribunal's jurisdiction instead of limiting the admissibility of claims [*Claimant, ¶75*]. From CLAIMANT's view it would follow that after the expiry of the time limit, the Tribunal would lack jurisdiction and the claims could be brought to a national court. CLAIMANT could have continued that RESPONDENT has admitted jurisdiction in this arbitration, and consequently, the Tribunal could hear CLAIMANT's claims. This view lacks merits. The arbitration clause is exclusive, i.e. the dispute can only be resolved in arbitration, and the time limit set in the clause restricts the admissibility of the claims.

75 When entering into an arbitration agreement, parties seek to resolve their disputes in arbitration by a final and binding decision. By default, an arbitration agreement grants a tribunal exclusive jurisdiction, and in turn, excludes national courts' jurisdiction [*e.g. Gaillard/Banifatemi, p. 257; Fouchard/Gaillard/Goldman, p. 381, ¶624*].

76 If a party exceeds a contractual time limit for commencing arbitration, the claim itself becomes barred, not the remedy of having the dispute resolved in arbitration [*Tommy C. P. Sze. & Co. v. Li & Fung (Trading) Ltd; China Merchant Heavy Indus. Co. Ltd v. JGC Corp.*]. When claims are barred by a time limit, they cannot be heard in arbitration or in court proceedings. Thus, the claims are inadmissible. [*Lew/Mistelis/Kröll, ¶¶20-15–20-16; Born, p. 941*] Admissibility is about *whether* certain claims can be heard on

any forum. Jurisdiction is a question of *where* claims can be brought. [*Mustill/Boyd 1982, p. 170; Park, pp. 100–102; Paulsson, p. 601; Pinsolle, p. 241; Walters, p. 660*]

77 A contractual time limit expresses the parties' intention to bar the claims if they are not put forward promptly. It would not be commercially sensible to interpret a contractual time limit to be jurisdictional, i.e. allowing the claims to be brought in a national court after the expiry of the time limit. [*Mustill/Boyd 2001, p. 203; Nanjing Tianshun Shipbuilding Co Ltd v. Orchard Tankers; Wholecrop Marketing Ltd v. Wolds Produce Ltd; The World Era Case; see Art. 8(2) CISG*] By entering into an arbitration agreement, parties intend to have the dispute, including the question of whether the claims were brought too late, finally and bindingly resolved in arbitration.

78 Moreover, a procedural time limit provides certainty. A party must be able to trust that no further cause of action will arise on any forum after the expiry of a time limit. [*Lew/Mistelis/Kröll, ¶20-10*]

79 The Parties' arbitration agreement states that *"**[a]ll disputes** - - shall be settled amicably and in good faith between the Parties. **If no agreement can be reached** each party has the right to initiate arbitration proceedings"*. [*Cl. Ex. 2, p. 11, sec. 21, emphasis added*]

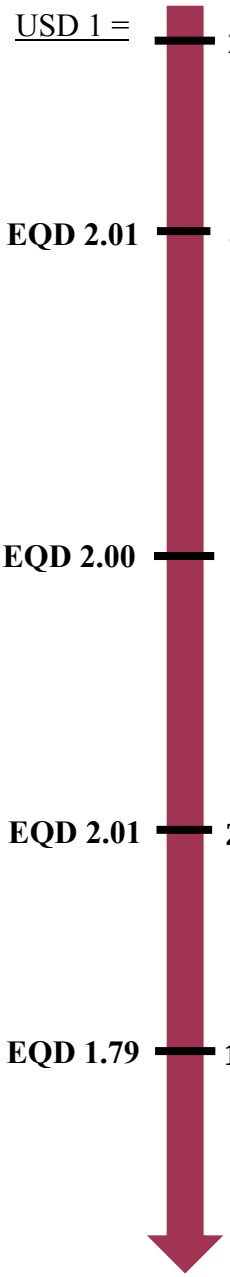
80 The wording of the Parties' arbitration agreement unequivocally demonstrates a will to submit all disputes to arbitration. Even though the Parties admittedly agreed on a multi-tier dispute resolution clause, arbitration is the last resort for resolving any disputes. The 60-day time limit clause must be interpreted to restrict the admissibility of claims rather than the jurisdiction of the Tribunal. The time limit has been exceeded and RESPONDENT is entitled to rely on the barring effect of the clause. The consequence of CLAIMANT exceeding the agreed time limit is the inadmissibility of the claims.

81 **To conclude,** the Tribunal should decide that CLAIMANT's claims were submitted after the 60-day time limit had lapsed. RESPONDENT has demonstrated that the expiry of the time limit results in inadmissibility of the claims. Therefore, the Tribunal should reject CLAIMANT's claims as inadmissible.

III. CLAIMANT IS NOT ENTITLED TO A HIGHER PURCHASE PRICE RESULTING FROM CLAIMANT'S CURRENCY APPRECIATING IN VALUE

82 The Parties disagree on which exchange rate determines the purchase price of RESPONDENT's order of fan blades. The purchase price consists of CLAIMANT's production costs and a profit margin. The production costs are incurred in EQD, but the purchase price is agreed to be paid in USD. To determine the purchase price, the production costs must be converted into USD.

