



XXIV Annual Willem C. Vis International Commercial Arbitration Moot

8th – 13th April 2017, Vienna (Austria)

Trabalho de Projecto

Ana Isabel Ferreira • António Biason • Catarina Morão • Mariana Santos Silva

Lisboa, 15 Março 2017

The Moot

The *Willem C. Vis International Commercial Arbitration Moot* is an international competition held annually in Vienna, Austria, since 1994. Drawing more than three hundred law schools from around the world, the goal of the Vis Arbitral Moot is to foster the study of international commercial law and arbitration for resolution of transnational business disputes through its application to a concrete problem, while training law leaders of tomorrow in methods of alternative dispute resolution.

This year's Moot involves a dispute arising out of a sales contract between two parties whose places of business are Contracting States to the United Nations Convention on Contracts for the International Sale of Goods [CISG]. The contract signed between them provides that if an agreement cannot be reached, all disputes shall be settled by arbitration in *Danubia*, that has enacted the UNCITRAL Model Law on International Commercial Arbitration [Model Law] and is a signatory party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As for the applicable arbitral rules, this edition of the Moot is to be conducted under the *Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada* (CAM-CCBC).

Attracted by the features of this dispute resolution method, the business community has been demonstrating a growing interest in resolving international commercial disputes through arbitration. Therefore, participation in the Moot serves as one of the most pragmatic mechanisms for law students to delve into the crucial aspects of arbitration while having to represent clients in an international framework. In order to achieve this, students are first required to write *memoranda* for claimant and respondent, and then to orally present their arguments, which must be extensively backed by relevant literature, doctrine, and jurisprudence, before a panel of arbitrators. Hence, the written and forensic exercises compel the analysis and understanding of a multitude of contractual elements tied to a transaction related to the sale and purchase of goods under the CISG and other uniform international commercial laws, in the context of an arbitral forum governed by specific rules.

For the first time, NOVA Faculty of Law takes part in this globally-renowned competition. The team was assembled following last year's curricular unit *Moot Courts*, which was taught in both *Mestrado em Direito Forense e Arbitragem* and *Mestrado em Direito Internacional e Europeu* and coordinated by Professor Doutor Francisco Pereira Coutinho.

The project

In contemplation of the Vis Moot oral hearings that will take place in Vienna next April and which represent the culmination of the competition, the NOVA Faculty of Law team has been working on the Problem since October 2016. Since then, we have submitted a Request for Clarifications and two written *memoranda*, firstly on behalf of Claimant (December 2016), and then on behalf of Respondent (January 2017). Moreover, as of this moment, the team has competed in the São Paulo and Lisbon pre-moots, aimed at exercising and improving the team's performance for the official oral hearings in Vienna.

This year's Problem encompasses four major issues (procedural and substantive). Although the pairs below worked extensively on each procedural and/or substantive argument, for the sake of this report and subsequent oral discussion, the team has decided to delegate the issues in the following manner: Catarina and Isabel focused on the procedural issues (*Admissibility of the Claims* and *Security for Costs*, respectively) while Mariana and António concentrated on the substantive issues of the dispute (*Applicable Exchange Rate* and *Money Laundering Levy*, respectively).

Procedural Issues

I. Admissibility of the Claims: *Are CLAIMANT's claims admissible or have they been untimely submitted?*

Pursuant to Section 21 of the Contract [Dispute Resolution Clause], the Parties agreed that *[A]ll disputes arising out of or in connection with this Agreement 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 within 60 days after the failure of the negotiation (...). The arbitration shall be conducted under the Rules of the Center*

for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (“CAM-CCBC”) and in line with international arbitration practice (...).

As the only relevant information regarding the origin of this clause is that it was the standard dispute resolution clause used between subsidiaries of Engineering International S.A., the Parties’ former parent company, the teams are invited to interpret the wording of the arbitration agreement, particularly the meaning of *initiating arbitration proceedings* by reference to the selected arbitration rules - namely the need for compliance with the requirements for valid commencement, set out in article 4 CAM-CCBC Rules, entitled *Commencement of the Arbitration*.

The commencement of arbitral proceedings comes with numerous legal consequences, the most relevant being the effect reflected on any applicable time limits. More precisely, the valid commencement of arbitration usually stops the running of eventual time limit provisions for referring a dispute to be resolved. If one fails to comply with the agreed limit, he or she may become unable to pursue its claim, since it would be rendered inadmissible as time barred, in light of the legal certainty commonly envisioned in the nature of those provisions.

The main issue thus pertains to whether Claimant has complied with the 60-day time limit for commencing arbitration. For this purpose, and since time was of essence, it is *a priori* necessary to establish the exact date on which negotiations between the Parties failed and therefore the kick off of the time limit. According to Respondent, on 1 April 2016, when the former stated to the latter that since it was “*not possible to find an amicable solution*” in the meeting held between the Parties on the previous day, Claimant had instructed its lawyer to take the necessary steps to initiate arbitration. However, at the same time, Claimant also declared that it remained open to negotiations should Respondent be willing to reconsider its position.

Should this communication be deemed insufficient to acknowledge the failure of the negotiations, there is little ground to support the notion that the negotiations failed at another time, as the Problem is silent in regards to a possible posterior event in that sense.

It is therefore reasonable to consider that the 1 April 2016 is the relevant starting point, which means that the 60th calendar day after the starting date would fall on the 31 May 2016. Yet, curiously, this was also the day when Claimant submitted its Request for

Arbitration to the CAM-CCBC, albeit failing to comply with all its conditions of form as laid down in articles 4.1 and 4.2 of CAM-CCBC Rules.

Seeing that the Request did not contain the required power of attorney signed by Wright Ltd [Claimant] and the Registration Fee was only partially paid, the Secretariat of CAM-CCBC first ordered CLAIMANT to amend those defects before sending the Request for Arbitration to RESPONDENT, not clarifying whether the arbitration had in fact commenced. The correct power of attorney [by Wright Ltd] was signed on the 5th of June and subsequently submitted on the 7th of June 2016, along with the proof of payment of the registration fee now in full – however, both already beyond the expiry of the contractual time limit.

The question therefore arising is whether an *incomplete* Request is sufficient to stop the time limit from expiring. The CAM-CCBC Rules mandatorily requires both the power of attorney and payment of a registration fee; yet, alternatively, as the mentioned rules do not specifically determine the commencement date of proceedings as opposed to other sets of institutional arbitration rules, one can question if the Tribunal can remain satisfied with a clear demonstration of intention to initiate proceedings from the initiating party on the 31 May 2016, before the said expiry.

Therefore, the date on which arbitration shall be deemed effectively or properly commenced for the purpose of setting aside the applicable time limit remains debatable. It is for teams to equate the retrospective effect of the later presented power of attorney or the very own nature and purpose of the obligation of payment of the registration fee, as well as, ultimately, the necessary balance between party autonomy and *favor arbitrandi*, both foundation stones of the preferred dispute resolution method. Finally, the manner through which the Arbitral Tribunal should articulate those somewhat apparently conflicting paradigms in the case at hand must also be considered.

II. Security for Costs: *Does the Tribunal have the power and, if so, should it order CLAIMANT to provide security for RESPONDENT's costs?*

In case the arbitration is considered to have been timely initiated, the procedural issue to be addressed subsequently is the Request for Security for Costs filed by Respondent. In regards to this issue, two main questions may arise: whether the arbitral

tribunal has the power to grant Security for Costs and, should the tribunal find it has, whether the measure should be applied to the present case.

Concerning the tribunal's power to order Security for Costs, Claimant's perspective may be that the tribunal should not have the power to grant Security for Costs since neither article 8 CAM-CCBC Rules nor article 17 Model Law expressly provide for such. Besides, the Rules seem to adopt an even-handed scheme according to which each party should equally bear the costs of the arbitration. However, international arbitration practice has almost unanimously adopted the opinion that a general provision on interim and conservatory measures (as foreseen in article 8.1 CAM-CCBC Rules) implicitly gives the tribunal the power to order Security for Costs. The same perspective applies to the Model Law (*lex arbitri*), as the UNCITRAL Working Group has made clear that article 17.2(c) should include Security for Costs within its scope of application.

Thus, should one consider that the tribunal has the power to order Security for Costs, the issue concerning the application of the measure in the case at hand is to be discussed.

Respondent contends that Claimant's submissions lack any factual or legal basis, in addition to Claimant's non-compliant and misleading intent, and that its financial situation has unexpectedly deteriorated since the conclusion of the Development and Sales Agreement, hereinafter the DSA, to the point where Claimant may be facing an imminent insolvency situation.

The first question that may arise from Respondent's submission concerns the requirements to order the other party to provide for Security for Costs. Though Security for Costs is commonly accepted as an interim measure, it is not a traditional one since it aims to assure the compliance with an award on costs rather than an award on the merits of the dispute. Furthermore, the measure does not require any state court assistance to be enforced: generally, the lack of payment leads either to the stay of the proceedings or to the issuance of an award against the defaulting party. Thus, the requirements to grant Security for Costs are not merely the traditional *fumus boni iuris* (the likelihood to succeed on the merits) and *periculum in mora* (the risk of irreparable harm). Rather, international arbitration practice has previously taken into account that to order Security for Costs the requesting party must be likely to be awarded costs in case it is successful on the merits and that the financial situation of the party against whom the measure is sought has been unexpectedly and exceptionally altered since the conclusion of the

contract due to a change of circumstances. Moreover, consideration is also given to both parties' past and present behavior.

In the case at hand, although there is no express provision neither on the Rules nor on the Terms of Reference regarding the costs allocation rule, which means that the tribunal has wide discretion on the matter, relevance ought to be given to the fact that the arbitrators are from jurisdictions where the *costs follow the event* principle is applicable and that both parties have requested the other party to bear the costs of the arbitration in case they are successful.

Additionally, Respondent, who traditionally bears the burden of proof, should demonstrate that Claimant's submissions are *prima facie* meritless. This might be a difficult requirement to fulfill since Claimant supports its position on the grounds that the parties have entered in a contract with a the risk-sharing structure. Therein, they had expressly included a clause which provided that the costs incurred by the transfer of the purchase price were to be borne by the buyer (Respondent). Regardless, in cases where both parties have a *prima facie* case, the tribunal may take into account other relevant factors to assess Respondent's request.

The main question deals with whether Claimant's financial situation has unexpectedly or exceptionally deteriorated since the conclusion of the contract. On this regard, several aspects have to be considered.

First, the fact that Claimant – before the conclusion of the DSA - had allegedly created the impression that it would be awarded 100 million dollars in an investment arbitration when, in reality, it was only awarded a fraction of such amount. On this point, relevance may be given to Respondent's possible duty to be informed about Claimant's realistic expectations, taking into account the international balance sheet which was publically available at the time.

Second, not only Claimant has not yet complied with an award rendered against it, which is now being enforced in a state court, but also has sought third party funding for the current proceedings (and had already resorted to such mechanism in previous investment arbitrations). Though arbitral tribunals take seeking external funding into consideration when assessing an application for Security for Costs, this is generally not enough evidence that the party against whom the measure is sought is facing financial difficulties.

Third, whether Claimant is facing a strained liquidity situation. As far as this aspect is concerned, one should take into account that such strained liquidity situation may be associated not only with Claimant's business model but also with Respondent's alleged failure to comply with its obligations under the DSA. The exceptionality of Security for Costs is especially highlighted on this matter: authors and arbitral tribunals have been adopting the perspective that Security for Costs should not be granted if the applicant has somehow taken the risk of contracting with a company whose business model or financial situation was known or could have been known at the time they entered into a commercial relationship. Moreover, the fact that Respondent has allegedly not complied with its obligations under the DSA may be accepted as grounds for exclusion of any right of protection.

Substantive Issues

III. Applicable Exchange Rate: *Is CLAIMANT entitled to the additional payments from RESPONDENT for the blades based on the exchange rate US\$ 1 = EQD 1.79?*

This issue deals with how Section 4(1) of the DSA should be interpreted, taking into account article 8 CISG. The parties agreed that the contract is governed by the CISG and, for issues not dealt with by the CISG, the UNIDROIT Principles of International Commercial Contracts are applicable [UNIDROIT Principles].

The Parties disagree on the interpretation and scope of some of the terms, in particular that of the applicable exchange rate. After all, the exchange rate has a strong influence on which party is to bear the currency risk, and constitutes a major concern in international transactions. In the case at hand, the exchange rate risk derives from the contract price being in US\$, while the production costs were incurred in EQD [Equatorianian Denars] by Claimant.

The difference of the exchange rate between these currencies at the time of contract formation and time of contract performance resulted in a price difference of US\$ 2,285,240, which is the basis of Claimant's submission. The Price Formula, present in Section 4(1) of the DSA, reads:

Section 4 PURCHASE PRICE

1. *The purchase price is calculated on a cost-plus basis according to the following formula:*

Production Costs per blade \leq 9,500 US\$: 9,975 US\$

Production Costs per blade: 9,500 – 10,500 US\$: Costs + 475 US\$ (5% of 9,500)

Production Costs per blade: 10,501 – 11,500 US\$: Costs + 420 US\$ (4% of 10,500)

Production Costs per blade: 11,501 – 12,000 US\$: Costs + 345 US\$ (3% of 11,500)

Production Costs per blade: 12,001 – 12,500 US\$: Costs + 240 US\$ (2% of 12,000)

Production Costs per blade: 12,501 – 13,000 US\$: Costs + 125 US\$ (1% of 12,500)

Production Costs per blade \geq 13,125 US\$: 13,125 US\$

The minimum price per fan blade irrespective of production costs is US\$ 9,975 while the maximum price to be charged per fan blade is US\$ 13,125.

Should the production costs per fan blade exceed US\$ 13,125 due to extraordinary unforeseeable 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.

The exchange rate issue entails the application of articles 8 and 9 CISG. Article 8 regards parties' intentions and article 9 the practices and usages.

For various reasons, since the agreed upon contract, at first, did not contain a provision as to which exchange rate was to be applied - whether the one at the time the contract was concluded [US\$ 1 = 2.0 EQD] or the one at the time the fan blades were produced [US\$ 1 = 1.79 EQD] – this calls for the analysis of parties' intention when negotiating and signing the DSA, pursuant to article 8 CISG. When negotiating the terms of this agreement, this matter was not discussed.

Claimant contends that only if the costs are converted at the rate at the time they are incurred it can be sure to recover its actual costs, which was one of the purposes of the price mechanism. Respondent, by contrast, relies on the Parties relationship and previous practices. In relation to their relationship and drafting history, Respondent

invokes a meeting in November 2009 convened by the then mother company of both Parties, Engineering International SA, where Respondent's potential sale was discussed. In order to make it more attractive to potential buyers, Engineering International decided that Respondent was to be *de-risked* from all currency risks in existing contracts by agreeing on a fixed exchange rate or other hedging strategies.

A few months after the DSA was concluded, Respondent noticed it had to buy clamps specifically from Claimant. Thus, an addendum regulating that order and adding a provision regarding the applicable exchange rate was signed, which also calls for its interpretation. The main question, therefore, is whether this provision also applies to the sale of the fan-blades, or if it is contained and meant only for the sale of the clamps.

Addendum of 26 October 2010 (handwritten)

The Buyer may request the Seller to produce and deliver 2,000 clamps to attach the fan blades to the fan shaft.

The Price for the clamps shall be on a cost coverage base and be paid in US\$.

Other terms as per main Agreement.

The exchange rate for the agreement is fixed to US\$ 1 = EQD 2.01.

Claimant contends that it does not extend, as such a delicate and decisive matter should have been properly addressed and cannot be implied from the exchange rate provision contained in the addendum, being opposed to Respondent's submission that this provision clearly aimed at the whole agreement. Moreover, Respondent relies on the fact that the parties were, at that point, no longer subsidiaries of the same group of companies, and that therefore, an express clause regulating the applicable exchange rate was necessary.

Given the apparent ambiguity of that provision, the question regarding the application of *contra proferentem* rule may be raised, since it was the Respondent who suggested the addendum and respective wording.

In conclusion, Claimant requests payment of the outstanding amount of US\$ 2,285,240.00 which corresponds to the remaining purchase price when applying the current exchange rate of US\$ 1 = 1.79 EQD.

IV. Money Laundering Levy: Is CLAIMANT entitled to the additional payments from RESPONDENT for the fees deducted by the Equatoriana Central Bank?

This issue deals with how Section 4(3) of the DSA must be interpreted, taking into account article 8 CISG once again. The Parties disagree on the nature, effect, and scope of some of the terms. However, Respondent advanced that, alternatively, an analogous application of article 35(2) is suitable, when considering that since the Seller is not obligated to know of all public law regulations in the country of the counterparty, the same should apply to the Buyer. The CISG is silent on this particular situation. Furthermore, given the facts of the present case, there is an inevitable discussion on whether it was Claimant who failed on its duty to inform or Respondent failed on its duty to be informed about the existence of the Levy, which brings to light articles 7, 54, and 80 CISG.

Regulation ML/2010C entered into force on 1 January 2010 as the Equatoriana government aimed at improving its bad reputation as a safe haven for money of dubious origins and was therefore implementing extensive legislation based on the UN-Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime. Regulation ML/2010C envisioned the creation of a Financial Investigation Unit, which under the auspices of the Equatoriana Central Bank, a government entity who transfers its profits to the Minister of Finance, deducted a 0.5% levy from every investigated transfer into Equatoriana of more than US\$ 2 million. When Respondent transferred the amount as per Claimant's invoice of 14 January 2014, a total of US\$ 102,192.80 was deducted from that payment.

Section 4(3) of the DSA reads:

*3. The BUYER will **deposit** the purchase price in full into the SELLER's account at the Equatorianian National Bank, Ocean Promenade 3, Equatoriana, IBAN 1209 3456 6798; SWIFT EQXPL6. **The bank charges for the transfer of the amount are to be borne by the BUYER.***

[added emphasis]

The question is whether the levy is envisioned in this provision, and if not, who must bear it. Therefore, in order to better understand how this Section may be interpreted, there will first be an analysis of the origin of the provision, which leads to whether Claimant or Respondent knew or ought to have known about the levy at the time of

contracting. Then, specific terms such as “deposit”, “bank charges”, and being liable for costs for the “transfer” of the amount are examined. Finally, Claimant alleges that Respondent ought to have performed adequate due diligence while, conversely, Respondent argues that Claimant ought to have informed it about the Regulation.

Section 4 of the DSA, including the provision on bank charges, was taken from a previous agreement between the Parties, concluded in 2003. It seems that when the DSA was signed in 1 August 2010, the Parties had a very limited notion on the scope and finality of the bank charges provision, as the persons negotiating the DSA were not even aware of the actual effect of the Regulation.

On one hand, while it is true that Claimant bore the Levy in contracts with third-parties twice (May 2010 and December 2011), Claimant only did so due to the fact that those contracts did not contain a bank charges provision such as Section 4(3). Up until the date of payment, only Claimant’s financial department fully understood the Regulation. But on the other hand, the levy results from a very specific public law regulation and is present only in six countries worldwide, in particular not in Mediterraneo, Respondent’s place of business. It is uncontested that Respondent only became aware of Regulation ML/2010C when Claimant approached its bank on 12 February 2015 and was informed that a deduction had been made from the payment of the fan-blades.

According to Section 4(3) of the DSA, Respondent is obligated to i) deposit the full purchase price in Claimant’s bank account, and ii) bear bank charges for the transfer of the amount. Interpretation by the opposing Parties of the specific terminology necessarily leads in different directions. For instance, to begin with, Claimant states that Respondent must account for the deducted amount as the purchase price was *not* deposited in full, which is in clear breach of the wording of the provision. In response, Respondent raises the question of the moment of passing of risk in case of payment by transfer (but since the CISG does not deal with this issue specifically, and seeing that the Parties agreed that the UNIDROIT Principles could be applied subsidiarily, Article 6.1.8(2) may be of relevance, and the fact that presented evidence points at how payment was confirmed to have been effected. Then, the issue of whether Respondent must only bear charges specifically by *banks* is put forward, since the Equatoriana Central Bank is not a “commercial bank” per se. Finally, the actual purpose of the levy is analyzed - is payment of the levy a necessary step to effect payment into Equatoriana, or something

more akin to a domestic tax aimed at *investigating* Claimant's source of income, and not a charge for the "physical" transfer of the amount.

Nevertheless, in Claimant's view, the levy is either covered by Section 4(3), or falls within the costs associated with the payment of the purchase price which has to be borne by the buyer under article 54 CISG. Article 54 CISG states that *[t]he buyer's 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*. The provision also provides that the buyer must bear the costs for these measures.

In turn, Respondent advocates that an analogous application of article 35(2) CISG is appropriate. Article 35 CISG deals with conformity of goods, and states that the seller has delivered conforming goods if they comply with the public law provisions of the seller's country while the public law provisions of the buyer's country only become relevant in special cases or where the buyer has informed the seller about them. Therefore, by analogously applying the relevant principles to the payment obligation would mean that Respondent cannot be expected to know of all public law regulations in the seller's place of business, and therefore would not bear the charges of the money laundering investigation levy. Whether such analogy is indeed adequate is crucial to understand the obligations of the Parties regarding compliance with unknown public law provisions in the counterparty's place of business. Thus, in turn, this leads to an alternative, but nonetheless fundamental question: was it Claimant who failed on its duty to inform in view of dealing in good faith and duty to cooperate, or was it Respondent who failed to be diligent and inform itself about the levy?

In conclusion, Claimant may request remedy in the form of specific performance under article 62 CISG in view of the maxim *pacta sunt servanda*, while Respondent may argue that Claimant's omission makes it exempt under article 80 CISG.

XXIV Annual Willem C. Vis International Commercial Arbitration Moot

Under the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada

MEMORANDUM FOR CLAIMANT

On behalf of

Wright Ltd.

232 Garrincha Street

Oceanside

Equatoriana

CLAIMANT

Against

SantosD KG

77 Avenida O Rei

Cafucopa

Mediterraneo

RESPONDENT

Counsel for CLAIMANT

Ana Isabel Ferreira • António Biason • Catarina Morão • Mariana Sampaio



TABLE OF CONTENTS

LIST OF ABBREVIATIONS	I
INDEX OF RULES AND LEGAL SOURCES	IV
INDEX OF AUTHORITIES.....	VI
INDEX OF COURT CASES AND ARBITRAL AWARDS	XXIII
STATEMENT OF FACTS	1
APPLICABLE PROCEDURAL AND SUBSTANTIVE LAW	3
SUMMARY OF ARGUMENT.....	4
I. CLAIMANT'S CLAIMS ARE ADMISSIBLE AS THEY HAVE BEEN SUBMITTED IN A TIMELY AND REGULAR MANNER	5
A. Claimant's Compliance With Articles 4.1 And 4.2 CAM-CCBC Rules Shall Be Deemed Sufficient To Consider The Request Submitted On 31 May 2016.....	6
i) The submission of the Request does not depend on the payment of the registration fee.....	6
ii) The posterior granting of the Power of Attorney by Wright Ltd ratifies the action already undertaken by Mr Fasttrack.....	7
iii) Claimant has demonstrated a clear intention to commence these arbitral proceedings	8
iv) The submission of the Request is in line with the understanding of the President of CAM-CCBC.....	9
B. Regardless Of The Arguments Presented Above, The Tribunal Shall Decide In Favour Arbitrandi.....	9
II. THE TRIBUNAL SHALL NOT ORDER CLAIMANT TO PROVIDE SECURITY FOR RESPONDENT'S COSTS	10
A. The Tribunal Does Not Have The Power To Order Security For Costs	10
i) The Parties did not agree nor envision the application of such measure	10
ii) According to the Rules, during the proceedings the expenses concerning the Tribunal are equally borne by both Parties	12
B. Even If The Tribunal Finds It Is Empowered To Order Security For Costs, It Shall Not Grant It As Respondent's Request Is Groundless	12

i) A prima facie examination of the merits of the dispute does not evidence Claimant's claims lack any factual or legal grounds.....	13
ii) Both the outcome of the arbitration and the ultimately applicable cost allocation rule remain unknown.....	14
iii) Claimant's financial situation is stable.....	15
iv) Claimant did not conceal its financial situation nor carried out a misleading conduct.....	17
v) Respondent's breach of contract contributed to Claimant's strained liquidity...	20
C. Even If The Tribunal Considers The Requirements By Any Means Fulfilled, The Amount Requested Shall Be Reasonably Reduced Regarding The Exceptional Nature Of The Measure	21
III. CLAIMANT IS ENTITLED TO FULL PAYMENT OF THE PURCHASE PRICE IN ACCORDANCE WITH ARTICLES 53, 54, 61 AND 62 CISG	22
A. The Parties Did Not Agree On A Fixed Exchange Rate For The Whole Contract.....	22
i) In their previous co-operations, the Parties did not fix an exchange rate.....	22
ii) The Contract and the addendum are separate agreements.....	23
iii) The exchange rate applicable to the Contract is the one at the time of Claimant's performance.....	26
B. Respondent Shall Bear The Transfer Costs Deducted By The Central Bank.....	27
i) The Contract expressly determines Respondent's obligation to bear the bank charges incurred with the transfer of the purchase price	28
ii) Both CISG and UNIDROIT Principles state that the buyer shall take the necessary steps to comply with its obligation to pay the price	29
C. Respondent Failed To Perform Its Contractual And Legal Obligations.....	31
D. Claimant Is Entitled To Require Full Performance Of The Contract Pursuant To Articles 61.1(A) And 62 CISG	31
i) Claimant has fully performed its own contractual obligations	32
ii) Specific performance is the viable and natural remedy under both the CISG and UNIDROIT Principles.....	32
iii) Claimant's conduct is not inconsistent with specific performance	33
REQUEST FOR RELIEF	35

LIST OF ABBREVIATIONS

% – Percent

& – And

¶/¶¶ - Paragraph/Paragraphs

Answer Req. Arb. – Respondent's Answer to Request for Arbitration

Answer Req. SfC – CLAIMANT's Answer to Respondent's Request for Security for Costs

art. /arts. – Article/Articles

ASA – Association Suisse de l'arbitrage (= Swiss Arbitration Association)

BIAC – Bangladesh International Arbitration Centre

CAM-CCBC – Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada

CAM-CCBC LtoArb. – CAM-CCBC's letter to Arbitrators

Central Bank – Equatoriana Central Bank

CEO – Chief Executive Officer

cf. – *conferatur* (= compare)

CFO – Chief Financial Officer

CIArb – Chartered Institute of Arbitrators

CISG – United Nations Convention on Contracts for the International Sale of Goods

Cl. Ex. – CLAIMANT's Exhibit

Claimant – Wright Ltd.

Contract – Development and Sales Agreement

COO – Chief Operations Officer

DSA – Development and Sales Agreement

e.g. – *exempli gratia* (= for example)

et al. – *et alii* (= and others)

EQD – Equatorianian Denars

Ex. /Exs. – Exhibit/Exhibits

Fasttrack to CAM-CCBC1– Letter from Mr Fasttrack to CAM-CCBC of 31 May 2016

Fasttrack to CAM-CCBC2 – Letter from Mr Fasttrack to CAM-CCBC of 7 June 2016

Fasttrack to CAM-CCBC – Letter from Mr Fasttrack to CAM-CCBC

IBA – International Bar Association

ICC – International Chamber of Commerce

LCIA – London Court of International Arbitration

MCA – Milan Chamber of Arbitration

ML – Money laundering

NAI – Netherlands Arbitration Institute

OECD – Organization for Economic Co-operation and Development

Or. CAM-CCBC – Order by CAM-CCBC of 26 July 2016

p./pp. – Page number/pages number

PA1 – Power of Attorney by Wright Holding PLC

PA2 – Power of Attorney by Wright Ltd.

Parties – Wright Ltd. and SantosD KG

PO1/PO2 – Procedural Order number one/ Procedural Order number two

R\$ – Brazilian Reais

Req. Arb. – Request for Arbitration

Req. SfC – Respondent's Request for Security for Costs

Res. Ex. – Respondent's Exhibit.

Respondent – SantosD KG

Rules – CAM-CCBC Rules

SCC – Stockholm Chamber of Commerce

SfC – Security for Costs

SIAC – Singapore International Arbitral Centre

SRIA – Swiss Rules of International Arbitration

ToF – Terms of Reference

UNCITRAL – United Nations Commission on International Trade Law

UNIDROIT – International Institute for the Unification of Private Law

USD – U.S. Dollars

v. – Versus (= against)

VIAC – Vienna International Arbitral Centre

INDEX OF RULES AND LEGAL SOURCES

1998 CAM-CCBC Rules	Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Rules (1998)
CAM-CCBC Rules	Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Rules (2012)
CAM-CCBC Table of Expenses	Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Table of Expenses (2015)
AAA Rules	American Arbitration Association Rules (2000)
BIAC Rules	Bangladesh International Arbitration Centre Arbitration Rules (2011)
CISG Digest	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for International Sale of Goods (2012)
DAL	Danubian Arbitration Law (2006)
DIS Rules	Rules of the German Institute of Arbitration (1998)
Geneva Convention	Convention on Agency in the International Sale of Goods, Geneva (1983)
IBA Guidelines on Conflicts of Interest	IBA Guidelines on Conflicts of Interest in International Arbitration (2014)
ICC Rules	International Chamber of Commerce Rules (2012)
LCIA Rules	London Court of International Arbitration Rules (2014)

MCA Rules	Milan Chamber of Arbitration Rules (2010)
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985 with amendments adopted in 2006)
Notes on Organizing Arbitral Proceedings	UNCITRAL Notes on Organizing Arbitral Proceedings (2006)
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
PECL	Principles of European Contract Law (2002)
Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)
SCC Rules	Stockholm Chamber of Commerce Arbitration Rules (2010)
SIAC Rules	Singapore International Arbitral Centre Rules (2016)
SRIA	Swiss Rules of International Arbitration (2012)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (Integral Version 2010)
VIAC Rules	Vienna International Arbitration Centre Rules (2013)

INDEX OF AUTHORITIES

- Bennett, Howard** *Agency in the Principles of European Contract Law and the Unidroit Principles of International Commercial Contracts*
11 Uniform Law Review (2006) pp. 771-793
Cited as: Bennet
In: ¶ 18
- Berger, Bernhard** *Arbitration Practice: Security for Costs: Trends and Developments in Swiss Arbitral Case Law*

ASA Bulletin, (Kluwer Law International 2010, Vol. 28, Issue 1)
pp. 7-81
Cited as: Berger
In: ¶ 59, 78, 85
- Blackaby, Nigel** REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION
Partasides, Constantine Oxford University Press, 6th ed., 2015
Redfern, Alan Cited as: Redfern & Hunter
Hunter, J. Martin In: ¶ 76, 83
- Blavi, Francisco** *It's About Time To Regulate Third Party Funding*

Available at:

<http://kluwerarbitrationblog.com/2015/12/17/its-about-time-to-regulate-third-party-funding/>

Cited as: Blavi
In: ¶ 71

- Blessing, Marc** INTRODUCTION TO ARBITRATION – SWISS AND INTERNATIONAL PERSPECTIVES
Helbing & Lichtenhahn, 1999
Cited as: Blessing
In: ¶ 45
- Born, Gary** INTERNATIONAL COMMERCIAL ARBITRATION
Kluwer Law International, 2nd ed., 2014
2014
Cited as: Born
In: ¶ 27, 31, 45, 72, 83
- Brekoulakis, Stavros** *The Impact of Third Party Funding on Allocation for Costs and Security for Costs Applications: The ICCA-Queen Mary Task Force Report*, (2016)
Cited as: Breakoulakis
In: ¶ 66
- Chartered Institute of Arbitrators** *Applications of Security for Costs*, (2015)
Available at:
<https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/2015securityforcosts.pdf>
Cited as: CIARB
In: ¶ 90
- Darwazeh, Nadia** *Disclosure and Security for Costs or How to Address Imbalances Created*

- Leleu, Adrien** *by Third-Party Funding*
Journal of International Arbitration, (Kluwer Law International
2016, Vol. 33, Issue 2) pp. 125-149
Cited as: Darwazeh & Leleu
In: ¶ 65, 71
- DeMott, Deborah A.** *Ratification: Useful But Uneven*
17 European Review of Private Law (2009) pp. 987-1002
Available at:
http://scholarship.law.duke.edu/faculty_scholarship/2838
Cited as: DeMott
In: ¶ 18
- DiMatteo, Larry A.** *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*
Dhooge, Lucien
Greene, Stephanie 34 Northwestern Journal of International Law and Business
Maurer, Virginia (Winter 2004) pp. 299-440
Cited as: DiMatteo
In: ¶ 137
- Dissaux, Nicolas** *Sur les conditions d'efficacité d'une clause de médiation*
La Semaine Juridique – Entreprise et affaires n.º 21-22 (2014) p.
1290
Cited as: Dissaux
In: ¶ 3

Farnsworth, Allan

Article 8

in BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL
SALES LAW

Giuffrè: Milan (1987) pp. 163-174

Cited as: Farnsworth

In: ¶ 127

Gabriel, Henry Deeb

*The Buyer's Performance Under the CISG: Articles 53-60 Trends in the
Decisions*

25 Journal of Law and Commerce (2005-06) pp. 273-283

Cited as: Gabriel

In: ¶ 134, 141

Gaillard, Emannuel

FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL
COMMERCIAL ARBITRATION

Savage, John

Kluwer Law International, 1999

Cited as: Fouchard/Gaillard/Goldman

In: ¶ 32, 61

Gu, Weixia

Security for Costs in International Commercial Arbitration

Journal of International Arbitration, (Kluwer Law International
2005, Vol. 22, Issue 3) pp. 167-206

Cited as: Gu

In: ¶ 64, 67, 81, 84

Ho, Jean

*Getting the Shoe to Fit – Obtaining Security for Costs under the Rules of
Arbitration of the International Chamber of Commerce*

9 Vindobona Journal of International Commercial Law & Arbitration (2005)

Cited as: Ho

In: ¶ 45, 78

Hoellering, Michael F.

Conservatory and provisional measures in international arbitration: The Practices and Experience of the AAA

in ICC CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION, 1993

Cited as: Hoellering

In: ¶ 34

Holtzmann, Howard M.

A GUIDE TO THE UNCITRAL MODEL LAW

Neuhaus, Joseph E.

Kluwer Law International, 1989

Cited as: Holtzmann & Neuhaus

In: ¶ 20

Honnold, John

Uniform Law for International Sales Under the 1980 UN Convention

Kluwer Law International, 3rd ed., 1999

Cited as: Honnold

In: ¶ 101, 103, 133

Hyland, Richard

CISG-Advisory Council Opinion No. 3

Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG,

October 2004

Available at: <http://www.cisg.law.pace.edu/cisg/CISG-AC->

op3.html#2

Cited as: CISG-AC Opinion No. 3

In: ¶ 101

Johnson, Lise

New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps (2013)

Bernasconi-Osterwalder,

Nathalie

Available at:

http://www.ciel.org/wp-content/uploads/2015/06/UNCITRAL_Transparency_Aug2013.pdf

Cited as: Johnson & Bernasconi-Osterwalder

In: ¶ 73

Karrer, Pierre A.

Security for Costs in International Arbitration: Why, when, and what if...

