Nova University of Lisbon - School of Law

Work Project: 29th Annual Willem C. Vis International Commercial Arbitration Moot

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Anti-Plagiarism Statement

We declare that the essay presented is of our exclusive authorship and that all use of contributions or texts from others are duly identified. We are aware that the use of extraneous elements constitutes a serious ethical and disciplinary breach.

Lisbon, 20th June 2022

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AIAC	Asian International Arbitration Center
ANoA	Answer to the Notice of Arbitration
Art./Arts.	Article/Articles
C.Ex.	CLAIMANT's exhibit
CEO	Chief executive officer
CIF	Cost, Insurance, Freight
cf.	Conferre (confer)
Chp.	Chapter
CISG	1980 United Nations Convention on Contracts for the International Sale of Goods
Co.	Company
contrariu sensu	in the opposite sense or *meaning*
DAL	Danubian Arbitration Law [UNCITRAL Model Law of International Commercial Arbitration]
ed./eds.	Edition/editor/editors
e.g.	Exempli gratia (for example)
et al.	Et alii (and others)
et seq.	Et sequens (and that which follows)
et seqq.	Et sequentes (and those which follow)
EUR	Euro
ibid.	Ibidem (in the same place)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
i.e.	Id est (that is)
Inc.	Incorporation
ipsis verbis	In the same words

KLRCA	Kuala Lumpur Regional Center for Arbitration
l.	line
Ltd.	Limited
NoA	Notice of Arbitration
No.	Number(s)
NY Convention	1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OGH	Oberster gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Regional Court of Appeals)
p./pp.	Page/pages
per se	By or in itself or themselves; intrinsically
¶	Paragraph/paragraphs
PO1	Procedural Order 1 of 8 October 2021
PO2	Procedural Order 2 of 8 November 2021
R. Ex.	Respondents' exhibit
SCC	Supreme Court of Canada
supra	Above
UN	United Nations
UNCITRAL	United Nations Commision on International Trade Model Law
v.	Versus

Introduction

The aim of this Report is to describe the different stages of work that the team representing NOVA University in the 29th edition of the Willem C. Vis Moot Competition of 2022 went through in the past seven months of this project.

In this Report, the Team will provide an overview of Willem C. Vis Moot followed by a detailed explanation of each member's personal experience in the different stages of the competition, namely the process of writing the Memoranda and the preparation for the Pre-Moots and Oral Rounds. The issues raised by this year's problem will then be analyzed as well as the impact of the competition and the importance it represents in our future paths as young professionals.

This Report has been drafted by the four members of the Team as a group, except for the analyses of the relevant issues raised by the Arbitral Tribunal which has been developed individually according to our studies and research throughout the competition.

The Willem C. Vis International Commercial Arbitration Moot

The Willem C. Vis Moot Competition is an international moot court competition organized by the Association for the Organization and Promotion of the Willem C. Vis International Arbitration Moot and sponsored by arbitration institutions and associations based worldwide. It is the largest moot competition on arbitration and the second largest moot in the world. The competition is held annually in Vienna where teams from more than 84 jurisdictions come together to learn, to meet and to develop their skills on international arbitration. This year's edition represented a record number of 365 participating teams with a total of more 2.500 students.[1]

The General Rounds in Vienna are preceded by Pre- Moots organized by universities, law firms and arbitrations institutions worldwide which reflect the true international nature of the competition.

The purpose of the Vis Moot is to give students the opportunity to act as counsels for the parties in dispute through a simulation of a true international arbitration hearing. The purpose of the moot is to foster the study of international commercial law and international arbitration as well as to trigger the student's attention to international commercial transactions.

Every year, the case is drafted by the organizing Association directed by Christopher Kee, Patrizia Netal and Professor Stefan Kroll and it intends to shed light on real, up to date controversial legal debates of the international arbitration community. The case always refers to a dispute arising from a contractual relationship between two companies located in different jurisdictions which should be governed by the United Nations Convention for the International Sales of Goods ("CISG"). An arbitration agreement will be part of the contract concluded by the parties and the seat of Arbitration will be Danubia, a fictitious country created for the purpose of the competition which is a signatory state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and has adopted the UNCITRAL Model Law on International Arbitration (UNCITRAL Model Law). Every year, a specific international arbitration institution is chosen and its rules are the ones which governed the proceedings.

[1] https://www.vismoot.org/29th-vis-moot/

Our experience

The opportunity to participate in the Willem C. Vis Moot and representing NOVA School of Law was given to the best four students of the course "Moot Court". All team members from different master's degree attended that same course with the same ambition. The 28th Willem C. Vis Moot problem was presented to the class, where all the students had to prepare a Memorandum for CLAIMANT and participate in oral rounds, being judged by experienced national and international lawyers and arbitrators.

From all of the students, Guilherme Pina Cabral, Mafalda Vila Nova, Mafalda Estácio e Paulo Moreira Queirós have been chosen by the previous coaches, André Pereira da Fonseca and Rute Alves who were replaced by the new coaches for the 29th Willem Vis Moot team, Ana Trigo, Ana Sousa and Carolina Apolo Roque.

We were very honoured to be selected to form a team, given that the Vis Moot competition is an internationally recognised competition and that while doing this experience we developed advocacy skills, given its realistic and practical nature.

Additionally, having the opportunity to complete our master's degree by testing our legal expertise was a motivating factor and an enriching journey. Thus, the competition was the perfect way to grow professionally and also, as a person, since the spirit of this competition is based on values of mutual help, solidarity, and cooperation.

Memorandum for Claimant

For time management purposes and given the complex nature of the legal questions that were posed by the Arbitral Tribunal in each stage of the competition, our first step in writing the memorandum was to allocate each of the four issues to a specific team-member who, as a result, would have the responsibility to present, to the rest of the team, a draft of the arguments that were to be used in CLAIMANT's Memoranda.

On one hand, this strategy was fundamental to make a clear division of tasks and consequently ensure greater effectiveness in writing the Memo.

On the other hand, and by taking into consideration the personal preferences and also the knowledge of each team member, we were able to separate the tasks in a manner that motivated each individual and also, ensure more in-depth research of each topic.

Thus, the logic that we followed allowed for a deeper specialization and dedication during the research process which overall increased the quality of the Memoranda.

Notwithstanding, we would still have had to assist our colleges in case of any doubt, issue, or hesitation, due to our inexperience.

In this sense, Mafalda Estácio and Mafalda Vila Nova focused their attention on the procedural issues and Guilherme Pina Cabral and Paulo Moreira Queirós dedicated themselves to the merits of the case. Issue A[2]was elaborated by Mafalda Estácio, and Issue B[3] by Mafalda Vila Nova; Issue C[4] was elaborated by Guilherme Pina Cabral and the D[5] was performed by Paulo Moreira Queirós.

Despite this decision, we made sure to schedule team meetings, at least once a week, to share our progress, discuss ideas, problems and critically discuss our research.

In the beginning of this process, we all felt some difficulty in gathering materials, relevant legal texts, jurisprudence, or books. However, our coaches helped us during this process, by giving great and valuable tips on how to do the research.

Thereafter, the research process became more efficient and in a matter of a few weeks we concluded the first draft of the arguments for CLAIMANT's Memoranda.

For this stage of the process, we found very useful to set internal deadlines to make sure that we had everything done on time. This strategy was also really important, giving that three of us were simultaneously working in law firms, therefore, the time management was one of our major problems.

Even though we held weekly meetings, at the time of combining the four drafts of the memorandum together, great difficulties arose. Firstly, by the time the four drafts were combined, we noticed that we had exceeded the maximum number of pages that were allowed in the competition. Secondly, given that each one of us has a specific style of writing, we also realized that the whole memoranda lacked a common denominator.

Hence, we combined all our efforts to review the memorandum back and forth, as a team, in order to harmonize and uniformed the writing, identifying eventual mistakes, discuss strategy and re-write our issues.

Lastly, since the issues of this year's problem were very intertwined, we had to make sure that there were no legal and logical inconsistencies between each issue.

In the end, all our combined efforts felt worth it when we submitted CLAIMANT's Memorandum on time, and as CLAIMANT, it was upheld that:

[2] What is the law governing the Arbitration Agreement?

[3] Is the CISG applicable to the conclusion of the Arbitration Agreement in the event it is governed by the Law of Mediterraneo?

[4] Have the Parties concluded a contract in 2020?

[5] (If a contract was concluded were Claimant's General Conditions of Sale validly included into that alleged contract?

The Tribunal has jurisdiction over the conflict, since the law applicable to the Arbitration Agreement was the law of Danubia (a); In the event the Arbitration Agreement is governed by the Law of Mediterraneo, the CISG does not apply (b); The Parties have concluded a contract in 2020 (c); and the General Conditions of Sale were validly incorporated into the contract (d).

Memorandum for Respondent

While writing CLAIMANT's Memoranda, we concluded that our way of working and research methods could be improved, and mistakes could be avoided while writing RESPONDENT's Memoranda.

After finishing CLAIMANT's Memoranda, we focused on changing some aspects of the process to ensure greater efficiency- As the deadline for the second Memoranda was shorter, we tried to identify possible mistakes or inefficiencies and put new solutions into place in order to avoid those undesirable situations.

In this way, we made some changes which consisted, essentially, in a higher proximity between all the team members, but especially between the two responsible for the procedural issues (issue A and B) and those dealing with the substantive issues (issue C and D) to make sure we would have a more harmonized Memoranda.

These small changes allowed RESPONDENTs drafting process to be more simple.

Nonetheless, by representing Respondent, new, and different challenges arose.

The hardest part was presenting the case in a way as to oppose to those presented by our counterpart which, in this case, was represented by the Masaryk University.

Hence, we read Masaryk University CLAIMANT's Memoranda, which followed a completely different approach from ours.

As a result, this part of the competition was harder and more challenging, as we had to adopt a strategy that would contradict and overturn the opposing team's arguments.

One helpful tip that was given by our coaches at the time we were researching and writing CLAIMANT's Memoranda, was to take some notes, as we read information, that could be helpful and useful for RESPONDENT's Memoranda.

Being responsive was one of our major concerns, as it cannot be a one-sided dispute, we would have to focus on contradicting our opposing party.

After reading CLAIMANT's Memoranda, we noticed that they extended more on the merits and not as much on the procedural issues, however, we decided, as a team, to keep

our strategy and make an equal division of the issues, keeping in mind that we would still have to be responsive and finding the weakness of the positions.

Hence, as RESPONDENTs, we upheld that: The Tribunal has jurisdiction, as the law applicable to the arbitration agreement is the law of Mediterraneo (a); and in this event, the CISG would apply to the agreement (b); The Parties have not concluded a contract in 2020 (c); and lastly the General Conditions of Sale were not validly incorporated into the contract (d).

Pre-Moots and Training Sessions

Unlike in the previous years, the Nova School of Law for the 29th Vis Moot had the opportunity to enjoy the in-person experience of the Vis Moot, by attending several in-person pre-moots. Such fact allowed the team members to connect to the Vis and Arbitration community around the globe, which is one of the fundamental goals of the Vis Moot Competition.

Taking that into consideration, the team decided to apply to several online, in-person and hybrid pre-moots, to be prepared to all possible outcomes, as well as to develop their oral advocacy skills in the different scenarios and retrieve the Moot experience as much as possible.

Our first pre-moot, which was held online, was the Rio Pre-Moot, in which our team ranked 9th Place amongst 50 teams from all over the world, just 3 points away from qualifying to the Final Rounds.

Two weeks later, the team travelled to Dublin, Ireland, to participate in the Dublin Pre-Moot. The Pre-moot was organized in a hybrid set-up, in which some rounds were conducted in-person and others were organized with the teams face to face, and the Arbitrators online. The in-person experience allowed us to meet Arbitrators and teams that would accompany us throughout our Vis Moot Journey. In this pre-moot we ranked to the final rounds among the #4 best teams, from 25 teams all over the world. We finished our journey in this Pre-Moot in the Semi-Finals.

One week after the Dublin Pre-Moot, the Team went to Prague, to participate in the Prague Pre-moot which was held in-person. In this Pre-Moot we ranked 7# place from more than 20 teams that were participating. We had the opportunity to meet Arbitrators and teams from different countries, as well as reconnect with the teams and Arbitrators we had met in Dublin.

In the week after, our team participated in the Lisbon Pre-Moot, and went to the final

rounds by ranking #2, in almost 20 teams participating. The team ended the competition in the eighth finals round.

Finally, in the beginning of April the team travelled to Paris, to participate in the ICC Pre-Moot. This Pre-Moot was also held in-person, in which we had the opportunity to be judged by renowned Arbitrators of the ICC and of the Paris Arbitration Community. The Nova Team finished the Pre-Moot in 4th Place.

Upon our return from Paris, we participated virtually in the PCA Hague Pre-moot, in order to prepare the online set-up to be used in the final rounds of the competition. We have used the Nova School of Law facilities and equipment to participate in this pre-moot and prepare for the final oral rounds of the competition.

Along our journey, we also scheduled several Training Sessions with teams such as Bucerius Law School (Germany), University of Hamburg (Germany), University of Charleston (USA), University of Florence (Italy), Catholic University of Milan (Italy), China EU School of Law (China), University of New South Wales (Australia), Guadalajara University (Mexico), Vienna university (Austria) and University of Bocconi (Italy).

These training sessions allowed us to train potential arguments for the pre-moots and the final competition, as well as to maintain contacts with the teams we have met in the pre-moots.

Even thought we were not able to travel to Vienna for the final competition, the Team was able to retrieve a memorable experience of the Vis Moot Journey, as well as make friends and business connections that will follow us throughout our personal and professional lives. For that, the team is grateful to Nova School of Law, for all the support and the unique experience it gave to its students.

Oral Rounds

The General Rounds of the final competition occurred from the 9th to the 12th of April, in where our team pleaded for four times: two as Claimant and two as Respondent.

The team had decided to not travel to Vienna in order to arrange a professional set-up in Lisbon for the online rounds, in which the members would plead side by side, with all the team together.

Unfortunately, due to a Covid outbreak, a last-minute change had to be made, and we pleaded in an unexpected scenario where we had to be separate from each other. As such, each team member prepared its own setup at home.

Our first session took place on Saturday, the 9th April at 7:30 (Lisbon Time), and was against the Yerevan State University. In this Round our Team plead as Respondent on the members Mafalda Vila Nova on the procedural issues, and Guilherme Pina Cabral on the merits of the case. The round was Arbitrated by Ms. Chithra Powathikunnil George, Ms. Carolina Barboza Lima and Mr. Lauri Heiskanen.

For our second round, the Claimant's side of the team, in the persons of Mafalda Estácio on procedural issue and Paulo Moreira Queirós on the merits, took place on the 10th of April at 09:30 (Lisbon time) and was against MEF University. The Arbitrators for the session were Ms. Dominique Koevoets and Ms. Chiara Gemoli.

Our third round, which was pleaded by Respondents, took place on the 11th April, at 10:30 (Lisbon Time) against Masryk University. There was only one designated Arbitrator for the session, which was Ms. Florentine Vos. The organization was able to find an additional emergency Arbitrator, and another Arbitrator joined in the middle of the pleadings.

Our last round was pleaded by the Claimants, on 12th April at 15:30 (Lisbon Time), and was against Osgoode Hall Law School, York University. The Arbitrators for the session were Mr. Toni Nogolica, Ms. Laura Zimmerman and Mr. Alexey Pirozhkin.