83 CLAIMANT has claimed that the applicable exchange rate should be that of the date of payment, which would in this case lead to CLAIMANT receiving a higher purchase price. However, the claim is unfounded and should be rejected:



The Parties established a binding practice of applying the exchange rate at the time of contract formation. [**A**]

The terms of the DSA were agreed upon and the DSA was supposed to be signed. The negotiations for the DSA were conducted under the understanding that the fixed exchange rate shall be applied. [**B.1**]

The DSA was signed. In case the exchange rate at the time of contract formation (27 July 2010) is not applied, the rate at the time of signing the contract must be applied. [**B.1**]

The Parties signed an Addendum to the DSA, which provides for the fixed exchange rate for the sale of the fan blades. [**B.2**]

The date of payment: the fan blades were paid as invoiced. CLAIMANT calculated the purchase price in the invoices with the fixed exchange rate of USD 1 = EQD 2.01. [**B.3**]

84 In case the Tribunal were to find that the Parties did not agree on the exchange rate, RESPONDENT will establish that the CISG and the UNIDROIT Principles provide for a fixed exchange rate [**C**].

A. When entering into the Development and Sales Agreement, the Parties were bound by their practice to apply the exchange rate of the time of contract formation

85 Since 2003, the Parties have applied the exchange rate at the time of contract formation to determine purchase prices in all of their contracts, despite never addressing the rate in writing. The established practice of applying the exchange rate of the time of contract formation applies to the sale of fan blades under the DSA. The Parties have repeated the practice twice, which constitutes an established practice in the aircraft industry [**1**]. The divestment of CLAIMANT did not end the practice [**2**].

1. Over the course of the Parties' long-term cooperation, the Parties established a practice of applying the exchange rate of the time of contract formation

86 CLAIMANT has alleged that there is no established practice on the applicable exchange rate between the Parties [*Claimant,* ¶¶*71–72*]. CLAIMANT's claim is, however, unfounded. Over the course of their cooperation, the Parties formed an established practice under Art. 9(1) CISG. CLAIMANT could have argued that two repetitions are not sufficient for a practice to become binding. In fact, in this case the two repetitions constitute a binding practice.

87 Pursuant to Art. 9(1) CISG, *"[t]he parties are bound [...] by any practices which they have established between themselves"*. The purpose of Art. 9(1) CISG is to protect a party's justified reliance on the consistent behaviour of the other party [*Pamboukis, p. 113; Graffi, p. 109; Sun, p. 83; Drobnig, p. 123*]. Duration of the parties' business relationship and the number of consecutive contracts are taken into account when determining whether a practice has been established [*Ferrari 2005, p. 333; Graffi, p. 108*]. The longer the production period and the more complex the product, the fewer contracts are needed to establish a practice [*see Propane Case; e contrario: Pizza cartons case; Cutlery Case; Calzaturificio Claudia v. Olivieri Footwear*]. At least two repetitions are generally required to establish a practice [*Mattress case; Ferrari 2002, pp. 274–275; White urea case*].

88 The Parties consistently applied the exchange rate at the time of contracting in all their previous contracts, during their long-lasting business relationship [*PO2, p. 54,* ¶5]. During this time the Parties entered into two contracts, lasting over three and four years respectively, prior to the DSA. [*PO2, p. 54,* ¶5] The development and production of the fan blades under the DSA took nearly five years [*Cl. Ex. 2, pp. 9–10*]. The Parties did not address the applicable exchange rate in writing in any of their contracts, including the DSA [*PO2, p. 54, ¶5; Cl. Ex. 2, pp. 9–11*]. However, in practice the Parties always applied the rate of the time of contract formation [*PO2, p. 54,* ¶5].

89 CLAIMANT has further asserted that, if anything, the practice that was established between the Parties was to apply the exchange rate favouring RESPONDENT [*Claimant, ¶¶71–72*]. This is not the case in RESPONDENT's view. The parties' objective actions constitute a binding practice, and the subjective reasons and motivations for certain conduct do not play a role [*Mattress case*]. Objectively, the Parties consistently applied the rate at the time of contract formation. The subjective reason was the parent company's strategy to allocate the profits to RESPONDENT [*PO2, p. 54,* ¶5]. RESPONDENT contends that, in fact, the practice was to apply the exchange rate of the time of contract formation. The reason for the practice is irrelevant.

90 Even if the practice was to choose the rate more favourable to RESPONDENT, it would lead to the same result. In this case, the rate more favourable to RESPONDENT is the same as the exchange rate of the time of contract formation. Therefore, the exchange suggested by CLAIMANT, USD 1 = EQD 1.79, cannot be applied.

91 In conclusion, over the years of the Parties' cooperation, RESPONDENT developed justified expectations of the continuity of the Parties' practice in connection with the DSA. Thus, the Parties were bound by their practice to apply the exchange rate of the time of contract formation.

2. The practice between the Parties did not end before they entered into the Development and Sales Agreement

92 CLAIMANT has argued that when entering into the DSA, the Parties' practice had ended, as the relationship between the Parties had changed when their common parent company divested itself of CLAIMANT [*Claimant, ¶72*]. However, at the time of contract formation the Parties' relationship had not yet changed. In any case, CLAIMANT did not notify RESPONDENT of the sale, and as such, could not have considered the change fundamental enough to end the practice.