Desax, Marcus

in LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY, LIBER AMICORUM BÖCKSTIEGEL, Robert Briner et al. (eds.), 2002, pp. 339-353

Cited as: Karrer & Desax

In: ¶ 67, 89

Kee, Christopher

International Arbitration and Security for Costs - a Brief Report on Two Developments

17 American Review of International Arbitration, Issue 2 (2006)
pp. 273-280

Cited as: Kee

In: ¶ 45

Kirtley, William

Should an Arbitral Tribunal Order Security for Costs When an

- Wietrzykowski, Koralie** *Impecunious Claimant Is Relying upon Third-Party Funding?*

Journal of International Arbitration, (Kluwer Law International
2013, Vol. 30, Issue 1) pp. 17-30

Cited as: Kirtley & Wietrzykowski

In: ¶ 88
- Knapp, Victor** *Article 62*

BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL
SALES LAW

Giuffrè: Milan (1987), pp.451-455

Cited as: Knapp

In: ¶ 145, 147, 157
- Kritzer, Herbert M.** RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE
LEGAL PRACTICE IN THE UNITED STATES

Stanford University Press, 2004

Cited as: Kritzer

In: ¶ 89
- Lew, Julian D. M.** COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION

Mistelis, Loukas A. Kluwer Law International, 2003

Kröll, Stefan M. Cited as: Lew/Mistelis/Kröll

In: ¶ 31, 32, 37

Liu, Chengwei

Comparison of CISG Article 45/61 remedial provisions and counterpart PECL Articles 8:101 and 8:102, (2004)

Available at:

<http://www.cisg.law.pace.edu/cisg/text/peclcomp61.html>

Cited as: Chengwei I

In: ¶ 146, 147

Liu, Chengwei

Specific Performance: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law,

2nd edition: Case annotated update (March 2005)

Available at:

<http://www.cisg.law.pace.edu/cisg/biblio/chengwei3.html>

Cited as: Chengwei II

In: ¶ 143, 157

Lookofsky, Joseph

The 1980 United Nations Convention on Contracts for the International Sale of Goods

in INTERNATIONAL ENCYCLOPAEDIA OF LAWS - CONTRACTS,
Suppl. 29, J. Herbots (ed.) / RES. Blanpain (gen. ed.), December
2000

Kluwer Law Arbitration

Cited as: Lookofsky

In: ¶ 141

Maniruzzaman, Munir

Third-Party Funding in International Arbitration – A Menace or Panacea? (2012)

Available at:

<http://kluwerarbitrationblog.com/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>

Cited as: Maniruzzaman

In: ¶ 71

Martowski, David

Order Security from an Arbitrator's Perspective

42 The Arbitrator – Society of Maritime Arbitrators, Issue 1 (2011) pp. 6-8

Cited as: Martowski

In: ¶ 48, 90

Miles, Wendy

Security for costs in international arbitration – emerging consensus or continuing difference?

Speller, Duncan

The European Arbitration Review (2007) pp. 32-34

Cited as: Miles & Speller

In: ¶ 53

OECD

Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures

OECD Working Papers on International Investment

OECD Publishing, 2005

Available at:

<http://dx.doi.org/10.1787/524613550768>

Cited as: OECD

In: ¶ 74

Osuna-González, Alejandro *Buyer's Enabling Steps to Pay the Price: Article 54 of the United Nations Convention on Contracts for the International Sale of Goods*

Journal of Law and Commerce, Vol. 25, 2005-06

Cited as: Osuna-González

In: ¶ 123, 133, 136, 137, 141

Pessey, Jean-Baptiste *When to Grant Security for Costs in International Commercial Arbitration: the Complex Quest for a Uniform Test, (2011)*

Available at:

<https://www.cpradRes.org/news-publications/articles/2011-05-06-when-to-grant-security-for-costs-in-international-commercial-arbitration-the-complex-quest-for-a-uniform-test-2011-writing-contest-winner>

Cited as: Pessey

In: ¶ 60

Redfern, Alan *Why it is time for international arbitration to embrace security for costs*

O'leary, Sam 32 Arbitration International, Issue 3 (2016) pp. 397-413

Cited as: Redfern & O'Leary

In: ¶ 53, 84, 85

Reports Of The United Nations Commission

Report of the United Nations Commission on International Trade Law, 41st session (June 16–July 3, 2008), Gen. Ass. 63rd session, supp. no. 17, A/63/17, ¶314;

Report of the United Nations Commission on International Trade Law, 44th session (June 27–July 8, 2011), Gen. Ass. 66th session, supp. no. 17, A/67/17, ¶200;

Report of the United Nations Commission on International

Trade Law, 45th session (June 25-July 6, 2012), Gen. Ass. 67th session, supp. no. 17, A/67/17, ¶69.

Cited as: Reports of the United Nations Commission

In: ¶ 73

Rogers, Catherine A.

Transparency in International Commercial Arbitration

54 University of Kansas Law Review (2006) pp. 1301-1337

Cited as: Rogers

In: ¶ 75

Rubino-Sammartano, Mauro

INTERNATIONAL ARBITRATION LAW AND PRACTICE

Kluwer Law International, 2nd ed., 2001

Cited as: Rubino-Sammartano

In: ¶ 72

Rubins, Noah

In God we trust, all others pay cash: Security for Costs in International Commercial Arbitration

11 American Review of International Arbitration (2000) pp. 307-378

Cited as: Rubins

In: ¶ 34, 53, 78, 83

Sahani, Victoria S.

The Impact of Third-Party Funders on the Parties They Decline to Finance, (2015)

Available at:

<http://kluwerarbitrationblog.com/2015/07/06/the-impact-of-third-party-funders-on-the-parties-they->

decline-to-finance/

Cited as: Sahani I

In: ¶ 52

Sahani, Victoria S.

Judging Third-Party Funding

63 UCLA Law Review (2016) pp. 388-448

Cited as: Sahani II

In: ¶ 66

Sandrock, Otto

The Cautio Judicatum Solvi in Arbitration Proceedings of The Duty of an Alien Claimant to Provide Security for the Costs of the Defendant

Journal of International Arbitration, (Kluwer Law International 1997, Vol. 14, Issue 2) pp. 17-37

Cited as: Sandrock

In: ¶ 45

Scherer, Maxi

ARBITRATING UNDER THE 2014 LCIA RULES: A USER'S GUIDE

Richman, Lisa

Kluwer Law International, 2015

Gerbay, Rémy

Cited as: Scherer & Richman

In: ¶ 14

Schlosser, Peter

DAS RECHT DER INTERNATIONALEN PRIVATEN
SCHIEDSGERICHTSBARKEIT

Mohr: Tübingen, 2nd ed., 1989

Cited as: Schlosser

In: ¶ 38

Schmitthoff, Clive

Agency in International Trade: A Study in Comparative Law

117 Rec. Cours 1970-I, pp. 115-161

Available at:

<https://www.trans-lex.org/128700>

Cited as: Schmitthoff

In: ¶ 18

Schwartz, Eric A.

GUIDE TO THE ICC RULES OF ARBITRATION

Derains, Yves

Kluwer Law International, 2nd ed., 2005

Cited as: Schwartz & Derains

In: ¶ 11

Sévon, Leif

Obligations of the Buyer under the UN Convention on Contracts for the International Sale of Goods

International Sale of Goods: Dubrovnik Lectures,

Petar Sarcevic & Paul Voken eds., Oceana (1986), Ch. 6, 203-238

Available at:

<http://www.cisg.law.pace.edu/cisg/biblio/sevon1.html#i261>

Cited as: Sévon

In: ¶ 158, 161

Straube, Frederico José

THE CAM-CCBC ARBITRATION RULES 2012: A COMMENTARY

Finkelstein, Cláudio

Eleven Publishing, 2016

Filho, Napoleão Casado

Cited as: Straube/Finkelstein/Filho

In: ¶ 16, 82

Cited as: Terashima & Gagliardi

In: ¶ 23

Cited as: Timm

In: ¶ 14

Task Force Report

ICCA-QMUL Task Force on TPF in International Arbitration

Subcommittee on Security for Costs

November 2015

Available at: http://www.arbitration-icca.org/media/6/09700416080661/tpf_taskforce_security_for_costs_and_costs_draft_report_november_2015.pdf

In: ¶ 65

Teitelbaum, Ruth

Look at the Public Interest in Investment Arbitration: Is it Unique? What Should We Do About It?

5 Publicist, Issue 1 (2010) pp. 54-62

Cited as: Teitelbaum

In: ¶ 74

Travaini, Gregory

Multi-tiered dispute resolution clauses, a friendly Miranda warning, (2014)

Available at:

<http://kluwerarbitrationblog.com/2014/09/30/multi-tiered-dispute-resolution-clauses-a-friendly-miranda-warning/>

Cited as: *Travaini*

In: ¶ 3

UNIDROIT Secretariat

UNIDROIT Working Group for the preparation of a Legal Guide on Contract Farming, (2014)

Available at:

<http://www.unidroit.org/english/documents/2014/study80a/wg03/s80a-wg03-12-e.pdf>

Cited as: *UNIDROIT Secretariat*

In: ¶ 122

Vanto, Jarno

Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 46 of the CISG

Available at:

<http://www.cisg.law.pace.edu/cisg/text/peclcomp46.html>

Cited as: Vanto

In: ¶ 153

Verbist, Herman

ICC ARBITRATION IN PRACTICE

Schäfer, Erik

Kluwer Law International 2005

Imhoos, Christophe

Cited as: Verbist /Schäfer/Imhoos

In: ¶ 90

Villaggi, Florencia

International Commercial Arbitral Awards: Moving from Secrecy towards Transparency? (2007)

Available at:

http://www.youngicca-blog.com/wp-content/uploads/2013/01/Villaggi-confidentiality-vs-publication-of-awards-edited05_01_13.pdf

Cited as: Villaggi

In: ¶ 75

Waincymer, Jeffrey

PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION

Kluwer Law International 2012

Cited as: Waincymer

In: ¶ 45

Wilske, Stephan

Commencement of Arbitral Proceedings and Unsigned Requests for Arbitration

Gack, Christine

Journal of International Arbitration, (Kluwer Law International 2007, Vol. 24, Issue 3) pp. 319-326

Cited as: Wilske & Gack

In: ¶ 20

Wolfram, Charles W.

MODERN LEGAL ETHICS,

West Publishing Co, 1986

Cited as: Wolfram

In: ¶ 89

Yesilirmak, Ali

Evolution of Provisional Measures in International Commercial Arbitration

International Arbitration Law Library, (Kluwer Law International, Vol. 12, 2005) pp. 19-46

Cited as: Yesilirmak

In: ¶ 45, 64

Živković, Patricia

Security for Costs in International Arbitration: What's Missing from the Discussion? (2016)

Available at:

<http://kluwarbitrationblog.com/2016/11/09/caution->

security-costs-international-arbitration-third-party-funding-
missing-link/

Cited as: Živković

In: ¶ 53

INDEX OF COURT CASES AND ARBITRAL AWARDS

Austria	<i>Conveyor band case</i>	¶
	Oberlandesgericht	104
	23 March 2005	
	6 R 200/04f	
	Available at: http://cisgw3.law.pace.edu/cases/050323a3.html	
Brazil	<i>Electro-erosion machine case</i>	¶
	Tribunal de Justiça Rio Grande do Sul	128
	20 May 2009	
	n° 70025609579	
	Available at: http://cisgw3.law.pace.edu/cases/090520b5.html	
CIETAC	<i>Silk shirts case</i>	¶
	Arbitration proceeding, China	143
	9 August 1996	
	CISG/1996/37	
	Available at: http://cisgw3.law.pace.edu/cases/960809c2.html	
France	<i>Medissimo v. Logica</i>	¶
	Cour de Cassation	3
	29 April 2014,	
	n° 12-27.004	
	Available at:	
	https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJurijudi&idTexte=JURITEXT000028894893&fastReqId=636603905&fastPos=1	

Finland	<i>Crudex Chemicals Oy v. Landmark Chemicals S.A.</i>	¶
	Appellate Court Helsinki	103
	31 May 2004	
	S 01/269	
	Available at: http://cisgw3.law.pace.edu/cases/040531f5.html	
Germany	<i>Automobile case</i>	¶
	Appellate Court Stuttgart	106
	31 March 2008	
	6 U 220/07	
	Available at: http://cisgw3.law.pace.edu/cases/080331g1.html	
	<i>Furniture leather case</i>	¶
	Appellate Court München	104
	15 September 2004	
	7 U 2959/04	
	Available at: http://cisgw3.law.pace.edu/cases/040915g2.html	
	<i>Germany 27 January 1981</i>	¶
	District Court Heidelberg,	121
	Available at: http://cisgw3.law.pace.edu/cases/810127g1.html	
	<i>Memory Module Case</i>	¶
	OLG Hamm	105
	12 November 2001	
	13 U 102/01	
	Available at: http://cisgw3.law.pace.edu/cases/011112g1.html	
ICC	<i>ICC Case No. 6784</i>	¶
	Final Award in <i>ICC Case No. 6784</i> , 1990	11
	Available at The International Court of Arbitration Bulletin, ICC, Vol. 8, n.º1, May 1997	

	<i>ICC Case No. 7047</i>	¶
	Consultant v. State agency and others,	42, 78
	Final Award, <i>ICC Case No. 7047</i> , 1994,	
	Available at Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 1996 - Volume XXI, Yearbook Commercial Arbitration, Volume 21,	
	Kluwer Law International	
	<i>ICC Case No. 7197</i>	¶
	Arbitral Award	134
	Available at:	
	http://www.unilex.info/case.cfm?pid=1&do=case&id=37&step=Abstract	
	Cited as: <i>ICC Award 00.00.1992</i>	
	<i>ICC Arbitration Case No. 8324 of 1995 (Magnesium case)</i>	¶
	Final Award	105
	Available at: http://cisgw3.law.pace.edu/cases/958324i1.html	
	<i>X. S.A.RES.L., Lebanon v. Y. AG, Germany</i>	¶
	Procedural Order No. 3, 4 July 2008,	45, 60
	available at ASA Bulletin, Association Suisse de l'Arbitrage, Kluwer Law International 2010, Vol. 28, Issue 1	
	Cites as: <i>X. S.A.R.L. Lebanon v Y. AG</i>	
	<i>ICC Case XY International, Inc. v. Société Z</i> (ICC), reprinted in	¶
	1997	45
	Available at ASA Bulletin, Volume 15, Issue 2,	
	Kluwer Law International 1997	
	Cited as: <i>XY International v. Société Z</i>	
ICSID	<i>Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador</i>	¶
	ICSID Case No. Arb /09/17	45

(annulment proceedings)

Decision on El Salvador's Application for Security for Costs,

Available at: <http://www.internationalarbitrationcaselaw.com/>

Cited as: *Commerce v. El Salvador*

Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania ¶

ICSID Case No ARB/05/22, 73

Procedural Order No 3, 29 September 2006,

Available at: <http://www.italaw.com/>

Cited as: *Biwater Gauff Ltd v. United Republic of Tanzania*

EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic, ¶

ICSID Case No. ARB/14/14, Procedural Order No. 3, 45

Available at: <https://icsid.worldbank.org>

Cited as: *EuroGas and Belmont Resources v. Slovak Republic*

Emilio Agustín Maffezini v. The Kingdom of Spain, ¶

ICSID Case No. ARB/97/7, 51

Available at: <http://www.italaw.com/>

Cited as: *Maffezini v. Spain*

Mexico

Arbitral Award, Centro de Arbitraje de México (CAM) ¶

30.11.2006 141

Available at: <http://www.unilex.info/case.cfm?id=1149>

Cited as: *Arbitral Award 30.11.2006*

José Luis Morales y/o Son Export, S.A. de C.V., de Hermosillo ¶

Sonora, México v. Nez Marketing de Los Angeles California, 151

E.U.A

COMPROMEX, Comisión para la Protección del Comercio Exterior
de Mexico, 04,05,1993, M/66/92

Available at:

<http://www.unilex.info/case.cfm?pid=1&do=case&id=39>

Cited as: *COMPROMEX case*

NAI	<p><i>Producer v. Construction Company,</i></p> <p>Interim Award NAI Case No. 1694,</p> <p>12 December 1996, Albert Jan van den Berg (ed.), available at</p> <p>Yearbook Commercial Arbitration 1998, Volume XXIII,</p> <p>Kluwer Law International 1998</p> <p>Cited as: <i>NAI Case No. 1694</i></p>	¶ 49
Russia	<p><i>Arbitral Award n.º 137/2004, 13.01.2006</i></p> <p>Tribunal of International Commercial Arbitration at the Russian</p> <p>Federation Chamber of Commerce and Industry Available at:</p> <p>http://www.unilex.info/case.cfm?pid=1&do=case&id=1322</p> <p>Cited as: <i>Russian Trib. Int't Comm. Arb. Award 13.01.2006</i></p>	¶ 151
	<p><i>Arbitral Award 27.05.2013</i></p> <p>International Arbitration Court of the Chamber of Commerce and</p> <p>Industry of the Russian Federation</p> <p>Available at:</p> <p>http://www.unilex.info/case.cfm?pid=2&do=case&id=1791&step=Abstract</p> <p>Cited as: <i>Russian Int'l Arb. Court CCI 166/2012</i></p>	¶ 148
	<p><i>Arbitration proceeding 123/1992, 17.10.1995</i></p> <p>Tribunal of International Commercial Arbitration at the Russian</p> <p>Federation Chamber of Commerce and Industry</p> <p>Available at: http://cisgw3.law.pace.edu/cases/951017r1.html</p> <p>Cited as: <i>Russia 17 October 1995 Arbitration proceeding 123/1992</i></p>	¶ 140
Switzerland	<p><i>Machines, devices and replacement parts case</i></p> <p>Switzerland 25 February 2002 District Court Schaffhausen Case No.</p> <p>12/1997/322</p> <p>Available at:</p>	¶ 133

<http://cisgw3.law.pace.edu/cases/020225s1.html>

Cour de Justice de Genève 20.01.2006

¶

C/27176/2001

151

Available at:

<http://www.unilex.info/case.cfm?pid=1&do=case&id=1195>

Cited as: *Cour de Justice de Genève 20.01.2006*

Office furniture case

¶

Court of Justice of Geneva

101

12 May 2006, ACJC/524/2006

Available at: <http://cisgw3.law.pace.edu/cases/060512s1.html#uab>

Cited as: *Office furniture case*

Not Indicated v. Not Indicated,

¶

Schiedsgericht Der Zürcher Handelskammer, Not Indicated, 12

33, 35

November 1991,

Available at ASA Bulletin, Volume 13 Issue 1

Kluwer Law International 1995

Cited as: *Not Indicated v. Not Indicated*

X Panama v. Une personne physique domiciliée à Genève,

¶

Award, available at ASA Bulletin,

32, 34

Volume 13, Issue 3,

Kluwer Law International 1995

Cited as: *X Panama v. Une personne physique*

Singapore

Insigma Technology Co Ltd v. Alstom Technology Ltd, SGCA

¶

(Singapore Court of Appeal), 2 June 2009

27

Available at:

<http://www.commonlii.org/sg/cases/SGCA/2009/24.html>

Cited as: *Insigma v. Alstom.*

	<i>Myanma Yaung Chi Oo Co Ltd v. Win Win Nu and Another,</i>	¶
	SGHC (Singapore High Court), 6 June 2003	72
	Available at: http://www.singaporelaw.sg/sglaw/images/ArbitrationCases/[2003]_2_SLR(R)_0547.pdf	
	Cited as: <i>Myanma Yaung v. Win Win</i>	
Spain	<i>Case involving machine for repair of bricks</i>	¶
	Appellate Court Navarra, Spain 27 December 2007	101
	Available at: http://cisgw3.law.pace.edu/cases/071227s4.html	
	Cited as: <i>Case involving machine for repair of bricks</i>	
United Kingdom	<i>Ali Shipping Corporation v. Shipyard Trogir,</i>	¶
	Court of Appeal, Division Civil, 19 December 1997	72, 76
	Available at: http://www.nadRes.co.uk/articles/published/ZzzzarbitrationLawReports/Ali%20v%20Trogir%201997.pdf	
	Cited as: <i>Ali Shipping Corp v. Shipyard Trogir</i>	
	<i>Bank Mellat v. Hellinki Techniki S.A.,</i>	¶
	London Court of Appeal, 8 June 1083 [H. No. 730],	41, 43
	Available at: http://www.uniset.ca/other/cs3/1984QB291.html	
	Cited as: <i>Bank v. Helliniki</i>	
	<i>Dolling-Baker v. Merrett and Another,</i>	¶
	Court of Appeal, 21 March 1990,	72
	[1990] 1 W.L.RES. 1205, [1991] 2 All E.RES. 890	
	Available at: http://www.uniset.ca/lloyddata/css/19901WLR1205.html	
	Cited as: <i>Dolling-Baker v. Merrett</i>	

-
- Farrer v. Lacy, Hartland & Co.,*** ¶ 83
(1885) 28 Ch D 482,
Available at: www.swarb.co.uk
- Hart Investments Ltd v. Larchpark Ltd,*** ¶ 91
Queen's Bench Division (Technology and Construction Court),
EWHC 291 (TCC),
9 February 2007,
Available at:
<http://www.bailii.org/ew/cases/EWHC/TCC/2007/291.html>
Cited as: *Hart Investments v. Larchpark*
- Keary Developments v. Tarmac Constructions,*** ¶ 81
Court of Appeal, Civil Division,
13 April 1994, [1995] 3 All ER 534,
Available at:
https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2012-65/Communication/Att.12_KearyDevelopmentsvTarmacConstruction_1995_3AllERES.pdf
- Koenigsblatt v. Sweet,*** ¶ 18
Court of Appeal, [1923] 2 Ch 314,
Available at: <http://swarb.co.uk/>
- Kufaan Publishing Ltd v. Al Warrack Bookshop Ltd,*** ¶ 67
Court of Appeal, 1 March 2000,
Unreported
- Nea Agrex SA v. Baltic Shipping Co Ltd,*** ¶ 21
[1976] Queen's Bench Division 933,
2 Lloyd's Rep. 47
Cites as: *Nea Agrex SA*
-

	<i>Porzelack KG v. Porzelack UK Ltd,</i>	¶
	<i>Unreported</i>	50
	<i>Allianz Versicherungs-Aktiengesellschaft v. Fortuna Co. Inc.</i>	¶
	<i>(The Baltic Universal),</i>	21
	Queen's Bench Division (Commercial Court), October 1998	
	[1999] Lloyd's Rep. 497,	
	Available at: http://www.simic.net.cn/upload/2010-	
	06/20100602151025370.pdf	
	Cited as: <i>The Baltic Universal</i>	
	<i>Charles M. Willie & Co. (Shipping) Ltd v. Ocean Laser</i>	¶
	<i>Shipping Ltd & George Roussos Sons SA (The Smaro),</i>	21
	Queen's Bench (Commercial Court), October 1998	
	[1999] 1 Lloyd's Rep. 225,	
	Available at:	
	http://www.simic.net.cn/upload/2010-06/20100602134634384.pdf	
	Cited as: <i>The Smaro</i>	
USA	<i>Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.</i>	¶
	U.S. Supreme Court, 473 U.S. 614, July 1985,	27
	Available at:	
	https://supreme.justia.com/cases/federal/us/473/614/case.html	
	Cited as: <i>Mitsubishi Motors v. Soler Chrysler-Plymouth</i>	
	<i>Oilex A.G. MM Mitsui & Co</i>	¶
	U.S. District Court for the Southern District of New York – 669 F.	62
	Supp. 85 (S.D.N.Y. 1987), 15 September 1987,	
	Available at: http://law.justia.com/cases/federal/district-	
	courts/FSupp/669/85/2370255/	

STATEMENT OF FACTS**THE PARTIES**

Claimant, **Wright Ltd.**, is a highly specialized manufacturer of fan-blades for jet engines. Respondent, **SantosD KG**, is a medium sized manufacturer of jet engines. Both companies used to be subsidiaries of **Engineering International, SA** [Req. Arb., p.3, ¶¶1&2] and had, in 2003 and 2005, cooperated in the development of the fan-blades TRF 155-II and TRF 163-I, respectively. Following negotiations since 2007, Claimant was sold to Skymover in July 2010, while Respondent, after being put up for sale in October 2009, was sold to SpeedRun in August 2010 [PO2, p.54, ¶1&2]. Skymover was then renamed **Wright Holding PLC**, and owns 88% of Claimant's shares [*idem*].

THE DEVELOPMENT AND SALES AGREEMENT

On January 2010, Respondent received notice that **Earhart SP**, a worldwide aircraft manufacturer, was seeking quotes for the engine for a new signature jet [Answer Req. Arb., p.24, ¶5]. Respondent contacted Claimant to discuss the possibility of jointly developing a state-of-the-art model of fan-blades – the TRF 192-I, based on Claimant's TRF 192 model – to be included into Respondent's high-spec jet engine to meet Earhart SP's standards [Req. Arb., p.4, ¶¶3&4].

On 1 May 2010, Respondent insisted on fixing a maximum price so it could make a binding offer to Earhart SP [Cl. Ex. C1, p.8]. Respondent feared it would miss its business opportunity with Earhart since the latter was negotiating with other suppliers and wanted to sign a contract in September 2010 with a fixed price [Answer Req. Arb., p.24, ¶7]. As the final production costs were not yet determinable, Parties agreed on a flexible price structure [Req. Arb., p.4, ¶5].

On 1 August 2010, the **Development and Sales Agreement** (hereinafter the "Contract") was concluded. In the first year of contracting, Respondent was bound to purchase 2,000 fan-blades [Cl. Ex. C2, p.10]. Respondent also expressed its firm intention to purchase further units in subsequent years [*idem*]. The final price would be paid in US\$ and calculated on a cost + profit basis [*idem*] with risk-sharing elements [Cl. Ex. C1, p.8] in accordance with the pre-agreed price structure, ranging from US\$ 9,975 to US\$ 13,125 *per* unit. The purchase price would be transferred to Claimant's bank account and the bank charges would be borne by Respondent [Cl. Ex. C2, p.10]. No exchange rate was fixed [Cl. Ex. C2, p.9&10].

THE ADDENDUM

On 26 October 2010, following Respondent's proposition, an **addendum** was added to the Contract regarding the purchase of 2,000 clamps [Req. Arb. p.4&5, ¶8]. Respondent initially

intended to buy the clamps from another producer, but they were inadequate [*idem*]. The inclusion of the purchase of the clamps into the main Contract was due to mere convenience and the fan-blades and the clamps were to be delivered together [PO2, p.57, ¶16]. Conversely to the main Contract, the addendum provided for a fixed exchange rate at US\$ 1= EQD 2.01 [Cl. Ex. C2, p.11]. All other terms of the addendum were *as per main Agreement* [Cl. Ex. C2, p.11].

On 9 January 2015, Ms Beinhorn, Claimant's COO, asked Mr Lee – from Claimant's accounting department – to finalize the two separate invoices for the fan-blades and the clamps [Cl. Ex. C4, p.13]. Mr Lee firstly prepared the invoice for the clamps as the purchase order and a note that the fixed exchange rate of US\$ 1 = EQD 2.01 was applicable to them had been left on top of Ms Kwang's binder – who was the original responsible for the financial side of the Contract [*idem*]. However, Mr Lee, who was not familiar with the project, its agreed terms, and was *under considerable time pressure*, wrongly applied the fixed exchange rate to the invoice concerning the fan-blades [*idem*].

On 14 January 2015, Claimant delivered the goods in conformity with the contract as confirmed by Respondent's inspection [Cl. Ex. C3, p.12], attaching the respective invoices [Req. Arb. p.5, ¶9]. The following day, Respondent transferred to Claimant's bank account US\$ 20,438,560 for the fan-blades and US\$ 183,343.28 for the clamps [Cl. Ex. C3, p.12]. Claimant immediately reported on the accounting department's error and sent the correct invoice for the blades applying the current exchange rate of US\$ 1 = EQD 1.79, thus requesting additional payment to meet the US\$ 22,723,800 full purchase price [Cl. Ex. C5, p.14], but received no response.

On 29 January 2015, only US\$ 20,336,367.20 was credited to Claimant's account due to a money laundering investigation [Req. Arb. p.5, ¶13]. As explained by the Equatoriana Central Bank, since the transfer exceeded US\$ 2 million, a 0.5% levy was subtracted under Section 12 of Regulation ML/2010C [Cl. Ex. C8, p.17].

THE BREACH OF CONTRACT

On 9 February 2015, Claimant once again contacted Respondent demanding the outstanding payment [Cl. Ex. C6, p.15] to which the latter replied denying any additional payment [Cl. Ex. C7, p.16], alleging that the Parties agreed that the fixed exchange rate present in the addendum was to be applied to the whole Contract [Cl. Ex. C7, p.16]. Respondent also refused to pay the levy arguing that it was not bound to bear bank charges based on public law regulations in Equatoriana under the Contract [Answer Req. Arb., p.26, ¶18].

On 1 April 2016, following the 31 March 2016 meeting where Respondent insisted on making no further payment and reported its unwillingness to purchase another 2,000 blades [PO2, p.58, ¶23], Claimant informed Respondent that it would take the necessary steps to initiate arbitration proceedings [Res. Ex. R3, p.29].

On 31 May 2016, Claimant presented its **Request for Arbitration** [Req. Arb., pp.3-7], attaching a Power of Attorney on Wright Holding PLC's behalf and partially paying the Registration Fee [PA1, p.18; CAM-CCBC LtoC., p.19, ¶¶2i&2ii].

On 7 June 2016, Mr Fasttrack sent the requested Power of Attorney signed by Wright Ltd as well as the remainder of the fee [Fasttrack to CAM-CCBC2, pp.20&21].

On 24 June 2016, Respondent presented its **Answer to Request for Arbitration** [Answer Req. Arb., pp.23-26].

On September 2016, Respondent requested the Tribunal to order Claimant to provide security for costs [Req. SfC, pp.45&46]. Claimant objected to that request [Answer Req. SfC. p.49].

APPLICABLE PROCEDURAL AND SUBSTANTIVE LAW

According to the arbitration agreement, *[t]he arbitration shall be conducted under the Rules of the (...) Chamber of Commerce Brazil-Canada ("CAM-CCBC") and in line with international arbitration practice* [Cl. Ex. C2, p.11, Section 21: Dispute Resolution]. Additionally, *[t]he seat of arbitration shall be Vindobona, Danubia*. Hence, the *lex arbitri* is the Danubian Arbitration Law – which is an adoption of UNCITRAL Model Law with the 2006 amendments [PO2, p.60, ¶37]. The latter consists of a subsidiary instrument, applicable whenever there is no express provision foreseen on the Rules and a hiatus needs to be remedied. The Parties also agreed that the *Agreement is governed by the UN Convention of the International Sale of Goods ("CISG")*. *[F]or issues not dealt with by the CISG the UNIDROIT Principles are applicable* [Cl. Ex. C2, p.10, Section 20: Choice of Law]. Pursuant to the agreement concluded between the Parties, the abovementioned statutes shall govern the arbitral proceedings and the merits of the present dispute.

SUMMARY OF ARGUMENT

On behalf of our Client, Wright Ltd., hereinafter *Claimant*, following the applicable law, we respectfully make the following submissions and request this Tribunal to find that:

- I. Claimant's claims are admissible as they have been submitted in a timely and regularly manner. Claimant has committedly attempted to resolve the dispute amicably; not succeeding, initiated arbitration. Claimant's compliance with articles 4.1 and 4.2 CAM-CCBC Rules shall be deemed sufficient to consider the Request for Arbitration submitted on 31 May 2016, within the 60-day time limit agreed **(A)**. Should the Tribunal remain uncertain concerning the commencement date of proceedings, the decision shall be taken *in favour arbitrandi* **(B)**.
- II. The Tribunal shall not order Claimant to provide security for Respondent's costs as it does not have the power to do so **(A)**. Should the Tribunal find it is empowered to order security for costs, it still shall not order it as Respondent's request is groundless **(B)**. Even if the Tribunal considers the requirements fulfilled, the amount requested shall be reasonably reduced regarding the measure's exceptional nature **(C)**.
- III. Claimant is entitled to full payment of the purchase price according to articles 53, 54, 61 and 62 CISG. Parties did not agree on a fixed exchange rate applicable to the fan-blades but only to the addendum for the clamps **(A)** and expressly provided that Respondent shall bear the transfer costs **(B)**. The latter, by not complying with its buyer's contractual and legal obligations, has incurred in a breach of contract **(C)** and shall therefore be ordered to pay the still outstanding purchase price in the amounts of US\$ 2,285,240.00 for the fan-blades – calculated according to the exchange rate at the time of Claimant's performance – and US\$ 102,192.80 for the 0.5% levy deducted by the Central Bank. Having Claimant duly fulfilled its own contractual obligations, it is entitled to require full performance of Respondent's obligation to pay the price. **(D)**.

ARGUMENT**I. CLAIMANT'S CLAIMS ARE ADMISSIBLE AS THEY HAVE BEEN SUBMITTED IN A TIMELY AND REGULAR MANNER**

1. Respondent argues that Claimant's claim has to be rejected as not admissible as the arbitral proceedings were initiated too late [Answer Req. Arb. p.25, ¶¶11-13]. Nonetheless, Claimant's claims have been timely and regularly submitted.
2. According to the arbitration agreement, '*All disputes arising out of or in connection with this Agreement shall be settled amicably and in good faith between the parties. If no agreement can be reached each party has the right to initiate the arbitral proceedings within 60 days after the failure of the negotiation*' [Cl. Ex. C2, p.11].
3. Claimant attempted to resolve the present dispute amicably and in good faith by making several offers combining a reduction in the sales prices for the 2,000 fan-blades with a firm commitment to promote further business [Req. Arb. p.6, ¶17]. To such a degree, Claimant performed the agreed mandatory pre-condition to start arbitral proceedings. Since the Parties failed to reach a compromise on 1 April 2016 [Res. Ex. R 3, p.29], Claimant's right to initiate arbitration was constituted, and so it filed its Request for Arbitration on 31 May 2016 [Req. Arb., p.3]. Only had Claimant failed to comply with the binding amicable dispute resolution clause could the Tribunal render its claims inadmissible [*Medissimo v. Logica*; Travaini quoting Dissaux, p.1290]. Therefore, Claimant's claims are admissible and the arbitral proceedings were initiated in time.
4. Differently to other institutional rules, there is no explicit mention in the CAM-CCBC Rules regarding the date the arbitral proceedings are deemed to have commenced [cf. art. 4.2 ICC Rules; art. 7.1 VIAC Rules; art. 3.2 SRIA; art. 4 SCC Rules]. Nevertheless, taking into account the wording of article 4.1 CAM-CCBC Rules – *the party **desiring to commence an arbitration will notify the CAM-CCBC (...)*** – the date of commencement of the proceedings is the date the Request is filed.
5. Hence, the CAM-CCBC Rules follow the common practice of well-established arbitral institutions to commence the arbitration on the date the Request is submitted [i.e. art. 4.1 ICC Rules]. Additionally, Respondent also recognizes the date Claimant submitted the Request for Arbitration as 31 May 2016 [Answer Req.Arbitr., p.25, ¶12&13], which represents the moment the arbitral proceedings commenced. Therefore, the arbitral proceedings were initiated in time since the Request was filed on 31 May 2016, within the 60-day time limit contractually agreed upon.