Despite all the last minute problems we have faced, the team was very pleased with the feedback from the Arbitrators, that recognized the quality of the arguments as well as the oral advocacy capacity of the oralists.

The team finished the competition by ranking 99th and was awarded with the "APA – Associação Portuguesa de Arbitragem" Prize for best Portuguese Team in the competition. The team is very proud of their performance, even though we are aware that there are external and subjective factors that one cannot control in these competitions and believe that those factors did not allows us to reach the standards we were aiming for.

The Problem

The Problem of the 29th Willem C. International Commercial Arbitration Vis Moot edition, released on October 7th, 2021, is based on the "disputed" conclusion of a long-term CIF contract providing for the sale of sustainable palm oil.

The contracting parties are ElGuP plc, the seller, and JAJA Biofuel, the buyer. In this way, the dispute involves the following companies:

ElGuP plc ("**CLAIMANT**"), which is one of the largest producers of RSPO-certified palm oil and palm kernel oil, based in Mediterraneo.

JAJA Biofuel ("**RESPONDENT**"), located in Equatoriana, is a well-established producer of biofuel which was acquired in late 2018 by Southern Commodities, a multinational conglomerate engaging in all kinds of commodities and their derivates with its headquarters in Ruritania.

For a better understanding of the case, it is important to bear in mind that for a long time, the CLAIMANT had sold 2/3 of its annual palm oil production to a single customer. However, in December 2018, the European Union revised the Renewable Energy Directive (RED II), which was followed by considerable pressure from environmental interest groups, in the RED II and it was, inter alia, foreseen that the EU would start phasing out the use of palm oil-based biofuels in 2023.

In light of these developments, CLAIMANT's long-time customer terminated the supply agreement in January 2020, by claiming temporary problems with CLAIMANT's RSPO certification as a pretext. Consequently, CLAIMANT had to find a customer for 2/3 for its production of certified palm oil on a very short notice.

In light of that, on 28th March 2020, at the Palm Oil Summit, Mr. Chandra (CLAIMANT's COO), approached Ms. Bupati (who had been appointed a year before as Head of Purchasing for RESPONDENT), and offered the favorable price of USD 900/t for a long-term commitment, precisely from 2021 onwards for the period of five years. Considering the favorable price Ms. Bupati showed great interest in purchasing the entire available production of palm oil.

It is important to acknowledge that Ms. Bupati had for a long time been the main purchase manager for the palm kernel oil section of Southern Commodities (Mother Company of RESPONDENT). In that function, she had concluded a total of 40 contracts with CLAIMANT for the sale of palm kernel oil.

In addition, the appointment of Ms. Bupati as Head of Purchasing was in line with the intention of Southern Commodities, which relied on considerably enlarge the palm oil-based biofuel business. This is because, upon the acquisition of RESPONDENT, Southern Commodities had announced that it would centralize its entire oil business under the roof of RESPONDENT which until then only had produced biofuel from other vegetable oils.

Furthermore, Mr. Chandra and Ms. Bupati managed to settle all the commercial terms in their negotiations at the Palm Oil Summit. However, due to the recent controversies concerning RESPONDENT's palm oil business, Ms. Bupati wanted to seek approval from RESPONDENT's management before entering intro such long-term contract.

Thus, it was agreed that she would get back to Mr. Chandra with a definitive offer within the next three days (this was in line with the mode of operation which Mr. Chandra and Ms. Bupati had established for their 40 palm kernel oil contracts).

On April 1st, 2020, Ms. Bupati then sent an email ordering 20,000t of RSPO-certified palm oil per annum for the year 2021-2025 to be delivered in up to six instalments per annum, delivery starting in January 2021 (according to the exact commercial terms agreed between the Parties at the Palm Oil Summit).

In light of this, Mr. Chandra had his assistant Mr. Rain prepare the necessary contractual documents. According to the practice established with Ms. Bupati, in line with previous transactions, the Contract was based on CLAIMANT's contract template (FOSFA/PORAM 81) into which the details of the offer were incorporated.

On April 9th, 2020, Mr. Rain sent the Contract signed by Mr. Chandra to Ms. Bupati's assistant, Ms. Fauconnier. Additionally, the accompanying letter explicitly mentioned that the Contract would be governed by the law of Mediterraneo and that the purchase would be subject to the CLAIMANT's General Conditions. The Standard Terms were not included in this letter as they were already known to Ms. Bupati from her work to Southern Commodities and also the letter named Mr. Rain as the relevant contact for all questions concerning the Contract and asked for the return of one of the signed versions.

On May 3rd, 2020, Ms. Fauconnier contacted Mr. Rain to set up a meeting to discuss the issue regarding the opening of a letter of credit which RESPONDENT was required to open under the Contract. Ms. Fauconnier asked for a list of acceptable banks and wanted to clarify the documents to be presented for the payment. Mr. Rain also pointed out that so far, no signed copy of the Contract had been received and Ms. Fauconnier promised that she would look into that.

In light of that promise, CLAIMANT was not worried, relying also on previous transactions conducted by Ms. Bupati, when working for Southern Commodities, considering that she had not always returned the requested signed versions of the contracts.

On October 29th, 2020, CLAIMANT knew from an article that RESPONDENT had allegedly stopped all further negotiations with CLAIMANT regarding the delivery of RSPO-certified palm oil and was potentially reconsidering its palm oil-based biofuel activities. Mr. Chandra immediately called Ms. Bupati to clarify the issue, however, he was told that she was on holiday but would call him back upon her return.

One day after, on October 30th, 2020, CLAIMANT received a letter from RESPONDENT's CEO, Ms. Youni Lever, where she declared the termination of any further negotiations on the delivery of palm oil and additionally renounced all existing relations, due to information about CLAIMANT´s infringements of basic RSPO standards.

On November 3rd, 2020, Ms. Bupati returned Mr. Chandra's call, confirming the content of the letter sent by RESPONDENT's CEO and offered Mr. Chandra to discuss the issue with RESPONDENT's COO, Mr. Fotearth.

On December 2020, several rounds of negotiations as well as mediation efforts between the Parties under the AIAC Mediation Rules, vastly failed and the Parties did not agree on the jurisdiction of the Arbitral Tribunal.

Therefore, due to an adverse business climate and environmental issues RESPONDENT lost interest in the transaction, by denying any contract conclusion or, as an alternative (irrelevant for the case of this year) by declaring its avoidance for mistake and fundamental breach.

Given this set of circumstances, described *supra*, the teams were requested to address, both in their memoranda and oral arguments, the following questions:

A. Have the Parties validly agreed on the jurisdiction of the Arbitral Tribunal and what is law governing the Arbitration Agreement?

B. Is the CISG applicable to the conclusion of the Arbitration Agreement in the event it is governed by the law of Mediterraneo?

C. Have the Parties concluded a contract in 2020?

D. If a contract was concluded were Claimant's General Conditions of Sale validly included into that alleged contract?

Considering that the various questions were closely connected to each other, the teams were free to decide in which order they want to address the different issues, whether the merits first followed by procedure issues and vice-versa.

At this stage of the proceedings, the teams were not supposed to address the avoidance or termination of the (already existing) contract and also no questions to the prayer for relief or further issues.

Issue A: The present issue relies on the discussion on whether the Parties have validly submitted their disputes to arbitration under the AIAC-Rules. This is primarily a question of whether the Parties have validly included Claimant's General Conditions of Sale (which contain the arbitration clause) into the contract (Issue D).

The requirements for a valid inclusion of an arbitration agreement contained in Claimant's General Conditions of Sale depend to a large extent on the law applicable to the arbitration clause.

Regarding the question of the governing law of the Arbitration Agreement, the goal relies on the discussion on whether the conclusion of the arbitration agreement is governed by the law of Danubia as the law of the place of arbitration or by the law of Mediterraneo as the implied choice of the parties.

Issue B: on this question it is expected to elaborate on whether the CISG is applicable considering that Mediterraneo is a contracting state of the convention and if the scope of the CISG is applicable to Arbitration Agreements.

Issue C: This issue is key to determine whether a contract was concluded between the Parties or not. There a several possibilities for when the contract could potentially have been concluded. As examples in chronological order:

• 1 April 2020 when Respondent placed its order based on the terms agreed at the Palm Oil Summit (Offer: at Summit – Acceptance: through order),

• 9 April 2020 when Mr. Rain sent the signed version of the contract (Offer: Order of 1st of April, 2020 – Acceptance: via letter of 9th of April, 2020)

• One week after 9th of April 2020 (Offer: letter of 9th April, 2020 – Acceptance: through silence – practices or usages)

• In May 2020 during the discussions between Mr. Rain and Ms. Fauconnier (Offer: letter of 9th April 2020 – Acceptance: performance of contract by discussing the Letter of Credit).

Issue D: The last issue is directly connected with the previous one, meaning that allegedly a contract has been concluded between the parties, and based on that, the main goal is on whether the CLAIMANT's General Conditions of Sale were validly included into that contract.

The first approach of the issue starts with the law applicable to the incorporation of the GCoS, which is the CISG. This is because the parties have agreed on the law of Mediterraneo as the law governing all aspects of the contract, with the exception of the Arbitration Agreement. Thus, being Mediterraneo a contracting state of the CISG, the analysis of the Convention requirements for a valid incorporation of the standard terms is key on this topic.

Considering that the CISG does not contain any specific rules for the inclusion of general terms, the general rules on contract formation apply (Issue C). These rules are

interpreted by the majority of scholars and courts to require that the standard terms text must be provided (the so called making available test) or, made otherwise known to the other party within the time of the offer, to be precise, before the acceptance took place.

Also relevant on the present issue is the extent of established practices between the Seller (CLAIMANT) and Southern Commodities (RESPONDENT's Parent Company) to RESPONDENT. In this way, the goal is to determine on whether these practices are binding on the wholly owned subsidiary (RESPONDENT) considering that the same agent was involved in all forty contracts concluded so far. Alternatively, other position could also be on whether the agent's (Ms. Bupati) knowledge, who performed is role in both parent and subsidiary company can be attributed to an alleged legal independent subsidiary company.

Procedural Issues

ISSUE A - Have the Parties validly agreed on the jurisdiction of the Arbitral Tribunal and what is the law governing the Arbitration Agreement?

Mafalda Estácio

Issue A represented two different juridical question to be debated, each of them with their own particularities. The first issue to be regarded is **i)** whether the parties concluded a valid arbitration agreement and therefore were bound be it and **ii)** which law should the Tribunal apply in order to reach its decision. It is important to note that this issue is deeply intertwined with the substantive issues of contract conclusion and inclusion of CLAIMANT's General Conditions of Sale given the fact that the Arbitration Agreement was a clause of the GCOS.

CLAIMANT has filled this action against RESPONDENT on the basis of the such agreement which, in its view is validly concluded under the requirements prescribed by the law of Danubia, the alleged seat of arbitration.

On the other hand, RESPONDENT challenges the jurisdiction of the Tribunal on the grounds that no agreement has been concluded since the GCOS (and consequently, the Arbitration clause) were never included into the contract allegedly concluded by the Parties. RESPONDENT'S position is that the law applicable to this discussion is the law of the main contract which invalidates the Arbitration Agreement.

1. The law applicable to the Arbitration Agreement

As put forward by Redfern and Hunter[6] international arbitration does not exist in a legal vacuum. It is regulated by the laws of procedure chosen by the parties but also the law of the place of arbitration. It can be the result of an interaction of laws such as the law governing the performance of the arbitration agreement, the law governing it existence and procedure, the law governing the substantive issues in discussion and the law governing its recognition and enforcement.

The problem arises when parties fail to determine the law applicable to the existence and validity of the arbitration itself and only choose the substantive law governing the main contract or the seat of arbitration, which is the case at hand.

In this case it is important to ascertain what is the law applicable to the agreement. While pleading on behalf of RESPONDENT I argued that it should be the substantive law of contract, agreed by the parties, in the present case the law of Mediterraneo[7]. On the other hand, while pleading on behalf of CLAIMANT as parties agreed on the seat of arbitration, this should be the governing law[8].

There are multiple ways to argue the applicability of such laws as there is no uniformity in jurisprudence, although there is a growing tendency in common law jurisdictions to apply the law of the contract [9].

2. The law of the seat of Arbitration:

CLAIMANT's position was based on two main arguments. The first that RESPONDENT could not argue it had no knowledge of the arbitration agreement in discussion nor the choice of seat therein. The second that given the importance of the seat of arbitration in any proceeding, this should be the governing law.

Turning to the first point, Mrs. Bupati and Mr. Chandra had an ongoing business relationship during more than 10 years[10]. Throughout these years, they represented their companies in all those contract negotiations. In the case at hand, RESPONDENT is a

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[6] *Redfern and Hunter, Chapter 3: Applicable Laws in: Blackaby Partasides, et al. Redfern and Hunter on International Arbitration, 6th edition, Kluwer International Law (2015) p.155-228*

[7] *The Problem, ANoA para. 14 p.27*

8 The Problem, NoA para. 14, p.6,

[9] *Sulamerica cia nacional de seguros s.a. v. Enesa engenharia s.a.- English Court of Appeal 2012; In Kabab-Ji SAL (Lebanon) v Kout Food Group. English Court of Appeal 2021*

[10] *The Problem, R. Ex. 3 para. 2 p. 31*

100% subsidiary company of Southern Commodities and it is still represented by Mrs. Bupati.[11] Although it was controversial whether RESPONDENT received the new GCOS, it is true that Mrs. Bupati had access to this document and was aware of the arbitration agreement from previous dealings[12]. Tribunals often acknowledged this reasoning and challenged RESPONDENT when it argued that it was not aware of arbitration proceedings at all given the fact that arbitration is common in the business industry and it was always the dispute resolution method chosen by the parties[13].

The general question was if the GCOS had been made available to RESPONDENT as they need to be according to the CISG. I followed the answer given by my team member on issue D, that CLAIMANT did not need to meet that requirement given the previous relationship between the Parties.[14]

The second argument was the importance of the law of the seat since it represents the judicial center of gravity of the arbitration proceeding.[15] The core focus of this discussion is the existence of Article V(1)(a) of the New York Convention[16]. This article is considered to be an authoritative conflict of laws rule to determine the proper law governing the arbitration agreement since non-compliance with the law of the seat may result in denial of enforcement of the award (Art. 34 (2) (a)(i) and 36 (1) (a) (i) of the UNCITRAL Model Law).[17] Furthermore, it is widely accepted that when parties agree on the seat of arbitration it is understood as an implied choice of having that law governing the arbitration agreement.[18]

As the High Court of Singapore decided on the *First Link Investment* case "the very choice of an arbitral seat presupposes parties' intention to have the law of the seat recognize and enforce the arbitration agreement (...) as parties would not have intended a specific place to be the arbitral seat if there is a serious risk that the law of the seat would invalidate the agreement. Moreover, when compared to the law of the main contract, the

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[11] *The Problem, PO2, para. 4, p.48*

[12] *The Problem, Anoa, para 12, p. 27*

[13] *The Problem, PO2 para.11 p. 49*

[14] *CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa.*

[15] Plures leges faciunt arbitrum, *Franco Ferrari in Arbitration International*, Volume 37, Issue 3, September 2021,p. *579–597,*

[16] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

[17] *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*

[18] *Supra 6- Chapter 3 p.3 para 3.15; Towards a harmonized theory on the law applicable to the arbitration agreement, Maxi Scherer and Ole Jensen in Indian Journal of Arbitration Law*

law of the seat has higher connections with the arbitration agreement itself since i) it is the place where the award is made, ii) courts on the seat fulfill supervisory functions and decide challenges on the award.[19] According to the Problem[20] Courts in Mediterraneo and Danubia both decide this issue following article V(1)(a).