93 A contract is formed when all the terms of the contract have been agreed upon [*Art. 18 CISG; Art. 2.1.1 PICC; Perales Viscasillas, p. 342; Orica v. Aston v. UE; Des Charmes Wines Ltd. v. Sabate Inc.*]. An agreement in writing is not necessary [*Art. 11 CISG; Art. 1.2 PICC*]. The Parties had come to an understanding on all the terms of the DSA by 27 July 2010, which was the originally planned signing date. For reasons not related to the negotiation of contract terms, the signing was delayed until 1 August 2010 [*PO2, p. 54, ¶1*]. However, the contract had already been formed by 27 July 2010.

94 CLAIMANT has claimed that the Parties no longer being part of the same group of companies constitutes a fundamental change that ends previously established practices [*Claimant, ¶72*]. However, at the time of contract formation, the sale of CLAIMANT had not yet taken place. CLAIMANT was divested on 27 July 2010 [*PO 2, p. 54, ¶1*], but by 27 July 2010 the DSA had already been concluded.

95 Therefore, the change cannot end the practice under the DSA. The practice was to apply the exchange rate of the contract formation, as established in the section above [*¶¶82–91*]. The applicable exchange rate is that of 27 July 2010, USD 1 = EQD 2.01 [*PO2, p. 56, ¶12*].

96 In any case, the change of circumstances was not fundamental enough to end the practice without notification by CLAIMANT. A party must notify the other in advance in order to one-sidedly end an established practice [*ICC Arb. 8817; Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 9, ¶9*]. Absent a notification of the other party, a party remains bound by a practice unless the circumstances have fundamentally changed *[Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 9, ¶9; Honnold, p. 125*]. For a change to be so fundamental that a practice ends without notification of the other party, it must be clear for both parties that the practice could not continue under the changed circumstances [*Bout, II.E; Honnold, p. 125; Pamboukis pp. 112–113; Forestry equipment case*].

97 It is undisputed that CLAIMANT did not notify RESPONDENT of any intention to end the practice [*PO2, pp. 54–57, ¶¶1, 15, 17*]. Furthermore, it is common to use fixed exchange rates in the aircraft industry, even between parties that are not part of the same group of companies [*PO2, p. 56, ¶13*]. Therefore, it was not clear at all that CLAIMANT would not have wanted to be bound by the practice after the divestment. Conversely, CLAIMANT clearly did not consider its divestment a fundamental change. CLAIMANT did not bring up its divestment in the negotiations for the DSA and thus prevented the Parties from agreeing on an alternative exchange rate [*PO 2, p. 54, ¶1*].

98 Even if the Tribunal were to find that the DSA was formed at signing on 1 August 2010, the rate claimed by CLAIMANT cannot be applied. The exchange rate of the signing date was USD 1 = EQD 2.00.

99 In conclusion, the practice to apply the exchange rate at the time of contract formation had not ended. The divestment of CLAIMANT was not a fundamental change that could end the practice.

B. In any case, the Parties were in agreement that the exchange rate applicable to the sale of the fan blades was fixed to USD 1 = EQD 2.01

100 Even if the Tribunal were to find that the Parties were not bound by their practice to apply the exchange rate of the time of contract formation, the Parties have agreed on the fixed exchange rate of USD 1 = EQD 2.01. CLAIMANT's conduct during the contract negotiations and afterwards left RESPONDENT with the justified understanding that CLAIMANT agreed to a fixed exchange rate with respect to the fan blades.

101 As a preliminary note, an agreement cannot be validly concluded if the purchase price is not sufficiently determinable [*Art. 14 CISG; DiMatteo, pp. 71–73; Sono, pp. 118–121*]. Parties must be deemed to have fully agreed on an applicable purchase price, because parties cannot have intended their contract to be invalid [*Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 8, ¶51; Bonell in Bianca-Bonell, p. 80; Keller, p. 252*]. The purchase price of the fan blades is based on the production costs that need to be converted into USD, the currency of payment. Without the exchange rate, the purchase price under the DSA cannot be determined.

102 Keeping this in mind, the Tribunal should find that the Parties have agreed on the applicable exchange rate. The negotiations for the DSA [**1**], the Addendum [**2**], and CLAIMANT's subsequent conduct [**3**] show that the Parties have agreed on a fixed exchange rate.

1. In the Development and Sales Agreement, the Parties agreed to apply the fixed exchange rate

103 The Parties entered into the DSA with the understanding that a fixed exchange rate shall be applied to the sale of the fan blades. Contrary to CLAIMANT's assertions [*Claimant, ¶¶67–68, 91–95*], the documentary evidence shows that the Parties agreed on the fixed exchange rate during the negotiations for the DSA.

104 Pursuant to Art. 8(3) CISG, all the relevant circumstances present before and at the time of entering into a contract must be taken into account when interpreting the contract. The relevant circumstances, including the negotiations leading up to the contract, reveal whether a party was aware of the other's intentions [*Proforce Recruit Ltd v. The Rugby Group Ltd; Fashion products case*]. Where a party knew or could not have been unaware of the other party's intentions, the parties' contract must be interpreted in line with such intentions [*Art. 8(1) CISG; Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 8, ¶3; Stanivukovic, sec. 1b*].