A. Claimant's Compliance With Articles 4.1 And 4.2 CAM-CCBC Rules Shall Be Deemed Sufficient To Consider The Request Submitted On 31 May 2016

6. Respondent argues that Claimant neither paid the Registration Fee in full nor submitted a Power of Attorney for the arbitration, unlawfully concluding the arbitral proceedings were only commenced on 7 June 2016, after the signed Power of Attorney was provided and the fee had been fully paid [Answer to Req.Arb., p.25, ¶12].
7. When submitting its Request for Arbitration, Claimant presented a Power of Attorney on behalf of its parent company Wright Holding PLC [PA1, p.18] and attached the bank confirmation for the payment of the registration fee in the amount of R\$ 400.00 instead of R\$ 4,000.00 [CAM-CCBC LtoC., p.19, ¶2].
8. Notwithstanding, the Tribunal shall consider the proceedings initiated on 31 May 2016 since *i)* the submission of the Request does not depend upon the payment of the registration fee, *ii)* the latter granting of the Power of Attorney by Wright Ltd ratifies the action already undertaken by Mr Fasttrack, and *iii)* Claimant has demonstrated its clear intention in commencing the arbitral proceedings. Finally, *iv)* the timing of the Request for Arbitration submission is in line with the understanding of the President of CAM-CCBC.

i) The submission of the Request does not depend upon the payment of the registration fee

9. As is the case in other arbitration rules, CAM-CCBC Rules do not require full payment of registration fee in order to consider that the arbitration has been submitted.
10. On the matter of the Request for Arbitration, CAM-CCBC Rules are similar to ICC Rules. Both contain separate provisions concerning the submission of the Request for Arbitration and the payment of registration fees [art. 4.3&4.4 ICC Rules and art. 4.1&4.2 CAM-CCBC Rules].
11. In what concerns ICC Rules, commentators have discussed the aim of such provisions in ICC Rules and have concluded that the submission of the Request does not depend on the payment of the fee [Schwartz & Derains, p.54]. The same approach was adopted by a tribunal in an ICC arbitration where the non-payment of the filing fee was not considered as grounds for inadmissibility of the request [*ICC Case No. 6784*]. This conclusion also follows from the systematic interpretation of ICC Rules as, according to article 4.4, in case of lack of payment, the Secretariat may fix a time limit for the requesting party to comply. Only after the non-compliance with that obligation is the file closed [art. 4.4 ICC Rules], which means that, even

if the fee is not paid at the time of submission, the initial request can still be successfully admitted.

12. Accordingly, articles 4.1 and 4.2 CAM-CCBC Rules also seem to have been deliberately drafted separately so that it was clear that the payment of the registration fee is not a condition for the submission of the Request for Arbitration itself [e.g. Or. CAM-CCBC, p.19, ¶3].
13. Thus, considering the similarity between ICC and CAM-CCBC Rules, as well as the fact that ICC Rules are the world's leading international arbitration institution with less of a national character thus seen as international practice, the same conclusion applies to CAM-CCBC Rules.
14. On the other hand, the CAM-CCBC Rules do not establish any consequences for the non-payment of the registration fee - as art.12.10 is only applicable to fees and expenses that are to be borne by both parties [Timm, p.195] - when comparing to other institutional rules as art.12.10 is only applicable to fees and expenses that are to be borne by both parties [cf. art. 4.4 ICC Rules; art. 10.4 VIAC Rules; art. 3(2) SCC Rules; art. 1(vi) LCIA Rules; art. 1.2 Schedule I BIAC Rules]. Indeed, differently from the Rules, other leading arbitration centres specifically provide that the payment of the mentioned fee is a precondition to successfully submit the request for arbitration. For instance, article 1 LCIA Rules determines that such request has to contain or be accompanied by *confirmation that the registration fee prescribed in the Schedule of Costs has been or is being paid to the LCIA* [art. 1(vi), LCIA Rules]. Without that payment, *the arbitration will be treated as not having been commenced* [Scherer & Richman, p.56]. The same applies to article 3 SIAC Rules which even adopts the wording *payment of the requisite filing fee* [art. 3.1(k) SIAC Rules].
15. Thus, the commencement of the arbitration under the CAM-CCBC Rules does not depend upon that payment.
16. To conclude, it is unquestionable the compliance with article 4.1 and not 4.2 CAM-CCBC Rules, stops the running of the contractual time limit applicable to the claim [Straube/Finkelstein/Filho, p.66]. Hence, the Request is deemed validly submitted on 31 May 2016 irrespective of the payment in full of the registration fee.

ii) The posterior granting of the Power of Attorney by Wright Ltd ratifies the action already undertaken by Mr Fasttrack

17. Both the Law of Danubia and Equatoriana regarding agency consist of verbatim adoptions of the relevant rules in the 2010 UNIDROIT Principles [PO2, p.58, ¶24]. In light of this, UNIDROIT Principles state that an act practiced by an agent without authority is as

- effective as if it had initially been carried out by the principal [art. 2.2.9.(1) UNIDROIT Principles, p.90]. Although acting without authority, an agent may bind the principal *whenever the principal ratifies the agent's act* [UNIDROIT Principles, p.83].
18. When filing the Request for Arbitration, Mr Fasttrack lacked the authority to represent Claimant as the attached Power of Attorney did not refer to Wright Ltd. However, Mr Fasttrack then promptly presented a written Power of Attorney on Claimant's behalf (the *principal*) which expressly provided that "*the grant of this Power of Attorney shall thereby approve any actions already undertaken by the lawyer*" [PA2, p.21], hence officially, expressly and retrospectively ratifying his previous unauthorized act [Schmitthoff, p.147; DeMott, p.6; *Koenigsblatt v. Sweet*]. Such practice is in line with the widely recognized uniform principles [cf. UNIDROIT Principles, p.91, ¶2] and also with the 1983 Convention on Agency in the International Sale of Goods upon which the UNIDROIT treatment on agency is based [art. 15 Geneva Convention; Bennett, p.771].
19. Consequently, despite the Power of Attorney on behalf of Wright Ltd not being attached to the Request for Arbitration on the day it was actually submitted, it was ratified by Mr Fasttrack within the given time limit [CAM-CCBC LtoC. p.19, ¶3]. Thus, the arbitral proceedings shall still be considered commenced on 31 May 2016, the date the act was materially practiced by the attorney.

iii) Claimant has demonstrated a clear intention to commence these arbitral proceedings

20. Irrespective of the fulfilment of the abovementioned requirements, Claimant has shown a clear intention in initiating arbitral proceedings when filing the Request for Arbitration on the 31 May 2016 [Wilske & Gack, p.324 *quoting* Holtzmann & Neuhaus, p.620].
21. As held by the English Commercial Court [*Nea Agrex SA; The Smaro; The Baltic Universal*], arbitral proceedings shall be considered initiated in time regardless of the fulfilment of formal requirements if the applicant's intention is clear. Although those court decisions refer to the appointment of arbitrators, their conclusions shall still apply to the case at hand since they are grounded on the inherent flexibility of arbitral proceedings rather than the strict application of law when the party desiring to commence the arbitration has materially taken the necessary steps to do so.
22. The Power of Attorney signed by Wright Holding PLC was distinctly aimed at the current proceedings as it dates of 2 April 2016 [PO2, p.60, ¶38], precisely a day after Claimant contacted Respondent to inform that *the necessary steps will be taken in order to commence the arbitral proceedings* [Res. Ex. R3, p.29]. Also, Mr Fasttrack's letter to the CAM-CCBC

evidences that he was indeed representing Claimant and not its parent company [Fasttrack to CAM-CCBC1, p.2].

23. Likewise, Claimant's failure to initially pay the full Registration Fee was merely due to a mistake in Mr Fasttrack's secretariat, and not due to a refusal or intent to not comply with such payment. The fact that Claimant partially paid the Registration Fee sufficiently demonstrates its serious commitment in commencing the arbitration, serving the fee's typical purpose of *discouraging manifestly inappropriate requests* [Terashima & Gagliardi, p.67].
24. Finally and most importantly, Respondent's right to present its defense was by no means harmed with the amendment of the Request. In fact, at the time the request was amended Respondent had not yet been notified to present its answer to the request for arbitration. Thus, when Respondent was made aware of such request, all the documents had already been correctly presented.

iv) The submission of the Request is in line with the understanding of CAM-CCBC

25. Claimant's understanding regarding the payment of the Registration Fee and the attachment of the Power of Attorney conforms with CAM-CCBC's perception.
26. As stated in the Orders of the President of CAM-CCBC of 1 June 2016 and 26 July 2016, the posterior presentation of the Power of Attorney and the payment of the remainder of the fee are considered mere supplementations to the originally submitted Request [CAM-CCBC LtoC., p.19; Or. CAM-CCBC, p.40, respectively]. Also, Claimant's Request was deemed to have been submitted on 31 May 2016 and not, as Respondent argues, on 7 June 2016 – the date it was ratified [CAM-CCBC LtoArb., p.32]. Observing the directions of the President of CAM-CCBC, and in line with international practice, the Request shall be deemed to have been validly filed on the date on which the initial version was received [cf. art. 3.5 SRIA; 6.4 DIS Rules].

CONCLUSION: THE TRIBUNAL SHALL NOT DISREGARD CLAIMANT'S CLAIMS SINCE THE ARBITRAL PROCEEDINGS INITIATED IN TIME

B. Regardless Of The Arguments Presented Above, The Tribunal Shall Decide In *Favour Arbitrandi*

27. In accordance with international practice, the Tribunal shall decide in *favour arbitrandi* [Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.]. By entering into an arbitration agreement, the Parties have shown their willingness to settle the dispute through arbitration

- rather than any other *separate and potentially inconsistent proceedings* [Born, p.1320]. Thus, as stated in a judgement set out by the Singapore Court of Appeal, *where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars so long as the arbitration can be carried out without prejudice to the rights of either party (...)* [Insignia v. Alstom].
28. In the case at hand, besides the Parties' unambiguous intention in submitting the dispute to arbitration – in line with their dispute resolution common practice [PO2, p.57, ¶21], it is also clear that these proceedings can be carried out without any harm to the rights of any party: both were given the right to participate in the arbitration in equal terms and without any benefit to one party in prejudice of the other.
29. In conclusion, any doubts that the Tribunal may still have concerning the timeliness of these proceedings, shall be resolved in favour of arbitration.

II. THE TRIBUNAL SHALL NOT ORDER CLAIMANT TO PROVIDE SECURITY FOR RESPONDENT'S COSTS

A. The Tribunal Does Not Have The Power To Order Security For Costs

30. Respondent filed an application for security for costs [Req. SfC, pp.45&46]. However, the Tribunal does not have jurisdiction to decide on the matter as **(i)** the Parties did not agree nor envision security for costs when drafting the arbitration agreement, and **(ii)** during the arbitral proceedings, the expenses concerning the Tribunal are equally borne by both Parties, according to the Rules.
- i) The Parties did not agree nor envision the application of such measure**
31. The arbitration agreement has a contractual nature whereby each party consents for the arbitration to take place [Lew/Mistelis/Kroll, p.99]. One of the main features of arbitration is precisely the maximization of the parties' autonomy, seen as the *cornerstone of arbitration* [Born, pp.84&1133].
32. When drafting arbitration agreements, parties have the opportunity to negotiate the rules applicable to the arbitration, allowing them to tailor and control the procedure according to their specific wishes and needs [X *Panama v Une personne physique*, Notes on Organizing Arbitral Proceedings, p.2 ¶¶6&7; Lew/Mistelis/Kroll, p.3]. Due focus on this clause is of crucial importance since it determines the extension of the arbitral tribunal's jurisdiction [Fouchard/Gaillard/Goldman, p.395].

33. In the present case, neither the arbitration agreement nor the Rules chosen by the Parties address security for costs [Cl. Ex. C2, p.6, Section 21]. Thus, neither Party foresaw, at the time of contracting, the granting of such measure. Hence, the absence of an express agreement regarding security for costs excludes the Tribunal's power to order so. This view is supported by a Swiss Tribunal, which held that *only an explicit agreement of the parties (...) would permit the Arbitral Tribunal to order the payment of a security deposit* [Not Indicated v. Not Indicated].
34. In fact, international commercial contracts do not usually address security for costs as the parties see little benefit in making *concessions in exchange for what seems a relatively minor procedural detail* [Rubins, p.5 quoting Hoellering, p.31, X Panama v Une personne physique]. Their silence is evidence of their lack of intention to request *the arbitrator to order security* [Rubins, p.29].
35. If even a generic reference to a certain legal basis that provides for security for costs is not enough to determine the parties' will [Not Indicated v. Not Indicated], neither is a general mention to a certain set of rules which do not specifically mention security for costs. Thus, the mere allusion to provisional measures foreseen in article 8 CAM-CCBC Rules is not a valid legal basis for Respondent to request security for costs.
36. Should the Tribunal find that article 8 CAM-CCBC Rules extends to security for costs, it still cannot be ordered, since the Parties did not foresee nor envision the Tribunal's generic power to order provisional measures when drafting the arbitration agreement, let alone the application of the specific measure.
37. In 2010, the year the Contract was concluded, the 1998 CAM-CCBC Rules were still in force. Article 8 was only added when the 2012 CAM-CCBC Rules were implemented. Hence, even though Claimant is aware of the fact that the Rules applicable to commence the arbitral proceedings are those in effect at the time of receipt of the Request for Arbitration [art. 15.3 CAM-CCBC Rules], the Tribunal has to consider the Parties' intention regarding the scope of the arbitral agreement at the time of consolidation of the Contract, since it must be interpreted as any other contract [Lew/Mistelis/Kroll, p.150, ¶¶7.59&7.60].
38. Indeed, the conjugation of articles 8 and 15.3 of the present Rules cannot determine the Parties' intention at the time of contracting – such must be understood to comprise only the version of the rules as known to them upon agreement [Schlosser, p.473, ¶631].
39. In conclusion, if no reference at all was made in the agreement or included in the set of Rules the Parties have agreed on, the Tribunal cannot order security for costs as it lacks jurisdiction to do so.

ii) According to the Rules, during the proceedings the expenses concerning the Tribunal are equally borne by both Parties

40. Considering the provisions in the Rules, the expenses incurred during the proceedings concerning the arbitral tribunal are to be equally borne by both Parties [art. 12 CAM-CCBC Rules; CAM-CCBC Table of Expenses]. Consequently, the mandatory advanced payment provisions by both parties of administrative and arbitrator's fees in equal shares [arts. 12.6 & 12.7 CAM CCBC-Rules, respectively] shall be interpreted to exclude the Tribunal's jurisdiction to order the measure as requested. Granting security for costs is therefore contrary to the notorious balanced scheme of the Rules.
41. The English Court of Appeal's Lord Justice Kerr came to a comparable conclusion, reporting that the payment of security for costs *is clearly inconsistent with the even-handed scheme that [1975 ICC] rules envisage in this regard [Bank v. Helliniki]*. Lord Kerr also found that (...) *the express provision for a prepayment of part of the costs of the arbitration by way of security (...) militate[s] against any intention, in the scheme of rules, concerning the provision of security in relation to any party's own legal costs (...) [idem]*.
42. Furthermore, a tribunal settled that *the ICC Rules do not provide for security for costs. However, Art. 9 of the [1988] ICC Rules stated that in principle, Claimant and Defendant pay the advance costs fixed by the ICC Court of Arbitration in equal shares, therefore the Defendant has to pay half of the advance on costs [ICC Case No. 7047]*.
43. Both ICC and CAM-CCBC Rules adopt similar and equitable approaches as to parties' obligations during the course of arbitral proceedings. In light of this, and envisioning the mentioned ICC Rules, Lord Kerr concluded that *[a]n order for security for costs against the defendants would have the effect of compelling them to make a double deposit (...) [Bank v. Helliniki]*. Likewise, in the event security for costs is ordered, Claimant would be unreasonably burdened to make a double advanced payment for the same costs. Thus, the admissibility of Respondent's request shall be logically ruled out.

B. Even If The Tribunal Finds It Is Empowered To Order Security For Costs, It Shall Not Grant It As Respondent's Request Is Groundless

44. Should the Tribunal decide on its authority to order security for costs, such measure shall still not be granted since the requirements to do so are not fulfilled.
45. Security for costs is an extraordinary measure that may only be granted in exceptional circumstances for which Respondent bears the burden of proof [Waincymer, pp.653-654].

Engaging in arbitral proceedings is ultimately considered a general commercial risk when parties have placed themselves in the business and trade market [Yesilirmak, p.215, ¶5.83; Blessing, p.284, ¶886]. Therefore, in line with international arbitration practice, security for costs is only granted under special circumstances [*Commerce v. El Salvador*; *EuroGas and Belmont Resources v. Slovak Republic*; *XY International v. Société Z*; Ho, p.334; Sandrock, p.17] and *on a case by case basis* [Kee, p.5]. Tribunals typically consider the applicant's prospects of success, the financial situation of the party against whom security is requested, the extent of third party funding and the possibility of enforcement of the final award [e.g. *X. S.A.R.L. Lebanon v Y. AG*; Born, p.2496].

46. Respondent attempts to ground its request for security for costs in unmotivated assumptions, rushing to conclude that the Tribunal has no option other than to reject Claimant's claims and render a cost award in Respondent's favour. Respondent further argues that Claimant will *very likely* not comply with such [Req. Sfc, p.46, ¶2], also accusing Claimant of concealing its financial situation as a business practice [Req. Sfc, p.46, ¶4].
47. However, **i)** a *prima facie* examination of the merits of the dispute does not evidence Claimant's claims *lack any factual or legal grounds* and **ii)** both the outcome of the arbitration and the cost allocation rule remain unknown. Additionally, **iii)** Claimant did not conceal its financial situation and **iv)** Respondent's breach of contract contributed to Claimant's strained liquidity. Therefore, as Respondent fails to prove any exceptional circumstance, the Tribunal shall not order Claimant to provide security for costs.

i) A *prima facie* examination of the merits of the dispute does not evidence Claimant's claims *lack any factual or legal grounds*

48. In its Request for Security for Costs Respondent suggests that *Claimant's claims lack any factual and legal basis* [Req. Sfc, p.46, ¶2]. Claimant's claims are otherwise unquestionably quantified, based on a breach *that goes to the heart of the Contract* [Martowski, p.6] and supported by sufficient evidence – namely Respondent's refusal to fulfill its obligations under the Contract [e.g. Cl. Exs. C2, pp.9-11; C3, p.12; C4, p.13; C5, p.14; C6, p.15].
49. When addressing a request for security for costs, the Tribunal must analyse whether the applicant has established a *prima facie case on the merits of one or more of its claims* [NAI Case No. 1694].
50. Respondent requests protection for a hypothetical right based on its very own understanding of total demerit of Claimant's claims. Yet, such application requires the Tribunal to pre-judge

the case. This is unbecoming unless the Tribunal can clearly demonstrate a high degree of probability of success or failure [cf. *Porzelsack KG v. Porzelsack UK Ltd.*].

51. In the case at hand, the preliminary assessment of Claimant's claims evidences its *bona fide* and seriousness, culminating in the denial of the measure. The abovementioned elements have to be carefully considered by the Tribunal, which is not able, at this moment, to provide detailed findings on factual issues nor prepared to thoroughly judge the merits of the dispute in order to hold that security for costs is to be granted. In such event, pre-judgement could jeopardize Claimant's further ability to present the case [cf. *Maffezini v. Spain*].

ii) Both the outcome of the arbitration and the ultimately applicable cost allocation rule remain unknown

52. Respondent's doubts concerning Claimant's financial situation are also based on the fact Claimant has sought and failed to obtain outside funding for these proceedings [Req. SfC, p.46, ¶3], simply relying on a non-solid source [Res. Ex. R6, p.47]. However, the fact that Claimant did not obtain third party funding does not indicate its unlikelihood to win the dispute since *a funder rejecting a case does not mean that the case lacks merit* [Sahani I, ¶3].
53. Security for costs is only a viable remedy when the losing party is at last condemned to bear the other party's costs and expenses [Rubins, p.369; Redfern & O'Leary, p.403; Miles & Speller, p.32; Živković, ¶4]. In the case at matter, there is no certainty concerning the outcome of the proceedings. Thus, Claimant's unlikelihood to win the dispute is far from undisputed.
54. Taking into account that the Tribunal has considerable discretion on determining the allocation of costs and that parties' conduct throughout the course of the proceedings may be considered [art. 10.4.1 CAM-CCBC Rules], this is not the proper moment for the Tribunal to decide on Claimant's ability or inability to provide for eventual arbitration costs.
55. It should be noted that, at this stage, it remains unknown whether the Tribunal will rule in Respondent's favour and, if so, whether the final award on costs will determine Respondent's right to reimbursement of its incurred costs. In what regards cost allocation, the Terms of Reference provide that the tribunal *shall establish the responsibility related to the payment* of the costs, not specifying how the responsibility is to be finally allocated [ToR, p.43, ¶12.3].
56. Even though procedural and arbitration laws in Danubia, Equatoriana and Mediterraneo are based on the '*costs follow the event principle*', this is strictly applied in court proceedings. In arbitration, however, in the absence of parties' specific agreement limiting such discretion, the Tribunal may deviate from the principle and allocate the costs differently [PO2, p.58, ¶26].

57. In conclusion, Respondent cannot argue that there is a risk of non-recovery of its incurred costs [Req. SfC, p.46, ¶2] since there is no strictly pre-defined rule on cost allocation [PO2, p.58, ¶26].

iii) Claimant's financial situation is stable

58. Respondent argues Claimant will very likely not comply with an eventually unfavourable award, grounding such claim on the allegation that Claimant has in the past failed to comply with an award rendered against it, as well as on the fact that Claimant failed to obtain external funding for these proceedings [Req. SfC, p.46, ¶2&3]. However, such allegations, as well as the conclusions drawn from them, are not true. Moreover, Respondent failed to file any concrete and reliable evidence on Claimant's inability or unwillingness to comply with an eventual adverse award.
59. To begin with, is noteworthy that Claimant's financial situation has not changed substantially or unexpectedly since the conclusion of the Contract [Cl. Ex. C9, p.50]. Considering the Parties' previous co-operations, Respondent could not have been unaware of Claimant's temporary strain in liquidity due to the development of the new fan-blade [Cl. Ex. C6, p.15]. According to Ms Jaschin's witness statement - Claimant's CFO – *[f]or companies of the size of Wright Ltd the development of a new fan-blade is normally associated with a considerable financial effort largely depleting the freely available financial means. Once the sale of the newly developed fan-blades starts liquid means are built up again* [Cl. Ex. C9, p.50]. Thus, the mentioned strain in liquidity was expected considering Claimant's business model and, for this reason, shall not justify Respondent's request [Berger, p.10].
60. Also, Claimant stresses it has a sound financial situation and is not involved in any insolvency or bankruptcy proceedings [*in contrast to X. S.A.R.L., Lebanon v Y. AG*] and there are no attempts to do so [PO2, p.60, ¶31]. Hence, no urgency or threatening harm can be forecasted to support this application [Pessey, p.22, ¶2.1].
61. In any event, and as commentators have concluded, not even *the fact that a party is suffering financial difficulties or is the subject of bankruptcy proceedings is (...) sufficient, in itself, to form the basis of a request for security* [Fouchard/Gaillard/Goldman, p.688, ¶1256].
62. According to its last balance sheet, Claimant possesses physical assets in higher value than the amount Respondent is requesting as security [PO2, p.59, ¶28], thus proving its financial capacity to support an eventual adverse award - *in contrast to Oilex A.G. MM Mitsui & Co*, where the plaintiff was ordered security for costs because it seemed to have no assets and be out of business.

63. In what concerns Claimant's non-compliance with the arbitral award rendered in the CAM-CCBC proceedings against one of its suppliers, represents a rather unique situation. Claimant is simply expecting the outcome of the enforcement proceedings related with such award and has claimed a set-off [PO2, p.59, ¶30] since the award creditor owes an even larger amount to Claimant's parent company [Answer to Req. SfC, p.49]. Thus, Claimant's conduct in such proceedings is directly related with its organizational context and cannot be considered as its common practice. On the contrary, Claimant has time and again demonstrated a compliance demeanour. Firstly, it has not defaulted on any of its obligations under the Rules, having paid both the registration fee and the advance on costs [Fasttrack to CAM-CCBC2, p.20; PO2, p.60, ¶32]. Secondly, Claimant has also performed its obligations under the Contract, having developed and delivered both the fan-blades and the clamps in *good order* [Req. Arb. p.5, ¶9; Cl. Ex. C3, p.12]. Finally, Claimant is not involved in any other enforcement or arbitral proceedings [PO2, p.60, ¶33].
64. Furthermore, there would be a considerable reduced risk of non-enforcement of an award on costs since both Equatoriana and Mediterraneo are parties to the NY Convention [PO2, p.60, ¶35; Gu, p.192]. In situations such as these, arbitrators are rightly particularly reluctant in ordering security for costs [Yesilirmak, p.218, ¶85] because there is no actual need to grant the measure when the requested party's assets can assure the payment of the arbitration costs, being any final award effectively enforceable under the NY Convention. As stated by commentators *[t]he lack of enforcement outside the forum of jurisdiction which was the concern at the root of cautio judicatum solvi has largely been mitigated by the (...) New York Convention* [Gu, p.191].
65. Lastly, Respondent doubts Claimant's financial stability since it sought outside funding for these proceedings. However, *procuring external funding of legal costs should not usually be proof that circumstances have materially changed in a way that is commercially unforeseeable* [Task Force Report, p.17, ¶C.2(a)]. Moreover, Claimant was able to commence the arbitration without any third party support [PO2, p.59, ¶29] and it has not, as abovementioned, defaulted on any of its obligations, reiterating its sound financial situation [Darwazeh & Leleu, p.144, ¶3.2(b)(i)].
66. In addition, Claimant highlights that the fact that it has previously resorted to third party funding in investment arbitrations – where, as it is general knowledge, third party funding is frequently used [Brekoulakis, p.1] – or sought it in the instant proceedings should not be construed as indicating any financial instability. In the present case, Claimant's search for funding was not due to an unusual or unexpected strained liquidity but rather related to its business model. There are many reasons for which a parties seek litigation funding as to *maintain cash-flow and offset the risk of an uncertain arbitration outcome* [*idem*] or to *even out the litigation*

line item on balance sheets since funders can offer a fixed payment system for managing litigation costs [Sahani II, p.396]. Indeed, Claimant's decision to search for outside funding represents a legitimate business one, justified, amongst other things, by its business practice and, in particular, its cyclical and temporary strained liquidity.

67. Finally, Claimant's financial statements evidence its permanent capacity to raise liquid funds throughout the years from both its parent company and financing institutions [PO2, p.59, ¶28]. Party's ability to get credit from external sources is also an important factor to be taken into account as it evidences its borrowing power [e.g. *Kufaan Publishing Ltd v. Al Warrack Bookshop Ltd*; Gu, p.190; Karrer & Desax, p.346].
68. For all given reasons, Claimant's financial situation is nothing but stable. Hence, Respondent's arguments shall be disregarded, and Claimant shall not be ordered to provide security for costs.

iv) Claimant did not conceal its financial situation nor carried out a misleading conduct

69. Respondent further argues that Claimant concealed its financial situation by not revealing the outcome of previous arbitrations or the fact it tried to obtain third party funding for these proceedings. On this regard, Respondent invokes – without any substantiation – an alleged transparency trend in international arbitration based on a single non-applicable legal source. Lastly, Respondent tries to justify it was only able to file its Request for Security for Costs after the conclusion of the Terms of Reference due to Claimant's conduct.
70. However, Respondent fails to prove not only Claimant's duty of disclosure, but also its inability to acknowledge those facts before the conclusion of the Terms of Reference, being its mere allegations insufficient for the Tribunal to order security for costs.

a) Transparency in international arbitration

71. Firstly, the circumstances under which a duty to reveal external funding in arbitral proceedings may be sustained are not present in the instant case. Upfront disclosure is associated with the integrity of the arbitral system and aims at gauging any potential conflicts of interest between the arbitrators and the funder as exemplified by the IBA Guidelines on Conflicts of Interest [Darwazeh & Leleu, p.135, ¶3.1; Blavi, ¶¶5-7; Maniruzzaman, ¶4]. These grounds for disclosure do not relate in any way to Respondent's argument; on the contrary, it appears that Respondent is invoking disclosure for personal interest rather than in view of the arbitration's legitimacy.

72. Respondent advocates that, according to an alleged general trend to transparency in arbitration, arbitral awards should be made available to the general public and, specifically, Claimant should have disclosed the outcome of previous arbitrations [Req. SfC, p.46, ¶4]. However, this notion disregards one of the main features of international arbitration – confidentiality – *whereby a party commits itself to the good faith resolution of specified disputes with another party in a single, centralized, commercially-sensible forum* [Born, p.2818]. Courts and commentators have recognized that the obligation of confidentiality encompasses the award and may only be breached if it is reasonably necessary [*Dolling-Baker v. Merrett; Ali Shipping Corp v. Shipyard Trogir; Myanma Yaung v. Win Win*; Rubino-Sammartano, pp.800&804]. In fact, the Rules applicable to the current arbitral proceedings expressly provide for confidentiality [art. 14 CAM-CCBC Rules].
73. Conversely, UNCITRAL Rules on Transparency evidence not a general but a limited transparency trend in arbitration, restricted to *the settlement of Treaty-based investor-State disputes to take account of the public interest involved in* [Johnson & Bernasconi-Osterwalder, p.3; *Reports of the United Nations Commission; Bewater Gauff Ltd v. United Republic of Tanzania*]. Art. 1(1) Rules on Transparency provides for its applicability to *investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”) concluded on or after 1st April 2014 unless the Parties to the treaty have agreed otherwise*.
74. However, should such reasoning be deemed as insufficient since the proceedings which opposed Claimant to the government of Xanadu are only referred to as an investment dispute and not treaty-based or initiated under the UNCITRAL Arbitration Rules, the Tribunal must note that those proceedings took place prior to the entering into force of the Rules on Transparency, as the final award was rendered in 7 June 2010 [PO2, p.61, ¶39(d)]. In any case, when and where such rules do apply or in investment arbitration generally, transparency is limited and specifically motivated by inherent public policy interests of the involved state such as the government’s conduct and the budgetary implications of the arbitration outcome [OECD, p.2, ¶1; Teitelbaum, p.55]. None of these reasons or the requirements set for the application of the rules can be found in the any of the proceedings.
75. Besides, the underlying argument in favour of transparency in arbitration is the concern of *fairness and quality of arbitrators, proceedings and awards and contribute to the development and evolution of arbitration* [Villaggi, p.20, ¶5], monitoring of arbitrators decision-making process [Rogers, pp.1310, 1328]. Respondent raises no similar justifications when referring to its alleged transparency expectation [Req. SfC, p.46, ¶4]. Instead, Respondent is motivated by its very own contractual commercial risk.

76. Lastly, a disclosure of the previous arbitral awards would possibly require the consent of the disputing parties [*Ali Shipping Corp v. Shipyard Trogir*] or the allowance of the arbitral institution involved [Redfern & Hunter, Chapter 2, ¶2.179]. Thus, as widely accepted in institutionalized arbitration, the disclosure of the outcome of the previously mentioned disputes would not unilaterally depend upon Claimant [e.g. art. 14.1.1 CAM CCBC-Rules; art. 27(4) AAA Rules; art. 30.3 LCIA Rules; art. 8.2 MCA Rules].

b) Availability of the information concerning Claimant's financial situation

77. Claimant's financial statement published in April 2010 – before the conclusion of the Contract [PO2, p.54, ¶1] – reflected its expectations concerning the outcome of the previous arbitrations [PO2, p.59, ¶28, Cl. Ex. C9, p.50, ¶3], quite accurately so: the award in the first arbitration was approximately the amount anticipated and, in the second, Claimant was also awarded the exact expected amount, as evidenced in the 2013 balance sheet [PO2, p.58, ¶28]. Apart from that, Claimant did not carry out a misleading conduct by creating the impression that an award of around US\$ 100 million would be rendered in the first arbitration with the government of Xanadu [PO2, p.60, ¶34]. Such fact would nonetheless always be irrelevant for the decision on the application for security for costs since Claimant's current financial stability does not depend – and it never did – on such award.

78. Therefore, no exceptional change of circumstances occurred since the conclusion of the Contract to support the application for security for costs [cf. *ICC Case No. 7047*]. As discussed, Claimant has not given misleading information about its assets [Rubins, p.32] nor started bad faith manoeuvres in order to avoid a rendered award on costs such as, for instance, deliberately organizing its own insolvency divesting itself from its assets [Ho, p.337] or transferring its domicile to escape enforcement [Berger, p.12].

c) Timeliness of Respondent's Request for Security for Costs

79. Respondent has failed to timely file an application for security for costs. The need for such application should have been considered by Respondent before filing its Answer to the Request for Arbitration and agreeing on the Terms of Reference. As has been demonstrated above, Respondent had, at the time of before filing its Answer to the Request for Arbitration, access to the information it used to ground its application of security for costs.

80. Indeed, irrespective of the disclosure of the outcome of the arbitration with the government of Xanadu, the award had impact in Claimant's shares [Res. Ex. R6, p.47], fact that Respondent could have been aware of without further details concerning the aforementioned arbitration.

81. Accordingly, the lateness of the application for security for costs shall be taken into account by the Tribunal [*Keary Developments v. Tarmac Constructions*] since Respondent had previously had the opportunity to file such request. Respondent's behaviour may thus be interpreted as an attempt to *stifle the claim* [Gu, p.195].
82. Notwithstanding, the Terms of Reference is considered a *core document* in arbitration, defining and setting forth the subject-matter and the rules of the proceedings [Straube/Finkelstein/Filho, p.98]. After its conclusion, both parties and arbitrators are bound to its scope and limits [Art. 4.21 CAM-CCBC Rules; Straube/Finkelstein/Filho, p.111]. Accordingly, security for costs shall not be ordered as it falls outside of the scope of the Terms of Reference, which only mention that costs and expenses concerning the proceedings are to be dealt with in the final award [ToR, p.43, ¶12.3]. Hence, the Tribunal shall disregard Respondent's request.

v) Respondent's breach of contract contributed to Claimant's strained liquidity

83. Respondent contributed to extend Claimant's temporary strain in liquidity considering that it has refused to comply with the Contract and pay the outstanding amount of US\$ 2,387,432.80 [Answer to Req. SfC, p.49]. In international arbitration practice, respondent's behaviour is taken into account by the arbitral tribunal. This raises the fact that respondent may not be entitled to protection if it is found, even partially, responsible for claimant's financial situation [*Farrer v. Lacy, Hartland & Co.*, Born, p.2496; Rubins, p.376]. Respondent's refusal to comply with its contractual obligations shall weight in the Tribunal's decision as Claimant's liquidity is also owed to *the very conduct of the respondent that has given rise to the arbitration* [Redfern & Hunter, ¶5.35]. Had Respondent not refused to pay the due price, Claimant would not have, at the moment, a strained liquidity, nor initiated these proceedings and consequently none of the parties would have incurred in arbitration costs. Therefore, security for costs shall not be ordered since it would be *particularly unfair to punish the Claimant for a lack of resources allegedly imputable to the respondent* [Rubins, p.362].