3. Validation principle

Finally, as the discussion between the parties was based on the validity *vs* invalidity of the arbitration agreement, CLAIMANT'S third possible argumentation was the validation principle.

This principle entails that whatever system of law is deemed to be the parties' implied choice, it should be the one which validates the arbitration agreement.[21] This means that if the law of the underlying contract invalidates the AA which is RESPONDENT's pretention, the law of the seat would apply to the parties' agreement instead.[22]

In the present case, RESPONDENT intends to apply the CISG in order to invalidate the arbitration agreement which it concluded with CLAIMANT. As in *Kabab-Ji vs Kout,* the English Court of Appeal concluded that any choice of law provision should be interpreted as to "*give effect to, and not to defeat or undermine, the presumed intention that an agreement would be valid and effective*"[23] when such is the case, even if the parties agreed on the law governing the contract. This solution ensures that the parties' intention to arbitrate in upheld to the greatest extent possible as it follows a pro-arbitration standard to safeguard the validity of the agreement.[24]

4. The law of the main contract

On opposing grounds, RESPONDENT argues that the law of the main contract should be extended to the arbitration agreement directly or as an implied choice of law by the parties.

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[19] *Supra 18*

[20] *The Problem PO1 para.3 p.47*

[21] *A Principled Approach Towards the Law Governing Arbitration Agreements, Chapter 24: in Jurisdiction, Admissibility and Choice of Law in International Arbitration: Neil Kaplan and Michael J. Moser Wendy Miles and Nelson Goh- Kluwer Law International pp. 385394*

[22] *Choice of Law Governing International Arbitration Agreements. Chapter 2, Gary B. Born in International Commercial Arbitration 3rd edition- Kluwer Law International*

[23] *Supra 9*

[24] *Supra 18*

i) Choice of Law for the Main Contract as en Express choice of Law governing the Arbitration Agreement

The first case to analyze is when it is assumed that the choice of law for the main contract is intended to regulate the parties' entire relationship, including the arbitration agreement (as this is a clause of the main contract). This has been followed by the Indian Supreme Court in *National Thermal Power Corp v Singer Co*[25]. and also in the previously cited *Kabab- Ji Kout* case[26] from England. Questions often arose when this argument was presented to the Tribunal. The most relevant one was regarding the principle of separability according to which the main contract and the arbitration agreement are independent from each other (Art. 16 UNCITRAL Model Law, Art. 20 AIAC Rules).[27] In order to answer this question, I argued that the principle of separability is intended to safeguard the validity of the arbitration agreement when the main contract is invalid and not to determine the applicable law.[28]

ii) Choice of Law for the Main Contract as Implied Choice of Law governing the Arbitration Agreement

As decided by the English Court of Appeal in the *Sulamérica* decision, a landmark decision on the discussion of the law applicable to the arbitration agreement, the court noted that an express choice of law governing the substantive contract is "a strong indication of the parties' intention in relation to the agreement to arbitrate".[29] A strong argument in favor of this position is that business people's intention should be interpreted as intending to apply one single system of laws to apply to their entire relationship and that it can be assumed that the parties intended their relationship to be regulated as a whole. This presumption would then only be reversed when parties knew that the choice of law to the main contract did not extend to the arbitration agreement.[30]

While pleading for RESPONDENT I further argued that the law governing the main contract- the law of Mediterraneo- was the only law that was discussed and agreed by the

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[25] *National Thermal Power Corp. Vs Singer Company and Ors- Supreme Court of India 7 May 1992*
[26] *Supra 9. - Note: The Court concluded that in theory the law of the main contract would apply, however as that would invalidate the agreement, the law of the seat should apply instead.*
[27] *Asian International Arbitration Center Arbitration Rules 2021*
[28] *George A. Bermann, international arbitration and private international law 132 (2017)*
[29] *Supra 18*
[30] *Supra 9*

parties[31] and it was CLAIMANT who chose this change since in previous dealings, the law of Danubia applied. In a communication to RESPONDENT, CLAIMANT even declared that the law of Mediterraneo was the most favorable one[32]. On this basis and given that no further discussion related to the applicable law took place, RESPONDENT's interpretation was that this would apply to the entire legal relationship.

In addition, the GCOS that were allegedly included into this contract by CLAIMANT were never provided to RESPONDENT. Not only were those conditions different from previous relationships between Southern Commodities and CLAIMANT, but there was the only document that contained the seat of arbitration to which RESPODENT never agreed too.

As such, RESPONDENT's allegations were that given that the only law agreed and discussed by the parties was the law of Mediterraneo and given that it had no knowledge of the arbitration clause in question, the law of the seat was never agreed by the parties and therefore could not apply.

5. Incorporation of the Arbitration clause by reference

With regards to the validity of the arbitration clause, CLAIMANT had to demonstrate to the Tribunal that even though the clause was not part of the contract directly, it still complied with its necessary validity requirements. In this case. CLAIMANT argued that the clause was incorporated into the contract by reference to the GCOS.

Article 7 of the UNCITRAL Model Law prescribes the validity requirements that an arbitration agreement must comply with. These articles was amended in 2006 which lead to the creation of options one and two in an attempt to make the formal requirements more flexible given the necessities that technologies demanded[33]. In paragraph 6 of article 7, the UNCITRAL Working Group established that a mere reference to a document containing an arbitration agreement fulfills the necessary validity requirements, even when there was no specific mention of that arbitration clause. This entails that a general reference to terms and conditions contained in a separate document which included an arbitration clause are enough to bind the parties to that clause when there was a "pre-existing relationship between the parties in which the general conditions have been

[31] *The Problem Cl. Exb 2 p.12*

[32] *The Problem CL. Exb 1 para 13 p.10*

[33] *UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006. Explanatory note*

exchanged such as they (the parties) should have been aware"[34], even if such conditions were not delivered in that contract. The same is true for Danubian contract Law which only requires a clear statement that the general conditions of sale apply and not that they are delivered.[35]

Even in cases where one party claims not to have received the arbitration clause, scholar such frequency *Di Pietro, Born* and *Schramm*[36] as well as Tribunals (*Del Médico case, Tradax case*)[37] have considered the circumstances of the case namely i) the parties business experience in the field, ii) the frequency of arbitration clauses in that field as circumstances where parties do not deserve to be protected and should thus be bound by the agreement.[38]

What is, therefore, necessary to address is whether the party which intends to invalidate the arbitration agreement was sufficiently aware of the existence of the arbitration clause, such that any *"reasonably prudent party would have been aware".*[39]

In the present case, CLAIMANT made it clear to RESPONDENT that is could not accept something other than arbitration[40]. Additionally, Ms. Bupati concluded eight contracts with CLAIMANT after the 2016 changes to the GCOS and at least of these contracts contained the new arbitration clause. Additionally, Mr. Chandra informed Ms. Bupati of the changes to this clause.[41]

In this sense, even if RESPONDENT argued that the GCOS were never made available in the present contract, the Tribunal could not ignore that there was a previous relationship between the Parties in which arbitration played an important role.

This issue was often questioned by the Tribunal and largely discussed between the parties as Ms. Bupati's experience and knowledge could not be ignored.

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[34] Société Bomar Oil N.V. v. Entreprise tunisienne d'activités pétrolières (ETAP)- Cour de Cassation ; New York Convention, Article II in Loukas A. Mistelis (ed), Concise International Arbitration, 2nd edition Kluwer Law International 2015 pp. 7 - 13

[35] The Problem, PO1 Para 3, p.48

[36] Supra 24; supra 22; Article II'- Dorothee Schramm, in Herbert Kronke , Patricia Nacimiento , et al. (eds), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention

[37] Del Medico & C. SAS v. Iberprotein Sl- Italian Supreme Court 2011; Tradax Export S.A. v Amoco Iran Oil Company- Federal Tribunal of Switzerland 1984

[38] Supra 36

[39] Supra 24, 36

[40] The Problem, Cl. Ex. 1, para. 11, p. 10

[41] The Problem, PO2, para. 7, p. 48

6. Conclusion

With regards to Issue A, given the complex discussion and the lack on uniformity both by scholars, Courts and Tribunals, each position was built by the drafters of the Problem with small details that made it easy to build the case on both positions. Indeed, as mentioned before, there is a growing tendency to apply the law contract to the entire contractual relationship. However, when such creates a challenge to the very own validity of the arbitration clause, there is no doubt that the "pro-arbitration" standards prevail in order to safeguard the chosen dispute resolution mechanism.

ISSUE B - Is the CISG applicable to the Arbitration Agreement, in the event it is governed by the law of Mediterraneo?

Mafalda Vila Nova

1. Introduction

The starting point of this issue relates to the fact that Mediterraneo is a contracting state of the CISG. Therefore, if the Tribunal finds that the Law of Mediterraneo is applicable to the Arbitration Agreement the further discussion is whether the CISG applies.

This discussion can be divided into three main arguments: the interpretation of the separability principle; the extent of the scope of the CISG; and lastly, the determination of the agreement between the Parties.

The strategy to defend CLAIMANT's position in this year's case is based in three arguments: firstly, a narrower approach of separability principle; secondly, the limited view of the scope of CISG; lastly, the lack of agreement regarding the application of the CISG.

On the other hand, to support RESPONDENT's position, it is crucial to assume, firstly, a wider approach of the separability principle; secondly, consider a broader view of CISG's scope; lastly, defend that Parties have impliedly agreed on its application.

2. Separability principle

The separability principle is one of the cornerstones of international arbitration and the widely accepted definition of this principle is "invalidity or avoidance of the main contract will not lead to the loss of the chosen method of dispute settlement".[42]

[42] *Maria Pilar Perales Viscasillas, David Ramos Muñoz "Chapter CISG & Arbitration" In Spain Arbitration Review, 2011, pp. 63-84*

Therefore, through this understanding, one can assure if the contract is invalid, but the Parties have agreed on the arbitration mechanism as a settlement of eventual disputes, this agreement remains valid.

This principle can be useful for both parties in this year's case, depending on the wider or modest interpretation of it.

a. Claimant's Position

On one hand, CLAIMANT has to state that this principle allows for the application of different sets of rules to the main contract and to the arbitration agreement. Therefore, even though the main contract is governed by the CISG, this sole fact in not sufficient to ensure that this Convention would also be applicable to the arbitration agreement.

There are different perspectives to the connection between the CISG and arbitration agreements. In this respect, the theory that extends the application of the CISG to the arbitration agreement supports so because the arbitration agreement is recognised as a part of a CISG contract[43]**.** According to this understanding, if the CISG is applicable to the main contract, it would be automatically applicable to the arbitration agreement. However, this theory shall not be accepted as, by recognising the arbitration agreement as part of the main contract, it fails to consider its autonomy and independence. Thus, CLAIMANT's position is that the CISG cannot be applicable to an arbitration agreement for the mere reason that it governs the main contract. Even though the arbitration agreement is incorporated into a contract in the form of an arbitration clause it does not change its nature as a separate contract, according to the separability principle.[44] The same logic can be followed in this case. By incorporating the arbitration agreement into the CLAIMANT's GCoS which were, in turn, validly incorporated into the main contract, the arbitration agreement upholds its autonomy due to its particularities and its procedural nature.

This principle recognises that an arbitration agreement is a separate contract, as a result, it is conceivable to have different laws governing the main contract and the arbitration

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[43] Janet Walker "Agreeing to Disagree: Can We Just Have Words? CISG Art. 11 and the Model Law Writing Requirement" In 25 J.L. & Com., 2005, pp. 153-165

Ingeborg Schwenzer and David Tebel "ASA Bulletin, "The Word is not Enough – Arbitration, Choice of Law Clauses under the CISG" in Kluwer Law Internacional 2013, Vol. 31, pp. 740-755

Jeffrey Waincymer "The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship Between Substance and Procedure", 2008, pp. 582-599

[44] Stefan Kroll "Selected Problems Concerning the CISG's Scope of Application" In 25 J.L & Com., 2005 pp. 39-57

agreement, since it is treated as separable or autonomous.[45] Consequently, there is no automatic application of the law governing the substantive part of the contract to the arbitration agreement.

There are also some facts of the present dispute that support this position. CLAIMANT's lawyer, Mr. Langweiler advised, at the moment of the negotiations, that would be more favourable for them to change the law governing the sales contract to the law of Mediterraneo and based its advice under the assumption that the extension of this alteration would not cover the arbitration agreement, which she considered to be entirely separate agreements.[46]

To sum up this argument, CLAIMANT has to demonstrate that this principle allows for the application of different laws to different aspects of the contract, namely, the substantive contract and the arbitration clause.

b. Respondent's Position

On the other hand, RESPONDENT has to defend a wider approach and argue that this principle does not hinder the application of the same law to the main contract and the arbitration agreement.

The first line of thought has to be that separability has only one effect: invalidity or avoidance of the main contract will not lead to the loss of the chosen method of dispute settlement. This means that the main contract and the arbitration agreement are considered to be separated for the purpose of validity, not for the purpose of the applicable law. Through this understanding, the separability principle does not, *per se*, dictate that the main contract and the arbitration agreement are to be considered as two separate contracts,[47] when discussing the applicable law.

Furthermore, RESPONDENT may also argue that the application of the same law to the main contract and to the arbitration agreement may grant a much more harmonised application.

To conclude this argument, RESPONDENT has to prove that this principle does not hinder the application of the same law to the main contract and the arbitration agreement.

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[45] *Aleksandrs Fillers "Application of the CISG to arbitration agreements", 2019, pp. 663-693*

[46] *The Problem, PO2, p.40, para 16*

[47] *Aleksandrs Fillers "Application of the CISG to arbitration agreements", 2019, pp. 663-693*

3. Scope of CISG

The analysis of the scope of the CISG is truly the core of the second issue, as through this scrutiny one can infer whether the CISG even applies to arbitration agreements in general. Although this argument is fundamentally theoretical, it has a vital importance to build the basis of both CLAIMANT and RESPONDENT positions. Moreover, this problematic is fairly recent in the jurisprudence and doctrine which can be a challenge to structure one or the other argument in this case.

Firstly, the CISG is the United Nations Convention on Contracts for the International Sale of Goods, commonly known as Vienna Convention and it deals with both contract formation and the obligations of the parties. Through an extensive review of the cases dealing with such application, only in a few of those cases adjudicators have attempted to provide any reasoning to justify the applicability or non-applicability of the CISG to an arbitration agreement.

While this is a very recent discussion, there are still different doctrines to support one or another position, being that the majority of the authors support the application of this Convention to arbitration agreements.