105 Before the Parties started negotiations for the DSA in the spring of 2010, their common parent company announced its interest to sell RESPONDENT. In order to make RESPONDENT more attractive for potential buyers, the Parties' parent company issued a de-risking order. The currency risk in all of RESPONDENT's contracts with other subsidiaries was to be mitigated by always adopting fixed exchange rates. CLAIMANT's representatives were aware of the de-risking order since November 2009, well before the start of the negotiations for the DSA. [*Re. Ex. 1, p. 27*] CLAIMANT and RESPONDENT knew that they were bound by the order and as such, the Parties could not have been unaware that the negotiations were conducted under the premises of the de-risking order.

106 CLAIMANT's notes from the negotiations for the DSA further demonstrate that CLAIMANT considered the currency risk involved in the DSA. The notes read *"[o]ur expenses in EQD will have to be converted but no major risk involved. Exchange rate should be around 2-1 and has been very stable over the last years"* [*Cl. Ex. 1, p. 8*].

107 If the exchange rate would be that of the time of payment, the exchange of EQD to USD (to determine the purchase price) and back (after CLAIMANT received payment in USD) would be done on the same date, using the same rate. Any exchange rate fluctuations of the rate between the time of contracting and the time of payment would not affect CLAIMANT in any way, i.e. there would be no currency risk for CLAIMANT. Conversely, applying the fixed exchange rate, the currency fluctuations change the value of the production costs against USD, and thus affect the purchase price. The only reason for CLAIMANT to consider the currency risk in its notes is that CLAIMANT thought that a fixed exchange rate would apply. Therefore, the notes show that CLAIMANT considered and accepted the currency risk.

108 If the Tribunal should find that CLAIMANT could have been unaware of RESPONDENT's expectations of complying with the de-risking order, the agreement

must be interpreted in accordance with the reasonable person standard. The statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had under the same circumstances [*Art. 8(2) CISG*].

109 CLAIMANT did not object or in any other way indicate that it would want to violate the binding order from the parent company. A reasonable person in RESPONDENT's shoes would never have expected CLAIMANT to infringe the orders from its parent company without even communicating such an intention.

110 Moreover, as established above [¶¶*85–99*], the Parties had a practice of applying a fixed exchange rate. Even if the Tribunal were to find the practice not legally binding, practices can be used to interpret the parties' intentions [*Art. 8(3) CISG; Fruit and vegetables case; Treibacher Industrie v. Allegheny Technologies; Frozen lobster tails case*]. A reasonable person in RESPONDENT's place would have assumed that the Parties would continue to apply a fixed rate, absent an agreement to the contrary.

111 The de-risking order together with CLAIMANT's notes from the negotiations could only be interpreted as CLAIMANT having agreed to the fixed exchange rate in the DSA. RESPONDENT's justified understanding of CLAIMANT's intention to be bound by the fixed rate should be protected.

2. In the Addendum, the Parties agreed to fix the exchange rate for the sale of the fan blades

112 CLAIMANT incorrectly alleges that the fixed exchange rate in the DSA's Addendum only applies to the price of the order of clamps [*Claimant,* ¶¶*53, 59*]. CLAIMANT has accepted the wording of the Addendum [*Re. Ex. 4, p. 30*], which provides that the fixed exchange rate applies for the sale of fan blades as well. The fundamental rules of contract interpretation support RESPONDENT's understanding of the Addendum.

113 Where a party has included specific expressions into a contract and the other party could not have been unaware what the intent behind the expressions was, such expressions represent the common intent of the contracting parties [*Art. 8(1) CISG; Schmidt-Kessel in Schlechtriem/Schwenzer 2010, Art. 8,* ¶*24; Huber/Mullis, p. 12*]. When the level of knowledge of the other party is uncertain, the contract is binding if a reasonable person of the same kind would have understood the expressions used [*Art. 8(2) CISG; Guang Dong Light Headgear Factory v. ACI International; Frozen chicken case; Cowhides case*].

114 Under the CISG, the terminology of a contract is presumed to be unified. A certain expression is presumed to have the same meaning throughout the contract, which must be interpreted as a whole. [*Schmidt-Kessel in Schlechtriem/Schwenzer 2010, Art. 8, ¶30; Stanivukovic, sec 5j; Lando/Beale, p. 296; Bund, p. 410*]

115 The different contract documents have the same respective meanings uniformly throughout the Addendum [*see Cl. Ex. 2, p. 11*], as follows:

- The Addendum, primarily governing the sale of the clamps, is called the "**Addendum**".
- The DSA, primarily governing the sale of the fan blades, is called the "**main Agreement**".
- The whole contract structure, namely the Addendum and the DSA together, are called the "**agreement**".