CONCLUSION: THE TRIBUNAL SHALL NOT ORDER CLAIMANT TO PROVIDE SECURITY FOR COSTS AS RESPONDENT FAILED TO PROVE ANY EXCEPTIONAL CIRCUMSTANCE

84. Several authors have agreed that Respondent must *demonstrate that claimant will be unable to pay, not a probability of the same or show that there is a real risk that the claimant will not comply with any costs award made against it* [Gu, p.189; Redfern & O'Leary, p.411].

85. Respondent has, however, failed to prove Claimant's inability to pay and to present concrete facts or other exceptional circumstance of unwillingness to comply with an eventual unfavourable award. Altogether, the facts demonstrate that there is no reasonably established *fumus boni iuris*, urgency, imminent danger nor risk of irreparable harm supporting the request [Berger, pp.9-10; Redfern & O'Leary, p.410]. Therefore, such application shall be disregarded.

C. Even If The Tribunal Considers The Requirements By Any Means Fulfilled, The Amount Requested Shall Be Reasonably Reduced Regarding The Exceptional Nature Of The Measure

86. Should the Tribunal find the application for security for costs grounded, Respondent fails to assure that the estimated amount actually corresponds to what it could reasonably expect to incur in throughout this arbitration.
87. Respondent requests the Tribunal to order Claimant *'to provide security for the costs Respondent is likely to incur in this arbitration, including the costs which Respondent has to pay to the Tribunal as well as its legal costs for the services of Mr Langweiler and expenses likely to be incurred for the oral hearing for witnesses and experts'*, overall estimated to a minimum of US\$ 200,000 [Req. SfC, p.46, ¶1].
88. The order of security for costs *requires a Claimant to post a security equivalent to the respondent's likely costs* [Kirtley & Wietrzykowski, p.21].
89. The fact that Respondent does not enclose any documentary evidence supporting that the expected cost should be deemed as a relevant factor in order to reasonably reduce the amount requested, especially in what concerns costs related with attorney's fees. In fact, the costs due to the arbitral tribunal are the only ones that can be objectively predictable and impartially accounted for both parties. As far as attorneys' fees, *party representation costs may vary widely for of a number of reasons, including the vastly different conditions under which lawyers work around the world* [Karrer & Desax, p.339], namely parties' legal backgrounds or domestic usages. That being said, the applicant's own procedural strategy shall not be secured under an exceptional measure whose main feature is reasonableness. In the case at hand, it is not possible to ascertain whether the merely estimated amount of \$200,000 includes an unproportioned contingency fee – which is not commonly accepted in global practice [Wolfram, pp.526-527; Kritzer, pp.258 & 2590] – for Mr Langweiler.
90. The Tribunal is not bound to the request and is *free to decide that some of the costs claimed should not be reimbursed or that the sums requested (e.g. lawyer's fees) should be reduced* due to reasonable concerns [Verbist/Schäfer/Imhoos, p.221; CIARB, p.13, ¶2(a); Martowski, p.7].

91. In conclusion, since the requested amount is not properly supported by evidence it shall be reasonably and proportionally reduced [cf. *Hart Investments Ltd v. Larchpark Ltd*].

III. CLAIMANT IS ENTITLED TO FULL PAYMENT OF THE PURCHASE PRICE IN ACCORDANCE WITH ARTICLES 53, 54, 61 AND 62 CISG

92. Claimant is entitled to full payment of the purchase price for the fan-blades, including the levy deducted by the Central Bank as contractually agreed and provided for in the CISG and UNIDROIT Principles.

93. The case beforehand mainly relates to the interpretation of the Contract according to the Parties' will. Therefore, since the Parties **(A)** did not agree on the application of a fixed exchange rate for the fan-blades and **(B)** expressly provided that Respondent shall bear the transfer costs, **(C)** the latter, by not complying with its obligations as the buyer, has breached the contract and **(D)** shall be ordered by this Tribunal to pay the still outstanding purchase price of US\$ 2,387,432.80 pursuant to articles 53, 54, 61 and 62 CISG.

A. The Parties Did Not Agree On A Fixed Exchange Rate For The Whole Contract

94. Respondent claims that the Parties agreed on a fixed exchange rate regarding the whole Contract, applicable to both the fan-blades and clamps, hence alleging that no payment is due [Ans. SoC., p.25, ¶¶15-17]. However, when drafting the addendum to the main Agreement, the Parties intended to fix an exchange rate only to the additional purchase of the clamps. Furthermore, Respondent could not have been unaware of Claimant's intent when negotiating both the main Contract and the addendum. Therefore, the Tribunal shall disregard Respondent's arguments as they do not accompany the **(i)** Parties' previous conduct, negotiations and practices. Moreover, **(ii)** the conduct of the Parties when drafting and negotiating the Contract itself leads to the understanding that the DSA and the addendum are two separate contracts with their own rules.

i) In their previous co-operations, the Parties did not fix an exchange rate

95. Claimant's main corporate object is the highly-specialized manufacture of fan-blades for jet engines [Req. Arb. p.3, ¶1]. Thus, Respondent could not have been unaware of the fact that its request for clamps fell outside Claimant's usual *modus operandi*, not to mention that all previous contracts concluded between the Parties naturally dealt only with fan-blades.

96. Previous to the case at hand, these previous contracts were celebrated and performed while the Parties were still both subsidiaries of Engineering International SA [Req. Arb. p.3, ¶2]. The first contract, signed in March 2003, regarded the TRF 155-II fan-blade, whereas the

- TRF 163-I fan-blade contract was signed on 3 January 2005 [PO2, pp.54&55, ¶5]. In both cases, exchange rates were only brought up in Claimant's invoices [*idem*].
97. Therefore, even though it is uncontested that certain parts of the DSA – such as the price calculation mechanism – were formulated according to the basic principles agreed for the joint development and some of the contractual provisions were contained in the two previous contracts, no express provision regarding the exchange rate was ever included [Cl. Ex. C1, p.8, ¶5; Cl. Ex. C2, p.10; Answer Req.Arb., p.24, ¶8].
98. Yet, Respondent claims that the applicable exchange rate has always been the one at the time of contracting [Ans. Req.Arb., p.24, ¶8]. This is simply not true. At the time of performance for both contracts, Engineering International decided to adopt whichever exchange rate was most profitable for Respondent [PO2, pp.54&55, ¶5], a method viewed by Engineering International SA *as an important tool in their tax optimization strategy* [PO2, p.55, ¶5]. This is clearly not the same as setting a fixed exchange rate: for the TRF 155-II contract, the circumstances favoured the use of the exchange rate at the time of contracting; while for the TRF 163-I, the exchange rates at the time of contracting and of performance were identical [PO2, p.54, ¶5] – and so, for mere convenience or due to its triviality, the exchange rate was set in the same way as the TRF 155-II contract. Thus, it cannot be concluded that the previous contractual practice between the Parties operated on a fixed exchange rate basis.
99. In addition, when the 2010 Contract was concluded, the Parties were no longer subsidiaries under the same group of companies [PO2, p.54, ¶1] so, there was no reason why there ought to be a one-sided preference for Respondent's profitability or risk taking.
100. Finally, there is no fixed usage regarding the application of exchange rates in the aircraft industry [PO2, p.56, ¶13]. Respondent cannot argue that not adding an express provision regarding the fixed exchange rate was due to a mere oversight [Answer Req.Arb., p.25, ¶10].

ii) The Contract and the addendum are separate agreements

101. Pursuant to article 8(1) CISG, the Parties' subjective intent when drafting the main Contract and the addendum must be drawn from *where the other party (...) could not have been unaware of what that intent was* [cf. *Office furniture case*]. Commentators have agreed that article 8 CISG foresees that all extrinsic evidence, including the Parties' declarations and actions, may be considered to establish and interpret the terms of a contract, which means that provisions in writing are but one of the many circumstances to be considered [*CISG Advisory Council Opinion No. 3*, ¶2.2; Honnold, p.117, ¶105; *Case involving machine for repair of bricks*].
102. Thus, considering the Parties' behaviour, Respondent knew or could not have been unaware of Claimant's intention to agree on a fixed exchange rate for the clamps only, whether

- through the establishment of different price calculation methods and distinct subject matters, or the fact that the addendum was written in much less detailed terms, as opposed to the Contract, which was carefully negotiated [Req. Arb. pp.4-7, ¶¶3, 6, 21; Cl. Ex. C1, p.8].
103. Should the Tribunal find the Parties' subjective intent when drafting the addendum insufficient, it shall adopt the objective approach under article 8(2) CISG. Any reasonable person of the same kind, in the same business field and given the specific circumstances at stake, would realize that Claimant's conduct could not have been understood otherwise [*Crudex Chemicals Oy v. Landmark Chemicals S.A.*; Honnold, p.257].
104. Considering the criteria for article 8(3), Respondent cannot advance its point of view by contradicting its own conduct. In fact, when negotiating Section 4 of the Contract, the exchange rate was, as usual, left unmentioned. Therefore, the addendum cannot determine the Respondent's intent when signing the main Contract, as a contradictory conduct by a party bars that party from relying on a different meaning of its former conduct – prohibition of *venire contra factum proprium* [cf. *Conveyor band case*; *Furniture leather case*].
105. Furthermore, article 9(1) CISG, *which addresses industry practices and prior dealings between the parties*, states that parties are bound by any usage to which they have agreed and any practices which they have established between themselves [cf. *Magnesium case*; *Memory module case*].
106. Finally, the standard *contra proferentem* principle – foreseen by both article 4.6 UNIDROIT Principles and article 8(2) CISG – shall be considered by the Tribunal. In case a contract is deemed ambiguous, its interpretation ought to go against the party who drafted the contract [cf. *Automobile case*]. As found, not only Section 4 of the Contract regarding the Purchase Price – in which an eventual fixed exchange rate was logically to be included – but also the addendum regarding the purchase of the clamps was drafted by Respondent [PO2, p.55, ¶6; Res. Ex. R2, p.28]. Consequently, in the absence of concurring intent, the Tribunal shall not favour Respondent's now alleged intention.
107. Nevertheless, as discussed in detail below, the different price calculation for each good, the pre-arranged two separate invoices, the sufficiently clear terminology and conduct adopted by both Parties, not only demonstrate that they unequivocally intended to conclude the addendum as a separate contract, but also that the fixed exchange rate was to be limited to the purchase of the clamps.
- a) The agreements have substantially different purposes and objects
108. The Contract serves as the basis for the development of a state-of-the-art fan-blade while the addendum was concluded solely for the purchase of clamps. Indeed, the purchase of the

clamps was so distinct from the Contract that Respondent even sought another producer [Req. Arb. p.5, ¶8].

109. The Contract signed by the Parties in 2010 remains unchanged by the addendum as its terms and conditions were not modified nor subjected to its provisions. As a matter of fact, the *main Agreement* actually framed all terms to the addendum, considering that the latter establishes **other terms** *as per the main Agreement* [Cl. Ex. C2, p.11]. In a similar fashion, the fact that the clause fixing an exchange rate for the clamps is set forth independently *after* the quoted statement again proves such intention to separate the agreements.

110. Thus, if at the time of the conclusion Contract Respondent did not mention anything similar to an exchange rate, let alone a fixed one, it is not in the scope of the new contract, i.e. the addendum, that Respondent would come to unilaterally and ambiguously define a crucial element that had never been dealt with.

b) Different price calculation for the fan-blades and for the clamps

111. As opposed to what was agreed to on the main Contract, where the price was determined on a “cost + profit basis”, the price calculation for the clamps was otherwise determined on a cost basis [Cl. Ex. C2, pp.10&11; Cl. Ex. C5, p.14; Res. Ex. R2, p.28].

112. The Parties concluded the Contract as having as the sole subject the purchase of fan-blades. Had the Parties intended to merge the addendum with the main Contract, they would have simply referred to the price calculation provision of the latter. Instead, they applied a different price calculation method to the clamps which is, in fact, not as favourable for Claimant as the method used to calculate the price for the fan-blades. Such business option is due to the fact that the purchase of the clamps represents a matter of lower significance in strict comparison with the fan-blades [Req. Arb. p.7, ¶22].

113. Besides, Mr Lee was asked to prepare two separate invoices for each of the goods [Cl. Ex. C4, p.13] which also demonstrates Claimant’s indubitable intention to apply two different price calculation methods and ultimately, different exchange rates, to each contract.

c) The Parties’ intention to restrict the use of US\$ 1 = EQD 2.01 to the addendum is clear

114. The fixed exchange rate of US\$ 1 = EQD 2.01 for the purchase of the clamps, as drafted by Respondent and envisioned in the addendum, was indeed accepted by Claimant. However, the email exchange between Claimant and Respondent clearly evidences the Parties’ intention to apply a fixed exchange rate only to the purchase price of the clamps and not the fan-blades.

115. Firstly, the subject of the 22 October 2010 email sent by Respondent to Claimant, *Re: Clamps* [Res. Ex. R2, p.28], illustrates the scope of what was specifically being discussed between the Parties. Even Respondent's CEO, Mr Paul Romario, considered that *the easiest way to regulate the purchase of the **clamps** is to sign an addendum* to the main Contract [*idem*].
116. Also, the different letter case adopted for the word 'agreement' on the addendum signals that the Parties intended to agree on a fixed exchange rate only for the clamps: whereas in the reference to the main Contract, 'agreement' is written with a capital letter – *other terms as per the main Agreement* –, in the clause providing for a fix exchange rate, the same word is written in lowercase – *The exchange rate for the agreement is fixed to (...)* [*idem*].
117. The same intention can be apprehended in the email sent by Claimant on 24 May 2010 [Res. Ex. R4, p.30], answering Respondent's proposal for the addendum. Claimant's intention to limit the addendum's scope, as well as the application of the fixed exchange rate, is very perceivable: *I think your suggestion to link the agreement, in regards to the clamps to the contract in regards to the TRF 192-I fan blades is a sensible one* [*idem*].
118. The fact that Claimant replied that it *also agree[d] to the fixed exchange rate* indicates that such clause had no connection to the main Contract. In reality, Claimant agreed on a fixed exchange rate for the clamps in view of good business, as had happened in previous contracts with third parties regarding other matters [PO2, p.56, ¶9].
119. Furthermore, the fact that Mr Mario Lee – who was not familiarized with the specific terms negotiated for both agreements when replacing Mr Kwang, the employee actually responsible for the financial side of the Contract – was given specific instructions on how to finalize the two separate invoices evidences Claimant's managerial understanding that the Contract and the addendum had different scope and purpose [Cl. Ex. C4, p.13].

iii) The exchange rate applicable to the Contract is the one at the time of Claimant's performance

120. The applicable exchange rate for the purchase of the fan-blades is the exchange rate at the time of Claimant's performance: US\$ 1 = EQD 1.79 [Cl. Ex. C4, p.13]. The production cost per fan-blade amounts to EQD 19,586.00, which multiplied by the current exchange rate at the time of performance, results in a final cost of US\$ 10,941.90 per blade [Cl. Ex. C5, p.14].
121. The Contract was concluded without a clause regarding the exchange rate. Had Respondent intended a fixed exchange rate for the entire Contract, the inclusion of such an important clause would have to be explicit, both in the written contract and during negotiations – all the more because it went against the Parties' previous reliance on using floating exchange rates. The same approach was adopted by a German Court that held that *[i]f the parties*

anticipate currency fluctuations they may account for it by means of a special clause in the contract. [Germany 27 January 1981]. Such clause would then be indisputable evidence of Respondent's alleged intention under article 8 CISG. Instead of such a clause, the parties have an essentially more comfortable and practical way to avoid the effects of currency fluctuations. Instead of using the currency of the place of payment or the place of delivery, they can agree to use the currency of a third country [idem].

122. Respondent insisted on pricing in US\$ [Req. Arb. p.4, ¶5], thereby choosing a currency of a third country instead of a fixed exchange rate as the risk mitigation mechanism to limit currency exchange fluctuations [UNIDROIT Secretariat, p.7, ¶17]. Thus, contrarily to what it is now arguing, Respondent foresaw or ought to have foreseen the possibility of currency devaluations. Had the Parties agreed on a fixed exchange rate, as claimed by Respondent, there would have been no concern over the fixation of the price in US\$.
123. Hence, the lack of provision in the Contract regarding an exchange rate clause entails the application of article 54 CISG and article 6.1.9 (1)(b) UNIDROIT Principles. For all intents and purposes, the parties have included an *effectivo* clause – a clause that stipulates that payment must be made in the expressed currency [Osuna-González, pp.320-322]. In regard to the exchange rate the UNIDROIT Principles provide that it *shall be the prevailing rate of exchange at the place for payment when payment is due [idem]*.
124. In the present case, payment was due on 15 January 2015 [Cl. Ex. C5, p.14]. As the current exchange rate at the time of delivery was identical to that at the time of production [idem], the rate US\$ 1 = EQD 1.79 is the one applicable to the fan-blades.
125. In conclusion, the Parties intended to apply a fixed exchange rate only to the addendum. Respondent has no ground to claim that the invoices Claimant sent were the lawful ones. Claimant is thus entitled to the outstanding amount of US\$ 2,285,240.00 which corresponds to the remaining purchase price when applying the current exchange rate referred.

CONCLUSION: THE PARTIES INTENDED TO APPLY A FIXED EXCHANGE RATE ONLY TO THE ADDENDUM DUE TO THE ADDITIONAL PURCHASE OF THE CLAMPS

B. Respondent Shall Bear The Transfer Costs Deducted By The Central Bank

126. There is no question over the fact that Respondent must pay the levy deducted. Regulation ML/2010C entered into force in January 2010, prior to the conclusion of the Contract – which not only expressly determines that Respondent ought to bear the deducted transfer costs (*i*), but also provides the applicable law under which it is specifically governed that the

buyer shall comply with its obligation to take all necessary steps to ensure full payment goes through *(ii)*.

i) The Contract expressly determines Respondent's obligation to bear the bank charges incurred with the transfer of the purchase price

127. In the case at hand, Section 4 of the Contract states that *the bank charges for the transfer of the amount are to be borne by the BUYER* [Cl. Ex. C2, p.10, Section 4.3]. Once more, Article 8 CISG sets out to determine the Parties' intent when drafting the contract, firstly according to a *subjective test* and, if insufficient, to an *objective analysis* [CISG Digest, pp.55&56, ¶¶6&11; Farnsworth, pp.98&99, ¶¶2.3&2.4].
128. First off, Section 4, including the provision on bank charges, was taken from the agreement between the Parties regarding the TRF 155-II of March 2003 [PO2, p.55, ¶6]. The fact that the Parties used the same provision after more than a decade assured Claimant that any change of circumstances in Equatorianian law would not limit its entitlement to and reliance on full payment. In other words, the very broadness of the term *bank charges* can only be aimed at including any bank charge, whether ordinary or extraordinary, contrarily to Respondent's allegations [Answer Req. Arb., p.26, ¶¶18&19]. The inclusion of such clause serves to prevent that any potentially changeable situation, such as the emergence of new laws or regulations, would cause unnecessary burden on the seller and discharge the buyer from its obligation to bear the bank costs. Hence, this was the *model of conduct socially accepted by the parties at the time of the conclusion of the contract* [Electro-erosion machine case].
129. It is uncontested that this business practice differs from Claimant's dealings with third parties in the two instances Respondent mentioned [Ans. Req. p.26, ¶19; PO2, pp.55-56, ¶¶8&9]. In the contracts concluded with JetPropulse (May 2010) or JumboFly (December 2011), Claimant did not request the payment of bank charges simply due to the fact that those did not contain any specific provisions regarding bank charges [*idem*]. Therefore, Claimant's previous conduct shall not be considered as its usual practice since such approach was reasonably justified by Claimant's legitimate desire to preserve long-standing relationships with both clients [PO2, pp.55-56, ¶¶8&9].
130. Rather, in the present case, the Parties concluded a contract whereby they both agreed on explicitly establishing that Respondent should bear the bank charges. Had the Parties wished to include exemptions to the provision regarding bank charges, they would have taken concrete steps to do so at the time of contracting or face possible consequences.
131. Indeed, when Claimant noticed the mistaken invoice and subsequent short payment, it immediately informed Respondent while simultaneously calling upon itself to bear *all the*

additional costs incurred with the following transfer [Cl. Ex. C5, p.14]. A *reasonable person of the same kind* and in the same circumstances could only have logically and objectively concluded that the intention of both Parties was that Respondent was the one to bear any bank charge that could eventually be charged at the time of payment [CISG Digest, p.56, ¶11].

132. Therefore, Respondent is obligated to pay the levy deducted in the amount of US\$ 102,192.80 under the Contract.

ii) Both CISG and UNIDROIT Principles state that the buyer shall take the necessary steps to comply with its obligation to pay the price

133. The fundamental contracting principle according to which each party has to bear the costs of its obligations is reflected throughout the CISG and UNIDROIT Principles [CISG Digest, p.45, ¶29; *Machines, devices and replacement parts case*]. Accordingly, while Claimant handled most of the risk of development and production and potentially incurring in expenses due to the preparation for the delivery [Req. Arb. pp. 4, 7, ¶¶5, 21; Honnold, p. 351], Respondent's obligation did not deplete at effecting payment, yet also including making the proper arrangements for payment and bearing all consequent costs associated to such [Cl. Ex. C2, p.10, Section 4.3; Osuna-González, p.303].

134. In fact, article 54 CISG states that the buyer's obligations to pay the contract price extends beyond the abstraction of owing money – such obligation includes taking whatever steps and costs that are necessary to ensure that payment is actually made, whether legal or contractual [Gabriel, p.273; *ICC Award 00.00.1992*].

135. Also in line is article 6.1.11 UNIDROIT Principles, when considering which party shall bear costs, it is usually the same party that has to pay them. In this case, Respondent is the party that has to bear the costs for the bank charge and pay for them seeing that there is no express provision that burdens a specific party with the payment otherwise; thus, the buyer must bear the costs of the bank charges [UNIDROIT Principles, p.197].

136. Respondent's unwillingness to bear the levy charged under Regulation ML/2010C consists of failure to pursue its buyer's obligation of enabling or performing the required steps to pay the full price under article 54 CISG, regardless of the fact that *no comparable rule exists in any country known to Respondent* [Answer Req.Arb., p.26, ¶18; PO2, p.55, ¶8] – as there was an explicit commitment by the Parties to achieve the result stated in the contract, in addition to the fact that it was within the buyer's control to know of and pay the levy [Osuna-González, p.304; CISG Digest Art. 54, ¶5].

137. In other words, Respondent cannot claim that it is excused from such payment *as the buyer must make his best reasonable effort to pursue compliance with the legal requirements full heartedly, with a*

view to actually obtaining the desired result [Osuna-González, p.305; art. 5.1.4(2) UNIDROIT Principles; DiMatteo, ¶IV 1].

138. Respondent ought to have known of Regulation ML/2010C for various reasons. As an experienced party in international business transactions, Respondent was expected to perform due diligence regarding the situation in Equatoriana, especially considering that it was the first contract since their dissociation from Engineering International.
139. First, Regulation ML/2010C entered into force on 1 January 2010, eight months before the Contract was signed, making it a clearly foreseeable provision to take into account at the time of contracting [PO2, p.55, ¶7]. Second, the foreign and Mediterranean press did report that the Equatorianian government was adopting measures to tackle money laundering on January 2010, which makes it all the more reasonable to keep an eye on Equatorianian government policies [*idem*]. Finally, the Equatorianian political scenario has changed considerably since 2010, leading to dramatic changes not only to the exchange rate, but also regarding internal and external economic policy, which should trigger crucial up-to-minute analysis [PO2, p.56, ¶12]. Therefore, Respondent did not even attempt to fulfil the requirements under article 54 CISG since the breach was clearly foreseeable and avoidable.
140. The case at hand can be compared to *Russia 17 October 1995 Arbitration proceeding*. In that case, the tribunal held that simply requesting the bank to transfer the amount payable under the contract (which was similarly lacking) was insufficient to fulfil the requirement of article 54 CISG. The same conclusion can be applied to the present case. Respondent merely requested the bank to transfer the sum after receiving the invoices, therefore not displaying any particular concern with the information that had been internationally conveyed regarding the adoption of measures against possible money laundering in Equatoriana [PO2, p.55, ¶7].
141. Any failure to comply with obligations under the contract shall be deemed a contractual non-performance [*Arbitral Award 30.11.2006*]. Thus, non-compliance with formalities required for the buyer to effect payment pursuant to article 54 is also considered breach of contract, since these formalities *are part of the principal obligation to effect payment; therefore, if a buyer fails to comply with any of these enabling steps he would be in breach of his contractual obligation to pay will entitle the seller to exercise the remedial rights* [Osuna-González, p.304; Gabriel, p.273; Lookofsky, ¶239].
142. Thus, Respondent did not follow the necessary steps to enable full payment to be made as bearing the levy is subsumed in the buyer's obligation to pay the price due to Claimant.

CONCLUSION: RESPONDENT MUST DUTIFULLY BEAR THE BANK CHARGES DEDUCTED UNDER REGULATION ML/2010C AS AGREED BY THE PARTIES

C. Respondent Failed To Perform Its Contractual And Legal Obligations

143. Respondent failed to perform its obligations as the buyer under the Contract and the CISG.

Once a contract is concluded, the parties are subject to the contract's binding effect and should perform their obligations accordingly [*Silk shirts case*]. Firstly, Respondent failed to pay the full purchase price for the 2,000 fan-blades in the amount of US\$ 22,723,800 calculated in accordance with the exchange rate at the time of Claimant's performance [Req. Arb., p.5, ¶¶10-12; Cl. Ex. C5, p.14]. And secondly, Respondent did not bear the bank charge for the transfer in the amount of US\$ 102,192.80 [Req. Arb., p.5, ¶15]. Therefore, considering that, according to articles 53 and 54 CISG, payment of the price is the buyer's foremost obligation in international sales contracts, Respondent incurred in a breach of contract, which *under the Convention (...) comprises any non-fulfilment of contractual obligations established not only in the contract (...), but also in the Convention, established practices and usages (art. 9)* [Chengwei II, ¶d].

144. According to the Contract, *the price is due upon delivery of the fan blades* [Cl. Ex. C2, p.10, Section 4, ¶4.2]. Following the delivery of the fan blades *in good order* on 14 January 2015 [Req. Arb. p.5, ¶9; Cl. Ex. C3, p.12], the correct invoices were sent to Respondent on 15 January 2015 [Cl. Ex. 5, p.14] – being this the date payment in full was due.

145. Despite Claimant's attempts to amicably compel Respondent to perform [Cl. Ex. C5, p.14; Cl. Ex. C6, p.15], only US\$ 20,336,367.20 was credited to Claimant's bank account [Cl. Ex. C6, p.15]. Therefore, Respondent did not fully pay the price in time. Such failure entitles Claimant to require the specific performance of Respondent's obligation, being Claimant's primary concern the performance of the Contract, embodied in article 62 CISG [Knapp, p.452, ¶1.3] and corroborated by Claimant's demeanour.

D. Claimant Is Entitled To Require Full Performance Of The Contract Pursuant To Articles 61.1(A) And 62 CISG

146. Subject to article 61 CISG, the natural remedy in case of non-payment of the due price is specific performance, expression of the maxim *pacta sunt servanda* [Chengwei I, ¶4.1].

147. As provided for in article 62 CISG, the seller is entitled to the due purchase price by the buyer under the contract. In fact, Claimant simply requests Respondent to comply with its very own buyer's obligations under the Contract: the payment in full of the purchase price for the fan-blades. It is not requesting the constitution of any other right, but simply a pursuance of its initial one under the Contract [Chengwei I, ¶4.1; Knapp, p.452, ¶2.2].

148. Claimant, thus, requires the specific performance of Respondent's obligation to pay the full purchase price. As demonstrated below, *i)* Claimant has fully performed its own contractual obligations. Therefore, *ii)* specific performance is a viable remedy both under the CISG and UNIDROIT Principles [arts. 61 CISG and 7.2.1 UNIDROIT Principles, respectively] since: *iii)* it is factually possible and *iv)* the fixation of an additional time for Respondent's compliance is not inconsistent with such remedy. Therefore, Claimant shall be awarded such remedy as it has proven its claims are grounded [cf. *Russian Int'l Arb. Court CCI*].

i) Claimant has fully performed its own contractual obligations

149. Claimant produced the 2,000 fan blades and 2,000 clamps and delivered both in a timely and regularly manner to Respondent [Req. Arb. p.5, ¶9], having the latter confirmed that the goods were in conformity with the required specifications in the Contract [Cl. Ex. C3, p.12]. Therefore, by complying with its own contractual obligations, Claimant is entitled to request full performance of Respondent's consideration.

ii) Specific performance is the viable and natural remedy under both the CISG and UNIDROIT Principles

150. Article 61.1(a) CISG adopts a single consolidated set of remedial provisions for breach of contract by the buyer. In the case at hand, the buyer, namely the Respondent, failed to perform its obligation to pay the price under the contract, which enables Claimant, the seller, to exercise the rights provided in articles 62 to 65 CISG.

151. Claimant resorted to the remedy provisioned in article 62 [Req. Arb., p.6, ¶20] which enshrines its right, as the seller, to require specific performance [cf. *COMPROMEX case; Russian Trib. Int'l Comm. Arb. Award 13.01.2006; Cour de Justice de Genève 20.01.2006*]. Article 7.2.1 UNIDROIT Principles also recognizes *the generally accepted principle that payment of money which is due under a contractual obligation can always be demanded and, if the demand is not met, enforced by legal action (...) irrespective of the currency in which payment is due*.

152. Claimant's right to require payment of the price of the goods could only be excluded had Respondent not accepted such delivery, which it did as previously mentioned. Only in that event could Claimant be expected to resell the fan-blades and the clamps, notwithstanding the fact that those were specifically produced under the Contract with the single purpose to be used in the manufacturing of Respondent's jet engine [Req. Arb., p.4, ¶3; Cl. Ex. C2, p.9; Answer Req. Arb., p.24, ¶¶5-6].

153. Even more, the remedy cannot be exceptionally excluded in the instant case. Specific performance of non-monetary obligations can occasionally be ruled out when *unlawful or*

factually *impossible*; (...) *would cause the debtor unreasonable effort or expense*; (...) *consists in the the provision of services or work of a personal character or depends upon a personal relationship*; or the aggrieved party may reasonably obtain performance from another source [c.f. art. 9:102 PECL, often resorted to for guidance in interpreting and supplementing art. 46 CISG; Vanto, ¶¶(d)&(e)]. Not only is Claimant requesting specific performance of a monetary obligation rather than a non-monetary one, but none of the previous criteria is met in the case at matter.

154. First, Claimant is lawfully demanding the due purchase price under the Contract. Second, *impossibilium nulla est obligatio* cannot be applied since the obligation is fungible and consequently factually possible. Third, specific performance will not cause Respondent unreasonable effort or expense since the due purchase price is in any case covered by the price range agreed upon by the parties [Req. Arb., p.4, ¶6] and, furthermore, Claimant has offered to bear the costs which may result from that additional transfer [Cl. Ex. C5, p.14]. Fourth, full performance in this case does not consist in *services or work of a personal character or depends upon a personal relationship* [c.f. art. 9:102 PECL].
155. And last but not least, Claimant may not reasonably *obtain performance from another source* considering that, as abovementioned, not only were both the fan-blades and the clamps specifically produced in view of Respondent's business with Earhart, but Claimant no longer possesses the goods since they are now in Respondent's possession.

iii) Claimant's conduct is not inconsistent with specific performance

156. After the correction of the invoice, Claimant requested payment to be made [Cl. Ex. C5, p.14]. However, Respondent did not fulfil its obligation, as Claimant did not receive the outstanding payment of the full purchase price [Cl. Ex. C6, p.15]. Thereafter, Claimant fixed an additional period of time – *Nachfrist* –, according to article 63 CISG.
157. Such remedy is not inconsistent with the request for specific performance under article 62 CISG [Knapp, p.453] since Respondent did not pay and promptly declared it will not do so [Cl. Ex. C7, p.16]. As it is recognized by commentators, *after a breach of obligations by the other party, the aggrieved party's principal concern is often that the breaching party perform the contract as he originally promised* [Chengwei II, ¶2].
158. Article 63 CISG requires the length of the period of time to be defined, since *it is not sufficient that the seller expresses his wish to receive payment as soon as possible without delay or uses other similar terms* [Sévon, ¶225]. Accordingly, Claimant requested payment to be made until 4 March [Cl. Ex. C6, p.15]. The additional period of a month shall be considered, in the business world, reasonable for the fulfilment of an already delayed obligation since the very beginning – 15

- January [Cl. Ex C5, p.14]. Besides, Claimant offered to exceptionally bear all the costs resultant from the second transfer [*idem*].
159. Despite of the above, Respondent not only did not fulfil his obligation to pay the full purchase price, which included the sum pertaining to the levy, but also gave notice he would not do so during the period of grace granted by Claimant nor after it [Cl. Ex. C7, p.16]. The fact that Respondent has denied the existence of the abovementioned obligations alone is sufficient to grant specific performance since it proves its unwillingness to fulfil such.
160. Thereafter, Claimant's request for specific performance is in accordance with article 7.1.5 (2) UNIDROIT Principles and also does not infringe article 63 (2) CISG, which states that *the seller may not, during that period, resort to any remedy for breach of contract, since Claimant has received notice from the buyer that he will not perform within the period so fixed*.
161. Consequently, Claimant did not resort to any other remedy inconsistent with performance as it did not, for instance, declare avoidance whilst waiting for performance to take place. Nonetheless, it is noteworthy that after the non-payment notice by Respondent, Claimant could, in fact, declare avoidance under article 64(1)(b) CISG *if the buyer does not pay the price within the additional period fixed by the seller* [Sévon, p.228].
162. Considering all of the above, Claimant is entitled to and requires specific performance pursuant to article 62 CISG. Moreover, pursuant to article 63(2) CISG *the seller, in granting an additional period of time, is not deprived of the right to claim damages for delay in performance* [CISG Digest Art.63, p.304, ¶9].
163. Notwithstanding that specific performance is the most accurate method of achieving the compensation aim of contractual remedies, giving the aggrieved party the precise performance that should have taken place, if the Tribunal considers that the remedy cannot be granted, Claimant shall naturally be awarded damages for the breach of contract, namely under the provision of "*sum equal to the loss*" [art. 74 CISG], in the amount difference between the due purchase price and the actually credited to Claimant's account.