The reasoning behind this discussion is, in the last instance, to determine the validity or invalidity of the arbitration agreement. In the present case, the application of the CISG could invalidate the arbitration agreement, therefore, RESPONDENT has to prove the CISG applies, and, in turn, CLAIMANT has to demonstrate that this application is not possible. To do so, RESPONDENT may argue that the scope of the CISG can be extended to arbitration agreements and CLAIMANT, *a contrario*, has to clarify that the arbitration agreement does not fall under the scope of the CISG.

a. Claimant's Position

As stated *supra*, the jurisprudence is lacking an in-depth analysis of the subject, therefore it is fundamental to focus on the academic approach.[48]

The doctrine that must be bearded in mind to support CLAIMANT's position, is the doctrine that rejects the application of the CISG to arbitration agreements, as the arbitration agreement does not fall under CISG's scope.[49]

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[48] *Aleksandrs Fillers "Application of the CISG to arbitration agreements", 2019, pp. 663-693*
Loukas Mistelis "CISG and Arbitration" In André Janssen and Olaf Meyer (eds.) 2009 pp. 386-391

[49] *Stefan Kroll "Selected Problems Concerning the CISG's Scope of Application" In 25 J.L & Com., 2005 pp. 39-57*

Consequently, to truly analyse the possibility of this application, one must scrutinise the scope of the CISG to conclude whether this question falls within or outside of it.

The scope of the CISG is defined in articles 4 and 5 by a broad description as to the matters explicitly governed by CISG along with a non-exhaustive list of issues not governed by it. In light of that, the interpretation of the various notions and concepts of those two articles have an important bearing on the unifying effect of the CISG.[50] Thus, a narrow interpretation of the concepts of the articles *supra* could limit CISG's scope of application significantly.

Regarding this interpretation, one must, firstly, consider the wording of the article 4 which defines broadly the two main areas of law governed by the CISG. This legal provision mentions that the CISG "governs only" two matters, i.e., the formation of contract and, rights and obligations of the seller and buyer. In this manner, it is unquestionable that the wording of the first sentence radically restricts the scope.[51] For this reason, it is crucial to determine which topics are under the CISG scope, namely, the arbitration agreement.

First of all, the CISG does not explicitly include arbitration agreements in its scope of application and, in this regard, the exclusion of a certain matter from the scope of the Convention is often deduced from the lack of an explicit regulation for a particular question. However, this fact may not be sufficient to conclude the CISG does not regulate this matter. Thus, a deeper analysis seems to be necessary. In this respect, it is fundamental to determine whether the CISG is at all intended to regulate the conclusion of arbitration agreements. To determine that, one must consider the articles 1 through 3 which regards CISG's sphere of application. Through an analysis of these legal provisions, it becomes clear that the CISG governs only substantive matters regarding the contracts of sale of goods.[52]

The arbitration agreement has, undoubtedly, a procedural nature. Hence, even when the arbitration agreement is included into a contract of sale of goods, or in General

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Alejandro Garro "The U.N. Sales Convention in the Americas: Recent Developments" In 17J.L. & Com., 1998 pp. 237-238

[50] Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas "Un Convention On Contracts For The International Sale For The International Sale Of Goods (Cisg)" 2nd Edition, 2018, pp. 253-255

[51] Maria Pilar Perales Viscasillas, David Ramos Muñoz "Chapter CISG & Arbitration" In Spain Arbitration Review, 2011, pp. 63-84

[52] Ingeborg Schwenzer, Florence Jaeger "Chapter 30: The CISG in International Arbitration" In The powers and duties of an Arbitrator: Liber Amicorum Pierre A. Karrer, 2017 pp. 311-326

Alejandro Garro "Some Misunderstandings about the U.N. Sales Convention in Latin America" In Franco Ferrari (ed.) 2005 pp. 171-121

Conditions, such as in this present case, the arbitration clause remains separate due to its nature.

To sum up, given the procedural nature of such contract, the arbitration agreement it is not regulated by the CISG.[53] Hereafter, in the event the CISG applies to the main contract, it shall not apply to the arbitration agreement.

b. Respondent's Position

Contrary to CLAIMANT's allegations, RESPONDENT has to prove that the arbitration agreement falls within scope of CISG.

The sole fact that the CISG does not explicitly address the applicability of the Convention to arbitration agreement is not sufficient to assure that CISG does not regulates it. The material scope of the CISG must be interpreted through its provisions.[54] Consequently articles 19 (3)[55] and 81 (1)[56] CISG are key to determine whether the CISG intends to regulate arbitration agreements. Both articles refer to terms or provisions for the "settlement of disputes". Thereupon, "settlement of disputes" encompasses both settlement before courts and Arbitral Tribunals.

Considering Article 19 CISG, this provision mentions "settlement of disputes" and as argued supra, this expression includes settlement before Arbitral Tribunals. Therefore, through an extensive interpretation of Article 19, this provision must be interpreted to cover dispute settlement clauses as part of a CISG-contract.[57]

In addition, Article 81 (1) also mentions "settlement of disputes" and pursuant to an extensive interpretation method employed above, it follows that the CISG does not limit its effects of the sales contract on dispute resolution clauses, but also regulates their termination and some other aspects.[58] Consequently, if CISG provides that the avoidance

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[53] *Robert Koch "The CISG as the Law Applicable to arbitration agreements", 2008 pp. 267, 280, 281*

[54] *Aleksandrs Fillers "Application of the CISG to arbitration agreements", 2019, pp. 663-693*

[55] *Article 19 (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.*

[56] *Article 88 (1) A party who is bound to preserve the goods in accordance with Article 85 or 86 may sell them by any appropriate means if there has been an ¬unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.*

[57] *Ingeborg Schwenzer and David Tebel "ASA Bulletin, "The Word is not Enough – Arbitration, Choice of Law Clauses under the CISG" in Kluwer Law Internacional 2013, Vol. 31, pp. 740-755*

[58] *Gustav Flecke-Giammarco and Alexander Grimm "CISG and Arbitration Agreements: A Janus-Faced Practice and How to Cope with It", in 25 Journal of Arbitration Studies 33, 2015, p. 49.*

of the main contract does not terminate an arbitration agreement, then it must regulate both of them.

Moreover, it is crucial to highlight that, even though CISG regulates sales of goods contracts, arbitration agreements are often an integral part of these same contracts.

Based on the above, RESPONDENT has to prove that the scope of the CISG extends to arbitration agreements. Also, according to this understanding, the CISG takes precedence over otherwise applicable domestic law. In that case, the CISG will govern the formation, formal validity, interpretation, and enforcement of an arbitration forming a part of a CISG-contract.[59]

4. Agreement

Party autonomy is also one of the cornerstones of international arbitration, therefore the agreement of the Parties is a crucial discussion that can take place in the present case.

On one hand, CLAIMANT has to establish that Parties have never agreed on the application of the CISG, and in fact, this application could have never been foreseeable;

On the other hand, RESPONDENT has to prove that Parties have impliedly agreed on the application of the CISG.

a. Claimant's Position

Firstly, the main contract is governed by the CISG. In this case, if a contract, as a whole is governed by the CISG, the interpretation rules of the Article 8 are applicable to all its provisions, including those which concern subject matters not governed by the CISG - *in casu*, the arbitration agreement. [60]Therefore, to interpret the Parties' willingness to exclude the application of the CISG, one must focus on Article 8 which provides the interpretation rules of statements and conducts of Parties.[61]

Analysing the facts of the present case, it is uncontested that Mr. Chandra informed Ms. Bupati via phone that the new arbitration clause was the model clause of the KLRCA (AIAC) providing for the seat of the arbitration in Danubia.[62] Giving that Danubia is not

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[59] *Jeffrey Waincymer "The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship Between Substance and Procedure", 2008, pp. 583*

[60] *Julius von Staudinger, Ulrich Magnus "J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB – Buch 2: Recht der Schuldverhältnisse, Wiener UN-Kaufrecht (CISG)" revised ed., Berlin 2018*

[61] *Christoph Brunner, Christoph Hurni, Michael Kissling "Commentary on the UN Sales Law (CISG) - Article 8 [Interpretation of Statements or Other Conduct of a Party]", 2019 pp. 89-98*

[62] *The Problem, PO2, p. 48, para 7*

a contracting state of CISG[63] then, the CLAIMANT's intention when deciding the seat in Danubia could never have been interpreted as a willingness to apply the CISG to the arbitration agreement, but only as an implicit exclusion of its application.

Moreover, during the negotiations, the only issue raised by RESPONDENT was regarding the institution chosen and, furthermore, it did not contest the choice of the seat of arbitration in Danubia, when it was informed by Ms. Bupati.

Considering the facts above, any reasonable person of the same kind would understand such conduct as an implied exclusion of the CISG to the arbitration agreement.

To sum up, it is CLAIMANTs position that the CISG does not apply, and the UNCITRAL Model Law and the NY Convention applies instead to validate the arbitration agreement, given that this agreement was incorporated by reference.

b. Respondent's Position

RESPONDENT focus also on Article 8 CISG to interpret the Parties intention on the inclusion of the CISG to the arbitration agreement. [64]

Firstly, CLAIMANT changed the law governing the main contract to the Law of Mediterraneo as it was "more favourable to us than the previously selected law of Danubia" end of quote.[65] This alteration never mentioned the exclusion of the CISG. In fact, this alteration was recommended by one of CLAIMANT's lawyers who based its advice under the assumption that the reference to the law of Mediterraneo would include the CISG. [66]Additionally, RESPONDENT never rejected this alteration.

Through the analysis of the facts, RESPONDENT supports that Parties have impliedly agreed on the application of the CISG, given that, any reasonable person of the same kind would understand such conduct as an implied inclusion of the CISG.

To conclude RESPONDENT has to defend the application of the CISG and consequently, the invalidity of the arbitration agreement, given that the CLAIMANT's GCoS, containing the arbitration clause, were never incorporated into the contract.

5. Conclusion

The second issue of this year's Willem C. Vis International Commercial Arbitration

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[63] *The Problem, PO1, p. 47, para 3*

[64] *Christoph Brunner, Christoph Hurni, Michael Kissling "Commentary on the UN Sales Law (CISG) - Article 8 [Interpretation of Statements or Other Conduct of a Party]", 2019 pp. 89-98*

[65] *The Problem, CL.Ex.1, p.10, para. 13, line 10*

[66] *The Problem, PO2, p.50, para 16*

Moot, regarding the application of the CISG to the arbitration agreement, raised innumerous questions which implied a huge challenge to achieve an in-depth knowledge of the subjects and thus present two solid and consistent positions.

ISSUE C – Have the parties concluded a contract in 2020?

Guilherme Pina Cabral

1. Introduction

The first substantive issue of the 29th Willem C. Vis International Commercial Arbitration Moot Problem regarded an alleged contractual conclusion, in which the participants needed to interpret and apply the CISG provisions on the formation of contracts, on the several discussions and exchange of emails between the parties. There are several moments in which one could extract either an offer, or an acceptance. The possible scenarios for a contractual conclusion were the ones as follows, and will be individually analysed hereunder:

- Offer in the Palm Oil Summit | Acceptance in the Email of 1st April;
- Offer in the email of 1st April | Acceptance in the Email of 9th April;
- Acceptance through silence or inactivity due to a practice established between the parties, or conduct

2. Underlying rules of the CISG

Before analyzing the specific provisions on contract formation, one must firstly address the General Provisions provided in Part I of the convention, that directly apply to this year's Problem, namely the freedom of form principle, established in Article 11 CISG, and the binding established practices between parties, established in Article 9 CISG.

2.1 The Freedom of Form Principle – Article 11 CISG

Pursuant to Article 11 CISG, there are no form requirements, and the freedom of form is the rule. As such, *"(…) conclusion of the contract, i.e. by 'offer' (Art. 14(1)) and 'acceptance' (Arts. 18 and 19(2)), is not subject to any requirements as to form"*[67].

Even though, one must keep in mind that party autonomy is the foundation of the CISG,

[67] *Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", Oxford legal Research Library, p. 429*

which is materialized in Article 6 CISG[68], that states that the parties can freely derogate or derive from the provisions of the Convention. As such, even though the freedom of form is the principle, the parties can adopt form requirements for the practice of several acts, and, in the present case, it could have been argued by Respondent that the parties derogated the freedom of form requirement, and that for a contract to be validly concluded, it was necessary to sign the copy of the contract.

Furthermore, the majority of authors consider that the practices established between the parties, prevail over all the provisions of the convention[69]. Respondent or Claimant could argue that due to past practices, the form requirement was either derogated or not, depending on the position.

2.2 Binding Practices and Trade Usages – Article 9 CISG

Article 9 CISG, and Article 8 (3) CISG, provide that the parties are bound by any practice that has been established between themselves. Practices are considered to be "*manners of conduct that are regularly observed by the parties to a specific transaction* (...). *Thus, the individual practice between the parties, rather than the general practice, is decisive*"[70].

The provisions relating to the binding practices derive from the general prohibition in International Private Law of "*venire contra factum proprium*" as well as the CISG underlying principle of good faith[71]. In fact, if a party in a business relationship conducts in a certain manner, it is reasonable for the counter-party to assume that it will act accordingly in future transactions.

This years' Vis Moot Problem, presented difficulties on this matter, considering that the practices had been established by the same agents, but in different companies, thus,

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[68] *Michal P. Alstine, "Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law", p. 35; J.O. Honnold, Uniform Law for International Sales (Boston, 3rd ed., 1999), p. 83; Giulio Giannini, "The Formation of the Contract in the UN Convention on the International Sale of Goods: A Comparative Analysis", Nordic Journal of Commercial Law (2006/1), p. 14; Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", Oxford legal Research Library;*

[69] *Franco Ferrari, Trade Usage and Practices Established between the Parties under the CISG, 2003 INT'l Bus. L.J. 571 (2003); J.O. Honnold, Uniform Law for International Sales (Boston, 3rd ed., 1999), p. 173. The Secretariat Commentary on Art. 8 of the 1978 New York Draft; Michal P. Alstine, "Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law", p. 6;, p.130; CLOUT Case 292; CLOUT Case 189.*

[70] *Franco Ferrari, Trade Usage and Practices Established between the Parties under the CISG, 2003 INT'l Bus. L.J. 571 (2003);*

[71] *Franco Ferrari, Trade Usage and Practices Established between the Parties under the CISG, 2003 INT'l Bus. L.J. 571 (2003); W. Melis, Kommentar zum UN-Kaufrecht Article 9, para. 1 (H Honsell ad-, Berlin, 1997); J.O. Honnold, Uniform Law for International Sales (Boston, 3rd ed., 1999);*

different parties. This situation has not yet been thoroughly analyzed in the doctrine and courts, thus leaving to the participants the difficult assignment of creating compelling arguments for each of the parties.

These general provisions must be considered upon the interpretation of the Articles that relate to the contract formation, Articles 14-24 CISG. This year's problem presented several possible outcomes for the formation of the contract, with ambiguous statements from the parties, as well as a practice established between different entities, even though the Agents, were the same.

3. Rules on the Contract Formation

For a contract to be concluded, pursuant to the CISG, two key elements are required: an offer pursuant to Article 14 CISG; and an acceptance, pursuant to Article 18 and 19 CISG.

3.1 Requirements of an Offer – Article 14 CISG

Article 14 states that "*A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price*."

3.1.1 It must be addressed to one or more specific persons

With this requirement, the Convention allows the generally accepted premise that a party can make an offer to a group as large as wished[72].

However, all the hypothetical scenarios in which an offer could have been done, did not raise any questions regarding this requirement. In fact, all the communications established between the parties have been done either by Mr. Chandra and Ms. Bupati, or by their assistances, Mr. Rain and Ms. Faucounier.