116 CLAIMANT has correctly noted that the capitalisation of the letter A in the word "Agreement" in contrast with "agreement" signifies a difference in meaning [*Claimant, ¶74*]. The lowercase "a" appears in the sentence concerning the fixed exchange rate: "*The exchange rate for the agreement is fixed to USD 1 = EQD 2.01*" [*Cl. Ex. 2, p. 11*]. CLAIMANT has noted this and goes on to allege that as the word "agreement" is not capitalised, the fixed exchange rate only applies to the Addendum [*Claimant, ¶¶74, 76*]. According to CLAIMANT, the use of different terms would otherwise not be given full effect, so "Agreement" and "agreement" cannot be understood to mean the same thing [*Claimant, ¶74*]. However, following CLAIMANT's logic, the terms "Addendum" and "agreement" cannot have the same meaning either. The term "agreement" cannot be understood to mean either the Addendum ("Addendum") or the DSA ("main Agreement"). The only remaining option is that "agreement" jointly refers to the Addendum and the DSA, and as such, the fixed rate applies to both.

117 Apart from the language of the contract, all other relevant circumstances must be considered when identifying the intent behind a contractual clause. In accordance with Art. 8(3) CISG these relevant circumstances include all statements and negotiations of the parties. Where a party fails to notify the other party of its objections to the terms intended to be part of the contract within a reasonable time, it can be deemed to have agreed to those terms [*Filanto v. Chilewich; Chemical product case*].

118 When negotiating the Addendum, CLAIMANT never objected to the inclusion of the fixed exchange rate provision. On the contrary, CLAIMANT confirmed the wording of the Addendum without any changes [*Re. Ex. 4, p. 30*].

119 Furthermore, contrary to CLAIMANT's assertions [*Claimant, ¶82*] RESPONDENT made its intention of including the Addendum into the DSA, not entering into a separate contract, clear by stating that "*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*" (emphasis added) [*Re. Ex. 2, p. 28*]. CLAIMANT accepted this notion without any objections, by agreeing to link the DSA and the Addendum, as well as explicitly stating that they *"agree to the fixed exchange rate"* [*Re. Ex. 4, p. 30*]. As such it was reasonable of RESPONDENT to understand that CLAIMANT intended to be bound by the fixed exchange rate in the Addendum.

120 CLAIMANT has further alleged that the Addendum should be interpreted against RESPONDENT in light of the *contra proferentem* rule, because RESPONDENT drafted the Addendum [*Claimant, ¶77–80*]. However, as RESPONDENT has established, any other interpretation than the one proposed by RESPONDENT would go against the wording of the Addendum and the intent displayed by the Parties. In the lack of any ambiguity in the wording of the Addendum, the *contra proferentem* rule cannot apply and the interpretation presented above must prevail.

121 To conclude, CLAIMANT must have understood that it was RESPONDENT's intention to include the fixed exchange rate into the DSA. The fixed exchange rate became part of the contract, when CLAIMANT accepted RESPONDENT's offer. The Tribunal should protect RESPONDENT's reasonable understanding that CLAIMANT had accepted the fixed exchange rate with regards to the fan blades. Therefore, the Tribunal should find that the fixed exchange rate in the Addendum applies to the sale of the fan blades.

3. CLAIMANT confirmed the Parties' agreement by using the fixed exchange rate in the invoice for the fan blades

122 The invoices with the fixed exchange rate prepared by CLAIMANT further confirm that CLAIMANT intended to be bound by the fixed exchange rate.

123 Pursuant to Art. 8(3) CISG, the parties' subsequent conduct should be taken into account when interpreting the contract. Where a party subsequently and without reservation refers to a certain term of the contract, this confirms the party's intention to be bound by it [*Schmidt-Kessel in Schlechtriem/Schwenzer 2010, Art. 8, ¶53*]. Invoices sent and accepted have in several cases been a decisive factor in determining whether the parties

intended to be bound by a contract or its terms [*Fabrics case; Floor tiles case; Alain Veyron v. Ambrosio*].

124 CLAIMANT prepared and sent the invoices applying the fixed exchange rate. RESPONDENT duly paid the purchase price in the invoice. [*Cl. Ex. 3, p. 12*] However, CLAIMANT seems to have had a change of heart. The first time CLAIMANT ever objected to the fixed exchange rate was after the payment had been made [*Cl. Ex. 5, p. 14*].

125 RESPONDENT's reasonable understanding of CLAIMANT's intention to be bound by the fixed exchange rate should be protected. CLAIMANT issuing invoices with the fixed exchange rate constitutes legally relevant subsequent conduct, which further confirms that CLAIMANT intended to be bound by the fixed rate.

C. In the absence of an agreement, the CISG and the UNIDROIT Principles provide for the exchange rate of the time of contract formation

126 Should the Tribunal find that the Parties have not agreed on the exchange rate, the Tribunal should turn to the CISG, the law chosen by the Parties. Under Art. 55 CISG, the contract price includes the exchange rate at the time of contract conclusion [**1**]. If the Tribunal were to find that Art. 55 CISG does not apply, the UNIDROIT Principles ("PICC") provides that the exchange rate at the time of contracting applies [**2**].