CONCLUSION: CLAIMANT IS ENTITLED TO THE ADDITIONAL PAYMENTS IN THE AMOUNT OF US\$ 2,387,432.80: US\$ 2,285,240.00 FOR THE FAN-BLADES AND US\$ 102,192.80 FOR THE DEDUCTED LEVY, ALL ADDED BY THE CORRESPONDING INTEREST AS FORESEEN ON ARTICLE 78 CISG

REQUEST FOR RELIEF

Counsel for Claimant respectfully requests the Tribunal to find that:

- Claimant's claims are admissible and have been timely and regularly submitted;
- It does not have jurisdiction to order Claimant to post security for costs;
- Should the Tribunal consider itself empowered to order security for costs, the request is groundless and consequently is to be denied;
- Respondent incurred into a breach of Contract, being Claimant entitled to the outstanding purchase price for the fan-blades of US\$ 2,285,240.00 and the bank charge in the amount of US\$ 102,192.80, all added by the correspondent interest.
- Respondent shall bear all the costs incurred in these arbitral proceedings, including costs due to the arbitral institution and legal fees.

XXIV Annual Willem C. Vis International Commercial Arbitration Moot

Under the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada

MEMORANDUM FOR RESPONDENT

On behalf of

SantosD KG

77 Avenida O Rei

Cafucopa

Mediterraneo

RESPONDENT

Against

Wright Ltd

232 Garrincha Street

Oceanside

Equatoriana

CLAIMANT

Counsel for RESPONDENT

Ana Isabel Ferreira • António Biason • Catarina Morão • Mariana Sampaio



Lisboa 2017

TABLE OF CONTENTS

LIST OF ABBREVIATIONS	I
INDEX OF RULES AND LEGAL SOURCES	III
INDEX OF AUTHORITIES	V
INDEX OF COURT CASES AND ARBITRAL AWARDS	XXIV
STATEMENT OF FACTS	1
APPLICABLE PROCEDURAL AND SUBSTANTIVE LAW	2
SUMMARY OF ARGUMENT	3
PRELIMINARY QUESTION	3
ARGUMENT.....	ERRO! MARCADOR NÃO DEFINIDO.
I. CLAIMANT’S CLAIMS ARE INADMISSIBLE AS NOT HAVING BEEN TIMELY SUBMITTED	4
A. Claimant did not initiate arbitration within the 60-day limit agreed by the Parties....	4
i) All procedural requirements were only complied with on 7 June 2016	5
ii) Respondent did not prevent Claimant from complying with the set out requirements in a timely manner.....	7
B. CAM-CCBC’s President can only <i>prima facie</i> verify the arbitration agreement.....	7
C. The time limit extension provision is of a procedural nature and is not accordant with the consolidated contractual intent of the Parties	8
II. THE TRIBUNAL IS EMPOWERED TO AND SHALL ORDER CLAIMANT TO PROVIDE SECURITY FOR COSTS.....	10
A. The elements contained in the arbitration agreement provide for security for costs	10
i) Article 8 of the Rules comprises security for costs as an available measure.....	11
ii) Consistently, Danubian Arbitration Law also foresees such measure	12
B. Respondent’s request for security for costs is grounded and shall be granted	12
i) The article of the Carioca Business News is an admissible evidence	12
ii) The facts demonstrate the request is grounded and made in good faith	13
iii) The Tribunal will not be prejudging the case by ordering security.....	22

III. CLAIMANT IS NOT ENTITLED TO AN ADDITIONAL PAYMENT OF US\$ 2,387,432.80	23
A. The Parties intended and agreed on a fixed exchange rate for the whole Contract .23	
i) According to article 8(1) CISG the subjective intent of the parties was to apply a fixed exchange rate to the whole Contract.....	24
ii) According to article 8(2) CISG any reasonable person under the same circumstances would understand that the fixed exchange rate applied to the whole Contract	25
iii) According to article 8(3) CISG, all the relevant circumstances of the case indicate that the Parties intended to fix an exchange rate to the Contract	27
iv) Moreover, the addendum validly and effectively clarified that intention.....	28
B. Respondent is not under the obligation to bear the levy	30
i) Respondent shall only bear the costs for the <i>transfer</i> of the amount.....	30
ii) Respondent did not have to be aware of the application of the levy	32
iii) Even if the Tribunal understands Respondent must bear the levy, it shall find it exempt under article 80 CISG.....	33
C. Respondent duly performed all contractual and legal obligations.....	33
D. Respondent cannot be liable for Claimant's inconsistent behaviour.....	34
REQUEST FOR RELIEF	35

LIST OF ABBREVIATIONS

% – Percent

& – And

¶/¶¶ – Paragraph/Paragraphs

A fortiori ratione – with stronger reason

AAA – American Arbitration Association

ACICA – Australian Center of International Commercial Arbitration

Answer Req. Arb. – Respondent's Answer to Request for Arbitration

Answer Req. SfC – Claimant's Answer to Respondent's Request for Security for Costs

art. /arts. – Article/Articles

ASA – Association Suisse de l'arbitrage (= Swiss Arbitration Association)

Bona fide – good faith

CAM-CCBC – Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada

CAM-CCBC LtoCl. – CAM-CCBC's letter to Claimant

Central Bank – Equatoriana Central Bank

CEO – Chief Executive Officer

cf. – *conferatur* (= compare)

CFO – Chief Financial Officer

CIArb – Chartered Institute of Arbitrators

CISG – United Nations Convention on Contracts for the International Sale of Goods

CISG AC – CISG Advisory Council

Cl. Ex. – Claimant's Exhibit

CLOUT – Case Law on UNCITRAL Texts

Contract – Development and Sales Agreement

Convention – United Nations Convention on Contracts for the International Sale of Goods

COO – Chief Operations Officer

DSA – Development and Sales Agreement

e.g. – *exempli gratia* (= for example)

et al. – *et alii* (= and others)

EQD – Equatorianian Denars

Ex./Exs. – Exhibit/Exhibits

Fasttrack to CAM-CCBC1 – Letter from Mr Fasttrack to CAM-CCBC of 31 May 2016

Fasttrack to CAM-CCBC2 – Letter from Mr Fasttrack to CAM-CCBC of 7 June 2016

IBA – International Bar Association

ICC – International Chamber of Commerce

ICSID – International Center for the Settlement of Investment Disputes

idem – the same as previously mentioned or cited

i.e. – that is to say

KLRC – Kuala Lumpur Regional Centre for Arbitration

Lege lata - the law as exists

MfC – Memorandum for Claimant, Strathmore University Law School

ML – Money laundering

NY – New York

Or. CAM-CCBC – Order by CAM-CCBC of 1 June 2016

p./pp. – Page number/pages number

PA1/PA2 – Power of Attorney by Wright Holding PLC/Power of Attorney by Wright Ltd.

Parties – Wright Ltd. and SantosD KG

PCA – Permanent Court of Arbitration

PO1/PO2 – Procedural Order number one/ Procedural Order number two

R\$ – Brazilian Reais

Req. Arb. – Request for Arbitration

Req. SfC – Respondent's Request for Security for Costs

Res. Ex. – Respondent's Exhibit.

Rules – CAM-CCBC Rules

SfC – Security for Costs

SMA – Society of Maritime Arbitrators

Stricto sensu – in a narrow sense

TICA - Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry

ToF – Terms of Reference

UNCITRAL – United Nations Commission on International Trade Law

UNIDROIT – International Institute for the Unification of Private Law

USD – U.S. Dollars

v. – Versus (= against)

Vide – see

ZCC – Zurich Chamber of Commerce

INDEX OF RULES AND LEGAL SOURCES

ACICA Rules	Australian Centre for International Commercial Arbitration Rules (2016)
CAM-CCBC Rules	Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Rules (2012)
CAM-CCBC Table of Expenses	Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Table of Expenses (2015)
CISG Digest	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for International Sale of Goods (2012)
DAL	Danubian Arbitration Law (2006)
IBA Rules	International Bar Association Rules on the Taking of Evidence (2010)
ICC Rules	International Chamber of Commerce Rules (2012)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and nationals of other States (1966)
KLRC Rules	Kuala Lumpur Regional Centre for Arbitration Rules (2013)
Notes on Organizing Arbitral Proceedings	UNCITRAL Notes on Organizing Arbitral Proceedings (2006)

NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985 with amendments adopted in 2006)
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (Integral Version 2010)

INDEX OF AUTHORITIES

- Advisory Council Opinion No. 3** *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, Rapporteur: Professor Richard Hyland*
Available at: www.cisg.law.pace.edu/cisg/CISG-AC-op3.html
Cited as: CISG AC Opinion No. 3
In: ¶ 122
- Altaras, David** *Security for costs*
69 Arbitration Journal, No. 2 (2003)
Cited as: Altaras
In: ¶ 73
- Andreason, Rod N.** *MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods*
Brigham Young University Law Review (1999)
Available at:
<http://www.cisg.law.pace.edu/cisg/biblio/andreason.html>
Cited as: Andreason
In: ¶ 123
- Audit, Bernard** *The Vienna Sales Convention and the Lex Mercatoria*
in LEX MERCATORIA AND ARBITRATION, Thomas E. Carbonneau ed., 1998, Juris Publishing
Cited as: Audit
In: ¶ 155
- Berger, Bernhard** *Arbitration Practice: Security for Costs: Trends and Developments in Swiss Arbitral Case Law*
ASA Bulletin, (Kluwer Law International 2010, Vol. 28, Issue 1)
Cited as: Berger
In: ¶¶ 35, 84

- Blackaby, Nigel** REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION
Partasides, Constantine Oxford University Press, 6th ed., 2015
Redfern, Alan Cited as: Redfern & Hunter
Hunter, J. Martin In: ¶¶ 24, 26, 29, 41, 88
- Blessing, Marc** *The ICC Arbitral Procedure under the 1998 ICC Rules – what has changed?*
ICC Bulletin, vol. 8, No. 2
Cited as: Blessing
In: ¶ 37
- Bondar, Kateryna** *Allocation of costs in investor-State and commercial arbitration: towards a harmonized approach*
Arbitration International, volume 32 (2016)
Cited as: Bondar
In: ¶ 58
- Bonell, Michael Joachim** *Rapporteur on chapter 1, 2 and 4*
in UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS
International Institute for the Unification of Private Law, 2010
Cited as: Bonell
In: ¶¶ 104, 119, 134, 165
- Born, Gary** INTERNATIONAL COMMERCIAL ARBITRATION
Kluwer Law International, 2nd ed., 2014
Cited as: Born
In: ¶¶ 5, 12, 19, 24, 29, 32, 33, 35, 37, 41, 52, 71, 74, 77, 92
- Bowstead, William** BOWSTEAD & REYNOLDS ON AGENCY
Reynolds, F.M.B. Sweet & Maxwell, 18th ed., 2006
Watts, Peter Cited as: Bowstead/Reynolds/Watts
In: ¶ 12

- Brekoulakis, Stavros** *The Impact of Third Party Funding on Allocation for Costs and Security for Costs Applications: The ICCA-Queen Mary Task Force Report*, (2016)
Cited as: Brekoulakis
In: ¶ 77
- Bühler, Micha** *Awarding Costs in International Commercial Arbitration: an overview*
22 ASA Bulletin 2/2004
Cited as: Bühler
In: ¶ 59
- Burnett, Harry**
Weiss, David *Systematic advocacy: a guide to cross-examination in international arbitration*
Revista Brasileira de Arbitragem
Kluwer Law International, volume XIII, 2016
Cited as: Burnett & Weiss
In: ¶ 44
- Butler, Allison E.** *Limitation of Remedies Due to Failure of Performance Caused by Other Party: Comparison Between Provisions of the CISG and Counterpart Provisions of the Principles of European Contract Law* (August 2004)
Available at:
www.cisg.law.pace.edu/cisg/text/peclcomp80.html
Cited as: Butler
In: ¶ 155
- Buys, Cindy G.** *The Tensions Between Confidentiality and Transparency in International Arbitration*
American Review International Arbitration, vol. 14 (2003)
Cited as: Buys
In: ¶ 88

- Carbonneau, Thomas E.** *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*
Journal Transnational Law, number 23 (1985)
Cited as: Carbonneau
In: ¶ 88
- Chartered Institute of Arbitrators** *Applications of Security for Costs*, (2015)
Cited as: CIArb Guideline
In: ¶ 56
- Colbran, Stephen** SECURITY FOR COSTS
Longman Professional, 1993
Cited as: Colbran
In: ¶ 51
- Craig, Laurence W.** INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION
Park, William W. Oceana Publications, 2000
Paulsson, Jan Cited as: Craig/Park/Paulsson
In: ¶¶ 30, 38
- Darwazeh, Nadia** *Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding*
Leleu, Adrien Journal of International Arbitration,
(Kluwer Law International 2016, Vol. 33, Issue 2)
Cited as: Darwazeh & Leleu
In: ¶ 62
- Delany, Jim** SECURITY FOR COSTS
Law Book Co., 1989
Cited as: Delany
In: ¶ 51

Dodge, William S.

Teaching the CISG in Contracts

50 Journal of Legal Education (March 2000)

Available at: www.cisg.law.pace.edu/cisg/biblio/dodge.html

Cited as: Dodge

In: ¶ 123

Eiselen, Sieg

Remarks on the manner in which the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 29 of the CISG

Available at: cisgw3.law.pace.edu/cisg/principles/uni29.html

Cited as: Eiselen

In: ¶ 130

Enderlein, Fritz

INTERNATIONAL SALES LAW

Maskow, Dietrich

Oceana Publications, 2012

Cited as: Enderlein & Maskow

In: ¶ 145

Eörsi, Gyula

INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS
in Galston & Smit (ed.), Juris Publishing, 1984

Available at: <http://cisgw3.law.pace.edu/cisg/biblio/eorsi1.html>

Cited as: Eörsi

In: ¶ 125

Farnsworth, Allan E.

Article 8

in BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW

Giuffrè: Milan (1987)

Cited as: Farnsworth

In: ¶ 116

Ferrari, Franco

Uniform Interpretation of The 1980 Uniform Sales Law

24 Georgia Journal of International and Comparative
Law (1994-95)

Cited as: Ferrari

In: ¶ 155

Finn, Paul

Rapporteur on article 1.8

in UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL
CONTRACTS

International Institute for the Unification of Private Law, 2010

Cited as: Finn

In: ¶ 167

Gabriel, Henry Deeb

*The Buyer's Performance Under the CISG: Articles 53-60 Trends in the
Decisions*

25 Journal of Law and Commerce (2005-06)

Cited as: Gabriel

In: ¶ 146

Gaillard, Emmanuel

FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL
COMMERCIAL ARBITRATION

Savage, John

Kluwer Law International, 1999

Cited as: Fouchard/Gaillard/Goldman

In: ¶¶ 2, 8, 19, 29, 32, 49, 83

- Gillette, Clayton P.** THE UN CONVENTION ON CONTRACTS FOR THE
Walt, Steven D. INTERNATIONAL SALE OF GOODS: THEORY AND PRACTICE
Cambridge University Press, 2016
Cited as: Gillette & Walt
In: ¶ 151
- Goeler, Jonas von** *Third Party Funding in International Arbitration and its Impact on
Procedure*
Kluwer Law International, volume 35, 2016
Cited as: Goeler
In: ¶¶ 38, 51, 52
- Gotanda, John Yukio** *Awarding Costs and Attorneys' Fees in International Commercial
Arbitrations*
Michigan Journal of International Law, vol. 21 (1999)
Cited as: Gotanda
In: ¶ 58
- Gruner, Dora Marta** *Accounting for the Public Interest in International Arbitration: The Need
for Procedural and Structural Reform*
Journal Transnational Law, number 41 (2003)
Cited as: Gruner
In: ¶ 88
- Gu, Weixia** *Security for Costs in International Commercial Arbitration*
Journal of International Arbitration,
(Kluwer Law International 2005, Vol. 22, Issue 3)
Cited as: Gu
In: ¶¶ 35, 37, 51, 52, 69, 80, 84, 95

Hanotiau, Bernard*Chapter 10: The Parties' Costs of Arbitration**in* EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION

Derains, Yves and Kreindler, Richard Editions (2006)

Cited as: Hanotiau

In: ¶ 96

Henderson, Alastair*Security for Costs in Arbitration in Singapore*

Asian International Arbitral Journal, SIAC

Kluwer Law International, vol. 7, issue 1 (2011)

Cited as: Henderson

In: ¶ 76

Highet, Keith*The Enigma of the Lex Mercatoria**in* LEX MERCATORIA AND ARBITRATION, Thomas E.

Carbonneau ed., 1998

Juris Publishing

Cited as: Highet

In: ¶ 155

Ho, Jean*Getting the Shoe to Fit – Obtaining Security for Costs under the Rules of Arbitration of the International Chamber of Commerce*

9 Vindobona Journal of Intern. Comm. Law & Arb. (2005)

Cited as: Ho

In: ¶ 80

Holtzmann, Howard M.

A GUIDE TO THE UNCITRAL MODEL LAW

Neuhaus, Joseph E.

Kluwer Law International, 1989

Cited as: Holtzmann & Neuhaus

In: ¶¶ 37, 94

- Huber, Peter**
Mullis, Alastair
THE CISG: A NEW TEXTBOOK FOR STUDENTS AND
PRACTITIONERS
Sellier European Law Publishers, 2007
Cited as: Huber & Mullis
In: ¶ 154
- Hwang, Michael**
Chung, Katie
*Defining the Indefinable: Practical Problems of Confidentiality in
Arbitration*
Journal of International Arbitration 26(5), (2009)
Cited as: Hwang & Chung
In: ¶¶ 88, 89
- Karrer, Pierre A.**
Desax, Marcus
Security for Costs in International Arbitration: Why, when, and what if...
in LAW OF INTERNATIONAL BUSINESS AND DISPUTE
SETTLEMENT IN THE 21ST CENTURY, LIBER AMICORUM
BÖCKSTIEGEL, Robert Briner et al. (eds.), 2002
Cited as: Karrer & Desax
In: ¶ 80
- Kee, Christopher**
*International Arbitration and Security for Costs - a Brief Report on Two
Developments*
17 American Review of International Arbitration, Issue 2 (2006)
Cited as: Kee
In: ¶¶ 30, 40
- Lew, Julian D. M.**
Mistelis, Loukas A.
Kröll, Stefan M.
COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION
Kluwer Law International, 2003
Cited as: Lew/Mistelis/Kröll
In: ¶¶ 5, 12, 19, 28, 29, 35, 37, 58

- Lew, Julian D. M.** *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*
ICC Bulletin, vol. 11, No. 23 (2000)
Cited as: Lew I
In: ¶ 52
- Lew, Julian D. M.** *The Case for the Publication of Arbitration Awards in The Art of Arbitration*, 22
Jan C. Schultz & Jan van den Berg editions (1982)
Cited as: Lew II
In: ¶ 88
- Lo, Chang-fa** *On a mechanism of publishing balanced arbitral awards*
Contemporary Asia Arbitration Journal, vol. 1, No. 2, (2008)
Cited as: Lo
In: ¶ 88
- Magnus, Ulrich** *General Principles of UN-Sales Law*
59 Rabels Zeitschrift for foreign and international Private Law,
Issue 3-4 (1995)
Cited as: Magnus
In: ¶ 155
- Martowski, David** *Order Security from an Arbitrator's Perspective*
42 The Arbitrator – Society of Maritime Arbitrators, Issue 1
(2011)
Cited as: Martowski
In: ¶¶ 52, 71, 92
- Maskow, Dietrich** *Article 54*
in BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL
SALES LAW
Giuffrè: Milan (1987)
Cited as: Maskow
In: ¶¶ 145, 153

- Mehren, George M. Von** *Submitting Evidence in an international arbitration: the common lawyers' guide*
Salomon, Claudia T. Journal of International Arbitration, volume 20(3) (2003)
Cited as: Mehren & Salomon
In: ¶¶ 44, 46
- Miles, Wendy** *Security for costs in international arbitration – emerging consensus or continuing difference?*
Speller, Duncan The European Arbitration Review (2007)
Cited as: Miles & Speller
In: ¶¶ 37, 80
- Needham, Michael J.** *Order for Security for a Party's Costs*
Journal of the Chartered Institute of Arbitrators, vol.63(3) (1997)
Cited as: Needham
In: ¶¶ 47, 91
- Neumann, Thomas** *The Duty to Cooperate in International Sales: The Scope and Role of Article 80 CISG*
Sellier European Law Publishers (2012)
Cited as: Neumann
In: ¶ 155
- Newman, Lawrence W.** *International Litigation Awarding Costs in International Arbitration*
Zaslowsky, David New York Law Journal (2016)
Cited as: Newman & Zaslowsky
In: ¶ 98
- Nicita, Alessandro** EXCHANGE RATES, INTERNATIONAL TRADE AND TRADE POLICIES: Policy Issues in International Trade and Commodities Study Series No. 56, United Nations, 2013
Available at:
http://unctad.org/en/PublicationsLibrary/itcdtab57_en.pdf
Cited as: Nicita
In: ¶ 137

- O'Malley, Nathan** RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION: AN ANNOTATED GUIDE
Lloyd's Arbitration Law Library, 2002
Cited as: O'Malley
In: ¶ 43
- Osuna-González, Alejandro** *Buyer's Enabling Steps to Pay the Price: Article 54 of the United Nations Convention on Contracts for the International Sale of Goods*
Journal of Law and Commerce, Vol. 25, 2005-06
Cited as: Osuna-González
In: ¶ 145
- Otto, Dirk** *Article IV*
in Kronke, Herbert
RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NY CONVENTION
Kluwer Law International, 2010
Cited as: Otto
In: ¶ 66
- Paulsson, Jan** *Jurisdiction and Admissibility*
in Global Reflections on International Law, Commerce and Dispute Resolution, ICC Publication, number 693 (2005)
Cited as: Paulsson
In: ¶ 25
- Paulsson, Jan**
Rawding, Nigel *The Trouble with Confidentiality*
ICC Bulletin, vol. 5(1) (1994)
Cited as: Paulsson & Rawding
In: ¶ 88
- Pauwelyn, Joost** *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*
25 Michigan Journal of International Law (2004)
Cited as: Pauwelyn
In: ¶ 89

- Pessey, Jean-Baptiste** *When to Grant Security for Costs in International Commercial Arbitration: the Complex Quest for a Uniform Test, (2011)*
Available at:
<https://www.cpradRes.org/news-publications/articles/2011-05-06-when-to-grant-security-for-costs-in-international-commercial-arbitration-the-complex-quest-for-a-uniform-test-2011-writing-contest-winner>
Cited as: Pessey
In: ¶ 80
- Poudret, Jean-Francois** COMPARATIVE LAW OF INTERNATIONAL ARBITRATION
Besson, Sebastien Sweet & Maxwell, 2nd ed., 2007
Berti, Stephen Cited as: Poudret & Besson
Ponti, Annette In: ¶ 88
- Redfern, Alan** *Why it is time for international arbitration to embrace security for costs*
O’leary, Sam 32 Arbitration International, Issue 3 (2016)
Cited as: Redfern & O’Leary
In: ¶¶ 33, 59, 92, 95
- Rogers, Catherine A.** *Transparency in International Commercial Arbitration*
54 University of Kansas Law Review (2006)
Cited as: Rogers
In: ¶ 88
- Rubino-Sammartano, Mauro** INTERNATIONAL ARBITRATION LAW AND PRACTICE
Kluwer Law International, 2nd ed., 2001
Cited as: Rubino-Sammartano
In: ¶¶ 19, 26, 32, 83
- Rubins, Noah** *In God we trust, all others pay cash: Security for Costs in International Commercial Arbitration*
11 American Review of International Arbitration (2000)
Cited as: Rubins

In: ¶¶ 33, 51, 52, 56, 57, 58, 62, 71, 92

Ruscalla, Gabriele

Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?

Groningen Journal of International Law, vol. 3(1): International Arbitration and Procedure (2015)

Cited as: Ruscalla

In: ¶ 88

Saidov, Djakhongir

The Present State of Damages under the CISG: A Critical Assessment

13 Vindobona Journal of International Commercial Law & Arbitration (1/2009)

Available at: www.cisg.law.pace.edu/cisg/biblio/saidov6.html

Cited as: Saidov

In: ¶¶ 150, 152, 153

Sandrock, Otto

The Cautio Judicatum Solvi in Arbitration Proceedings of The Duty of an Alien Claimant to Provide Security for the Costs of the Defendant

Journal of International Arbitration, (Kluwer Law International 1997, Vol. 14, Issue 2)

Cited as: Sandrock

In: ¶¶ 71, 77

Schlechtriem, Peter

UNIFORM SALES LAW – THE UN CONVENTION

ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Manz, 1986

Available at:

<http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-08.html>

Cited as: Schlechtriem

In: ¶¶ 104, 154

Schwartz, Eric A.

GUIDE TO THE ICC RULES OF ARBITRATION

Derains, Yves

Kluwer Law International, 2nd ed., 2005

Cited as: Schwartz & Derains

In: ¶¶ 37, 83

Schwartz, Eric A.

Provisional Remedies in International Arbitration - Part II: Perspectives from the ICC and Germany

World Arbitration and Mediation Report, vol. 6 (1995)

Cited as: Schwartz

In: ¶ 52

Secretariat Commentary on article 7 of the 1978 Draft of the CISG

Secretariat Commentary on article 7 of the 1978 Draft of the CISG

Pace Law School Institute of International Commercial

Law (last updated August 29, 2006)

Available at:

<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-08.html>

Cited as: *Secretariat Commentary*

In: ¶¶ 101, 115, 158

Sevón, Leif

Obligations of the Buyer under the UN Convention on Contracts for the International Sale of Goods

in Petar Sarcevic & Paul Voken (eds.), INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES

Oceana (1986), Chapter 6

Cited as: Sevón

In: ¶ 163

Sim, Disa

The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods

September 2001

Available at: www.cisg.law.pace.edu/cisg/biblio/sim1.html

Cited as: Sim

In: ¶ 155

- Skoufalos, Peter** *Having arbitrators order the posting of security and other interim measures: a practitioner's perspective*
42 *The Arbitrator – Society of Maritime Arbitrators*, 1 (2011)
Cited as: Skoufalos
In: ¶¶ 33, 81, 92
- Straube, Frederico José** *THE CAM-CCBC ARBITRATION RULES 2012: A COMMENTARY*
Eleven Publishing, 2016
Finkelstein, Cláudio
Filho, Napoleão Casado
Cited as: Straube in: ¶¶ 19, 20
Cited as: Filho & Lacrete in: ¶ 30
Cited as: Haddad & Coelho in: ¶ 33
Cited as: Escobar & Leite in: ¶ 39
Cited as: Pereira & Levin in: ¶ 46
Cited as: Giusti & Catarucci in: ¶ 60
Cited as: Terashima & Gagliardi in: ¶¶ 5, 6, 15, 83
Cited as: Timm in: ¶¶ 16, 96
Cited as: Wald/Borja/Vieira in: ¶ 20
Cited as: Verçosa in: ¶ 28
- Style, Christopher** *The Role of Arbitration*
International Financial Law Review, 3 (1995)
Cited as: Style
In: ¶ 29
- Task Force Report** *ICCA-QMUL Task Force on TPF in International Arbitration*
Subcommittee on Security for Costs, November 2015
Available at: <http://www.arbitration-icca.org/>
In: ¶ 51
- Tweeddale, Andrew** *Delay in Commencing an Arbitration*
Arbitration – The Journal of the Chartered Institute of Arbitrators, volume 68, number 3 (2002)
Cited as: Tweeddale
In: ¶ 26
- Tweeddale, Andrew**
Tweeddale, Karen *Commencement of Arbitration and Time-Bar Clauses*

- Arbitration – The Journal of the Chartered Institute of Arbitrators, volume 75, number 4 (2009)
Cited as: Tweeddale & Tweeddale
In: ¶ 2
- Uchkunova, Inna**
Security for Costs in ICSID Arbitration
Temnikov, Oleg
Kluwer Arbitration Blog (2005)
Available at:
<http://kluwerarbitrationblog.com/2015/02/10/security-for-costs-in-icsid-arbitration/>
Cited as: Uchkunova & Temnikov
In: ¶ 34
- UN Official Records**
Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna 10
March - 11 April 1980, A/CONF. 97/19 (1991)
In: ¶ 122
- UNCITRAL Report**
Report of the Committee of the Whole I relating to the draft Convention on the International Sale of Goods (1997),
in UNCITRAL Yearbook VIII (1997) A/32/17
Cited as: *Report of the Committee*
In: ¶ 145
- UNCITRAL Working Group**
Report of Working Group II (Arbitration and Conciliation)
U.N. Commission on International Trade Law (UNCITRAL)
47th Session, at U.N. Doc. A/CN.9/641 (2007)
Cited as: UNCITRAL Working Group
In: ¶ 40
- Vaughn, Robert G.**
America's First Comprehensive Statute Protecting Corporate Whistleblowers
57 Administrative Law Review, 1 (2005)
Cited as: Vaughn
In: ¶ 90

- Villaggi, Florencia** *International Commercial Arbitral Awards: Moving from Secrecy towards Transparency? (2007)*
Available at:
http://www.youngicca-blog.com/wp-content/uploads/2013/01/Villaggi-confidentiality-vs-publication-of-awards-edited05_01_13.pdf
Cited as: Villaggi
In: ¶ 88
- Viscasillas, M^a del Pilar Perales** *Modification and Termination of the Contract (Art. 29 CISG)*
25 Journal of Law and Commerce (2005-06)
Cited as: Viscasillas
In: ¶¶ 130, 131
- Vorobey, Dmytro V.** *CISG and Arbitration Clauses: Issues of Intent and Validity*
Journal of Law & Commerce, Vol. 31 (2012-2013)
Cited as: Vorobey
In: ¶ 104
- Wetter, J. Gillis** *Costs and Their Allocation in International Commercial Arbitration*
Priem, Charl American Review Int'l Arbitration, vol. 2 (1992)
Cited as: Wetter & Priem
In: ¶ 58
- Wilske, Stephan** *Commencement of Arbitral Proceedings and Unsigned Requests for Arbitration*
Gack, Christine Journal of International Arbitration,
Kluwer Law International, vol. 24 (2007)
Cited as: Wilske & Gack
In: ¶¶ 7, 8, 10
- Zeller, Bruno** *Determining the Contractual Intent of Parties under the CISG and Common Law - A Comparative Analysis*
European Journal of Law Reform Vol. 4, No. 4 (2002)
Cited as: Zeller
In: ¶¶ 101, 108, 114, 122

Ziegel, Jacob

*Report to the Uniform Law Conference of Canada on Convention on
Contracts for the International Sale of Goods (1981)*

Available at:

<http://cisgw3.law.pace.edu/cisg/text/ziegel8.html>

Cited as: Ziegel

In: ¶ 101

Živković, Patricia

*Security for Costs in International Arbitration: What's Missing from the
Discussion? (2016)*

Available at:

<http://kluwerarbitrationblog.com/2016/11/09/caution-security-costs-international-arbitration-third-party-funding-missing-link/>

Cited as: Živković

In: ¶ 84

INDEX OF COURT CASES AND ARBITRAL AWARDS

AAA	<i>American Steamship Company v. Thai Transportation Enterprise Award</i>	¶ 44
	Case No. 1310-0417-78, 4 January 1980, Pieter Sanders (ed), Yearbook Commercial Arbitration 1983 - Volume VIII, Yearbook Commercial Arbitration, Volume 8, Kluwer Law International 1983 Cited as: <i>Steamship v. Thai Transportation</i>	
Australia	<i>Allstate Life Insurance Co. v. Australia & New Zealand Banking Group Ltd.</i>	¶ 98
	Federal Court of Australia 22 March 1996 134 Australian Law Reports 187 Cited as: <i>Allstate Life v. Banking Group</i>	
Canada	<i>Corporacion Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al.</i>	¶ 94
	Superior Court of Justice (Lax J.), September 22, 1999 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V01/847/23/PDF/V0184723.pdf? Cited as: <i>Transnacional v. STET International</i>	
Czech Republic	<i>Carpet Case</i>	¶ 162
	Supreme Court 32 Odo 725/2004 29 March 2006 Available at: http://cisgw3.law.pace.edu/cases/060329cz.html	
France	<i>Brassiere cups case</i>	¶ 160
	Cour d'appel de Rennes 07/03098 27 May 2008 Available at: http://cisgw3.law.pace.edu/cases/080527f1.html	

	<i>Cauillez</i>	¶ 19
	Cour de Cassation de France, 22 february 1949, JCP, 1949, II 4899	
	<i>Europmarkets v. Argolicos Gulf Shipping Co.</i>	¶ 5
	CA Paris, Jan. 16, 1986, unpublished Cited as: <i>Europmarkets v. Argolicos</i>	
	<i>Cathode ray tube case</i>	¶ 162
	Tribunal de grande instance de Strasbourg 04/00925 22 December 2006 Available at: http://cisgw3.law.pace.edu/cases/061222f1.html	
	<i>Laborall v. Matis</i>	¶ 161
	Cour d'appel de Paris, 97/24418 4 March 1998 Available at: http://cisgw3.law.pace.edu/cases/980304f1.html	
Germany	<i>Chemical products case</i>	¶ 111
	Appellate Court Dresden, 2 U 2723/99 27 December 1999 Available at: http://cisgw3.law.pace.edu/cases/991227g1.html	
	<i>Doors case</i>	¶ 162
	Appellate Court Saarbrücken 1 U 69/92 13 January 1993 Available at: http://cisgw3.law.pace.edu/cases/930113g1.html	
	<i>Machinery case</i>	¶ 155
	Bundesgerichtshof VIII ZR 60/01 31 October 2001 Available at: http://cisgw3.law.pace.edu/cases/011031g1.html	

	<i>New Zealand mussels case</i>	¶ 151
	Bundesgerichtshof	
	VIII ZR 159/94	
	8 March 1995	
	Available at: http://cisgw3.law.pace.edu/cases/950308g3.html	
	<i>Rare hard wood case</i>	¶ 131
	OLG Köln	
	22 U 202/93	
	22 February 1994	
	Available at: http://cisgw3.law.pace.edu/cases/940222g1.html	
ICC	<i>ICC Arbitration Case No. 7331</i>	¶ 101
	November 1994	
	Available at: http://cisgw3.law.pace.edu/cases/947331i1.html	
	Cited as: <i>Cowhides case</i>	
	<i>ICC Case No. 10032</i>	¶¶ 37, 52, 81
	Procedural Order in ICC Case No. 10032,	
	9 November 1999	
	<i>Seller v. Buyer</i>	¶ 58
	Final Award in the ICC Case No. 6962, 1992	
	Albert Jan van den Berg (ed), Yearbook Commercial Arbitration	
	1994 Volume XIX, Yearbook Commercial Arbitration, Volume 19,	
	Kluwer Law International 1994	
	Cited as: <i>ICC Case No. 6962</i>	
	<i>Société Casa v. Société Cambior</i>	¶ 37
	Partial Award, ICC Case No. 6697, 26 December 1990	
	Revue de l'Arbitrage, Comité Français de l'Arbitrage, 1992	
	Volume 1992, Issue 1	
	Cited as: <i>ICC Case No. 6697</i>	

Consultant v. Contractor¶
58

Final Award in the ICC Case No. 6248, 1990, Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 1994 Volume XIX, Yearbook Commercial Arbitration, Volume 19, Kluwer Law International 1994

Cited as: *ICC Case No. 6248*

Parties Not Indicated¶
37

Procedural Order in ICC Case No. 12542/EC, 19 December 2003
ASA Bulletin, Kluwer Law International 2005, Volume 23, Issue 4

Cited as: *ICC Case No. 12542*

ICC Case No. 12124¶
44

Procedural Order

23 November 2004

ICC Bulletin, 2010, Special Supplement: Decisions on ICC Arbitration Procedure

ICC Case No. 14108¶¶
166, 167

Final Award, Excerpt in J.J Arnaldez - Y. Derains - D. Hascher (eds), Collection of ICC Arbitral Awards, Kluwer Law International 2013

ICC Case No. 6228¶
8

Interim Award in Case No. 6228, 1990, ICC Bulletin, Vol. 8, n.º1, May 1997

ICC Case No. 8324¶
114

Final Award, 1995

Available at: <http://cisgw3.law.pace.edu/cases/958324i1.html>

Cited as: *Magnesium case*

***Décision de procédure dans l'arbitrage CCI No...entre
XY International, Inc. (District de B.) partie demanderesse et
Société Z partie défenderesse concernant la requête présentée
par la partie défenderesse tendant à la constitution d'une
caution relative aux frais d'arbitrage***

¶¶
37, 84

ASA Bulletin, Volume 15, Issue 2, Kluwer Law International 1997

Cited as: *XY International v. Société Z*

ICSID

Joseph Charles Lemire v. Ukraine

¶
164

ICSID Case No. ARB/06/18

ICC Bulletin 424, 2010

Available at: <http://www.unilex.info/case.cfm?id=1533>

Cited as: *Lemire v. Ukraine*

***Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk
Kaplún v. Plurinational State of Bolivia***

¶
81

ICSID Case No. ARB/06/2, Decision on provisional measures

Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0698.pdf>

Cited as: *Quiborax v. Bolivia*

RSM Production Corporation v. Saint Lucia

¶¶
37, 50,
68, 72

ICSID Case No. ARB12/10, Decision on Saint Lucia's Request for
Security for Costs

Available at: <http://www.italaw.com/cases/2706>

Cited as: *RSM Production v. Saint Lucia*

SAUR International SA v. Republic of Argentina

¶
98

ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability

Available at: <http://www.italaw.com/cases/documents/1466>

Cited as: *Saur v. Argentina*

Italy

Romano v. Rinaldi¶
26

Court of Cassation Italy

January 8 n.º111 (1980), Foro it. 1980, I, 310

Netherlands

Interland Chemie BV v. Tessenderlo Chemie NV¶
162

Rechtbank

Rolnummer 160136 / HA ZA 06-826

27 February 2008

Available at: <http://cisgw3.law.pace.edu/cases/080227n1.html>Cited as: *Interland v. Tessenderlo*

PCA

***Guaracachi America Inc. and Rurelec PLC. v. The
Plurinational State of Bolivia***¶
41

Case No. 2011-17, 11 March 2013

Procedural Order No. 14

Available at: <http://www.italaw.com/cases/518>Cited as: *Guaracachi v. Bolivia****Ulysseas, Inc. v. The Republic of Ecuador***¶¶
57, 98

Final Award

Available at: <http://www.italaw.com/sites/default/files/case-documents/ita1019.pdf>Cited as: *Ulysseas v. Ecuador*

SMA

***Frank Montecalvo, As Owner of
M/Y WASTE KNOT v. ACE American Insurance Company***¶
2

Final Award No. 4225, June 12, 2015

Cited as: *Montecalvo v. ACE*

***Meteor Shipping Co., Ltd., Owners of the
M/V ACROPOLIS v Ethiopia Amalgamated Ltd.***

¶
5

Final Award No. 1326, May 31, 1979

Cited as: *Meteor Shipping v. Ethiopia*

Triumph Tankers Ltd. v. Kerr McGee Refining Corp.