3.1.2 It must be sufficiently definite

Pursuant to Article 14 CISG, an offer is sufficiently definite if "*it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price*". Several authors consider that this are mere examples of a sufficiently definite requirement, and there can be additional or fewer elements if, for example, there are

[72] *J.O. Honnold, Uniform Law for International Sales (Boston, 3rd ed., 1999), p. 147*

established practices between the parties[73]. In order to address the "sufficiently definite" requirement it is necessary to apply the CISG provision on interpretation of the parties conduct, namely, article 8 CISG.

3.1.3 It must indicate the intention of the offeror to be bound in case of acceptance

This requirement obliges that the "*offer must make it clear that, if accepted, the offeror intends to be bound otherwise there is in law no offer at all but just an invitation for the addressee to make an offer or to start bargaining*"[74].

In fact, considering that there are no additional elements for a contract conclusion besides an offer, and an acceptance, it is of utmost importance that the party making an offer, or a mere invitation to make an offer, makes clear that there is/there is not an intention to be bound, otherwise a contract could be concluded with undesirable contractual terms.

To help deal with this subjective requirement, some authors propose that when contractual terms are considered by the party as material, pursuant to Article 19 (3) CISG and article 8 CISG, a proposal omitting them may have been done without intention to be bound[75].

3.2 Requirements of an Acceptance – Article 18 and 19 CISG

Article 18 and 19 of the CISG, follow the "mirror image rule", i.e., the contractual acceptance must mirror the conditions of the offer previously presented. That reasoning is extractible from article 19 CISG, in which "*A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer*".

Article 18 CISG provides that "*A statement made by or other conduct of the offeree indicating -assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.*". Article 18 follows the freedom of form principle, provided in Article 11 CISG, by defining that an acceptance can be done by any means, either statement, or conduct. Furthermore, even though the article states that silence or inactivity

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[73] Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", Oxford legal Research Library, p. 270; Giulio Giannini, "The Formation of the Contract in the UN Convention on the International Sale of Goods: A Comparative Analysis", Nordic Journal of Commercial Law (2006/1), p. 3

[74] Giulio Giannini, "The Formation of the Contract in the UN Convention on the International Sale of Goods: A Comparative Analysis", Nordic Journal of Commercial Law (2006/1), p. 3

[75] Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", Oxford legal Research Library, p. 272; CLOUT Case 537, 07/03/2022

cannot amount to acceptance, several authors have followed the understanding that silence or inactivity can amount to acceptance, for example, when there is a practice established between the parties in concluding a contract through silence, which could be argued in the present case.

Article 19 CISG, regulates the situations in which there is a reply to an offer, but that reply contains different terms from the ones established in the offer. The solution proposed by Article 19 is that, as a general rule, a reply that contains different terms is a rejection of the offer, and a counter-offer.

However, paragraph 2 "*operate(s) as an exception to the strict mirror image rule of the first*

paragraph of the article"[76] relating to material/immaterial alterations. This paragraph states that a reply that contains alterations that do not materially alter the terms of the agreement, is an acceptance, unless the offeror objects to the alterations without undue delay. Paragraph 3 of the same Article provides several examples on material alterations, such as "*the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes*". It is also well accepted in the doctrine and courts that these are mere examples on material alterations and if, for example, there are established practices in submitting eventual disputes to Arbitration, a reply to an offer containing an Arbitration Clause, is not deemed as a rejection of the offer, but has an acceptance[77]. Such interpretation by the authors derives from Article 9 CISG, in which the practices are binding on the parties. Once again, the authors and courts follow the understanding that party autonomy, and established practices and usages, prevail over all the provisions of the Convention. In sum, one can summarize material alterations as "*changes to terms of an offer which affect the significance of the offer under article 8 CISG*"[78].

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[76] *Michal P. Alstine, "Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law", p. 25*

[77] *Farnsworth, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 175-184; Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", Oxford legal Research Library, p. 359; J.O. Honnold, Uniform Law for International Sales (Boston, 3rd ed., 1999), p. 187; Steel Case*

[78] *Giulio Giannini, "The Formation of the Contract in the UN Convention on the International Sale of Goods: A Comparative Analysis", Nordic Journal of Commercial Law (2006/1), p. 11*

4. Practical application on the several scenarios

4.1 Offer in the palm oil summit, and acceptance in the email of 1st April;

a. Claimant's Position;

For Claimant to argue such fact, it would be firstly necessary to demonstrate that the offer placed in the palm oil summit was a) sufficiently definite; and b) indicated the intention of Claimant to be bound in case of acceptance.

To follow such position, Claimant needed to argue that all the requirements of article 14 CISG were met in the offer placed in the Palm Oil Summit. To do so, Claimant would claim that there was a definitive stipulation of the Goods (RSPO Certified Palm Oil), the quantity (20.000t), and the price (900$/ton)[79], and that no additional elements were necessary for the offer to be considered sufficiently definite.

Addressing the acceptance, Claimant would have to demonstrate that the communication from 1st April 2020, was an indication of assent of Respondent, and that no additional elements were brought to discussion. To do so, Claimant would argue that Ms. Bupati repeated the exact conditions as discussed at the summit and made an "order"[80]. Claimant would then argue that the terms brought by Ms. Bupati relating to the settlement of disputes were a mere suggestion, and that those concerns were already addressed in Claimant's General Conditions of Sale since the Arbitration Institution chosen was a non-industry related, just as Ms. Bupati requested.

b. Respondent's position

Respondent could argue that the offer in the Palm Oil Summit was not sufficiently definite, considering that it did not contain essential elements for the parties, such as the agreement on the dispute resolution mechanism. In fact, during the Palm Oil Summit, Ms. Bupati informed Mr. Chandra that "*it could eventually be necessary to adapt some of the "legal" terms which had been used in the previous contracts between us, in particular the dispute resolution mechanism given the wide-spread hostility to arbitration in Equatoriana*"[81].

Such concern was, yet again, brought up in the email of 1st April, in which Ms. Bupati expressly told Mr. Chandra that: "*the submission of the sales contract to Mediterranean*

[79] *The Problem, NoA, p. 5, para. 6*
[80] *The Problem, CL.Ex.2, p.12, para. 3*
[81] *The Problem, CL.Ex.1, p.10, para. 11, line 4*

law, which you mentioned as your company's new policy, is less a problem for us than the submission to arbitration, in particular if we submit to an institution which exclusively deals with palm oil."[82].

By using the interpretation criteria set forth in Article 8 CISG, namely article 8 (3) CISG that states that "*due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties*.", Respondent could argue that the agreement on the dispute resolution mechanism was an essential term of the contract, and an offer that did not address the dispute resolution mechanism could not be considered as sufficiently definite.

Thereinafter, Respondent could argue that, even if the negotiations at the palm oil summit are to be interpreted as an offer, the email of 1st April would be a rejection of the offer, and a counter offer Pursuant to Article 19 CISG. In fact, pursuant to such article, a reply to an offer that contains different terms, is to be interpreted as a rejection of the offer and a counter-offer. As such, Respondent would argue that the terms relating to the settlement of disputes, are different from the ones in the original offer, and those materially alter the agreement, thus, a rejection of the offer and a counter-offer. If this option was followed, Respondent would have to prove that there was no acceptance from Claimant, as explained in the following scenario.

4.2 Offer in the Email of 1st April | Acceptance in the email of 9th April

a. Claimant's Position

Pursuant to this scenario, Claimant would have to prove that all the requirements of article 14 CISG, were met in the email of Ms. Bupati, and most importantly, Claimant would have to be able to argue that Respondent had an intention to be bound, in case of acceptance.

Furthermore, Claimant would have to demonstrate that the email of 9th April is a mirror image of the offer (or counter-offer) placed by Respondent, an indicated Claimant's assent. In order to do so, Claimant should argue that the concerns of Ms. Bupati, relating to "*a non-industry related arbitration institution*"[83], were covered by applying Claimant's General Conditions of Sale, to matters not related in the contract template. In fact,

[82] *The Problem, CL.Ex.3, p.12, para. 5*

[83] *The Problem, CL.Ex.3, p.12, para. 5*

Claimant's General Conditions of Sale provided the AIAC as the competent arbitral institution.

b. Respondent's Position

In this scenario, Respondent could argue that the email of 1st April did not present any intention to be bound on behalf of Respondent. In fact, there were issues that had not been agreed upon, namely, the Arbitration Clause. Once again, using the interpretation criteria set forth in article 8 CISG, Respondent could argue that due to the previous negotiations, the intention to be bound was dependent on the agreement of the dispute resolution mechanism, as Respondent did not want to submit eventual disputes to Arbitration.

Regarding the acceptance, Respondent had to argue that, in the event the email of 1st April is interpreted as an offer or a counter-offer, it was rejected by Claimant pursuant to article 19 CISG.

In fact, Respondent could argue that the acceptance contained different terms from the alleged offer/counter-offer. Claimant, in the communication of 9th April stated that it accepted the offer, but also referred that "*in addition, Claimant's General Conditions of Sale apply to issues not regulated in the attached document*"[84]. The application of Claimant's General Conditions of Sale was not referred in the offer/counter-offer placed by Respondent, thus, it could be argued that it was a rejection of the offer and a counter-offer. Furthermore, Respondent would have to demonstrate that these additional terms materially altered the terms of the agreement by arguing that the application of Claimants' General Conditions of Sale would imply two material alterations: one relating to the settlement of disputes (Clause 9 of the GCoS)[85], and one relating to the extent of one party's liability to the other (Clause 4 of the GCoS)[86]. Following this rationale, Respondent would prove that Claimant presented a counter-offer, which Respondent did not accept, has explained in the following scenario.

4.3 Offer/counter-offer in the email of 9th April | Acceptance through silence or inactivity/conduct

a. Claimant's Position

For Claimant to prove that the contract was concluded through silence or inactivity, it

[84] *The Problem, Cl.Ex.4, p. 17, para. 3*
[85] *The Problem, RE.Ex.4, p. 32*
[86] *The Problem, PO2, p.52, para. 31*

should firstly demonstrate that there is a binding practice established between the parties. The truth is that the previous practices had been established when Ms. Bupati was working as Purchase Manager of Respondent's parent company, Southern Commodities. Therefore, Claimant should prove that a practice established between two parties can bind a third one, or that the parties have agreed to the application of the previous practices in the present case.

After proving that the practices between Claimant and Southern Commodities, or between Mr. Chandra and Ms. Bupati, could bind Respondent, Claimant would have to prove that it was a general business practice between them to indicate assent through silence. From Mr. Chandra's witness statement, we can see that there were 5 occasions in which a signed copy of the contract was not returned[87].

Furthermore, Claimant could also argue that Respondent initiated the performance of the contract, thus accepting it through conduct by inquiring on acceptable banks for the opening of the letter of credit.

b. Respondent's position

In this scenario Respondent would need to argue that there are no binding practices between the parties and, following Article 18 CISG, "*silence or inactivity cannot amount to acceptance*".

Regarding the acceptance through performance, by inquiring on letters of credit, Respondent would need to argue that a mere inquire on acceptable banks should not be regarded as a contractual performance. In fact, in the communication of 3rd may, Respondent expressly refers that the inquire is due to the "*upcoming biennial discussions with our banks next week and the problems we had with the payment terms in another contract recently*" [88], thus it could be argued that there were no acts of contract performance.

5. Conclusion

The third issue of this year's Willem C. Vis International Commercial Arbitration Moot, regarding the contract formation, presented several difficulties, in which the participants needed to be creative in interpreting the communications between the parties, as well as to be ready to defend any of these scenarios in an oral pleading, and have deep knowledge

[87] *The Problem, C. Ex.1, p. 9, para. 3, line 11 in fine*
[88] *The Problem, R. Ex.2, p. 30*

about the CISG General Provisions, as well as the provision relating to the contract formation.

ISSUE D - If a contract was concluded, were Claimant's General Conditions of Sale validly incorporated into that contract?

Paulo Moreira Queirós

In order to determine if CLAIMANT's General Conditions of Sale were validly incorporated into the contract, it is crucial to determine whether the requirements are met under the applicable substantive law. It is undisputed from the records that the parties agreed on the law of Mediterraneo, including the CISG, as the law governing all substantive aspects with the exception of the Arbitration Agreement.[89] However, the Convention does not expressly deal with the requirements for the inclusion of standard terms. In this way, the prerequisites for the effective incorporation of GCoS into the contract are to be taken from the provisions relying on the rules for the formation and interpretation of the contract, accordingly Articles 8, 9 and 14 of the CISG.[90] In addition, according to the CISG Advisory Council Opinion no. 13, for the valid incorporation of the GCoS, the standard terms text must be provided, or the other party must be otherwise aware of its content.[91] Nevertheless, for a better understanding of the issue at hand and its importance we will firstly start by elaborating on the specific requirements for a valid incorporation of standard terms **(1)**, followed by the analysis of the concept of practices established between parties under the CISG **(2)**, within that and given the circumstances of this year's case, leads us to elaborate on the possibility of knowledge attribution **(3)** and lastly, the relevant arguments regarding the alleged extent of binding commercial practices on non-contracting parties **(4)**.

1. Requirements for the incorporation of standard terms into the contract

Firstly, it is important to notice that for the incorporation into a sales contract, the GCoS must be part of the offer, as interpreted according to the offeror intent and understood

[89] *The Problem, PO2, p. 53, para. 33.*
[90] *Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", 2016, pp. 370-372.*
[91] *Sieg Eiselen, "CISG-AC Opinion No. 13, Inclusion of Standard Terms under the CISG", 2013.*

by any reasonable person of the same kind, pursuant to Article 8 CISG.[92] On the one hand, it requires a reference to the standard terms by the offeror and, on the other, the offeree must be aware of the standard terms content, unless the GCoS have already become part of the offer due to previous practices established between the parties or, made applicable by virtue of usages.[93] [94]

1.1 Incorporation by reference

The GCoS are often found in a separate document and for that reason, to make them part of the offer, a reference to the standard terms is required. However, under the Convention, there are no specific requirements such as form for such reference. Within that, it is required that the reference must be clear to any reasonable person of the same kind as the other party in the same circumstances.[95] [96] In this way, a reference for the incorporation of the standard terms is regarded to be clear when it is readable and understandable by any reasonable person, and also available in a language that the addressee could be reasonably expected to understand.[97]

In this year's case, at the Palm Oil Summit, the CLAIMANT informed Ms. Bupati that the GCoS would be applicable to the sales contract[98] which was followed by a reference on the contract template.[99] However, such mere references are only sufficient to incorporate the standard terms in cases in which the offeree already had actual knowledge of the GCoS content at the moment that receives the offer.

Therefore, if the offeree (RESPONDENT) does not have knowledge of the standard terms content or, such awareness cannot be proved by the offeror (CLAIMANT) it requires the CLAIMANT, who has the burden of proof,[100] to ensure that the

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[92] *Pilar Peralez, "The Formation of Contracts and the Principles of European Contract Law", In Pace International Law Review (Fall 2001), pp. 374-378.*

[93] *Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", 2016, pp. 514-515.*

[94] *Sieg Eiselen, "CISG-AC Opinion No. 13, Inclusion of Standard Terms under the CISG", 2013.*

[95] *Pursuant to Article 8(2) CISG.*

[96] *Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", 2016, pp. 516;541.*

[97] *Sieg Eiselen, "CISG-AC Opinion No. 13, Inclusion of Standard Terms under the CISG", 2013.*

[98] *The Problem, PO2, p. 49, para. 13, lines 5-7.*

[99] *The Problem, C. Ex.3., p. 13.*

[100] *On the Machinery case, the German Supreme Court concluded that it would contravene good faith in international trade, as embodied in article 7(1) CISG, as well as the parties' duty to cooperate, to request the offeree to inquire about standard conditions and to hold the offeree liable in case such an inquiry was not made. Therefore, the Court ruled that the standard conditions could only become part of the offer if they were attached to it or otherwise placed at the disposal of the offeree.*

RESPONDENT is aware of the GCoS text, by providing it at the time of the offer.[101]

1.2 The making available requirement

The making available test is not only the result of stricter requirements for the incorporation of standard terms into international sales contracts but also to ensure that it is not the offeree duty to enquire the offeror about the standard terms content.