1. Art. 55 CISG provides for the exchange rate of the time of contract formation

127 C: CLAIMANT has argued that Art. 6.1.9 PICC provides for the exchange rate at the time the payment was due [*Claimant, ¶¶85, 88*]. However, the Parties have agreed that the DSA is governed by the CISG. Only *"[f]or issues not dealt with by the CISG the UNIDROIT Principles are applicable"* [*Cl. Ex. 2, p. 10, sec. 20*]. Therefore, the Tribunal cannot apply the UNIDROIT Principles as long as the issue is dealt with by the CISG. RESPONDENT will establish that Art. 55 CISG provides that the exchange rate at the time of contract conclusion applies.

128 R: Art. 55 CISG can be used as a means of determining the contract price, when the parties have performed their contract without a sufficient agreement on the price [*Mohs in Schlechtriem/Schwenzer, Art. 55, ¶¶6, 10; Alain Veyron v. Ambrosio; Fabrics case*]. All the components needed to determine the contract price that have not been agreed upon, must be determined in accordance with the price generally charged at the time of contract conclusion [*Mistelis, ¶III; Mohs in Schlechtriem/Schwenzer, Art. 55, ¶¶10, 16;*

Eörsi, in Bianca-Bonell, ¶2.3.1]. Price fluctuations after contract conclusion are irrelevant; the purpose of Art. 55 CISG is that the seller cannot benefit from the price increasing nor the buyer from the price decreasing [*Secretariat Commentary, Art. 51, ¶3; Butler/Harindranath in Kröll/Mistelis/Perales Viscasillas, Art. 55, ¶7; Enderlein/Maskow, p. 211, ¶7; Mistelis, ¶V*].

129 A: The DSA does not provide for the applicable exchange rate, which is an essential component to determine the purchase price. When the Parties' signed the contract, the prevailing exchange rate was USD 1 = 2.00 EQD [*PO2, p. 56, ¶12*]. CLAIMANT is claiming that the exchange rate of the time payment was due, i.e. USD 1 = 1.79 EQD, should be applied [*Claimant, ¶85*]. Applying the rate of the date of payment could allow CLAIMANT as the seller to charge more money from RESPONDENT, which goes directly against the purpose of Art. 55 CISG.

130 As the exchange rate is essential for the determination of the purchase price, it should be fixed to the rate prevailing at the time of contracting under Art. 55 CISG.

2. In any case, the UNIDROIT Principles provide for the exchange rate of the time of contract formation

131 Even if the Tribunal were to find that Art. 55 CISG does not govern the question of the exchange rate, neither does Art. 6.1.9 PICC, contrary to CLAIMANT's assertion [*Claimant, ¶¶85, 88*]. Instead, Art. 5.1.7 PICC provides for a fixed exchange rate.

132 Pursuant to Art. 6.1.9(3) PICC, the applicable exchange rate is the rate of exchange when payment is due, but its scope is limited to payments "in the currency of the place of payment". The exchange rate of Art. 6.1.9 PICC cannot be extended to payments not made in the currency of the place of payment. [*Atamer in Vogenauer, Art. 6.1.9 ¶¶1, 11; Osuna-González, pp. 320–321*]

133 It is undisputed that RESPONDENT was obligated to pay the purchase price in USD, which is not the currency of the place of payment. The place of payment is CLAIMANT's bank in CLAIMANT's domicile, Equatoriana. [*Cl. Ex. 2, p. 10, sec. 4*] Equatoriana's currency is the EQD [*PO2, p. 57, ¶ 14*].

134 The payment is not made in the currency of the place of payment as required by Art. 6.1.9 PICC. This case does not fall under the scope of Art. 6.1.9, but rather under Art. 5.1.7 PICC, which establishes the applicability of an exchange rate fixed to the date of contracting.

135 Similarly to Art. 55 CISG, Art. 5.1.7 of PICC does not allow either party to *"take advantage of fluctuations in market price"* [*Vogenauer in Vogenauer, Art. 5.1.7, ¶8; see also Gotanda, pp. 5–6*]. Absent an agreement on all or any of the pricing terms, the pricing components are determined based on *"the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned"* [*Art. 5.1.7 PICC; Werlauff, pp. 69–70, ¶13.3; Frugima v. Vegamur*].

136 The DSA was concluded on 1 August 2010, lacking any explicit agreement on the applicable exchange rate determining the final purchase price [*Cl. Ex. 2, pp. 9–11*]. The Parties have used the exchange rate of the date of contract conclusion in connection with their two previous contracts [*PO2, pp. 54–55, ¶5*]. In these previous contracts the circumstances, including the products ordered as well as the multiyear contract terms, were comparable to the DSA. [*PO2, pp. 54–55, ¶5*] Fixed exchange rates are also commonly used in the aircraft industry, which further demonstrates that a fixed rate is a reasonable price component in the trade concerned [*PO2, p. 56, ¶13*].

137 In order to prevent either Party from taking advantage of the exchange rate fluctuations affecting the market price, the exchange rate prevailing at the time of contract conclusion must be applied to the sale of the fan blades. CLAIMANT's wish to apply the exchange rate at the time of payment is not supported by the applicable law.