¶
58

Final Award, Case No.2642, 28 March 1990, Albert Jan van den
Berg (ed), Yearbook Commercial Arbitration 1993, Volume XVIII,

Yearbook Commercial Arbitration, Volume 18

Kluwer Law International 1993

Cited as: *Triumph v. Kerr*

Switzerland

Building Materials case

¶
104

Obergericht des Kantons Thurgau

ZBR.2006.26

12 December 2006

Available at: <http://cisgw3.law.pace.edu/cases/061212s1.html>

Fiberglass composite materials case

¶
125

Tribunal cantonal du Valais

C1 08 45

28 January 2009

Available at: <http://cisgw3.law.pace.edu/cases/090128s1.html>

Fruit and vegetables case

¶
134

Handelsgericht Aargau

HOR.2006.79 / AC / tv

26 November 2008

Available at: <http://cisgw3.law.pace.edu/cases/081126s1.html>

Parties Not Indicated

¶
37

Ad-Hoc Arbitration Award, 21 December 1998,

ASA Bulletin, Kluwer Law International 1999, Volume 17 Issue 1

Cited as: *Parties Not Indicated Award*

	<i>Summer cloth collection case</i>	¶ 131
	OG Basel	
	40-99160	
	5 October 1999	
	Available at: http://cisgw3.law.pace.edu/cases/991005s1.html	
	<i>X. Holding in Bankruptcy, Switzerland v. Y. Co. Ltd., Republic of Yemen</i>	¶ 78
	Ad-Hoc Arbitration, Procedural Order No. 4, 2003	
	ASA Bulletin, Kluwer Law International 2010, Volume 28 Issue 1	
	Cited as: <i>X Holding v. Yemen</i>	
	<i>White urea case</i>	¶ 125
	ZG Basel	
	P4 1996/00448	
	3 December 1997	
	Available at: http://cisgw3.law.pace.edu/cases/971203s2.html	
TICA	<i>Arbitration proceeding 123/1992</i>	¶ 145
	17 October 1995	
	Available at: http://cisgw3.law.pace.edu/cases/951017r1.html	
	<i>ICAC Case No. 61/1993</i>	¶ 137
	21 April 1994	
	Available at: http://cisgw3.law.pace.edu/cases/940421r1.html	

Ukraine

Crucible press case¶
162

Supreme Court of Ukraine

Case No. 44/69

11 December 2007

Available at: <http://cisgw3.law.pace.edu/cases/071211u5.html>United
Kingdom***Harbour & General Works Ltd v. Environment Agency***¶
28

12 October 1999, [1999] Adj.L.R. 02/19

Summary available at:

[http://www.nadr.co.uk/articles/published/ArbitrationLawReports/
Harbour%20&%20General%20No2%201999.pdf](http://www.nadr.co.uk/articles/published/ArbitrationLawReports/Harbour%20&%20General%20No2%201999.pdf)Cited as: *Harbour v. Agency****Hassneh Insurance Co. of Israel and Others v. Steuart j. Mew***¶
88

[1993] 2 Lloyd's Rep. 243

Queen's Bench Division (Commercial Court)

Cited as: *Hassneh Insurance v. Steuart J. Mew****Nanjing Tianshun Shipbuilding Co Ltd and Jiangsu Skyrun
International Group Co Ltd v. Orchard Tankers PTE Ltd***¶
5

[2011] EWHC 164 (Comm)

11 February 2011

Cited as: *Nanjing v. Orchard****Regia Autonoma de Electricitate Renel
v. Gulf Petroleum International Ltd.***¶
91

[1996] 1 Lloyd's Rep. 67

Queen's Bench Division (Commercial Court)

Cited as: *Regia v. Gulf****Sir Lindsay Parkinson and Co Ltd v. Triplan Ltd***¶
51

[1973] QB 609, [1973] 2 All ER 273

Cited as: *Parkinson v. Triplan*

Wholecrop Marketing Limited v. Wolds Produce Limited¶
2

16 July 2013

[2013] EWHC 2079 (Ch)

Available at:

<http://www.bailii.org/ew/cases/EWHC/Ch/2013/2079.html>Cited as: *Wholecrop v. Wolds Produce****Hart Investments Ltd v. Larchpark Ltd***¶
51

Queen's Bench Division (Technology and Construction Court),

EWHC 291 (TCC),

9 February 2007,

Available at:

<http://www.bailii.org/ew/cases/EWHC/TCC/2007/291.html>Cited as: *Hart v. Larchpark****Keary Developments v. Tarmac Constructions***¶¶
52, 93

Court of Appeal, Civil Division,

13 April 1994, [1995] 3 All ER 534,

Available at:

<https://www.uncece.org/fileadmin/DAM/env/pp/compliance/C20>

12-

65/Communication/Att.12_KearyDevelopmentsvTarmacConstructi
on_1995_3AllERES.pdfCited as: *Keary v. Tarmac****UK No. 58, Tongyuan (USA) International Trading Group v.
UniClan Limited***¶
66

High Court of Justice, Queen's Bench Division

(Commercial Court), 19 January 2001

Albert Jan van den Berg (ed), Yearbook Commercial Arbitration

2001 Volume XXVI, Yearbook Commercial Arbitration, Volume 26,

Kluwer Law International 2001

Cited as: *Tongyuan v. Uni-Clan*

United
States of
America

***US No. 92, Geotech Lizenz AG (Switzerland)
v. Evergreen Systems, Inc. (USA)***

¶
65

United States District Court, Eastern District of New York, 27 and
28, October 1988

Albert Jan van den Berg (ed), Yearbook Commercial Arbitration
1990 Volume XV, Yearbook Commercial Arbitration, Volume 15,
Kluwer Law International 1990

Cited as: *Geotech v. Evergreen*

MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino

¶¶
101, 123

United States Federal Appellate Court, Eleventh Circuit

No. 97-4250, 29 June 1998

Available at: <http://cisgw3.law.pace.edu/cases/980629u1.html>

Cited as: *Marble v. Ceramica*

***Tyrone BROOKS, Lanett Stanley, et al, v. Zell MILLER,
Governor of Georgia, Georgia State Board of Elections, et al.***

¶
44

United States Court of Appeals, Eleventh Circuit

No. 969284, 30 October 1998

Available at: [http://caselaw.findlaw.com/us-11th-
circuit/1274737.html](http://caselaw.findlaw.com/us-11th-circuit/1274737.html)

Cited as: *Brooks v. Miller*

Planned Parenthood Southeast, Inc. v. Luther Strange

¶
44

33 F.Supp.3d 1330, 2014 WL 3809403 (M.D.Ala.2014)

Cited as: *Planned Parenthood v. Strange*

Larez v. City of Los Angeles

¶
44

946 F2d 630, 34 Fed. R. Evid. Serv. 1103

Available at: [http://openjurist.org/946/f2d/630/larez-v-city-of-los-
angeles](http://openjurist.org/946/f2d/630/larez-v-city-of-los-angeles)

Petroleum Separating Company v. Interamerican Refining Corporation

¶
44

U.S. Court of Appeals for the Second Circuit

296 F.2d 124 (2d Cir. 1961)

Available at: <http://law.justia.com/cases/federal/appellate-courts/F2/296/124/131703/>

Cited as: *Petroleum v. Refining*

Pasta Zara S.p.A. v. United States, American Italian Pasta Company, et al.

¶
160

U.S. Court of International Trade, 7 April 2010

Available at: <http://cisgw3.law.pace.edu/cases/100407u1.html>

Cited as: *Zara v. Company*

Zhejiang Shaoxing Yongli Printing and Dyeing Co., Ltd v. Microflock Textile Group Corporation

¶
160

U.S. District Court, Southern District of Florida, 06-22608-CIV, 19

May 2008

Available at: <http://cisgw3.law.pace.edu/cases/080519u2.html>

Cited as: *ZPrinting and Dyeing v. Microflock Textile*

ZCC

Swiss entity v. Dutch entity

¶¶
37, 96

Award, HKZ Case No. 415, 20 November 2001

ASA Bulletin, Kluwer Law International 2002, Volume 20, Issue 3

STATEMENT OF FACTS

THE PARTIES: *Claimant, Wright Ltd.*, is a specialized manufacturer of fan-blades for jet engines; *Respondent, SantosD KG*, is a manufacturer of jet engines. During the period both were subsidiaries of **Engineering International**, the Parties cooperated in other joint developments for fan-blades [Answer Req. Arb., p.24, ¶7]. Shortly after being put up for sale, in November 2009 it was decided Respondent should be *de-risked* in order to make it more attractive to potential buyers, for instance, via the agreement of fixed exchange rates [Res. Ex. R1, p.27] not only in ongoing relations but also newly concluded contracts [Answer Req. Arb., p.24, ¶9]. On the other hand, as a result of the confidential negotiations between Engineering International and Skymover – which finally bought Claimant on 27 July 2010 – the signature of the Development and Sales Agreement had to be postponed to 1 August 2010, instead of the former original date [PO2, p.54, ¶1]. Subsequently, Respondent was sold to SpeedRun on 3 August 2010 [*idem*].

NEGOTIATION AND CONCLUSION OF THE DEVELOPMENT AND SALES AGREEMENT

In January 2010, Respondent received notice from **Earhart SP**, an aircraft manufacturer, seeking quotes for a new jet engine, particularly focusing on its low fuel consumption and noise reduction [Answer Req. Arb., p.24, ¶5]. **In Spring 2010**, Respondent contacted Claimant to discuss the possibility of jointly developing the state-of-the-art TRF 192-I fan-blade, to be included into Respondent's high-spec jet engine to meet Earhart SP's standards. At the time, both Parties were subsidiaries of Engineering International [*idem*, ¶¶6&7]. **On 1 May 2010**, when agreeing on the basic principles for their cooperation, Respondent made clear that, in order to contract with Earhart in September 2010 – and thus guarantee business for both Parties – it needed a fixed figure; as the final production costs for the fan-blade were not yet determined, the Parties agreed on a price range as the basis for Respondent's internal calculation of its offer to Earhart [*idem*].

On 1 August 2010, the **Development and Sales Agreement** was concluded. In the first year of contracting, Respondent was bound to purchase 2,000 fan-blades [Cl. Ex. C2, p.10]. The final price would be paid in US\$ and calculated on a cost + profit basis [*idem*] with risk-sharing elements [Cl. Ex. C1, p.8]. As a comparable model had already been used in their two earlier cooperations, the Parties copied the price mechanism. At the time of those cooperations, there had been no need for the Parties to explicitly regulate the exchange rate as they belonged to the same group of companies. Yet, in the end, the exchange rate at the time of contracting had been used for the conversion of the cost elements for both [Answer Req. Arb., p.24, ¶8]. It was clear for Respondent that this should also be the basis for the present cooperation considering Respondent's *de-risking* context [*idem*, ¶9; Res. Ex. R5, p.31]. However, since the Parties used previous contracts and adopted very similar conducts as

in the past, the inclusion of an express provision regarding a fixed exchange rate was overlooked [Answer Req. Arb., p.25, ¶10]. **On 26 October 2010**, the Parties agreed to add an **addendum** to the Contract regarding the purchase of 2,000 clamps [Req. Arb. p.4&5, ¶8]. Given that they no longer belonged to the same group of companies and to avoid any discussions on the applicable exchange rate, Respondent suggested to explicitly regulate the rate governing the whole Contract in the addendum, to which Claimant did not raise any objections [Answer Req. Arb., p.25, ¶10; Res. Ex. R2, p.28; Res. Ex. R4, p.30].

PERFORMANCE OF THE DEVELOPMENT AND SALES AGREEMENT

On 14 January 2015, Claimant delivered the goods in conformity with the Contract [Cl. Ex. C3, p.12], attaching the respective invoices [Req. Arb. p.5, ¶9]. The following day, after examining the received goods, Respondent transferred to Claimant's bank account US\$ 20,438,560.00 for the fan-blades and US\$ 183,343.28 for the clamps [Cl. Ex. C3, p.12], fully performing its payment obligations under the Contract [Answer Req. Arb., p.25, ¶¶15-19]. After receiving payment confirmation from Respondent, Claimant sent a second invoice for the fan-blades wrongly applying a floating exchange rate and requesting additional payment of US\$ 2,285,240.00 [Cl. Ex. C5, p.14; Cl. Ex. C7, p.16]. **On 29 January 2015**, only US\$ 20,336,367.20 was credited to Claimant's bank account due to unknown reasons for Respondent [*idem*]. As then explained by the Central Bank, since the transfer exceeded US\$ 2 million, a 0.5% levy had been subtracted under Regulation ML/2010C [Cl. Ex. C8, p.17], a specific public law regulation in Equatoria regarding money laundering investigations [Answer Req. Arb., p.26, ¶¶18&19] with no correspondence in Mediterraneo [PO2, p. 55, ¶8]. **On 9 February 2015**, Claimant once again contacted Respondent demanding further payment [Cl. Ex. C6, p.15]. The latter replied that no such was due under the Contract as the invoice correctly reflected the Parties' agreement on a fixed exchange rate for the whole Contract [Cl. Ex. C7, p.16], also stating it was not bound to bear the levy as it was not an ordinary charge [Answer Req. Arb., p.26, ¶¶18&19].

THE ARBITRAL PROCEEDINGS: On 1 April 2016, as Claimant informed Respondent it would take the steps to initiate arbitral proceedings [Res. Ex. R3, p.29], the 60-day limit started running [Answer Req. Arb., p.25, ¶13]. **On 31 May 2016**, the deadline for initiating arbitration [*idem*], Claimant presented an incomplete Request for Arbitration [Req. Arb., pp.3-7], neither attaching a power of attorney for these proceedings nor paying the registration fee in full [CAM-CCBC LtoCl., p.19, ¶¶2i&2ii]. **On 7 June 2016**, Mr Fasttrack presented the correct signed power of attorney by Wright Ltd and payment confirmation of the fee remainder [Fasttrack to CAM-CCBC2, pp.20&21]. **On September 2016**, Respondent requested security for costs [Req. SfC, pp.45&46].

APPLICABLE PROCEDURAL AND SUBSTANTIVE LAW

According to the arbitration agreement, *[t]he arbitration shall be conducted under the Rules of the (...) Chamber of Commerce Brazil-Canada ("CAM-CCBC") and in line with international arbitration practice* [Cl. Ex. C2, p.11]. Additionally, *[t]he seat of arbitration shall be Vindobona, Danubia*. Hence, the *lex arbitri* is Danubian Arbitration Law – which is an adoption of UNCITRAL Model Law [PO2, p.60, ¶37]. The Parties also agreed that the *Agreement is governed by the UN Convention of the International Sale of Goods ("CISG")*. *[F]or issues not dealt with by the CISG the UNIDROIT Principles are applicable* [Cl. Ex. C2, p.10]. Pursuant to the agreement between the Parties, the abovementioned statutes shall govern the arbitral proceedings and the merits of the present dispute.

SUMMARY OF ARGUMENT

On behalf of our Client, SantosD KG, hereinafter *Respondent*, following the applicable law, we respectfully make the following submissions and request this Tribunal to find that:

- I. Claimant's claims are inadmissible since the arbitration was not regularly initiated within the 60-day limit agreed by the Parties **(A)**, irrespective of CAM-CCBC's President acceptance of the Request for Arbitration **(B)**. Furthermore, the said limit cannot and shall not be deemed extended under the Rules as it consists of a contractual provision accordant to the Parties' will **(C)**.
- II. The Tribunal is empowered to and shall order Claimant to provide security for Respondent's costs as the elements contained in the arbitration agreement provide for such an application **(A)** and the facts of the case demonstrate an exceptional circumstance grounding the request **(B)**.
- III. Claimant is not entitled to additional payment since the Parties intended and agreed on a fixed exchange rate for the whole Contract **(A)** and Respondent is not under the obligation to bear the levy as it is an extraordinary bank charge **(B)**. Therefore, no further payment of any kind is due since Respondent duly concluded the Contract and performed its obligations under the CISG **(C)**. Furthermore, Respondent reasonably relied on Claimant throughout the negotiation and performance of the Contract, and thus not being liable for the latter's inconsistent conduct **(D)**.

PRELIMINARY QUESTION

In Claimant's submission there are several misreferences as to the Parties in dispute as well as to relevant facts and events of the case [MfC, pp. i, ii, 1-3&6, etc.] which could substantially impact the argumentative logic hereinafter adopted. Notwithstanding, relying on the initially submitted Request for Arbitration and Answer to Request for Security for Costs, parallel to the global context of the case Claimant presents, those shall be disregarded in order to address the issues at matter, being for all purposes Wright Ltd, Claimant in dispute and, SantosD KG, Respondent.

ARGUMENT**I. CLAIMANT'S CLAIMS ARE INADMISSIBLE AS NOT HAVING BEEN TIMELY SUBMITTED**

1. Claimant's claims are inadmissible since the arbitration was not properly initiated within the 60-day limit agreed by the Parties **(A)**, irrespective of the CAM-CCBC's President acceptance of the Request for Arbitration **(B)**. Furthermore, the said limit shall not be deemed extended under the Rules as it consists of a contractual provision accordant to the Parties' will **(C)**.

A. Claimant did not initiate arbitration within the 60-day limit agreed by the Parties

2. Pursuant to Section 21 of the Contract, the arbitral proceedings had to be initiated – meaning properly commenced – *within 60 days after the failure of the negotiation* [Cl. Ex. C2, p.11]. When agreeing to this 60-day limit, the Parties were clearly and unambiguously [cf. *Montecalvo v. ACE*] contracting an absolute time-bar clause to refer the disputes pursuant to the underlying contract to arbitration [cf. *Wholecrop v. Wolds Produce*; Tweeddale & Tweeddale, p.480]. Additionally, when consenting on the arbitration to be *conducted under the Rules of (...) CAM-CCBC* [Cl. Ex. C2, p.11], the Parties were agreeing on the conditions as to the form of the request for arbitration that *must be enforced by the arbitrators* by reference to institutional arbitration rules [Fouchard/Gaillard/Goldman, p.657].
3. However, the Request for Arbitration that Claimant submitted on the 31st of May 2016 did not comply with the specific mandatory requirements concerning the commencement of the proceedings provided for in article 4 CAM-CCBC Rules. The proceedings were only commenced on the 7th of June 2016 [Fasttrack to CAM-CCBC2, p.20] when the required valid **signed** power of attorney by Wright Ltd was provided and the requisite registration fee paid **in full (i)**, thereby the date when all requisites were fulfilled – as CAM-CCBC itself found the deficiencies of an importance preventing from notifying Respondent of the said Request. Similarly, the Kuala LRCA Rules establish that *the date of receipt (...) of the request **complete with all the accompanying documentation and (...) registration fee** shall be (...) the date on which the arbitration has commenced for all purposes* [cf. art. 2(2) KLRCA Rules]. In addition, Respondent cannot be deemed liable for Claimant's untimely commencement of arbitral proceedings **(ii)**.
4. By the 7th June the time limit for initiating arbitration had already expired. According to article 1.12(1) UNIDROIT Principles, the agreed 60-day contractual provision must be counted in calendar days. Thus, and as Claimant duly observes [MfC, p.12, ¶¶27&28], considering that the negotiations failed on the 1st of April 2016, the submission deadline was indeed the 31st of May.
5. Only a complete and thereby validly submitted request for arbitration could *stop the running of time limits applicable to the claim* [Terashima & Gagliardi, p.66]. Therefore, a claimant amending its

request after the deadline *is running the risk of having an arbitral award declaring that the claim is barred* [*idem*] considering *that the arbitration was not validly commenced before the expiry of the time limit* [Lew/Mistelis/Kröll, p.520]. Hence, the non-compliance with the requirements for initiating arbitration within the abovementioned agreed time limit shall render Claimant's claims inadmissible as time-barred [cf. *Nanjing v. Orchard*; Born, p.942].

i) All procedural requirements were only complied with on the 7th June 2016

- a) The power of attorney by Wright Holding PLC presented on the 31st of May 2016 did not provide for Claimant's adequate representation nor give Mr Fasttrack proper authority to commence the proceedings on its behalf
6. Pursuant to article 4.1 CAM-CCBC Rules, *[t]he party **desiring to commence an arbitration will notify the CAM/CCBC, (...) enclosing (...) a power of attorney for any lawyers providing for adequate representation.*** From this wording, one concludes that the party initiating proceedings *must* enclose all the requested documents [Terashima & Gagliardi, p.65]. Yet, Claimant argues that the power of attorney *did (...) provide for adequate representation* as Wright Holding PLC is Claimant's parent company and the one who had originally approached Mr Fasttrack to prepare the claim [MfC, p.13 ¶30].
7. However, since Mr Fasttrack is representing Claimant and not its parent company in these proceedings [Fasttrack to CAM-CCBC2, p.20], which are for all matters and purposes independent legal entities, the power of attorney presented first [PA1, p.18] did not provide for Claimant's representation as was therefore invalid. Hence, since the Request for Arbitration was solely signed by Mr Fasttrack [Req. Arb., p.7] and not accompanied by a power of attorney on Claimant's behalf, the Request shall be considered an **unsigned** Request whose legal certainty cannot be ensured [Wilske & Gack, p.323].
8. The Tribunal shall thus consider there was neither unequivocal nor implied indication from the initiating party to commence proceedings upon the filing of the Request [Wilske & Gack, pp.323&324; Fouchard/Gaillard/Goldman, p.656; contrarily, *vide ICC Case No. 6228* where claimant's *signature* implied the party's intention]. As Mr Fasttrack did not represent Claimant in the negotiations preceding the arbitration nor in any previous proceedings Respondent is aware of [PO2, p.58, ¶25], the attorney could not be deemed to be Claimant's adequate nor apparent representative on the 31st of May 2016. Even though Mr Fasttrack referred to Wright Ltd as its client in his first letter to CAM-CCBC [Fasttrack to CAM-CCBC1, p.2], there was not, at the time, proper documentation to attest such claim.
9. Besides, Wright Holding PLC had not been directly involved in the negotiations, drafting or conclusion of the Contract [PO2, p.57, ¶22]. Its involvement in the dispute merely concerned the

obtainment of a general policy decision on customer complaints concerning the levy and not the initiation of the arbitration or the preparation of the claims [PO2, pp.57&58, ¶22].

10. Furthermore, Claimant's 1st of April 2016 e-mail is not an evident manifestation of its intention to initiate arbitration on the 31st of May 2016 [MfC, p.12, ¶27], as it did not refer any specific dates for such event nor provide any information that could indicate to Respondent – or even the Tribunal – that Mr Fasttrack was Claimant's nominated attorney [Res. Ex. R3, p.29]. For these reasons, there was neither a clear demonstration that Claimant intended to start this arbitration [Wilske & Gack, p.324] nor that it had, for that end, had named Mr Fasttrack as representative.
11. Moreover, the presentation of the second power of attorney, on the 7th June 2016 [PA2, p.21], does not cover the blunder of not presenting a proper power of attorney in the first place.
12. Respondent does not contest the fact that Mr Fasttrack was *given* retrospective power to present the Request on the 31st of May 2016 [*idem*]. However, the procedural formal requirement for commencing an arbitration – which has to be both dissociated from the attorney's material act and analysed in the singular context of institutionalized arbitration – was only carried out on the 7th of June 2016, after the time limit had already expired and therefore being incompatible with the agreement of the Parties. Indeed, the arbitral center is an intermediary between the Parties for the purposes of commencing proceedings and has its own procedural rules and specific formal requirements [Born, pp.63-67; Lew/Mistelis/Kröll, p.514]. The liberty to ratify is not an absolute unrestricted right, instead subject to restrictions [Bowstead/Reynolds/Watts, pp.65-66], namely the terms relied and agreed upon by the Parties. Giving ratification full effect in this case clearly denies those terms as it consequently extends the 60-day limit beyond the legal certainty the Parties intended to assure.
13. In conclusion, the Tribunal shall deem the proceedings to have initiated on the date Mr Fasttrack was given the authority to make any submission on Claimant's behalf – the 7th of June 2016.

b) The partial payment of the registration fee is insufficient for the effective commencement of the arbitration

14. Claimant argues that all requisites for initiating proceedings were met and all *required documents provided* on 31 May 2016 [MfC, pp.12&13, Section 2.2 & ¶29]. However, it does not mention that at that time Claimant did not pay the registration fee in full.
15. Article 4.2 CAM-CCBC Rules dictates that, coupled with the notice for the commencement of proceedings, *the party must* [Terashima & Gagliardi, p.67] – *attach proof of payment of the Registration Fee in accordance with article 12.5 of the Rules*. This article, in turn, provides that ***[a]t the time of presentation of the notice for commencement of arbitration, the claimant must pay (...) the Registration Fee, in the amount stated in the Table of Expenses.***

16. The payment of the fee *must* be effected *in full* – R\$ 4,000.00 – even before the presentation of the mentioned notice as the *payment receipt shall* accompany the request [4.2 CAM-CCBC Rules; Timm, p.192]. Thereby, such payment is a precondition for the effective commencement of the arbitration as it has to be already demonstrated along with the Request. For that reason, the proceedings were only initiated on the 7th of June 2016 when Claimant suitably paid the Center the *price for the service of processing the case*, having CAM-CCBC made service of the Request dependent on the compliance of all formalities [Fasttrack CAM-CCBC2, p.20; Timm, p.192; cf. art. 5.2 ACICA Rules *the arbitration shall be deemed to commence on the **date** on which the Notice of Arbitration or the **registration fee is received** by ACICA, whichever is the later*].

ii) Respondent did not prevent Claimant from complying with the set out requirements in a timely manner

17. Respondent is not prevented from relying on Claimant's inefficiency to properly initiate arbitration. In fact, Respondent did not impede Claimant to comply with the demanded requirements [Answer Req. Arb., p.25, ¶14] as neither depends on Respondent's cooperation. To the contrary, they are all under Claimant's sphere of control, so the time-bar clause shall be enforced.

18. Regardless, seeing that Claimant was the one who declared the negotiations to have failed, and now is claiming undue payment [Res. Ex. R3, p.29], it was burdened to take the necessary steps to duly commence the arbitration – as it well recognizes two months prior to the expiration of the time-limit [*idem*]. Thus, Respondent is not accountable for Claimant's failure to properly do so.

CONCLUSION: PROCEEDINGS COMMENCED ON 7 JUNE 2016 AFTER THE TIME LIMIT HAD ALREADY EXPIRED

B. CAM-CCBC's President can only *prima facie* verify the arbitration agreement

19. Claimant seems to interpret the communication for the amendment of the Request for Arbitration of CAM-CCBC's President [Or. CAM-CCBC, p.19] as the acceptance of its timeliness [MfC, p.14, ¶¶31&32]. This is in disregard, however, of the *Kompetenz-Kompetenz* principle, one of the fundamental principles of arbitration [Born, Chapter 7; Fouchard/Gaillard/Goldman, pp.213,395-401; Rubino-Sammartano, p.584; *Canillez*]. Such principle is foreseen in the Rules [art. 4.5 CAM-CCBC Rules; Straube, p.12], in the applicable law to the arbitration [art. 16.1 DAL] and is *now firmly established in most modern arbitration laws* [Lew/Mistelis/Kröll, p.332, ¶14-17]. In accordance to the principle, arbitrators are empowered to ultimately examine the effectiveness of the arbitration agreement [Fouchard/Gaillard/Goldman, p.213, ¶416].

20. Consequently, the Tribunal is the single entity enabled to finally and definitely decide on the admissibility of these proceedings and is not bound to a preliminary *administrative* assessment [Wald/Borja/Vieira, p.81]. Even though the Rules authorize the President of the CAM-CCBC to examine the existence, validity or effectiveness of the arbitration agreement ***whenever requested or when respondent raises any objections*** [Straube, p.12; Wald/Borja/Vieira, p.81] without the production of evidence – which was not the case at the time of the amendment request – such eventual *prima facie* verification will always be confirmed or modified once the tribunal is constituted [art. 4.5 CAM-CCBC Rules]. The fact that the Request for Arbitration was not *thrown out* by CAM-CCBC's President shall not be portrayed as Claimant suggests [MfC, p.14, ¶31] as, *in practise, the President (...) will, (...), decide that the arbitration shall continue and any complex aspects related to the dispute (...) end up readdressed and effectively decided by the arbitral tribunal as already occurs in ICC* [cf. art. 6(3) ICC Rules; Wald/Borja/Vieira, p.84].
21. Therefore, the acceptance by the arbitral institution of the Request for Arbitration without the fulfilment of all the needed requirements does not, by any means, indicate that the proceedings were initiated on the 31st of May 2016. Conversely, it is for this Tribunal to finally decide whether or not the proceedings were timely initiated.

C. The time limit extension provision is of a procedural nature and is not accordant with the consolidated contractual intent of the Parties

22. Claimant argues that even if the Tribunal finds the proceedings not timely initiated, its claims are still admissible as the Rules provide for the extension of time periods, invoking article 2.6(a) – which instead refers to representation – and unrelated case law to support such argument [MfC, pp.14&15, ¶¶33&34]. According to Claimant's conception, the request for amendment implied the extension of the 60-day limit, until 10 June 2016 [MfC, p.14, ¶33].
23. Assuming Claimant intended to rely on article 2.6(i) CAM-CCBC Rules as the one providing for time periods, it still is confusing procedural and contractual time periods. It is not only calling upon the wrong provision, but also on article 6.6 of the Rules to count towards the agreed 60-day limit [MfC, p.13, ¶28] – whose nature differs from the procedural time periods the Rules foresee [art. 6 CAM-CCBC Rules].
24. The 60-day limit is of contractual nature since it is included in an arbitration agreement. Being a creature of contract [Born, p.1317], it *records the consent of the parties to submit to arbitration* [Redfern & Hunter, ¶2.01]. Therefore, the limit included in the agreement to arbitrate, as an exercise of party autonomy, shall only be modified according to the parties' will and not at the discretion of either the arbitral institution or tribunal. Contrarily, the time periods forecast in the Rules are of procedural nature and can be extended [arts. 2.6(i) & 6.4 CAM-CCBC Rules].