The main goal of this test is to guarantee that the full text of the GCoS is included in the offer, allowing the offeree to foresee the clauses in which will agree when accepting the offer. Consequently, enables the offeree to request it since there is no obligation of the addressee to ask for the other party standard terms under the CISG.

To comply with this requirement, it is sufficient that the offer made, for example, via e-mail contains an attachment with GCoS text.[102]

1.3 Making the Standard Terms Text Otherwise Available

Alternatively, the offeror may ensure the offeree awareness of the GCoS text by making it otherwise available, as per the following examples:

1.3.1 Providing the GCoS during meetings

The offeror by making the standard terms text available to the offeree perusal, during an office meeting is considered sufficient for the other party awareness of its content. However, by merely showing the GCoS text to the offeree during a meeting has been ruled insufficient in the event of the other party neither had the opportunity to read its content or received a copy of their it.[103][104]

1.3.2 Through availability on the internet

Generally, if the sales contract is being concluded over the internet it suffices if the offeror made the GCoS available via hyperlink on the homepage and subject to download. In this way, the standard terms text must be easily accessible for any reasonable person of the same kind, pursuant to Article 8(2) CISG, to download it.[105] However, if the hyperlink

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[101] *Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", 2016, pp. 516-520.*

[102] *Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", 2016, pp. 516-519.*

[103] *Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", 2016, p. 518.*

[104] *See: Propane Gas Case, CISG-online 224, Austrian Supreme Court.*

[105] *On the Kapiteyn B.V. v. Kurt Weiss Greenhouses Inc. case, the District Court of Amsterdam considered that the availability of standard terms on a website that contained different sets of terms clearly marked for customers from different countries was considered sufficient for a valid incorporation.*

directs the offeree to a website in which it is contained several versions of standard terms and consequently turning it onerous for the other party to realize the correct document subject to the sales contract, the requirement is not fulfilled.[106]

Furthermore, the burden of proof regarding the accessibility of the GCoS text available online, along with the fact of that they can be subject of download and printing, lies within the party relying on the standard terms, in these proceedings, CLAIMANT. [107] [108] [109]

1.3.3 Constant Business Relationship

When both contracting parties have a long business relationship, it can be sufficient that the GCoS text has been already made available to the offeree in prior sales agreements. This exception on providing the standard terms text in every single transaction occurs when there is a constant business relationship. This can only be assumed if the offeree's awareness of the GCoS content can, however, be assumed under the condition that these terms were validly incorporated into one or more previous sales contracts concluded between the parties.[110] For this exception to be granted, due consideration must be also given to the duration of the parties business relationship, number of past transactions and the gap between each of them. This is because an outer time limit can be derived from the CISG,[111] when two years have passed since the previous agreement concluded between the parties[112] where the GCoS text was provided[113], the other party is not required to be aware of its content.[114]

Following this rationale, when there is a practice established between the parties, providing the same GCoS text in every single transaction would be considered a mere

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[106] *See both: Roser Technologies, Inc v Carl Schreiber GmbH case, CISG-online 2490, U.S District Court of Maryland and CSS Antenna, Inc v Amphenol-Tuchel Electronics, GmbH, CISG-online 2177, U.S District Court of Pennsylvania, where both Courts found the reference to the website insufficient.*

[107] *It is also advisable to secure proof for the other party's awareness of the standard terms' text, e.g., by requiring a confirmation, for example, the so-called 'clickwrap'.*

[108] *See supra: footnote no. 98.*

[109] *Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", 2016, p. 519.*

[110] *Harris Pamboukis, "The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods", in 25 Journal of Law and Commerce (2005-06), pp. 107-113.*

[111] *Article 39(2) CISG.*

[112] *UNCITRAL "Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods", 2016 Edition.*

[113] *Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", 2016, pp. 541-555.*

[114] *Franco Ferrari, "Relevant trade usage and practices under UN sales law", In the European Legal Forum (E) 5-2002, pp. 273-275.*

formality.[115] In other words, and from a practical perspective, it is expected that such practices will lower the formal requirements regarding the incorporation of standard terms into the sales agreement.[116] [117]

However, in the case at hand, not only the GCoS were amended at least twice during the 10-year business relationship between CLAIMANT and RESPONDENT's parent company, but it can also not be positively excluded that the new amended version of the CLAIMANT 's GCoS were duly provided to RESPONDENT.[118]

Thus, other relevant issues[119] are required to analyse for the alternative requirement of "*making the GCoS otherwise available*" to be considered. The first, relies on whether there is effectively a practice established under Article 9 CISG. Secondly, in the event that there is a practice established between Southern Commodities and CLAIMANT, it is crucial to determine whether the entailed knowledge of the agents can be attributed to RESPONDENT, and lastly, determine if those commercial practices are binding on non-contracting parties.

2. **Practices Established Between the Parties under the CISG**

Due consideration must be firstly given to the fact that the CISG does not define "*practices established between the parties*". The majority of scholars interpret the rational of Art. 9(1) CISG as practices being established only between the parties, contrary to usages, which must be observed in at least one branch of the industry.[120] [121]

In specific, practices are conducts that occur with a certain frequency and during a certain period of time that Parties can assume, in good faith, will be observed again[122]

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[115] *Harris Pamboukis, "The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods", in 25 Journal of Law and Commerce (2005-06), pp. 117-119.*

[116] *UNCITRAL "Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods", 2016 Edition.*

[117] *Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", 2016, p. 533.*

[118] *The Problem, PO2, p. 50, para. 18, lines 4-6.*

[119] *Developed below on (2), (3) and (4).*

[120] *Franco Ferrari, "Relevant trade usage and practices under UN sales law", In The European Legal Forum (E) 5-2002, p. 273.*

[121] *Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", 2016, p. 370.*

[122] *Harris Pamboukis, "The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods", in 25 Journal of Law and Commerce (2005-06), pp. 127-129.*

in a similar instance.[123] [124]

Pursuant to Art. 8(2) CISG, such conducts that establish a practice also create an expectation that such conduct will be continued, except when their application for the future is expressly excluded.[125]

Following this rationale, if the Tribunal considers that there is a practice established between the parties, the contractual documents sent by the CLAIMANT to RESPONDENT had a clear reference stating that the contract is subject to the CLAIMANT's GCoS.[126] Precisely, in the last line of the header box of the contract it is stated that "*Seller's General Conditions of Sale apply*". Additionally, on the 9th of April 2020, Mr. Rain (CLAIMANT's Assistant) sent an e-mail[127] to RESPONDENT with the contractual documents and explicitly mentioned on the body of that e-mail that "*in addition, CLAIMANT's General Conditions of Sale apply to issues not regulated in the attached document*".[128] In this way, the requirement for a valid incorporation of standard terms by reference is met. However, this would only be sufficient if the exception to the making available test apply. It is indeed possible to apply such exception through a practice established between the parties where the standard terms text was already made known to the RESPONDENT, in prior occasion.

Thus, on the one hand RESPONDENT argues that the GCoS were not provided with the contractual documents, and, on the other hand, CLAIMANT is of the view that such requirement was not necessary as Ms. Bupati (RESPONDENT's Representative) was aware of the conditions and content of the standard terms from prior dealings with CLAIMANT while she was still working for Southern Commodities.

It is important to be aware that it is undisputed that the GCoS were sent to Ms. Bupati in 2010 and since then remained largely unchanged, however, one of the alterations made to the arbitration clause contained in Clause 9 of the transmitted GCoS, in 2016, replaced the original arbitration agreement in Clause 9 of the GCoS by a clause providing for arbitration under the rules of the Kuala Lumpur Regional Center for Arbitration. It is, however, uncontested that Mr. Chandra (CLAIMANT's

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[123] *UNCITRAL "Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods", 2016 Edition.*

[124] *See also: Tantalum Powder Case, Austrian Supreme Court; High People's Court of Guangdong, 2009.*

[125] *Harris Pamboukis, "The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods", in 25 Journal of Law and Commerce (2005-06), pp. 119-121.*

[126] *The Problem, C. Ex.3., p. 13.*

[127] *The Problem, C. Ex.4., p. 17, para. 3.*

[128] *The Problem, C. Ex.4., p. 17, para. 3-4.*

Representative) had orally informed Ms. Bupati about the change of the arbitration clause to the AIAC rules.

The second relevant change to the standard terms concerns the choice of law of the merits. As a deviation from the previous practices, the application of the "*substantive Law Danubia*" was replaced, being the sales contract governed by the Law of Mediterraneo, which was duly communicated by Mr. Chandra to Ms. Bupati at the Palm oil Summit in March 2020, followed by the e-mail of 1st of April 2020, where Ms. Bupati stated that "*the submission of the sales contract to Mediterranean Law, which you mentioned as your company's new policy is less a problem for us than the submission to arbitration*"[129] being, RESPONDENT's biggest concerns the submission to arbitration, meaning the second change of the GCoS was agreed between the parties.

3. Knowledge Attribution

This is particularly important since Ms. Bupati was involved in the negotiations of all 40 contracts concluded so far with CLAIMANT, while she was working for Southern Commodities, some of which even signed by her and also the ones which had not been signed, were still duly performed.[130] CLAIMANT position relies on these personal interconnections that may lead to knowledge attribution[131], considering that increase the flow of information. [132] [133] Furthermore, she played a leading role in the negotiations between CLAIMANT and Southern Commodities for the past 10 years, which entails crucial knowledge. However, in the present dispute, RESPONDENT (JAJA Biofuel), may argue that this is the first ever contract negotiated between the parties. On the contrary, CLAIMANT position is that such practice established with RESPONDENT's parent company could not be ignored considering that RESPONDENT, remain under Southern Commodities roof as a wholly owned subsidiary.[134]

It is important to mention that the strategy of knowledge attribution for CLAIMANT's case is far from easy, considering that the CISG does not specifically adress the question of knowledge attribution. However, it is analogically possible to apply Article 79 CISG

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[129] *The Problem, C. Ex. 2., p. 12, para 5.*

[130] *The Problem, R. Ex. 3., p. 31, para 5, lines 1-4; The Problem, PO2, p. 48, para. 7, lines 1-3.*

[131] *Morten M. Fogt, "The knowledge test under the CISG – A Global Threefold distinction of negligence, gross negligence, and de facto knowledge", Vol. 34, No. 1, 2015, pp. 301-313.*

[132] *Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas "UN Convention on Contracts for the International Sale of Goods (CISG)", 2nd Edition, 2018, pp. 197-199.*

[133] *See: The Court of Appeal of England and Wales on Chandler v. Cape plc case.*

[134] *The Problem, R. Ex. 3., p. 31, para 4, in fine.*

according to Professor Schwenzer commentary to this provision, where she states that "*a company is liable for all persons that engages to perform is duty under contracts and any relevant knowledge acquired by such employees can therefore be imputed to the company*".[135] Following this rationale[136], CLAIMANT position relies on the fact that Ms. Bupati knowledge while working for the parent company must be binding on the fully owned subsidiary[137] [138]. On the contrary, RESPONDENT position relies on Article 9(1) CISG by stating that the parties for such purposes, are the contracting ones, which has nothing to do with Southern Commodities. Additionally, RESPONDENT also argues that Ms. Bupati made clear that she was working in a completely different political environment in JAJA Biofuel (RESPONDENT) than the one while she was working for Southern Commodities (Parent Company).[139]

Another possible scenario that was brought on the Memorandum phase regards the Group of Companies Theory. According to this doctrine, a non-signatory of an arbitration agreement can be bound by it if belonging to the same group but also if it plays an important role in the negotiation, conclusion, performance, or termination of the contract, which is supported for the polemical decision on Dow Chemical France & Ors. v. ISOVER Saint Gobain case., where due to a strict corporate structural link, all companies belonging to the same group share the same "group personality"[140] [141], which could apply given the fact that RESPONDENT was acquired by Southern Commodities in 2018. Despite this was considered a solid argument to be used on the memorandum in an early stage, it was quickly dropped on the oral rounds considering that RESPONDENT handled the position that in 2020 the parent company did not have a direct involvement on the contractual negotiations and also that Ms. Bupati made clear that she was working in a completely different environment, allegedly also demonstrated when she sought for RESPONDENT Management approval[142] before

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[135] *Peter Schlechtriem, Ingeborg Schwenzer, "Commentary on the UN Convention on the International Sale of Goods (4th Edition)", 2016, pp. 1504, 1509-1511.*

[136] *See: Northern Natural Gas Case, Court of Appeal of California.*

[137] *Christoph Brunner, Christoph Hurni, Michael Kissling, "Commentary on the UN Sales Law (CISG) - Article 8 [Interpretation of Statements or Other Conduct of a Party]", 2019, pp. 90-93.*

[138] *Stefan Kroll "Selected Problems Concerning the CISG's Scope of Application", In 25 J.L & Com., 2005, pp. 55-57.*

[139] *The Problem, R. Ex. 2, p. 31, para. 5.*

[140] *J. Sagar Associates "Two's Company, Three's A Crowd: Revisiting the Group of Companies Doctrine", Kluwer Arbitration Blog, June 2021.*

[141] *See also: Manuchar Steel Hong Kong Ltd. V. Star Pacific Line Pte Ltd Case.*

[142] *The Problem, R. Ex. 3., p. 31, para 4, in fine.*

entering into the alleged contract, being *per si* an independent legal entity.[143]

4. Binding Commercial Practices on Non-Contracting Parties

The CLAIMANT allegedly has sufficient grounds to rely on the previous practice established between itself and Southern Commodities. Even if the RESPONDENT did not act as an agent of Southern Commodities, its intentions expressed during negotiations can be expected that those practices were meant to be continued in the present dispute.

The rationale behind this position relies on the possibility of an established practice between the parent company may be applicable to its wholly owned subsidiary. Particularly, where two different companies may lose their identities[144] and be considered as one single entity.[145] In such cases the subsidiary company usually has no independent interests and acts accordingly with the parent company goals. This could possibly be justified when two companies share their human resources, assets and also if the subsidiary company was only set up to carry out the goals of the parent company and to operate under its veil.[146] [147] For example, the ICC case 6000, the Tribunal found the correspondence between the CLAIMANT and the non-signatory parent company, given their previous relationship, which evidenced the involvement of the parent company in the contractual negotiations, along with the fact that the parent company was the one benefiting from the contract.