138 **To conclude,** the Tribunal should reject CLAIMANT's claims for an additional payment of USD 2,285,240. The Parties were bound by their established practice of using the exchange rate at the time of contract formation, in spite of the sale of CLAIMANT. The agreement on the fixed exchange rate was confirmed in writing when the Parties added the Addendum to the DSA. The negotiations for the DSA show that the Parties shared a mutual understanding of the fixed exchange rate. This was further confirmed by CLAIMANT, when it applied the fixed exchange rate in the invoices sent to RESPONDENT. In any case, the fixed exchange rate must be applied under the CISG and PICC.

IV. CLAIMANT IS NOT ENTITLED TO AN ADDITIONAL PAYMENT FOR THE GOVERNMENTAL LEVY DEDUCTED FROM THE PURCHASE PRICE

139 After RESPONDENT paid the full purchase price in January 2015, CLAIMANT unexpectedly demanded further payment. An amount had been deducted from the purchase price by the governmental Central Bank of Equatoriana, as required under the Equatorianian money laundering regulation ML/2010C. According to CLAIMANT, it should be reimbursed for the governmental levy [*Claimant, ¶102*]. RESPONDENT, however, is not liable for the levy.

140 In the absence of an agreement on the governmental levy, CLAIMANT must carry the levy under the CISG [**A**]. In any case, CLAIMANT is liable for the levy because it violated its obligation to act in good faith [**B**].

A. In the absence of an agreement, CLAIMANT carries the governmental levy

141 In the following, RESPONDENT will show that it is not liable for the governmental levy under the DSA [**1**]. Under the CISG, CLAIMANT must carry the governmental levy [**2**].

1. The Parties did not agree which Party is liable for governmental levies

142 Contrary to CLAIMANT's allegations [*Claimant, ¶¶99–104*], RESPONDENT is not obliged to pay the governmental levy. In fact, pursuant to the DSA, RESPONDENT is only liable for commercial bank charges, not governmental payments.

143 Pursuant to the DSA, *"[t]he bank charges for the transfer of the amount are to be borne by the BUYER [i.e. RESPONDENT]"* [*Cl. Ex. 2, p. 9, sec. 4*].

144 According to the well-established rule of contract interpretation, statements in a contract are to be interpreted in accordance with the understanding a reasonable business person would have had under the same circumstances [*Art. 8 CISG; Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 8, ¶¶20, 25*]

145 It is general practice for commercial banks to charge fees for international money transfers [*Tierney*]. As any commercial operator, they charge for their services. In international trade, parties commonly address such charges in their contracts in order to determine who is liable. In this case, the Parties addressed these charges in the DSA clause cited above [*Cl. Ex. 2, p. 10, sec. 4*].

146 The governmental levy is collected through the Equatorianian Central Bank, which is a governmental institution. Equatorianian legislation determines whether, and how, the levy is charged. Such a governmental levy is highly unusual and in effect in only six countries in the world [*PO2, p. 55, ¶7*]. Furthermore, even the Parties' representatives in the negotiations for the DSA were not aware of the governmental levy [*PO2, p. 55, ¶8*]. The Parties could not have intended *"bank charges for the transfer of the amount"* to refer to the governmental levy.

147 The governmental levy is not a bank charge for the transfer of money in accordance with the DSA. This means that the Parties did not agree on who is liable for the governmental fee. Therefore, the liability is left to be determined by the applicable law.

2. RESPONDENT is not liable for the governmental levy under the CISG

148 Under the CISG, CLAIMANT is liable for the costs of the governmental levy in its domicile. RESPONDENT's obligation to pay the full purchase price to the bank account of CLAIMANT was effectively discharged by the payment on 15 January 2015, despite the subsequent deduction of the governmental levy. In order to pass on the burden of the levy to RESPONDENT, CLAIMANT should have informed RESPONDENT of the regulation ML/2010C. As CLAIMANT failed to inform RESPONDENT of the governmental levy, CLAIMANT has to bear the costs of it.

149 The seller must inform the buyer of any regulations that may have an effect on the payment. Pursuant to Art. 54 CISG, it is a general obligation of the buyer that it must take all the necessary steps to enable payment to be made. However, observing the public law regulations of the seller's country is not one of those steps, because it may prove to be impossible for the buyer [*Maskow in Bianca-Bonell, Art. 54, ¶2.7*]. Not all legislation is freely available in every jurisdiction, especially for foreign actors. Because the CISG must be interpreted uniformly [*Art. 7(1) CISG*], an obligation that may at times be impossible to fulfil cannot be considered a general obligation [*Maskow in Bianca-Bonell, Art. 54, ¶2.7; see also Art. 79 CISG*].

150 Furthermore, the buyer's obligations under Art. 54 CISG must be interpreted in line with the seller's obligations in Art. 35 CISG. Pursuant to Art. 35 CISG**,** unless the buyer informs the seller of the public law regulations in the buyer's country, the seller does not need to comply with such regulations [*New Zealand Mussels Case; Schlechtriem/Schwenzer, Art. 35, ¶17; Kröll/Mistelis/Perales Viscasillas, Art. 35, ¶¶ 89, 91*]. It is easier and more efficient for each party to observe the public law

regulations of its own domicile. To balance the parties' positions and in light of the CISG's general approach to require the parties to cooperate, and to achieve commercial efficiency, the buyer's obligations under Art. 54 must be interpreted in the same way as the seller's obligations under Art. 35 [*Butler in Kröll/Mistelis/Perales Viscasillas, Art. 54, ¶2; Magnus ¶5,b,(11); Visser, 3.3–3.4*]. Each party must therefore inform the other of the relevant public law regulations of its domicile.