25. Claimant further alleges that the jurisdiction of the Tribunal has been established and for that reason the admissibility of the claims is an irrelevant issue [MfC, pp.14&15, ¶34], ignoring however that *jurisdiction and admissibility* are somewhat distinct concepts [Paulsson, p.601]. The fact that neither Party challenged *in principle* the jurisdiction of the Tribunal to address this dispute [PO1, p.52, ¶3(i)] does not mean Claimant's claims are admissible as it is the Tribunal – when exercising its jurisdiction – that shall finally determine on such (in)admissibility in order to after all consider *the merits of the dispute* [Paulsson, p.617].
26. Both Parties agreed that if no amicable solution could be found each had the right to initiate arbitration *within 60 days after the failure of the negotiations* [Cl. Ex. C2, p.11]. As the claims were only appropriately submitted after the 60-day limit, Claimant can no longer submit its claims to arbitration [Redfern & Hunter, ¶2.202; Rubino-Sammartano, p.248; Tweeddale, p.239; *Romano v. Rinaldi* where the court held that neither the arbitration agreement was effective nor could the parties refer the dispute to courts].
27. Claimant's vision that, irrespective of the effectiveness of the arbitration agreement for this dispute, the Tribunal shall extend the time limit, contradicts the contractual nature of this arbitration. The Rules may only be applied to a timely referred dispute. Claimant cannot argue an extension of the time limit based on an alleged power of the institution even before it is involved at all. It would be rather illogical to exercise a power which arises from the Parties' agreement when the same agreement determines that such power can no longer be constituted for the present dispute.
28. Additionally, even if the Tribunal could actually consider an extension, its decision would have to be fully justified and formalized via a procedural order and only when facing *force majeure* or other unforeseen circumstances [Verçosa, p.126; *Harbour v. Agency*]. In the present case, the 60-day limit is both reasonably long – not violating public policy – and familiar to Claimant as it was not only originally agreed by the Parties but also the standard dispute resolution clause in all contracts between subsidiaries of Engineering International [PO2, p.57, ¶21]. Any extension would always be unfair to Respondent which is not – and could not have been – accountable for Claimant's untimely submission [*vide* Lew/Mistelis/Kröll, pp.510&511, *concerning the fairly high considerations to meet for such an extension to be granted, for instance respondent's responsibility*].
29. [A]s a general rule, arbitrators will ensure that deadlines stipulated by the parties are complied with, and the courts will not set aside or refuse to enforce the award for having done so [Fouchard/Gaillard/Goldman, p.658]. The Tribunal shall, above all, honour the Parties' agreement to arbitrate: the *foundation stone of almost every arbitration* [Lew/Mistelis/Kröll, p.99, ¶6-1; Redfern & Hunter, ¶2.01] and expression of their intentions [Born, p.1343]. Thus, since arbitrators derive their power from such agreement, they should consider *not the preferences of the parties in the heat of battle, but their more abstracted utility*

calculations before [Style, p.3], as well as their emerging legitimate expectations, namely the strictly fixed time period in which a claim could be brought forward [*vide* Lew/Mistelis/Kröll, p.507 *regarding legal certainty provided by time limits*]. Otherwise be running the risk of rendering a non-enforceable arbitral award under the Model Law and the NY Convention, whose articles 36 and V, respectively, provide for the refusal of enforcement of arbitral awards following proceedings contrary to the effective agreement of the parties as to procedure.

CONCLUSION: CLAIMANT'S CLAIMS ARE INADMISSIBLE AS NOT HAVING BEEN TIMELY SUBMITTED AND SHALL THEREFORE BE DISREGARDED

II. THE TRIBUNAL IS EMPOWERED TO AND SHALL ORDER CLAIMANT TO PROVIDE SECURITY FOR COSTS

30. Claimant shares Respondent's perspective as to the Tribunal's power to order security for costs, which correctly notes its jurisdiction although based on different standards. The arbitral power to order interim measures seems now uncontested [*vide* Filho & Lacreta, p.143; Kee, p.280; Craig/Park/Paulsson, p.467]. Indeed, the elements contained in the arbitration agreement provide for security for costs **(A)**. However, Claimant's arguments as to the non-fulfilment of the requirements to grant the measure shall be deemed unacceptable and consequently be disregarded since Respondent's request is grounded **(B)**.
31. Therefore, Claimant shall be ordered to secure in advance the costs Respondent has to pay to the Tribunal, as well as the legal costs for the services of Mr Langweiler and also the likely expenses incurred for the oral hearing for witnesses and experts [Req. SfC, p.46, ¶1], in the estimated minimum amount of US\$ 200,000.00, probably higher [*idem*].

A. The elements contained in the arbitration agreement provide for security for costs

32. As previously mentioned, the arbitration agreement, being a reflection of party autonomy, is the primary source of the arbitral tribunal's jurisdiction [Born, pp.75,2453; Rubino-Sammartano, p.56; Fouchard/Gaillard/Goldman, p.11, ¶11].
33. When agreeing that *[t]he arbitration shall be conducted under the Rules of the (...) Chamber of Commerce Brazil-Canada* the Parties thereby incorporated CAM-CCBC Rules as those applicable to the proceedings [Born, p.1388; Haddad & Coelho, p.32; Cl. Ex. C2, p.11, Section 21: Dispute Resolution]. Additionally, by selecting Vindobona, Danubia as the seat of arbitration [*idem*], the Parties also subscribed that the *lex arbitri* would be Danubian Arbitration Law. Finally, the Parties consented on the arbitration to be conducted *in line with international arbitration practice* [*idem*]. As

hereafter demonstrated, all these elements are the genesis of the parties' ability to request security [Rubins, p.315; Redfern & O'Leary, p.401; Skoufalos, p.3] which provide for such a provisional measure to be within the scope of the Tribunal's jurisdiction.

34. Thereby, it is clear that the current proceedings shall be conducted under the abovementioned statutes and not ICSID Convention nor any other arbitration laws or institutional rules that Claimant refers [MfC, p.4, Section 1.1], neglecting the specific context of the cited article "*Security for costs in ICSID Arbitration*" [Uchkunova & Temnikov, ¶1].

i) Article 8 of the Rules comprises security for costs as an available measure

35. Despite some of its distinctive features, security for costs is commonly accepted as a provisional measure [Gu, p.167; Born, p.2495; Lew/Mistelis/Kröll, p.594; Berger, p.9].
36. Article 8.1 CAM-CCBC Rules – and not 10.4.1 [MfC, p.5, ¶3] – provides that the Tribunal has the power to grant injunctive or *anticipatory* measures, *unless otherwise agreed by the parties*.
37. The mentioned provision can be compared to other institutional rules, such as ICC former article 23 – now 28 – drafted in order to *bridge the problematic security for costs gap in the previous regime* [Gu, p.181] and broadly enough to include applications for that measure [Schwartz & Derains, p.298; Blessing, p.31; Miles & Speller, p.33]. Although there is no express mention as to security for costs in the mentioned rules, the current international approach tends to conclude *tribunals can grant such orders under their general power to grant interim relief* [Lew/Mistelis/Kröll, p.600, ¶23-53; RSM *Production v. Saint Lucia*]. Thus, the absence of an express agreement to the contrary is commonly interpreted in international arbitration as a tacit consent to order measures as security for costs [Born, pp.2434-2454; cf. *Swiss entity v, Dutch entity*; *ICC Case No. 12542*; *ICC Case No. 10032*; *XY International v. Société Z; Parties Not Indicated Award*]. Consequently, an arbitral tribunal is empowered to issue security unless there is evidence that parties did not intend to bestow that power [Holtzmann & Neuhaus, p.550].
38. Notwithstanding, even if the Tribunal considers security for costs not included in the scope of article 8 CAM-CCBC Rules, it shall still find it is empowered to order it as a determination of procedure under article 7.8 which foresees *[t]he Arbitral Tribunal will adopt the necessary and convenient measures for the appropriate conduct of the proceedings (...)* in order to *preserve their integrity* [Goeler, p.336, quoting Craig/Park/Paulsson, p.467]. Respondent's application is both necessary and convenient in this case [*vide* B(ii)].
39. Altogether, in light of *the spirit of the Rules in the matters that relate to their own powers* [Escobar & Leite, p.212 on article 13.1 CAM-CCBC Rules], arbitrators are supposed to address security for costs as a provisional measure, envisioning arbitral plenitude towards courts.

ii) Consistently, Danubian Arbitration Law also foresees such measure

40. The *lex arbitri* is a verbatim adoption of the Model Law [PO1, p.53, ¶5(4)] which foresees that the tribunal may order a party to *provide a means of preserving assets out of which a subsequent award may be satisfied* [art. 17(2)(c) Model Law]. Despite the fact that there is no express reference to security for costs, the UNCITRAL Working Group has clarified that such may be included within the scope of article 17(2)(c) [*vide* UNCITRAL Working Group, p.10, ¶48; Kee, p.275].
41. The 2006 amendments to the Model Law confirmed *the arbitral tribunal's broad authority to grant provisional measures and clarified the existing substance of the Model Law rather than expanding previously-limited powers* [Born, p.2449], being security for costs available under the general provision to issue interim protection [Redfern & Hunter, ¶5.37; *Guaracachi v. Bolivia*].

CONCLUSION: THE TRIBUNAL HAS THE INHERENT POWER TO ORDER SECURITY FOR COSTS**B. Respondent's request for security for costs is grounded and shall be granted**

42. Conversely to Claimant's argument, Respondent's request is duly substantiated and shall therefore be granted. The Tribunal should exercise its power on the present case since Respondent's case is properly supported by evidence **(i)**, indeed representing exceptional circumstances for security for costs **(ii)**. Moreover, by granting the measure, the Tribunal will not be prejudging the merits of the dispute in any way **(iii)**.

i) The article of the Carioca Business News is an admissible evidence

43. Claimant argues the news article [Res. Ex. R6, p.47] is an inadmissible evidence since it is based on *out-of-court declarations* generally not allowed under the *hearsay rule* [MfC, p.8, ¶18]. However, such objection is rather uncommon in international arbitration [O'Malley, p.240, ¶8.25].
44. Respondent does not contest the general non-acceptance of the rule in domestic court proceedings [Burnett & Weiss, p.107] – as Claimant well demonstrated when trying to support its argument on state court decisions based on non-applicable national law provisions [e.g. *Brooks v. Miller*, *Planned Parenthood v. Strange*, *Larez v. City of Los Angeles*].
45. It should be noted, however, that not only is there *no formal bar to the admission of hearsay evidence* [Burnett & Weiss, p.107; Mehren & Salomon, p.293] but also that such sort of evidence is generally accepted in arbitration either by state courts or arbitral tribunals [*Petroleum v. Refining*; *Warborough v. S. Robinson & Sons*; *Steamship v. Thai Transportation*; ICC Case No. 12124].
46. Each party is entitled to produce the documents to prove their case on their evidentiary initiatives [Pereira & Levin, p.137]. In the instant case, Respondent presented one press article and did not exclusively rely on it to demonstrate the necessity of the measure [MfC, pp.8&9, ¶¶17&20]. Notwithstanding, the Tribunal has *broad discretion to determine what evidence it should bear* [Mehren &

Salomon, p.285], deem *useful, necessary and appropriate*, according to the applicable statutes and international practice [*vide* art. 7.4.1 Rules; art. 19(2) DAL; art. 9.1 IBA Rules].

47. The news article provides circumstantial evidence and credible testimony of Claimant's impecuniosity and previous non-compliance behaviour and aims to underline the current risk of its unwillingness or inability to comply with an adverse award [Needham, pp.122-125].
48. Identical conclusions can also be drawn from the analysis of Claimant's financial statements [PO2, pp.58&59, ¶28] and other relevant facts: Claimant's unsuccessful search for funding; the use of the US\$ 3,000,000.00 parent company loan for commence this arbitral proceedings; the enforcement proceedings initiated by its supplier; the objection to the declared set-off or Claimant's past misleading and concealment behaviour [PO2, pp.59&60, ¶¶29,30&34]. Thus, Claimant cannot argue the inadmissibility of the article on the ground it jeopardizes the fairness and equality of the proceedings, namely because its author cannot be cross-examined [MfC, p.8, ¶18], since all facts therein reported are either uncontested by Claimant or demonstrated by of other evidentiary elements.
49. In conclusion, the Tribunal shall freely assess the *admissibility, relevance, materiality and weight* of the article [art. 19(2) DAL; Fouchard/Gaillard/Goldman, p.698] and deem it admissible.

ii) The facts demonstrate the request is grounded and made in good faith

50. Claimant argues that an application for security for costs should follow an alleged fixed group of criteria [MfC, p.6, ¶7]. This criteria is particularly based on investment arbitration case law which is actually similar to Respondent's case [*RSM Production v. Saint Lucia*]. Furthermore, Claimant alleges the measure should only be granted *in very exceptional cases* [MfC, p.4, ¶2].
51. However, contrarily to Claimant's understanding, there is not an *internationally recognized "legal test" for granting security for costs* [Gu, p.186]. Instead, there are several different criteria that can be applied [Colbran, p.233; Delany, p.130; Rubins, pp.369-376; e.g. *Parkinson v. Triplan*; *Hart v. Larchpark*; *ICC Case No. 12542*]. Institutions, scholars and tribunals have developed widely accepted guidelines when assessing such applications [Goeler, p.336; Task Force Report, p.13, ¶B]. For instance, while article 8 CAM-CCBC Rules is silent on any specific conditions, UNCITRAL Model Law provides some guidance for granting general interim relief, although not for security for costs in particular.
52. Hence, following international arbitration practice – which the Parties incorporated into to their agreement – not bound to the completion of concrete dispositions and since the grounds of the measure are entirely within the Tribunal's discretion [art. 8.1 CAM-CCBC Rules; Rubins, p.320], this discretion shall be exercised considering the particularities of the case [Martowski, p.6; *Keary v. Tarmac*] and balancing both parties' interests [Goeler, p.336; Gu, p.186; *ICC Case No. 10032*].

Thus, it is not accurate to say that the power to order security shall be *used rarely* [MfC, p.4, ¶2]. Such restrictive approaches are based on singular legal backgrounds of particularly structured institutions such as the ICC [Born, p.2460; Rubins, p.340; Schwartz, p.54] and cannot be interpreted as a general international trend. In the contrary, its historic reluctance is presently being overridden as it was mostly associated with past doubts about arbitrator's power to provisional measures comparing to courts [Rubins, p.341; Born, p.2461; Lew I, pp.23-30].

53. As an available remedy, the measure shall only be granted when the circumstances of the case justify it. Thus, Respondent does not contest such *cannot be abused* [MfC, p.4, ¶2].

54. Nonetheless, Respondent further points out relevant facts which prove there are grounds to order security for costs, thus such will not constitute a misuse of the Tribunal's jurisdiction.

a) Claimant's claims lack any factual and legal basis so the Tribunal will ultimately render an award on costs in Respondent's favour

55. Claimant states Respondent's case concerning its chances to win this dispute are not *clear-cut* [MfC, p.8, ¶16]. However, Claimant failed, all in all, to prove any facts to support its statement, not honouring the principle it invokes: *who alleges must prove* [MfC, p.6, ¶8]. Respondent has fully performed its obligations under the Contract and therefore Claimant's claims for additional payment are non-meritorious and shall consequently be disregarded.

56. Claimant is attempting to take advantage of the exchange rate fluctuation between the conclusion of the Contract and its performance [PO2, p.56, ¶12] – which swayed its way – arguing that the rate included in the addendum was only applicable to the purchase of the clamps and not the fan-blades [Req. Arb. p.5, ¶¶8&12; MfC, p.16, ¶37]. Hence, the *prima facie* analysis of Claimant's claims evidences they lack *bona fide*, an essential element when evaluating the prospects of success on an application for security [Rubins, p.370; art. 2 CI Arb Guideline]. Therefore, Claimant's claims are not only inadmissible but also unjustified.

57. Since Claimant's claims have no factual or legal basis, an award on the merits will most likely be rendered in Respondent's favour. In that sense, Claimant will certainly be condemned to pay all the costs Respondent incurred in these proceedings as the cost shifting rule is the one applicable to the case at matter, under which the prevailing party is awarded the reasonable expenses incurred for presenting its case [Rubins, p.312].

58. Cost allocation is an element of procedure governed by the Parties' agreement and the selected institutional rules [Wetter & Priem, p.249; *Triumph v. Kerr*; ICC Case No. 6962; ICC Case No. 6248]. That being said, the *cost shifting rule* – also known as *the costs follow the event principle* – is not only *almost universally recognized* to the extent it *may be viewed as a general principle of international law* [Gotanda, p.34, section III, B2, ¶a] and international commercial arbitration practice [Bondar, pp.45-58;

Rubins, p.363], but also the rule under which Danubian, Equatorianian and Mediterranean arbitration and procedural laws are based upon [PO2, p.58, ¶26]. Thus, the Tribunal shall at this stage of the proceedings order security for Respondent's costs as it will ultimately render a costs award in its favour [Req. SfC, p.46, ¶2], entitling it – as the prevailing party – to recover its incurred costs [Lew/Mistelis/Kröll, pp.23-52].

59. Although the Tribunal has discretion to allocate costs [PO2, p.58, ¶26], its decision is likely to depend either on the legal environment arbitrators were *educated and formed* [Redfern & O'Leary, p.403] or on *the law and practices as to costs at the locus arbitri* [Bühler, p.256]. In the current proceedings, all three appointed arbitrators have their professional domiciles in the abovementioned countries, thus being more familiar with cost shifting [Req. Arb., p.6, ¶18; Answer Req. Arb. p.24, ¶4; ToR, p.41, ¶4.1]. For that reason, they will certainly tend to apply such rule when rendering the final award on costs pursuant to article 10.4.1 CAM CCBC-Rules.
60. This approach is also corroborated by each party's submission on the reimbursement of arbitration costs, namely the relief sought in these proceedings [Req. Arb. p.7; Answer Req. Arb., p.26]. Consensus on this matter shall be deemed by the Tribunal as a decisive factor [Giusti & Catarucci, p.179]. Had the Parties intended to deviate from the cost shifting rule, they would not have formulated requests for the losing party to bear those costs.
61. Finally, *[t]he Arbitral Tribunal shall also fix the amount or the proportion of refund of one party to the other* [ToR, p.43, ¶12.3]. This wording indicates it will ground its decision on cost allocation upon the final award on the merits. Thus, the costs will *follow* the outcome of the dispute and vary in proportion of the success of the winning party.

b) Claimant's past behaviour evidences a non-compliance intent

62. The parties' conduct must also be addressed when analyzing an application for security for costs, namely of the one against which the measure is sought. Claimant's behaviour is of extreme importance in order to determine the rectitude of the request [Rubins, p.375], particularly in *previous arbitral or court proceedings* [Darwazeh & Leleu, p.144].
63. Claimant argues all the awards in previous proceedings were complied with, thereby concluding Respondent has failed to prove its non-compliance with adverse awards [MfC, p.6, ¶8]. However, not only Claimant is alleging unsustained facts but is now presenting a different – and contradictory – version of the ones initially reported.
64. Claimant assumed it has not complied with the award rendered against it in January 2016 in the arbitration against its supplier – allegedly due to an imminent set-off against the latter [Answer Req. SfC, p.49; MfC, p.6, ¶10]. Thus, Claimant cannot argue there is *no valid proof* it has failed to

- comply with any award* [MfC, p.6 ¶8] when such fact was uncontested, specifically when Claimant admits the amount is owed to its supplier *has not been due for more than three months* [MfC, p.6, ¶10].
65. Additionally, and despite the aforementioned arguments, the Tribunal shall consider the fact that the supplier commenced enforcement proceedings in a court under the New York Convention and therefore objected to the set-off declared by Claimant, which is currently still being litigated in the courts of Ruritania [PO2, p.59, ¶30]. Although Claimant imprecisely argues *any sum awarded will be set off* [MfC, p.6, ¶10], the mentioned claim will most likely be disregarded. Indeed, an US Court held *the right to assert counterclaims in [an application to enforce a foreign award] appears nowhere in the [New York] Convention. (...) [T]he relief sought is to be denied only if the party resisting enforcement shows that one of the specific grounds stated in the Convention for non-enforcement exists* [Geotech v. Evergreen].
66. Besides, there is *a tendency to reject such a[n] [unadjudicated] claim as a set-off defense in enforcement proceedings* [Otto, p.201]. Accordingly, an English Court stated it was not *aware of any case in which the courts have accepted it would be inappropriate to allow a Convention award (...) valid and enforceable to be enforced on the grounds the debtor has a cross-claim against the holder of the award* [Tongyuan v. Uni-Clan].
67. One should also note that the set-off invoked in the pending enforcement proceedings consists of an amount its supplier allegedly owes to Claimant's parent company [Answer Req. SfC, p.49] and not to Claimant itself. Thus, there is no direct connection between the debt Claimant is now trying to take advantage of and the amount in debt.
68. Therefore, Claimant does have a history of non-compliance which can actually be compared to the applicant's background in *RSM Production v. Saint Lucia*. The mentioned award has similarities to the current proceedings as in both cases the claimants did not comply with past awards rendered against them nor gave valid explanations for their behaviour.
69. In conclusion, the fact Claimant did not challenge nor complied with a previous unfavourable award unveils an evasive or dilatory behaviour which could equally convert into non-compliance with the future adverse award [Gu, p.196] rendered in these proceedings. In that event, and even though both Equatoriana and Mediterraneo are contracting states to the New York Convention [PO2, p.60, ¶35], it cannot be argued that the award will always be enforceable as the New York Convention foresees several grounds for refusal [*vide art. V*].

c) Claimant's financial situation is unstable

70. Claimant's non-compliance with the payment order of US\$ 2,500,000.00 in the previous arbitration against its supplier raises serious doubts as to its actual financial situation.
71. When deciding applications for security for costs, tribunals typically consider *the financial state of the party from whom security is requested (...) and the likely difficulties in enforcing a final costs award* [Born, p.2495; Martowski, p.7; Rubins, p.373]. Tribunals also assess whether such condition has

unforeseeably and significantly deteriorated since the conclusion of the contract [Sandrock, pp.17-30; Rubins, p.357] and therefore constitutes a serious risk to the enforcement of any costs award. Orders for security are the standard method of protecting a party against the other's potential inability to pay costs [Rubins, p.310].

72. Claimant argues it is in a *very healthy financial status* and not currently facing *any liquidity challenges* [MfC, p.7, ¶13] although adopting a contrary position when setting forth that *once Claimant's liquidity is stable (...) this will all be sorted* – referring to its non-compliance with the arbitral award rendered against it [MfC, p.6, ¶10]. In fact, Claimant recognizes its lack of funding when arguing Respondent is the one causing it [Answer Req. SfC, p.49]. Such acknowledgement can also be compared to the claimant's admission of its financial limitations in *RSM Production v. Saint Lucia*. Moreover, Claimant relies on the witness statement of its CFO, Ms Jaschin, to prove it is now facing a strained liquidity due to the production of the new TRF-305 fan-blade [Cl. Ex. C9, p.50]. Therefore, such fact shall be deemed uncontested by the Tribunal.
73. Furthermore, Claimant's fragile situation is reflected in its published financial statements. According to the 2015 balance sheet, Claimant's cash and cash equivalents – which amount to US\$ 199,950.00 – are insufficient to pay the costs Respondent is estimating to incur in this arbitration [PO2, p.59, ¶28]. Furthermore, the vast majority of Claimant's assets are non-current, which includes property, plant and equipment, and other intangible assets. These cannot be easily liquidated to suppress any urgent need since they are essential to maintain the business activity. As some authors note, *the classical case where security may be granted is the claimant's impecuniosity* here reflected in its *serious cash-flow problem* and *lack of working capital* [Altaras, p.86].
74. Moreover, as Claimant's set-off defense in the abovementioned enforcement proceedings is most likely to be disregarded, the liabilities position may increase in, at least, US\$ 2,500,000.00. In that scenario, the debt will be larger than the amount of assets Claimant presently has, portraying uncertainty concerning the future development of the company [in accordance with the ruling in *ICC Case number 6697* in which security was ordered since Claimant was near insolvency and had far more creditors than assets to satisfy them]. Therefore, although it is *still in possession of (...) assets* [MfC, p.7, ¶13], the Tribunal shall not ignore the fact that Claimant is facing serious financial difficulties, which can immediately convert into an insolvency situation. Such facts reveal urgency in an immediate relief in order to stop potential harm – though awarding security for costs does not typically require such showings [Born, p.2472; Redfern & Hunter, ¶5.35]. Thus, Claimant's imminent bankruptcy will deprive Respondent from recovering its incurred arbitration costs due to Claimant's substantial debts, essentially loans usually secured and therefore first satisfied. There is in fact serious risk that Claimant will not have the funds or its assets will not be readily available to pay the costs as the end of these proceedings.

d) Claimant's financial status unexpectedly deteriorated

75. In addition to considering Claimant's current instability, the Tribunal shall also acknowledge that its financial situation has unexpectedly deteriorated since the conclusion of the Contract. Firstly, at that time, the 2010 balance sheet, which reflected a loss in the amount of US\$ 760,000.00, had not yet been published [PO2, p.58, ¶28]. Thus, Respondent could not have been aware of Claimant's difficult financial situation. Besides, Claimant's 2009 balance sheet portrayed an unrealistic amount in the claims position which Claimant consents [MfC, p.7, ¶12], creating the impression it was supposed to be rendered US\$ 15,000,000.00 when, in reality, it was actually awarded only US\$12,000,00.00 [Res. Ex. R6, p.47] of the US\$203,000,000.00 allegedly claimed – not being Respondent aware of Claimant's largely unsuccessful arbitration at the time of contracting. Such US\$ 3,000,000.00 difference is of major importance for Claimant's financial situation given the fact it is now claiming an inferior amount in these proceedings which has – according to Claimant's version – contributed to its current lack of funding [Answer Req. SfC, p.49; MfC, p.8, ¶14]. Moreover, the largely unfavourable award in the arbitration with one of Claimant's supplier was only rendered the past year.

e) Claimant has a history of searching for third party funding and has employed external funding for the purpose of initiating these proceedings

76. Claimant previously resorted to third party funding in both arbitrations with Xanadu [PO2, p.61, ¶39(d)] and has sought it for these proceedings. Although Respondent is well aware Claimant did not successfully obtain third party funding for the current proceedings [MfC, p.7, ¶11], its inquiries shall be considered when thoroughly evaluating Claimant's situation as its *financial difficulties are more likely to justify security for costs if (...) coupled with some other unforeseen factor that amplifies concerns about ability or willingness to pay* [Henderson, p.73].

77. Indeed, due to the unsuccessful search for third party funding [Res. Ex., p.47; PO2, p.59, ¶29], Claimant had to make use of a US\$ 3,000,000.00 loan provided by Wright Holding PLC – aimed for the final stages of the TRF-305 production – **to be able to finance this arbitration** [*idem*]. Therefore, albeit Claimant did not obtain third party funding, for all purposes availed itself of *the financial aid of a third person* [Sandrock, p.34] since it lacked funding capacity to independently commence this proceedings [Brekoulakis, ¶1], contributing to a *strong prima facie* for security for costs in the same terms as resorting to third party funding [cf. Born, p.2496] since it is doubtful whether the parent company *will assume responsibility for honouring* an eventual adverse costs award [RSM Production v. Saint Lucia].

f) Respondent is not responsible for any lack of liquidity

78. Simultaneously, it cannot be argued that Respondent contributed to Claimant's strained liquidity or lack of funding [Answer Req. Arb., p.49; MfC, p.8, ¶14] since, as mentioned before and further demonstrated, Respondent has fully performed its payment obligations under the Contract. Thus, Claimant's claims are unlawful and unproven.
79. Claimant also failed to prove Respondent was the sole or primary cause of its financial difficulties as, according to the former, it is undergoing self-inflicted strained liquidity due to the development of the TRF-305 [Cl. Ex. C6, p.15; *Hart v. Larchpark*]. In fact, Claimant's admissions regarding the strained liquidity associated with the new fan-blade and lack of funding allegedly caused by the Respondent's refusal of additional payment only add to the very own acknowledgement of its doubtful financial condition.
80. In conclusion, the requested measure is not only adequate but *necessary to efficiently protect* Respondent against Claimant's frivolous claims [Req. SfC, p.46, ¶5; Miles & Speller, p.32; Ho, p.334], having been genuinely demonstrated that granting security will ensure the preservation of Respondent's reimbursement right [Gu, p.168] and consequently the effectiveness of the arbitration [Pessey, p.18].
81. Moreover, Claimant's compliance with its administration fees obligations [PO2, p.60, ¶32] does not guarantee its ability to pay any costs award at the end of the proceedings, might rendering these meaningless [Skoufalos, p.5] – *if the matter relates to the integrity of the proceedings (...) it is always urgent* [*Quiborax v. Bolivia*]. In addition, Claimant failed to demonstrate that ordering security would either be onerous, unnecessary, **unfair** or deprive it from pursuing its claim [Skoufalos, p.5; ICC Case No. 10032]. Respondent's request was presented in good faith, meeting its obligations under article 12 CAM-CCBC Rules [PO2, p.60, ¶32; *vide* ICC Case No. 10032, considering Respondent's conduct as a relevant factor in order to justify granting security]. Additionally, the fact that Claimant offered to settle for a fraction of the amount claimed [Req. Arb., p.5, ¶17] *may lead the arbitrators to conclude that the claim is being used oppressively and it would be fair to require the party to provide security for the applicant's costs* [commentary on art. 4 CI Arb Guideline].

g) Claimant's concealment of its financial situation prevented Respondent from an earlier request for security for costs

82. Claimant also sustains the Tribunal should not order security because *the request was made after the Parties and the tribunal had already agreed on the terms of reference* [MfC, p.3, ¶1], providing no reasoning for such conclusion.
83. Although the terms of reference are usually interpreted to fix the subject matter of the dispute and specify the parties' claims [Terashima & Gagliardi, p.111; *vide also*

Fouchard/Gaillard/Goldman, p.666, ¶1228 *controverting such nature*], they do not prevent future applications for security for costs – as interim measures can be sought at any time before or during arbitral proceedings – let alone when parties only acknowledge relevant facts after their signature, in this case essentially through the pieces of information reported by Carioca Business News. Indeed, Respondent's request is no new counterclaim for the purposes of article 4.21 CAM-CCBC Rules but instead a provisional measure to ensure further compliance with the claim for costs Respondent filed upon its defense [Answer Req. Arb., p.26], therefore already included in the scope of the dispute [Rubino-Sammartano, p.588, ¶23.8; *RSM Production v. Saint Lucia*].

84. Costs are foreseen in the Terms of Reference and have to be allocated when rendering the final award [art.10.4.1 CAM-CCBC Rules; *XY International v. Société Z*]. However, it cannot be argued that requesting security conflicts with the wording of the Terms of Reference under which *[d]uring the course of the arbitration proceedings, each party shall bear the fees of its respective attorneys and possibly of technical assistants, (...)* [ToR, p.43, ¶12.4]. The granting of the measure does not exclude the payment by each party of the incurred costs but instead adds a guarantee to that payment – in a variety of forms, such as an escrow account, bond or bank guarantee – that the winning party will finally be reimbursed of those expenses by the opposing party. Thus, once security is ordered, it is deposited to the Tribunal's order for release [Berger, p.13], being either *used to cover the costs of the respondent or paid back to the claimant* [Živković, ¶4], and not compromising the regular continuance of the proceedings nor the outcome of the arbitration. Thus, the likely non-recoverability of Respondent's costs largely outweighs any harm associated with Claimant's deposit of the requested sum.
85. Regardless, Claimant's concealment of its financial situation through the omission of the outcome of previous arbitrations restrained Respondent from requesting the measure when previously approaching CAM-CCBC or the Tribunal. The non-compliance with the award rendered in the arbitration with Claimant's supplier was only disclosed – under article 11.2 of the Rules – to the Chambers of Commerce in Equatoriana and Mediterraneo on 1 September 2016 and then press-released the following day [Res. Ex. R6, p.47], after Respondent had already answered to the Request for Arbitration on 24 June 2016 and agreed to the Terms of Reference on 22 August 2016. Additionally, Respondent only became aware of Claimant's need for funding for these proceedings due to the paper dated 5 September 2016 [*idem*], being this the ultimate triggering event for the request for security for costs [art. 4 CIArb Guideline].
86. Considering that when drafting the terms of reference Respondent was unaware of any financial details regarding the TRF-305 other than it was to be completed in 2016 [PO2, p.58, ¶27], it could not be certain whether requesting security for costs was justifiable at that date.

87. Meanwhile, Respondent relied on Claimant's misleading information about its assets and could never have been aware of the latter's real financial status. At the time of contracting, Claimant presented itself as a financially sound company (presenting its financial status too positively) creating and maintaining the impression that an award of at least US\$ 100 million was imminent in its arbitration with the government of Xanadu [PO2, p.60, ¶34]. Notwithstanding the fact that the final award was rendered three weeks before the signature of Contract, Claimant never informed Respondent that it was well below its expectations, not meeting the provisions for the 2009 balance sheet [PO2, p.59, ¶28]. Claimant refused to comment on the information, opting not to clarify any misconceptions that might have been created due to the inaccurate information initially conveyed [Res. Ex. R6, p.47].
88. Even though confidentiality has always constituted a main feature of arbitration [Redfern & Hunter, ¶1.105], such *duty cannot be an absolute one* [Hwang & Chung, p.612]. Exceptions have thus been found portraying a gradually growing transparency in international arbitration [Redfern & Hunter, ¶2.170; Lew II, p.22; Carbonneau, p.579; Lo, p.235; Villagi, p.3; Ruscilla, p.9; Buys, p.121] evidenced, for instance, by UNCITRAL Rules on Transparency – though not directly applicable to the disputes. Such tendency may be motivated by award enforcement aspects, public interest and inevitably international trade protection [Hwang & Chung, p.613-618; Gruner, p.923; Rogers, p.2]. Hence, confidentiality is not to be considered *lege lata* [Paulsson & Rawding, p.48] and depends on the specific circumstances of the case [Poudret & Besson, p.316].
89. Not only the outcome of the arbitration with the government of Xanadu was of major financial importance – weighing on Respondent's decision to engage in a long term relationship with Claimant – but the arbitration itself directly encompassed general public interests. It emerged from an *alleged non-compliance with local regulations and governmental officials conspiracy with local competitors to take possession of the very profitable subsidiary and its production facilities* [Res. Ex. R6, p.47], which should immediately ground its public availability – though *there is clearly a public interest in any arbitration by an investor against a government, especially if the claim is for a large sum of damages* [Hwang & Chung, p.618].
90. Furthermore, the transparency trend may also comprise disclosure obligations in international arbitration proceedings such as those pertaining to financial disclosure of legal proceedings, including private proceedings that may affect the company's stock price [Vaughn, pp.37&38]. This is the case of both previous arbitrations Claimant was involved in. Had Respondent known about Claimant's actual finances, it might not have engaged in a substantial contractual relationship possibly risking other business associations as the one established with Earhart.
91. Besides, Claimant apparently holds that Respondent is demanding disclosure of the facts reported, when those were already solely revealed by the article in the Carioca Business News

[MfC, p.10, ¶22]. Respondent's request was therefore submitted in a timely manner [Needham, pp.122-125; *Regia v. Gulf*] upon discovery of these facts on 6 September 2016.

iii) The Tribunal will not be prejudging the case by ordering security

92. Arbitrators have long abandoned the perspective according to which considering an application for security for costs would inevitably imply addressing the merits of the dispute, underlined by the fact that Claimant supports such allegation on outdated bibliography [MfC, p.10, ¶23]. However, *there is no need for the tribunal to prejudge the outcome of the dispute and no reason why it should be thought to be doing so in making an order for security for costs* [Redfern & O'Leary, pp.400&401; art. 2 CIArb Guideline], limiting their examination to preliminarily establishing the claims' good faith [Lew I, p.27; Rubins p.370; *RSM Production v. Saint Lucia*; *Keary v. Tarmac*]. In fact, such measure is usually issued by means of interim order or partial final award [Born, p.2505], in any case not disposing [Skoufalos, p.2] neither determining on the merits [Martowski, p.7] as it consists of a procedural decision [*XY International v. Société Z*].
93. Claimant affirms ordering security may stifle its claim or even deter it from continuing this arbitration [MfC, p.10, ¶23]. Yet, such ruling will generally not stifle the claim when funds can be provided from elsewhere, for example resorting to credit as Claimant previously has [*vide Keary v. Tarmac*; *Hart v. Larchpark*] nor prevent it from equally presenting its case. Nonetheless, Claimant's concerns regarding the matter and its consequences – which contradict its prior statements asserting its financial stability [MfC, p.7, ¶13] – shall be interpreted as additional evidence of Claimant's current fragile financial status and the admission of the demerit of its claims.
94. By contrast, the non-granting of the measure may jeopardize the equal treatment of the parties – another core mandatory principle in arbitration [Holtzmann & Neuhaus, p.550] – established both in articles 7.8 CAM-CCBC Rules and 18 DAL. This principle is not intended to protect a party – Claimant in this case – from its *own failures or strategic choices* [*Transnacional v. STET International*], for instance the TRF-305 development, in a way that surpasses a reasoned request.
95. Claimant would certainly not have cast the burden of a claim on Respondent if it were not thought that the latter had sufficient funds to pay an award. Respondent, in turn, does not have such assurance and therefore was placed in an uneven playing field [Redfern & O'Leary, p.412] and in a less favourable position when dragged to this arbitration [*idem*, p.398; Gu, p.168]. Thus, to guarantee equal treatment, Respondent is entitled to an order of security for costs.