It is important to bear in mind that RESPONDENT was acquired in late 2018 by Southern Commodities.[148] CLAIMANT argues that the purpose of such acquisition was for Southern Commodities to concentrate its entire oil business under RESPONDENT's roof to benefit from the greater purchasing power, which was known by the CLAIMANT due to considerable press coverage.[149] Additionally, upon the acquisition,

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[143] *The Problem, PO2, p. 48, para. 4, lines 2-3.*

[144] *Frank, Antoine J., "Corporations - Parent and Subsidiary - Corporate Entity", Marquette Law Review, Volume 17 Issue 4, June 1933, Article 5, pp. 280-283.*

[145] *Moses, Margaret L, "The Principles and Practice of International Commercial Arbitration", Second Edition, Cambridge University Press, 2012, p. 39.*

[146] *Brekoulakis, Stavros, "The Evolution and Future of International Arbitration, International Arbitration Law Library", Volume 37, Kluwer Law International; Kluwer Law International, 2016, pp. 137-141.*

[147] *See: ICC case 5894, where the Tribunal ruled that the mentioned approach can be applied if the subsidiary company was set up only for certain purposes and were operating to carry them out, following the instructions of the parent company which made all the important commercial, financial and other decisions.*

[148] *The Problem, R. Ex. 3, p. 31, para. 4.*

[149] *The Problem, C. Ex. 2., p.12, para 5; The Problem, R. Ex. 3, p. 31, para. 4.*

Southern Commodities made changes on the RRESPONDENT's human resources, including the appointment of Ms. Bupati[150] as Head of Purchasing of JAJA Biofuel, who had been for a long time the main purchase manager for the palm kernel oil section of Southern Commodities. Moreover, Ms. Bupati herself emphasized the interests and involvement of Southern Commodities in the Contract between the Parties in her email of the 1st of April which can easily create the idea on CLAIMANT that both companies constitute a single economic entity.[151]

On the contrary, RESPONDENT argues that not only is the first ever contract negotiated between the parties as also the type of goods involved are different, which constitute a significant difference for the purposes of previous practices that always involved palm kernel oil instead of RSPO-certified palm oil. Furthermore, contrary to Southern Commodities, JAJA Biofuel was committed with environmental political measures for the production of biofuel which was one of the reasons that lead RESPONDENT to allegedly conclude the present contract, given the limited availability of RSPO-Certified Palm Oil.[152]

Moreover, RESPONDENT also argues that given the environmental political opposition in Ruritania, it is a problem to submit any dispute to arbitration, specially, to a non-industry related institution, which was used as an argument in RESPONDENT's favor, considering that the AIAC was already a non-industry related institution. Therefore, this allegedly demonstrate RESPONDENT's unfamiliarity with the Arbitration Clause included on CLAIMANT's GCoS.[153]

5. Conclusion

The fourth and final issue of this year's Willem C. Vis International Commercial Arbitration Moot, regarding the Incorporation of Standard Terms into the contract was particularly challenging, considering that the Arbitration Agreement was only included on the CLAIMANT's General Conditions of Sale. In this way, it "opened the door" for an unusual switch on the oral rounds, which was starting with the merits first, instead of the procedural issues to determine whether the Tribunal has jurisdiction to hear the case or not.

Additionally, this issue also brought for discussion the topic of practices established

[150] *The Problem, R. Ex. 3, p. 31, para. 4, lines 3-6; The Problem, PO2, p. 48, para. 5, lines 7-9.*
[151] *The Problem, C. Ex.2., p. 12, para. 2, in fine,*
[152] *The Problem, C. Ex.1., p. 10, para. 10, in fine.*
[153] *The Problem, C. Ex.2., p. 12, para. 6, lines 3-6.*

between the parties under the CISG. This is because the case was drafted to elaborate on whether these practices could potentially be binding upon non-contracting parties, in these proceedings, RESPONDENT's Parent Company. Nevertheless, at the end of this journey, I personally found it as the most interesting topic to approach on the oral rounds, given the unlimited number of questions raised by the Arbitrators which reflected on a non-stopping search to keep my case even more solid.

Conclusion

Taking part in the Vis Moot was an incredibly enriching experience for every member of our Team. Not only did we have the chance to develop our technical skills as lawyers to be but also got the opportunity to meet with peers and practitioners worldwide.

The Vis experience is particularly important as it teaches us different tools from legal writing to public speaking, from legal research to having to stand up to our position.

It cannot be forgotten the importance of team spirit and the learning experience it is to work with other team members that were complete strangers in the beginning of this journey. This year, working as a team was an extra challenge since as for the written part, all the members of our team were working and one of them in Madrid, Spain.

Our results could not have been achieved without the guidance, mentoring and support from our coaches to whom we sincerely thank, Ana Coimbra Trigo, Ana Sousa and Carolina Apolo Roque. They took the time to teach us and to accompany us during these seven months of work.

Additionally, we need to thank Nova School of Law for not only providing us a budget that allowed the team to travel and to experience the real Moot but also for providing us the best conditions for the oral rounds, as well as we thank to Professor Mariana França Gouveia that kindly accepted to guide us through the entire project and makes this amazing journey possible.

Last but not least, we thank all the previous coaches (André and Rute) as well as last year's team for helping us, coaching us, and taking the time to assist multiple of our training sessions. We also wish to thank our families and friends, who gave tremendous support and lots of patience in those harder times, and the nerves took over us.

Finally, we are very grateful to have had this experience that made us grow not only as professionals but also as individuals.

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Appendix

29th Willem C. Vis International Commercial Arbitration Moot

9th December 2021

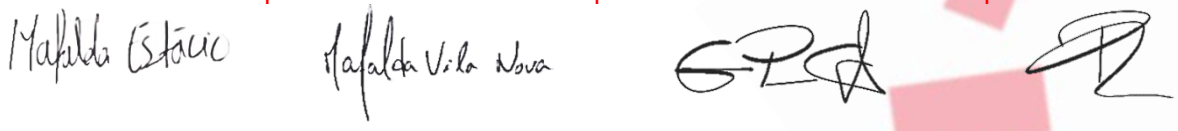
Lisbon

MEMORANDUM FOR CLAIMANT

on behalf of		*Against*
ElGuP plc 156 Dendé Avenue Capital City Mediterraneo **- CLAIMANT -**	***v.***	**JAJA Biofuel Ltd** 9601 Rudolf Diesel Street Oceanside Equatoriana **- RESPONDENT -**

COUNSELS

Mafalda Estácio | Mafalda Vila Nova | Guilherme Pina Cabral | Paulo Queirós



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IV. Claimant's General Conditions of Sale were validly included into the concluded contract. 26

A) CLAIMANT´s General Condition of Sale, were incorporated into the concluded contract through a practice established between the parties, pursuant to Art. 9(1) of the CISG 26

1) The fact that CLAIMANT removed the arbitration clause from the contract template, and kept it only in the GCoS, is considered a usage in international business practice, pursuant to Art. 9 (2) CISG 29

B) RESPONDENT could not have been unaware of the General Conditions of Sale 31

1) Ms. Bupati's knowledge must be attributed to RESPONDENT 31

2) Due to its status as parent company, the knowledge of Southern Commodities must be attributed to RESPONDENT 33

REQUEST FOR RELIEF 35

LIST OF ABBREVIATIONS

AIAC	Asian International Arbitration Center
ANoA	Answer to the Notice of Arbitration
Art./Arts.	Article/Articles
C.Ex.	CLAIMANT's exhibit
CEO	Chief executive officer
cf.	Conferre (confer)
Chp.	Chapter
CISG	1980 United Nations Convention on Contracts for the International Sale of Goods
Co.	Company
contrariu sensu	in the opposite sense or meaning
DAL	Danubian Arbitration Law [UNCITRAL Model Law of International Commercial Arbitration]
ed./eds.	Edition/editor/editors
e.g.	Exempli gratia (for example)
et al.	Et alii (and others)
et seq.	Et sequens (and that which follows)
et seqq.	Et sequentes (and those which follow)
EUR	Euro
ibid.	Ibidem (in the same place)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
i.e.	Id est (that is)
Inc.	Incorporation

ipsis verbis	In the same words
KLRCA	Kuala Lumpur Regional Center for Arbitration
l.	line
Ltd.	Limited
NoA	Notice of Arbitration
No.	Number(s)
NY Convention	1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OGH	Oberster gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Regional Court of Appeals)
p./pp.	Page/pages
per se	By or in itself or themselves; intrinsically
¶	Paragraph/paragraphs
PO1	Procedural Order 1 of 8 October 2021
PO2	Procedural Order 2 of 8 November 2021
R. Ex.	Respondents' exhibit
SCC	Supreme Court of Canada
supra	Above
UN	United Nations
UNCITRAL	United Nations Commision on International Trade Model Law
v.	Versus

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22 May 2014	ICC – International Chambers of Commerce	*Case no. 18133/CYK, Rock Resource Ltd. v. Altos Hornos De Mexico, S.A.B. de C.V* Cited as: Rock Resource v. Altos Hornos de Mexico in ¶ **79**
10 June 2002	CIETAC - China International Economic and Trade Arbitration Commission	CISG/2002/02 Cited as: CISG/2002/02 in ¶ **127**
June 1999	ICC – International Chambers of Commerce	Case no. 9187/1999 Cited as: ICC Award No. 9187/1999 in ¶ **79**
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1982	ICC	Cited as: Dow Chemical v. Isover Saint Gobain in ¶ **200, 201**

STATEMENT OF FACTS

CLAIMANT *ElGuP plc* *156 Dendé Avenue Capital City* *Mediterraneo*	Is one of the largest producers of RSPO-certified palm oil and palm kernel oil based in Mediterraneo.
RESPONDENT *JAJA Biofuel Ltd* *9601 Rudolf Diesel Street* *Oceanside* *Equatoriana*	Is a producer of biofuel based in Equatoriana, and a subsidiary company of Southern Commodities, which is a multinational conglomerate producer of biofuel.

2010 - 2018	CLAIMANT and Southern Commodities concluded multiple contracts, regularly, during this period.
2018	Southern Commodities acquired RESPONDENT.
March 2019	Ms. Bupati, former Main Purchase Manager of Palm Kernel oil of Southern Commodities, is appointed Head of Purchase of RESPONDENT.
March 2020	Palm Oil Summit, where CLAIMANT and RESPONDENT settled on the commercial terms of the contract in dispute.
1st April 2020	RESPONDENT sent an email ordering 20,000t of RSPO Certified Palm Oil.
3rd May 2020	RESPONDENT's approach on the issuance of the Letter of Credit.
30th October 2020	RESPONDENT's CEO sent an email terminating the contract.

SUMMARY OF ARGUMENTS

The present dispute is a straightforward case. The Tribunal should find that the Parties concluded a Purchase Agreement for the selling of RSPO Certified Palm Oil with the inclusion of CLAIMANT'S General Conditions of Sale. Furthermore, the Tribunal should find that parties have agreed to submit this dispute to Arbitration, by concluding a valid arbitration agreement under the Law of Danubia.

- **(ISSUE I)** The Parties concluded a valid arbitration agreement. This agreement fulfills the necessary requirements as it has been incorporated by reference to CLAIMANT's GCoS. Furthermore, the Parties have agreed to submit the agreement to the Law of Danubia as this is the Law of the seat of arbitration. Alternatively, the Law of Danubia is the only applicable law which will uphold both the validity of the agreement and the Parties' agreement to submit every dispute arising between them to arbitration.

- **(ISSUE II)** The CISG is not applicable to the conclusion of the arbitration agreement in the event it is governed by the law of Mediterraneo. Firstly, because the separability principle allows for the application of different laws to the main contract and the arbitration agreement. Also, the CISG is not applicable to the arbitration agreement *ab initio*, since the arbitration agreement does not fall under its scope. Moreover, the Parties have excluded the application of the CISG by choosing Danubia as the seat of arbitration.

- **(ISSUE III)** In April 2020, Parties concluded a contract pursuant to the CISG, where the freedom of form is the rule. Under Art. 23 CISG, the only requirements for contract conclusion are an offer and its acceptance. In the present case, RESPONDENT has expressly accepted CLAIMANT's offer pursuant to Art. 8 CISG, without any further amendments. Notwithstanding, CLAIMANT will also demonstrate that the contract must still be considered as concluded, if such communication from RESPONDENT is not deemed as a contractual acceptance.

- **(ISSUE IV)** The General Conditions of Sale were validly incorporated into the concluded contract through a practice established between the parties,

pursuant to Art. 9 of the CISG. Alternatively, by removing the arbitration clause from the contract and keeping it only on the GCoS, CLAIMANT was following an international business practice usage, pursuant to Art. 9(2) CISG.

In any case, RESPONDENT could not have been unaware of the GCoS. Indeed, considering its status as a parent company, the knowledge of Southern Commodities must be attributed to RESPONDENT along with Ms. Bupati's knowledge attribution to RESPONDENT.

I. The Arbitral Tribunal has jurisdiction to hear this case

1. The Parties to these arbitration proceedings are bound by an arbitration agreement that provides for arbitration under the 2021 Rules of the Asian International Arbitration Centre (AIAC) having its seat in Danubia [*R. Ex.;4, p. 32 (Art. 9 after 2016); PO1 p.46 ¶ II*]. RESPONDENT alleges that the Arbitral Tribunal does not have jurisdiction since there is no valid arbitration agreement according to the Law of Mediterraneo and, therefore, according to the CISG. These allegations are ill-founded as RESPONDENT only intends to excuse itself from an agreement which it has concluded.

2. RESPONDENT claims that the Arbitral Tribunal does not have jurisdiction because the arbitration clause included in CLAIMANT's General Conditions of Sale (GCoS) was not validly included in the contract [*ANoA p.27 ¶ 14*].

3. Contrary to RESPONDENT's baseless allegations, CLAIMANT will demonstrate that the Arbitral Tribunal has jurisdiction.

4. In sum, CLAIMANT will establish that *the parties have agreed on the Law of Danubia to govern the interpretation of the arbitration agreement* **(A)**. Secondly, *the arbitration agreement has been validly concluded under Danubian Law* **(B)**.

A) The parties have agreed on the Law of Danubia to govern the interpretation of the arbitration agreement

5. CLAIMANT will demonstrate that the Law of Danubia governs the interpretation of the arbitration agreement. Firstly, *the parties have agreed on the application of Danubian Law* **(1)**. Secondly, even if the Tribunal considers otherwise, it must hold that *the parties have impliedly agreed on the Law of Danubia for the interpretation of the arbitration agreement* **(2)**.

1) There is an express agreement between the Parties to apply the Law of Danubia to the arbitration agreement

6. It is undisputed that parties are entitled to select the law applicable to their arbitration agreement [*Scherer&Jensen p.1; Born p.525; Redfern&Hunter p.157; Berger p.303*]. Parties' autonomy to select the law applicable to their arbitration agreement is confirmed in multiple international instruments such as the UNCITRAL ML (Art. 19), which has been adopted by Danubian Law, and the NY Convention (Art. II (1) and V (1) (a)), to which the State of Danubia is a signatory [*PO2 p. 47 ¶ 3*].

7. When negotiating the terms of the contract, CLAIMANT made it clear that it would not accept any solution other than arbitration. [*C. Ex. 1 p. 10 ¶ 11; PO2 p. 50 ¶ 15*]. RESPONDENT did not discuss this issue further with CLAIMANT. On the contrary, RESPONDENT accepted the contractual terms discussed [*NoA p.5 ¶ 6 and p. 6 ¶ 14; ANoA p. 32; PO1 p.47 ¶ IV*].

8. Furthermore, RESPONDENT, represented by Mrs. Bupati [*PO2 p. 49 ¶ 12*], never refused the applicability of Danubian Law to the arbitration agreement. It merely stated its intention to avoid arbitration in "*an institution which exclusively deals with palm oil*" and investment arbitration [*C. Ex. 2 p. 12 ¶ 6; ANoA p. 27 ¶ 11-12*].