151 CLAIMANT could have claimed that pursuant to Art. 57 CISG, the buyer must carry the costs of the payment not reaching the seller. This default rule is reversed by the seller's obligation to inform the buyer of public law regulations in the seller's domicile. If the buyer could not fulfil its payment obligation without the seller's contribution, it would be unreasonable for the buyer to be liable for the other party's failure. [*see Art. 80 CISG*] The seller must bear the consequences of its own failure to comply with its obligation to inform.

152 RESPONDENT would have had to know of the regulation ML/2010C to effect the payment as per CLAIMANT's request, because ML/2010C allows a part of the transferred payment to be deducted. ML/2010C is a public law regulation in CLAIMANT's domicile. CLAIMANT was aware of the regulation, but failed to inform RESPONDENT of it. [*PO2, p. 55, ¶7*] CLAIMANT's failure to inform resulted in CLAIMANT not receiving the full payment.

153 CLAIMANT failed to comply with its obligation to inform RESPONDENT of the regulation ML/2010C. CLAIMANT did not receive the full payment due to its own failure. Therefore, CLAIMANT is liable for the governmental levy.

154 Additionally, CLAIMANT has alleged that pursuant to Art. 6.1.11 PICC, RESPONDENT must bear the levy [*Claimant, ¶¶108–109*]. However, as RESPONDENT has established above, this issue falls under the scope of CISG, which is a primary source of law under the DSA [*Cl. Ex. 2, p. 10, sec. 20*]. Even in the unlikely event that the Tribunal would find the PICC applicable, a duty for the buyer to bear additional levies does not follow from PICC. Under Art. 6.1.11 PICC, costs for receiving money from another country must be carried by the seller [*Werlauff, pp. 82–83*]. The levy was charged from the purchase price RESPONDENT paid, when it entered Equatoriana. Therefore, pursuant to PICC, it is CLAIMANT's duty as the seller to carry such costs, including the governmental levy.

B. In any case, CLAIMANT violated its obligation to act in good faith when it did not inform RESPONDENT about Regulation ML/2010C

155 CLAIMANT alleges that it did not breach the obligation to act in good faith, as its negotiators did not know of specific provisions of ML/2010C [*Claimant, ¶118*]. RESPONDENT will establish that CLAIMANT violated its obligation, because CLAIMANT's management did not inform the negotiators of the levy.

156 Good faith is recognised as a general principle under the CISG [*Zeller, chapter 4; Bonell in Bianca-Bonell, p. 84; Propane case, BRI Production "Bonaventure" v. Pan African Export; Goderre, pp. 261–262*]. In accordance with the principle, a party must respect the interests of its contracting party [*Powers, p. 351; Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, Art. 7, ¶25; Magnus, ¶5,b,(5); Dulces Luisi. v. Seoul International; Mushrooms Case*]. In order to act in good faith, parties must share all information that is relevant for assessing whether they want to be bound to an obligation or not. If such relevant information was withheld from one of the parties, it cannot be held liable for a failure to fulfil its obligations [*Broadcasters case; Machinery case; Automobiles Case; Butler in Kröll/Mistelis/Perales Viscasillas, Art. 54, ¶5*].

157 CLAIMANT learned about the regulation ML/2010C when it discovered that the levy had been deducted from a payment from another customer. At the same time, the Parties were in the middle of negotiations for the DSA, but CLAIMANT withheld the information about ML/2010C from RESPONDENT. CLAIMANT's management chose not to share the knowledge of the regulation with the negotiators. [*PO2, p. 55, ¶8*]

158 CLAIMANT cannot rely on its negotiators not being aware of the regulation. CLAIMANT breached its obligation to act in good faith. In consequence, CLAIMANT cannot hold RESPONDENT liable for failure to ensure that the purchase price reaches CLAIMANT in full. Therefore, RESPONDENT does not have to reimburse CLAIMANT for the levy collected from the purchase price.

159 **To conclude,** the Tribunal should reject CLAIMANT's claim regarding the governmental levy. RESPONDENT never agreed to bear any governmental fees. It was CLAIMANT's duty under the CISG to inform RESPONDENT about such unusual payments. As CLAIMANT neglected this duty, it cannot expect RESPONDENT to bear the deducted levy. Therefore, RESPONDENT's payment of USD 20,438,560 was adequate and CLAIMANT is not entitled to any additional payments.

REQUEST FOR RELIEF

Counsel for RESPONDENT respectfully requests the Tribunal to:

1) Order CLAIMANT to provide security for RESPONDENT's legal costs;

2) Reject CLAIMANT's claims as inadmissible;

3) Reject CLAIMANT's claims for additional payments as unfounded;

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

Helsinki, 26 January 2017

Counsel for RESPONDENT

CERTIFICATE OF VERIFICATION

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

Miisa Happonen | Saramaria Kalkku | Iina Laak

Patrick Leßmeister | Ina Rautiainen | Veera Sundberg