CONCLUSION: THE TRIBUNAL SHALL ORDER CLAIMANT TO PROVIDE SECURITY IN THE MINIMUM AMOUNT OF US\$ 200,000.00

96. Although uncontested, the amount Respondent is requesting given that nowadays arbitration costs can reach amounts in the millions or tens of millions of dollars [Redfern & Hunter, ¶1.124; Hanotiau, p.213] in exchange of its clear benefits [Timm, p.202] and also include parties' legal costs [ToR, p.43, ¶12.3; e.g. annotation 5(a)(iv) UNCITRAL Notes]; CIArb Guideline; *Swiss entity v. Dutch entity*]. The amount is merely estimated at this point since part of those final costs, namely evidentiary expenses and attorney's fees, cannot yet be determined.
97. Both CAM-CCBC Rules [art. 10.4.1] and the Terms of Reference [¶12.3] are silent on the reasonableness of the costs awarded to the winning party, as any definition for the concept is non-existent. Thus, the Tribunal is free to fix the amount secured pursuant to the particular circumstances of the case.
98. Considering that regularly awarded legal costs can also amount to millions of dollars [Newman & Zaslowsky, p.2; e.g. *Ulysseas v. Ecuador* (US\$2 million awarded for legal costs); *Saur v. Argentina* (US\$1.5 million awarded for legal costs)], Respondent's request for a minimum of US\$ 200,000.00 is not only justifiable – since it includes all accountable defense costs and evidence production expenses – but also will probably be far below its final costs. The amount is more than plausible for legal costs covering inhouse counsel from Mr Langweiler's who already prepared two submissions [Answer Req. Arb & Req. SfC, *the latter under considerable time pressure*], and the expenses for the oral hearing of experts (subject to proposed fees, travel, accommodation and services) and witnesses (namely travel, accommodation and translation, since the Parties are from different domiciles) – this may amount up to 80% of the average overall costs of arbitral proceedings [ICC Report on Decisions as to Costs]. Thereby the Tribunal shall considerer the amount requested to be reasonable [*vide RSM Production v. Saint Lucia* where the claimant was ordered to post security for costs for US\$ 750,000.00].

III. CLAIMANT IS NOT ENTITLED TO AN ADDITIONAL PAYMENT OF US\$ 2,387,432.80

99. Claimant is not entitled to additional payment since the Parties intended and agreed on a fixed exchange rate for the whole Contract **(A)** and Respondent is not under the obligation to bear the levy as it is an extraordinary bank charge **(B)**. Therefore, no further payment of any kind is due as Respondent duly concluded the Contract and performed its payment obligations under the CISG **(C)**. Furthermore, Respondent reasonably relied on Claimant throughout the negotiation and performance of the Contract; thus, it cannot be held liable for the latter's inconsistent conduct **(D)**.

A. The Parties intended and agreed on a fixed exchange rate for the whole Contract

100. Claimant argues that its *ability to request payment of outstanding amounts* arises from *the proper reading of the wording of the addendum* [MfC, p.16, ¶35]. However, Claimant cannot claim that the purchase

price was not the one provisioned in the 14 January 2015 invoice since both Parties clearly foresaw the application of a fixed exchange rate to the purchase of the fan-blades in their negotiations, statements and meetings, and by ultimately adding an express clause in the addendum to the Contract in this sense [Answer Req. Arb., p.25, ¶17].

101. Article 8 CISG provides for the interpretation of unilateral acts of each party, such as their statements and conduct, in order to shed light on the purpose of the contract [CISG Digest, p.34, ¶1; *Secretariat Commentary*, ¶2; Zeller, p.630; *Cowhides case*; *Marble v. Ceramica*]. It applies not only to the interpretation of concluded contracts but also to its formation [Ziegel, ¶3].
102. Pursuant to this provision, it can only be inferred that the Parties intended to work on a fixed exchange rate basis for the whole Contract. An analysis of the subjective intent of the wording of the Contract points in that direction **(i)** as well as through the understanding of a reasonable person under the same circumstances **(ii)** and considering the particularities of the case **(iii)**. Moreover, the addendum clarified such intention **(iv)**.

i) According to article 8(1) CISG the subjective intent of the parties was to apply a fixed exchange rate to the whole Contract

103. Claimant argues the Contract should be interpreted in line with articles 8(1) and 8(2) CISG; however, it holds a misleading understanding of their scope and application [MfC, p.16, ¶35].
104. Article 8(1) CISG provides that contracts are to be interpreted according to the **actual** intent of the parties [Schlechtriem, p.39], *where the other party (...) could not have been unaware of what that intent was* [CISG Digest, p.34, ¶4; Vorobey, p.143; *Building materials case*]. Similarly, UNIDROIT Principles establish that *[a] contract shall be interpreted according to the common intention of the parties* [art. 4.1(1); *vide* Bonell, p.137] and that *statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention* [art. 4.2(1)]. In fact, not only was Claimant not unaware of Respondent's intention to establish an exchange rate, but it even expected to work on a US\$ 1 = EQD 2 exchange rate basis regardless of this dispute, which is evidenced by various facts.
105. First, while the Parties were still subsidiaries of Engineering International, Claimant knew of Respondent's need to be *de-risked* to make it more attractive to buyers, which expressly included taking steps such as agreeing on fixed exchange rates in order to reduce the business risk of its commercial agreements [Res. Ex. R1, p.27].
106. Second, considering the final remark in Claimant's notes on the meeting of 1 May 2010, Claimant acknowledged the expected and intended exchange rate: *our 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. C1, p.8].

107. Third, the signing of the Contract had to be postponed due to Claimant's sale to Wright Holding PLC, at that time Skymover, on 27 July 2010; Respondent did not know about such sale up until that date [PO2, p. 54, ¶1]. At that point, however, the Contract had already been negotiated and written down. It was only three days after its signature that Respondent realized that *the Parties forgot to add an express provision as to the exchange rate to the model used* [Answer Req. Arb. p.25, ¶10]. Hence, in view of convenience and following a notice that Respondent could need clamps in the future [PO2, p.57, ¶16; Req. Arb. pp.4&5, ¶8], the Parties regulated the order and all remaining terms (i.e. the exchange rate) in the addendum. Thus, Claimant accepted Respondent's offer to explicitly include the exchange rate governing the whole Contract in the addendum [Cl. Ex. C2, p.11; Res. Ex. R2, p.28; Res. Ex. R4, p.30].
108. Indeed, Claimant knew or ought to have known [Zeller, p.630] Respondent's intention to fix an exchange rate; it had sufficient reason to; the exchange rate was well within its own predictions; and, more than all, it willingly and knowingly accepted such provision.

ii) According to article 8(2) CISG any reasonable person under the same circumstances would understand that the fixed exchange rate applied to the whole Contract

a) Fixing a price range in Section 4 of the Contract cannot be interpreted as the Parties' intention not to establish an exchange rate

109. Claimant holds that *the inclusion of the price range at Art. 4 of the Development and Sales Agreement, may be seen as prima facie evidence of the lack of a fixed exchange rate and a realization of the parties shared intention to make a profit from this agreement to jointly develop and for the sale of fan-blades and clamps* [MfC, p.16, ¶36]. In other words, Claimant deems that the establishment of a provision to fix an exchange rate for the fan-blades was unnecessary altogether since the Parties fixed *maximum and minimum sale price for the blades* to ensure both Parties *obtained a profit* [MfC, pp.16&17, ¶¶37&38]. This could not be further from the truth.
110. Furthermore, Claimant raises another false issue: from its understanding, a reasonable person reading the addendum *would find the fixed exchange rate only applicable to the clamps, as the sum of 9.744 US\$ falls short of the minimum pricing range seen at Art. 4 of the DSA* [MfC, p.16, ¶37]. Indeed, the exchange rate is applicable only to production costs, but as the Contract *price is calculated on an actual cost plus profit basis* [Cl. Ex. C5, p.14], the formula to calculate the final purchase price is based on the production costs added to a contractually agreed upon percentage, namely Claimant's profit, depending on which bracket the final production cost falls into [Cl. Ex. C2, p.10, Section 4]. Thus, unlike what Claimant argues, the need to fix an exchange rate is vital.

111. It is interesting to note that considering the price mechanism in Section 4 of the Contract, Claimant would obtain a greater profit by using the fixed exchange rate rather than through the use of a floating one (respectively, US\$ 950,000.00 v. 840,000.00) [*vide Chemical products case* concerning interpretation suggested by the parties' interests in the contract].
112. Nevertheless, Respondent will demonstrate how the application of a fixed exchange rate results in a final purchase price entirely within the pricing range of Section 4 of the Contract, thus not failing its obligations by refusing to pay the additional payment [MfC, p.16, ¶37].
113. It is undisputed that the production costs per fan-blade is EQD 19,586 [PO1, p.52, ¶3(ii)]. Applying the agreed exchange rate of US\$ 1 = EQD 2.01, each fan-blade costs US\$ 9,744.28, in addition to the respective profit of US\$ 475. Thus, Respondent paid US\$ 10,219.28 per fan-blade. This is well above the minimum price per fan-blade provisioned in Section 4 of the Contract. Asymmetrically, applying a floating exchange rate of US\$ 1 = EQD 1.79, each fan-blade would cost US\$ 10,941.9, in addition to US\$ 420. This amounts to a total of US\$ 11,361.9 per fan-blade, representing a non-contractual 11% increase in the agreed price.

b) Rather, an objective analysis under article 8(2) CISG determines that both Parties intended to apply a fixed exchange rate to the whole Contract

114. If the examination of the subjective intent proves insufficient, which Respondent holds otherwise, *statements made by 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 in the same circumstances* [art. 8(2) CISG; CISG Digest, pp.34&35, ¶8; Zeller, p.635; *Magnesium case*].
115. In order to determine the intent of a reasonable person of the same kind in the same circumstances, it is necessary, among other things, to analyze the wording actually adopted or the conduct engaged in. Hence, article 8(2) provides the interpretation process to determine the true content of the communication [*Secretariat Commentary*, ¶5].
116. In cases where *a seller mistakenly offers to sell goods for '68,000 francs' when he intended to offer to sell them for 86,000 francs, a reasonable person of the same kind and in the same circumstances of the buyer might not realize that the seller has made a mistake in expression* [Farnsworth, p. 102]. The invoice, however, had no mistake, as the exchange rate provision was clear and unequivocal.
117. To begin with, Claimant was specifically asked if the terms contained in the addendum were acceptable [Res. Ex. R2, p.28]. If there were any ambiguous terms, Claimant had the chance to dispute, challenge or correct them. However, Claimant agreed to link the agreement concerning the purchase of the clamps to the one concerning the purchase of the fan-blades [Res. Ex. R4, p.30], *also agreeing to the fixed exchange rate* [*idem*]. It is clear from the wording of the e-mail sent by Claimant that the first sentence concerned exclusively the purchase of the clamps whereas the second one aimed the whole Contract. Indeed, when *also* agreeing to the fixed exchange rate,

- Claimant is applying a single formula to both purchases. Thus, a reasonable – business – person would have understood such wording and phrasing as intent to address the issues together, all the more since the Contract and the addendum embody a single document.
118. Besides, adding such provision was an entirely new practice in the Parties' relationship, so any lack of clarity had to be dealt with in a crucial manner. Therefore, if Claimant did not understand the full extent of the clause, *they should have said so and not let us believe that the exchange rate applied to the complete contract* [Res. Ex. R5, p.31].
119. However, and very suitably, there are two *reasonable person[s] of the same kind as the parties (...) in the same circumstances* [arts. 4.1(2) & 4.2(2) UNIDROIT Principles]: Mario Lee – Claimant's accountant, and Paul Romario – Respondent's CEO, *persons with, for example, the same linguistic knowledge, technical skill, or business experience* [Bonell, p.138].
120. Mario Lee himself stated that he was given *excel files with the costs incurred per fan blade and per clamp as well as Ms Kwang's [another accountant for Claimant] binder concerning the blade project containing all correspondence and the Development and Sales Agreement* [Cl. Ex. C4, p. 13], thus having more than enough information regarding the whole transaction. Hence, when Mario Lee applies *the fixed exchange rate of US\$ 1 = EQD 2.01 as stated in the addendum [idem]* to both invoices, it demonstrates that the Parties' intention to apply the fixed exchange rate and the wording of the Contract is so clear that even under considerable time pressure it can be read and understood according to Respondent's real intention.
121. As experienced business persons, Paul Romario's and Amelia Beinhorn's (Claimant's COO) e-mail exchange is the paradigm of the understanding of both Parties. Paul Romario sent Amelia Beinhorn an e-mail detailing the explicit wording of the addendum which she agreed to. The wording of the addendum *could not be clearer* [Res. Ex. R5, p.31]. Indeed, it is safe to objectively conclude that both parties *found it clear that the exchange rate would apply also to the fan-blades [idem]*.

iii) According to article 8(3) CISG, all the relevant circumstances of the case indicate that the Parties intended to fix an exchange rate to the Contract

122. In the present case, it is also particularly important to consider *all relevant circumstances of the case, including*, but not limited to [UN Official Records, p.18, qualifying article 8(3) as enumerative rather than exhaustive], *the negotiations, any course of conduct or performance between the parties, any relevant usages, and subsequent conduct of the parties* [art. 8(3) CISG; CISG Digest, pp. 35&36, ¶17; *vide also* art. 4(3) UNIDROIT Principles]. Thus, all extrinsic evidence may be weighed to establish and interpret the terms of a contract [Zeller, p.630], which means that provisions in writing are but one of the many circumstances to consider [CISG AC Opinion No. 3, ¶2.1].
123. Claimant cannot invoke the Parol Evidence Rule in the case [MfC, p.17, ¶38] as the Contract is governed by the CISG which rejects such approach [*Marble v. Ceramica*]. Commentators have

- agreed that the CISG *lacks a parol evidence rule and allows a court interpreting a written contract to consider not just trade usage, course of dealing, and course of performance, but even the parties' prior negotiations*. [Dodge, p.87]. In fact, conversely to the Parol Evidence Rule, the Convention specifically allows for the consideration of prior negotiations [Andreason, ¶III(A)(1)].
124. While the Parties contracted under the same group of companies, there *had been no need for the parties to explicitly regulate the exchange rate* [Answer Req. Arb. p.24, ¶8]. However, presently, their business model is independent from one another and current practices do not have to meet their previous ones. Claimant cannot rely on their *previous dealings* [MfC, p.16, ¶37] as the circumstances in which they took place have significantly changed [Req. Arb. p.7, ¶21]. This is also one more reason to justify why the Parties intended to fix the exchange rate.
125. Nevertheless, if the Tribunal were to consider the Parties' *usages* under article 9 CISG [*Fiberglass composite materials case*; Eörsi, ¶¶2.05&2.06], it shall take into consideration the fact that there is no fixed usage as the agreements depend on the bargaining power of each party, resting on who has a better opportunity to hedge the risk or is willing to take the risk [PO2, p.56, ¶13]. Besides, an usage requires standardization and reiteration. Thus, *two contractual relationships were anyway not sufficient to establish a practice between the parties* under article 9(1) CISG [*White urea case*]. In order for a practice between the parties to be established, long lasting contractual relationships involving more sales contracts between the parties are required [*idem*], contrary to what Claimant puts forth when sustaining that the Parties did not intend to fix an exchange rate similarly to previous cooperations [MfC, pp.16&17, ¶37&38].
126. Therefore, not only did such previous cooperations occur in particularly different instances [Answer Req. Arb., p.24, ¶8], but the non-fixation of an exchange rate is contrary to the aircraft industry's normal business practice according to which parties normally either explicitly agree on the exchange rate or the relevant date for it [PO2, p.56, ¶13].
127. Even if the Tribunal deems the referred previous contracts as an actual established practice, then it shall conclude that the Parties never intended to apply the exchange rate at the time of contract performance [Answer Req. Arb. p.24, ¶8]. Furthermore, if this route is taken, then the Tribunal must also take into account the established practice of *the Parties to adopt the exchange rate which was profitable for RESPONDENT* [PO2, p.54, ¶5].
128. Therefore, considering all relevant circumstances in which the Contract was negotiated and concluded, it comes out clear that the Parties intended to fix an exchange rate for both orders. Accordingly, when signing the addendum, Claimant could not have been unaware of its scope.
- iv) Moreover, the addendum validly and effectively clarified that intention**
129. Irrespective of the Parties' demonstrated intention to fix an exchange rate to the Contract, Claimant alleges the fan-blades were *not under a fixed exchange rate as the clamps* [MfC, p.18, ¶41].

130. Both articles 29 CISG and 2.18 UNIDROIT Principles *reinforce the principle that any agreed modification (...) will be valid in whatever form it is made or contained* [Eiselen, ¶d]. The first entrenches the principles of party autonomy, freedom of contract and from formalities contained in article 11 CISG [*idem*], envisioning contractual modification – which may include variations, alterations and *a fortiori ratione* clarifications – [Viscasillas, p.170] by mere agreement between the parties. This is underlined by the fact that the Contract does not contain a provision requiring any modification to be in writing or an entire agreement clause [PO2, p.54, ¶4].
131. Firstly, in light of the circumstances, the language contained in the addendum was clear and unambiguous [cf. *Summer cloth collection case*] so both Parties could not have been unaware of its extent. Secondly, Claimant expressly confirmed its content [cf. *Rare hard wood case*], which is of extreme importance since mere silence or inaction does not by itself amount to an acceptance [Viscasillas, p.172]. Therefore, the addendum contained specific clarifications concerning the whole Contract, agreed to and signed by both Parties [Res. Ex. R 4, p.30].
132. Claimant argues that the stipulation providing for *[o]ther terms as per main Agreement* [Cl. Ex. C2, p.11] objectively excludes the application of the fixed exchange rate to the fan-blades [MfC, p.16, ¶35]. Although Claimant recognizes the importance of the interpretation of the addendum, the conclusion that the Tribunal must draw is rather different from Claimant's.
133. The actual order in which the clauses contained in the addendum are drafted is not aimless: the one establishing the fixed rate is the last precisely due to the fact that it is the only addition to the main Contract and therefore needed to be singled-out.
134. The addendum defines the terms applicable to the purchase of the clamps and contains specifications as to the quantity and the price calculation method. The terms not expressly foreseen in the addendum are the same terms provided for the purchase of the fan-blades, according to the clause *[o]ther terms as per main Agreement* [Cl. Ex. C2, p.11]. Those *other terms* could have never included a provision concerning the applicable exchange rate since the main Contract was originally silent on that matter. Thus, the clause providing for the fixed exchange rate cannot be seen as an exception to a non-existent clause. Instead, the logical conclusion to be drawn from the interpretation of the clause fixing the exchange rate [*idem*] is that it aimed the whole Contract and not only the addendum as Claimant claims [MfC, p.16, ¶35], since *terms and expressions used by one or both parties are clearly not intended to operate in isolation but have to be seen as an integral part of their general context* [Bonell, p.142 on article 4.4 UNIDROIT Principles]. As the Parties did not initially add the provision concerning the exchange rate, the inclusion of the same in the addendum can only be seen as comprising the purchase of both the fan-blades and the clamps, according to *the exact wording of the parties and well as the systematic context of the contract* [*Fruit and vegetables case*].

135. In virtue of good faith, Claimant could have requested further clarifications as early as 22 October 2010, when Respondent first suggested the wording of the addendum via e-mail [Res. Ex. R2, p.28; Res. Ex. R4, p.30], all the more since it was the first time a provision dealing with exchange rates was added to a Contract between the Parties.
136. Considering that the addendum stands as a contractual modification clarifying the Parties' intentions and payment terms, Claimant cannot allege that the exchange rate was a floating one [Req. Arb. p.5, ¶12]. Consequently, Respondent did not fail to complete its obligations [MfC, p.16, ¶37] since it effected payment as per the main agreement.
137. Although, and alternatively, even if the Tribunal finds the Parties had not actually fixed an exchange rate for the Contract – which Respondent contests – the latter could not be the one to bear the risk of Claimant's national currency fluctuations over the course of the Contract since it can be sustained that this must be borne by the creditor as it is its *domestic affair* [e.g. *ICAC Case No. 61/1993*], despite being a logically foreseeable aspect of international trade [Nicita, p.1]. Claimant could ultimately claim compensation from losses arising from such devaluation had Respondent delayed in the payment of the price [cf. CISG Digest, p.347, ¶37] which it did not.

**CONCLUSION: THE FIXED EXCHANGE RATE APPLIES
TO THE WHOLE CONTRACT**

B. Respondent is not under the obligation to bear the levy

138. Claimant alleges that Respondent did not take the necessary steps to enable the full payment of the purchase price it was obliged to under both the Contract and article 54 CISG [MfC, p.19&20, ¶¶42-45]. However, Claimant seems to ignore that Respondent was not under any obligation – contractual or legal – to pay the levy. This is because Respondent was only to bear the costs for the *transfer* of the amount (i) and cannot be held liable for Claimant's own lack of foreseeability (ii). Alternatively, Respondent is exempt under article 80 CISG (iii).

i) Respondent shall only bear the costs for the *transfer* of the amount

139. Section 4 of the Contract states that *[t]he bank charges for the transfer of the amount are to be borne by the BUYER* [Cl. Ex. C2, p.10, Section 4: Purchase Price].
140. At the time the bank charges provision was introduced, Respondent had no knowledge nor justifiable reasons to be aware of the existence of Regulation ML/2010C, since Wright Ltd was its only Equatorianian supplier and no comparable rule exists in Mediterraneo or any other country known to Respondent [Answer Req. Arb., p.26, ¶18].
141. Claimant, on the contrary, was aware of the press reports from December 2009 that greatly criticized the fact that Equatoriana was one of six countries worldwide where private parties had to pay a fee for such type of investigations and clearances [PO2, p.55, ¶7]; its Contract negotiators

- did not know about the *specific* provisions of the Regulation, but were aware of its existence; and finally, Claimant's financial department was fully aware of the scope of the Regulation nearly two months before the Contract was signed, remaining unknown why this fact only came to surface after the Contract was performed and paid for [*idem*, ¶¶7&8]. Nevertheless, this cannot be imputed to Respondent and must instead be borne by Claimant as the latter failed to inform the former about such Regulation [Answer Req. Arb., p. 26, ¶19] or to clarify the bank charges provision since it was Claimant who suggested its inclusion in the Contract [PO2, p.55, ¶6].
142. Thus, following the rules of interpretation of contracts provided in article 8(1) CISG, the bank charges provision included in the Contract has to be interpreted as not including the levy applied to the paid amount since neither negotiating party was aware of its application nor was that the intended purpose of the provision when written for the agreement concerning the TRF 155-II of March 2003.
143. Had Claimant wanted to include the payment of the levy on the bank charges provision, it would or could have, upon inclusion, suggested alterations to its drafting [*idem*]. Thereby Respondent is not under any contractual obligation to bear such non-ordinary charge.
144. Furthermore, contrarily to Claimant's arguments [MfC, pp.19&20, ¶42], Respondent is not obliged under article 54 CISG to pay the levy as it cannot be considered *to enable the payment*.
145. Article 54 CISG *deals with actions preparatory to payment of the price* [CISG Digest p.264, ¶1], encompassing *several steps prior to the date of payment* [Report of the Committee, p.341, ¶319; Osuna-González, p.299]. Preparatory actions required by public law regulations may include, for instance, governmental permissions or even – as Claimant indeed notices – the procurement of securities for payment [CISG Digest p.264, ¶1; Maskow, p.399, ¶2.9; MfC, pp.19&20, ¶42]. Nonetheless, these aim to *ensure that the payment is actually made* [Arbitration proceeding 123/1992].
146. Regulation ML/2010C is rather different from preparatory actions because the 0.5% subtraction by the Central Bank can only occur after payment is indeed made, non-constituting a measure necessary to enable the buyer to pay the price [*vide* Gabriel, p.274, exemplifying a governmental *tariff on the export of money*, prior to buyer's transfer, as such a measure]. In that sense, it is only after an amount larger than US\$ 2 million is transferred to an Equatorianian bank account that the Financial Intelligence Unit comes into the picture in order to determine if the transferred amount should be cleared and credited back to the relevant bank account – as it has been doing since 2010 [PO2, p.56, ¶10]. Hence, as such process first required Respondent's transfer to Claimant's chosen bank account – which it duly performed, and only then was the 0.5% deducted, Claimant is wrong to affirm Respondent is burdened to pay the levy when, according to article 54 CISG, it is not under any legal obligation to bear it.

ii) Respondent did not have to be aware of the application of the levy

147. Besides the abovementioned interpretation, Respondent shall still not be deemed liable for the levy as it was not under the duty to know its content or applicability.
148. As previously mentioned, Respondent had no knowledge about the content of ML/2010C since no comparable rule exists in Mediterraneo [PO2, p.55, ¶¶7&8]. In addition, the foreign press, including newspapers in Mediterraneo, merely reported that the Equatorianian government had taken actions to fight money laundering [*idem*], but did not specify the nature of such actions.
149. Furthermore, not only does the Contract not specifically mention the specialized public law provision contained in Regulation ML/2010C, but despite having superior information about the specific regulatory requirements within its own jurisdiction, Claimant failed to disclose such relevant piece of information.
150. Strikingly, Claimant argues that Respondent must bear the financial loss it incurred due to the regulation, despite having foreseen, but neither accounted for nor informed Respondent about its scope. This does not mean, however, that Respondent ought to have known about the levy. Indeed, *the mere fact that a party has entered into a contract with a party from a different country should not in itself be sufficient to impute knowledge into the former of the intricacies of that country's trading policy and legislation* [Saidov, p.202].
151. This analysis is consistent with the famous approach of the German Supreme Court who decided that the seller was not expected to comply with *specialized public law provisions of the buyer's country or the country of use* due to it being impossible to determine where, exactly, would its goods be used [New Zealand Mussels Case]. Furthermore, the Court stated that regulations of the buyer's country would apply only *where the same standard exists in both the seller's country and the buyer's country or where the buyer had specified the applicable standards and relied on the seller's expertise to satisfy them* [*idem*; Gillette & Walt, p.226].
152. Taking such court decision into account, the same conclusion can also be applied to the present case. Indeed, commentators advocate that in order for Claimant to be correct in assuming that Respondent ought to know of and pay for the levy, *there must be some additional evidence showing (...), at the time the contract was made, the buyer was informed about the relevant rules in the seller's country; or laws in the buyer's country were the same as those in the seller's country and there was a good reason why the buyer should have been aware of that fact* [Saidov, p.203].
153. Hence, Respondent cannot be burdened with the payment of a charge it was not in position to be aware of due to its peculiarity. Indeed, *it should not be assumed that buyers will necessarily be aware of the laws and regulations of the seller's country* [*idem*, p.202]. Conversely, in such situations *the seller should be deemed obliged to indicate such peculiarities to the buyer* [Maskow, p.398, ¶2.7]. Therefore, the lack of

information given to Respondent concerning the levy shall be understood as excluding its liability for the payment of the claimed amount.

iii) Even if the Tribunal understands Respondent must bear the levy, it shall find it exempt under article 80 CISG

154. Nevertheless, if the Tribunal finds Respondent liable for the levy, it shall still not be awarded to pay the amount as Respondent would be exempt under article 80 CISG which deals with *impaired performance* and prohibits a party from relying on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission [Schlechtriem, p.105]. This omission *will only be sufficient if the promisee has a duty to act, for instance because the act was necessary in order to enable the promisor to perform* [Huber & Mullis, p.266].
155. Claimant argues Respondent is not allowed to invoke any exemption to the obligation to pay the levy under article 79 CISG [MfC, pp.19&20, ¶42]. However, Claimant did not act appropriately when it failed to inform Respondent of the levy, going against the general duty to cooperate arising from the principle of *good faith* upon which article 80 CISG is based [Neumann, pp.68&69; Butler, Section 1]. Indeed, *good faith implies a duty of cooperation and a duty to communicate all relevant information between the contracting parties* [Audit, Section B; Highet, p.133, 135]. Accordingly, the general duty to cooperate includes the general duty to disclose material information to the other party [Magnus, ¶5.11; Ferrari, p.226; *Machinery Case*] *which might threaten the performance of the contract* [Sim, Section B, 2b)]. In this sense, Claimant had the duty to inform Respondent about the content of ML/2010C as the lack of information indeed *threatened* the performance of the Contract, namely the payment of the levy.
156. Claimant did not comply with its duty to cooperate with Respondent by not disclosing such relevant information about the levy even though it was aware of its existence at the time of performance [PO2, p.55, ¶8]. As previously explained, Respondent did not have any goods reasons to know about such particular and extraordinary levy other than by relying on Claimant's knowledge. Thus, the Tribunal shall deem Claimant responsible for Respondent's default and exempt the latter from specific performance of this part of the Contract.

CONCLUSION: CLAIMANT SHALL BEAR THE LEVY AS IT IS AN EXTRAORDINARY BANK CHARGE

C. Respondent duly performed all contractual and legal obligations

157. In accordance with the invoice sent with the fan-blades on 14 January 2015, Respondent transferred US\$ 20,438,560 to Claimant's bank account [Answer Req. Arb. p.25, ¶16&17]. Since the Parties intended to and agreed on using a fixed exchange rate for the whole Contract [*idem*], and Respondent is not under the obligation to bear the levy [*idem*, p.26, ¶¶18&19], no further

- payment is due since the latter duly concluded the Contract and performed its obligations as per the main agreement and the CISG, complying with articles 53, 54 and 60.
158. A contract is, first and foremost, the manifestation of an offer and an acceptance, and therefore the product of two unilateral acts [*Secretariat Commentary*, ¶2].
159. Article 14(1) CISG provides that an offer is sufficiently definite if it indicates the goods and fixes or makes provision for determinability of the price. Considering Sections 3 and 4 of the Contract, in addition with the addendum, the Parties agreed on the production of fan-blades and clamps, making sufficient provisions for determining their quantity and price.
160. Accordingly, Respondent's purchase order of fan-blades and clamps was accepted at the moment Claimant performed acts assenting to that offer [art. 18 CISG] by producing [*Zara v. Company*], shipping [*Brassiere cups case*] and submitting written invoices [*ZPrinting and Dyeing v. Microflock Textile*] to Respondent.
161. In fact, Respondent is in agreement with Claimant's understanding of the 1998 Appellate Court of Paris *Laborall v. Matis* judgement in the sense that *once the duty to deliver goods has been adhered to, the completion of the duty will be seen (...) when goods and necessary documentation have effectively transferred property to buyer* [MfC, ¶40, pp.17&18], not contesting Claimant completed its obligations.
162. Respondent also successfully performed its obligations under the CISG by receiving [*Doors case; Carpet case*], examining [Cl. Ex. C3, p.12; art. 38 CISG], and paying for the goods as per Claimant's instructions [*Interland v. Tessenderlo; Crucible press case; Cathode ray tube case*] in a timely manner, thus paying *the price (...)* and taking *delivery as required by the contract and this Convention* [arts. 53&60 CISG].
163. The Contract bound Respondent to pay not once the new-fan blade had been developed as Claimant claims [MfC, p.1], but *upon delivery of the fan-blades* – which occurred on 14th January 2015. This *should be confirmed by the BUYER as soon as possible*, and in accordance, Respondent examined and effected full payment the following morning [Cl. Ex. C2, p.10]. In conclusion, Respondent complied with all obligations: price, time, and place for payment [Sevón, p.208].

CONCLUSION: RESPONDENT FULLY PERFORMED ITS CONTRACTUAL AND LEGAL OBLIGATIONS

D. Respondent cannot be liable for Claimant's inconsistent behaviour

164. As demonstrated above, Respondent reasonably relied on Claimant throughout the negotiation and performance of the Contract [cf. *Lemire v. Ukraine*]. Thus, since Claimant failed to avoid detriment occasioned in consequence of such reliance, Respondent cannot be held liable for Claimant's inconsistent behaviour and claims.
165. According to widely accepted standards, *[e]ach party must act in (...) good faith and fair dealing in international trade* [art. 1.7 UNIDROIT Principles]. Such duty may not be excluded nor limited

[*idem*]. Moreover, [*a*] party cannot act inconsistently with an understanding it has caused the other party to have and upon which that party reasonably has acted in reliance to its detriment [*idem* art. 1.8]. This understanding may result, for instance, from conduct, or from silence when a party would reasonably expect the other to speak to correct a known error or misunderstanding that was being relied upon [Bonell, p.23].

166. Claimant did not act in *bona fide* since it did not reasonably pursue everything in its reach in order to enlighten Respondent of its alleged own subjective intent regarding the contractual provisions, having rather adopted an *ambiguous* conduct [e.g. *ICC Case No. 14108*]. For instance, it could have demanded clarifications about the applicable exchange rate, voiced its disagreement over the use of a fixed one when the addendum was added, estimated the final production costs or even prepared provisional documents containing the price for the goods at an earlier date. In addition, Claimant did not provide any clarifications concerning the levy, nor seemingly take the effort to inform the negotiating parties about its existence and eventual applicability. Furthermore, Claimant is now demonstrating a contradictory behaviour in disregard of Respondent's legitimate expectations in relation to the Contract, opportunistically attempting to take advantage of the exchange rate fluctuation between the conclusion of the Contract and its performance [PO2, p.56, ¶12] – which happened to sway in Claimant's way.

167. Needless to say, Claimant had enough opportunities and expertise to account for these faults. Instead, it was only after the Contract was performed that Claimant demanded additional payment. Consequently, since it is now unjustifiably *seeking to act inconsistently*, Claimant shall be the one liable for any *costs or losses incurred by reason of reliance* [Finn, p.24; cf. *ICC Case No. 14108*], and not Respondent.

CONCLUSION: CLAIMANT IS NOT ENTITLED TO ANY ADDITIONAL PAYMENT UNDER THE CONTRACT

REQUEST FOR RELIEF

Counsel for Respondent respectively requests the Tribunal to find that:

- Claimant's claims are inadmissible as not having been timely submitted and therefore shall be rejected;
- It is empowered to order Claimant to post security for the costs Respondent is likely to incur in this arbitration, and should exercise it by granting the justified measure;
- Claimant's claims for payment are to be dismissed as Respondent fully and dully performed its obligations under the Contract and the CISG; and
- Claimant shall bear all the costs Respondent incurred in this arbitration, including costs due to the Tribunal, attorney's fees, and expenses related to production of evidence.