9. Hence, the Parties agreed that the law governing their arbitration agreement is the Law of Danubia. Consequently, the Tribunal must rely on it to interpret the arbitration agreement.

2) *If the Tribunal considers that there is no express agreement, it must hold that there was an implied choice of law by the parties*

10. *The law of the seat is the law applicable to the interpretation of the arbitration agreement* **(a)**. *The same conclusion is drawn from the application of the separability principle* **(b)**.

11. If the Tribunal considers that there was no explicit agreement between the Parties, it should nevertheless consider that there is an implied agreement for the reasons set out below.

a) *There is an implied choice to apply the law of Danubia to the arbitration agreement*

12. When deciding on the seat of arbitration, parties make an implicit choice on the law applicable to the arbitration agreement [*Redfern&Hunter Chp.3 p.3 ¶ 3.15; Enka case*].

13. The seat theory is generally understood to be "*an authoritative conflict rule to determine the proper law of the arbitration agreement*" [*Scherer&Jensen p.5; Born 4 p. 528, Redfern&Hunter p.173 ¶ 3.54; Berger p.306, Belolahvek p.2*]. The rationale behind this understanding regards the closest connection test [*Berger p.315; Karrer p.48 ¶98*]. Being the place where the arbitration agreement will necessarily be performed, the law of the seat will therefore be the law with the closest connection to the proceedings [*Sulamerica Case; Bulbank case*].

14. Moreover, the law of the seat is fundamental as it governs the place where the award will be rendered, determines the validity of the agreement as well as the law of the place where courts fulfill supervisory functions [*Dunmore p.3 ¶IV; Noy Vallesina case; Scherer&Jensen p.7*].

15. It is a duty of the Arbitral Tribunal to render an enforceable award under Rule 1 (1.5) of the AIAC Rules and this is widely recognized by scholars [*Lew&Kroll p. 279; Horvarth p.1351, Sharma p.314 Boog p.1*]. In addition, the award's

enforceability and validity may be denied due to non-compliance with the law of the seat [*NY Convention Art. V(1)(a)*].

16. Therefore, the Tribunal must consider that the parties have indirectly chosen the Law of Danubia to be the legal framework applicable.

17. In the present case, CLAIMANT mentioned Danubia as the seat of arbitration due to its pro-arbitration environment [*PO2 p.50 ¶15*]. RESPONDENT has never objected to this choice. It has only rejected arbitration under palm oil specialized institutions and investment arbitration [*NoA page 6 ¶ 14; ANoA p. 32; PO1 p.47* ¶ IV].

18. Furthermore, RESPONDENT'S argument is misleading [*ANoA p. 27 ¶ 14*] since the law applicable to the main contract cannot be "*extended*" to the arbitration agreement as their purposes are "*fundamentally different*". [*FirstLink Case; Scherer&Jensen p.12*].

19. Hence, this Tribunal must consider that the Parties have impliedly chosen the law of the seat to govern the interpretation of the arbitration agreement by selecting Danubia as the seat of arbitration. Applying any other set of rules would therefore jeopardize the entire purpose of the arbitration agreement.

b) The applicability of the law of the seat to the arbitration agreement complies with the principle of separability.

20. The principle of separability is "*a conceptual and practical cornerstone of international arbitration*" [*Born Chp. 3 p. 350*]. This presumption entails that an arbitration agreement is considered "*autonomous and juridically independent from the main contract*" [*Fiona Trust case* ¶ 23; *Premium Nafta case; Art. 20 AIAC RULES 2021; Art 16 UNCITRAL ML*].

21. This will entail the application of a set of rules to the arbitration agreement which may differ from the main contract, while further allowing to uphold the validity of the arbitration agreement notwithstanding invalidity of the underlying contract [Shiping Case*; Premium Nafta case*].

22. The arbitration agreement has a procedural function which regards the settlement of disputes, as opposed to the main contract which regulates the substantive terms of the commercial relationship [*Scherer&Jensen p.12*].

23. The principle of separability is derived from the expectations of the Parties in their commercial transactions [*Born Chp.3 p.355*]. It is a result of their autonomy to choose the law applicable to the arbitration agreement.

24. The Tribunal must not disregard that Parties decided to place the choice of law applicable to the contract in a different clause from the arbitration agreement [*NoA p.6 ¶14; R. Ex. 4 (Clause 9); PO2 p. 50 ¶ 15*]. Thus, the fact that the Law of Mediterraneo applies to the contract does not entail *per se* its extended applicability to the arbitration agreement [A*NoA p. 27 ¶12*].

25. In light of the above, the Tribunal must hold that the law of Danubia shall govern the interpretation of the arbitration agreement, either expressly or impliedly, as it results from the agreement of the parties.

c) The Law of Danubia would always be applicable under the validation principle

26. If, *quod non*, the Tribunal considers that the parties have not agreed on the law of Danubia to govern the arbitration agreement, it would still be applicable under the validation principle.

27. The validation principle is widely recognized [*Arts. II and V (1) (a) of the NY Convention; Art. 34(2)(a)(i) and 36(1)(a)(i) of the UNCITRAL ML*] as a default rule for choice-of-law issues. This principle upholds the purpose of the arbitration agreement and provides for the application of the law of the jurisdiction which would give effect to the parties' agreement [*Turner p.4*].

28. The application of this principle ensures that the parties' intention to submit their dispute to arbitration is upheld to the greatest possible extent. Furthermore, it is in accordance with the objective of international arbitration to provide effective and enforceable mechanisms for resolving transnational

disputes, despite complexities arising from the differences between national legal systems [*Scherer&Jensen p.3 ; UNCITRAL DG 2012 p. 133 ¶ 37*].

29. As such, the validity of the arbitration agreement shall be upheld if it satisfies either the law applicable to the interpretation of the arbitration agreement, the law of the seat or the law applicable to the main contract [*Enka case*] in such a way as to uphold the validity of the agreement [*Enka case; Turner p.4; Berger p. 312-313*].

30. As RESPONDENT's claim that the CISG should apply to the arbitration agreement would impair its validity, the Tribunal could never reasonably apply a law other than Danubian Law to the agreement.

31. Choosing to apply any other set of rules would go against the Parties' agreement to submit this dispute to arbitration, which would make "*particularly little sense*" [*Born p. 624*].

32. All in all, the Law of Danubia applies to the arbitration agreement as it is the Law that upholds its validity.

B) The parties have concluded a valid arbitration agreement under Danubian Law

33. CLAIMANT will now demonstrate that the parties have concluded a valid arbitration agreement under Danubian Law, which is a verbatim adoption of the UNCITRAL ML [*PO1 p. 47 ¶ 3*]. *The arbitration agreement was incorporated in the contract*, therefore complying with the necessary substantive **(1)** and formal validity requirements **(2).**

1) The arbitration agreement was incorporated by reference, therefore, it is valid under Danubian Law and the NY Convention:

34. **"***Parties commonly bind themselves to arbitration clauses by executing one instrument that refers to another document (…)***"** [*Schramm p. 88*]. Thus, CLAIMANT will demonstrate that a valid arbitration agreement was concluded by the parties because *the reference to CLAIMANT's GCoS constitutes a substantively valid agreement* **(a),** *the "in writing" requirement is fulfilled* **(b)**.

a) The arbitration agreement was incorporated by reference

35. The 2006 amendments to the UNCITRAL ML have broadened the definition of a valid arbitration agreement. The changes to the rules were intended to be a "*bridge between the Model Law and the (New York) Convention* [*Holtzman & Neuhaus*], to which Danubia is a signatory.

36. Paragraph 6 of Art. 7 Option I, which has been adopted by Danubia, [*PO1 p. 47 ¶ 3*] establishes that a mere reference to a document which contains an arbitration agreement fulfills the necessary validity requirements [*UNCITRAL Model Law Option 1 Art. 7, Schramm p.82;*], despite the absence of a specific, mention to that clause.

37. According to Art. II of the NY Convention, the same holds true as documents exchanged by the parties that reference an arbitration clause contained in another document, even if not exchanged, are considered to be a valid arbitration agreement [*Schramm p.83 ; Mistelis.12*].

38. General reference to standard conditions containing an arbitration clause is enough, when the other party was aware of such arbitration clause [*Born Chp 5; Schramm. 89*]. This requirement is fulfilled if there was a "*pre-existing relationship between the parties in which the general conditions have been exchanged such as they could and should have been aware*" [*Bomar Case; Di Pietro p.12*].

39. Even in cases where one party claims not to have received the arbitration clause and, therefore, it is not bound by the agreement, scholars [*Di Pietro p. 443; Born Chp 5 p.; Schramm p. 88-89*] and tribunals [*Prefabricados Case; Radax Case; Del Medico case*] have considered the circumstances of the case, namely i) the parties business experience, ii) the experience in the same field, and iii) the frequency in which arbitration clauses are used in that field, as circumstances where the parties do not deserve to be protected by the specificity requirement [*Schramm p. 92*].

40. The purpose of Art II of the NY Convention is to make sure that the parties were aware that they were agreeing to arbitration [*ibid*]. A specific test to this awareness is whether the party has been "*sufficiently alerted to the existence of the arbitration clause, such that any reasonably prudent party would have been aware*" [Di Pietro p. 12; *Born 5 p.1148*].

41. In the present case, RESPONDENT was aware of the fundamental importance that arbitration had for CLAIMANT [C. *Ex.1 p.10 ¶ 11*]. Ms. Bupati concluded eight contracts with CLAIMANT after the 2016 changes to GCos, and at least one of these contracts contained CLAIMANT's GCos 2016 version [*PO2 p. 48 ¶ 7*]. Additionally, Mr. Chandra had informed Ms. Bupati about the new arbitration clause [*Po2 p.48 ¶ 7*]. Finally, it is a common business practice in the palm oil industry to include arbitration clauses in general conditions [*PO2 p. 49 ¶ 11*].

42. It is clear that, in light of the above, RESPONDENT is bound by the arbitration agreement by reference to the GCos.

b) The arbitration agreement fulfills the formal requirements under 7 of the Danubian Law Art. II and V (1) (a) of the New York Convention

43. The arbitration agreement concluded by the Parties fulfills the necessary formal requirements, namely the "*in writing*" criteria present in Art. II of the NY Convention and Art. 7 of the Danubian Law.

44. The requirement established by Art. II of the NY Convention should not be interpreted as exclusive nor exhaustive [*UNCITRAL Recom; UNCITRAL Guide*]. On the contrary, it should be interpreted in light of Art. 7 of the UNCITRAL ML [*Di Pietro p.12; Born p.1149; Schramm p 62; Shipping case*] which complies with the pro-arbitration objective of these Conventions [UNCITRAL Recom; Changzou Case]. This means that other types of "*writing*" besides signature or exchange of documents fulfills the requirement of Art. II. This is the case with the incorporation of an arbitration agreement by reference [*UNCITRAL Art. 7 Option 1*].

45. The same conclusion has been reached in the *Medico Case* according to which the Supreme Court of Italy stated that the definition of an "*agreement in writing*" under Art. II of the NY Convention encompasses "*the generic reference in the agreement to the arbitration clause included in (…) the general terms and conditions*" [*Medico Case*].

46. Considering the above and accepting the rationale of this Italian court, the arbitration clause included in the CLAIMANT GCos is valid and RESPONDENT is bound by it. Therefore, the Arbitral Tribunal has jurisdiction to hear this case.

II. The CISG is not applicable to the conclusion of the arbitration agreement in the event it is governed by the law of Mediterraneo

45. CLAIMANT will demonstrate that if, *quod non*, the Tribunal considers that the arbitration agreement is governed by the Law of Mediterraneo, the CISG is not applicable.

46. Firstly, because the *CISG does not apply to the arbitration agreement by the mere fact that it applies to the main contract* **(A).** *Secondly, the Parties have not agreed on the application of the CISG to the arbitration agreement* **(B).**

A) The CISG is not applicable to the arbitration agreement by the mere fact that it applies to the main contract

47. CLAIMANT will demonstrate that the CISG does not apply to the arbitration agreement simply because it applies to the main contract. Firstly, *the separability principle allows for the application of a different set of rules to the main contract and to the arbitration agreement* **(1).** Secondly, *the arbitration agreement does not fall under the scope of the CISG* **(2).**

1) The separability principle allows for the application of different set of rules to the main contract and to the arbitration agreement

48. The Tribunal must bear in mind that even though the arbitration agreement is incorporated into a contract in the form of an arbitration clause it does not

change its nature as a separate contract, according to the separability principle [*Kroll p. 45; Xanadu v. Utopia*].

49. As explained *supra*, the separability principle is one of the cornerstones of international arbitration, and it is fundamental to understand the non-application of the CISG to the arbitration agreement.

50. This principle recognizes that an arbitration agreement is deemed to be a contract in itself, separable and autonomous from the contract within which it is found, thus allowing for the application of different laws to the main contract and the arbitration agreement [*Kroll p. 45; Fillers p. 678*].

51. It is therefore, conceivable to have two different laws governing the main contract and the arbitration agreement. Indeed, the law governing the substantive part of the contract will not necessarily apply to the arbitration agreement since it is separable from the rest of the contract. [*Kroll pp. 45- 46; Garro, The U.N. pp. 237-238; Witz p. 2285; Xanadu v. Company*].

52. The same rationale is followed in this present case. By incorporating the arbitration agreement into the CLAIMANT'S GCoS which were, in turn, validly incorporated into the main contract, the arbitration agreement maintains its autonomy.

53. This understanding is widely supported by case law worldwide, where courts have refused to extend the effect of the choice of the law for the main contract to the arbitration agreement due to the separability principle [*XL Insurance Case; Landesgericht Case No 186; Bundesgericht Case No 627*].

54. CLAIMANT's position is in line with the law and doctrine explained above and a second theory, also existing in Mediterraneo. CLAIMANT follows the position adopted by CLAIMANT's counsel and found a scholarly writing by Ms. Nigrescens, one of the leading sales experts in Mediterraneo, in which she argued against extending the CISG to arbitration clauses, because she considered to be entirely separate agreements [*PO2 p. 50 ¶ 16*].

2) The arbitration agreement does not fall under the scope of the CISG

55. In any case, even if the Tribunal disregards the separability principle, the CISG cannot be applicable to the arbitration agreement.

56. In a multiplicity of cases dealing with the application of the CISG to arbitration agreements, adjudicators have rarely attempted to provide reasoning to justify the applicability of the CISG to the arbitration agreement. As jurisprudence is lacking an in-depth analysis of the subject, it is fundamental to focus on the academic approach [*Fillers pp. 667-668; Mistelis CISG pp. 394-395*].

57. The rejection of applicability of the CISG to the arbitration agreement is recognized since it does not fall under CISG's scope [*Kroll pp. 43-44; Garro, The U.N. pp. 237-238; Ewald Dorken AG Case*].

58. Consequently, one must scrutinize the provisions of the CISG to conclude whether this question falls within or outside of the scope of application of the CISG [*Fillers p. 669*].

59. The scope of the CISG is broadly defined in Arts. 4 and 5. The interpretation of the various notions and concepts of Arts. 4 and 5 have an important bearing on the unifying effect of the CISG [*Kroll p. 40; Tech v. Barr Lab*].

60. Thus, a narrow interpretation of such concepts could limit the CISG's scope of application significantly.

61. Article 4 provides that the CISG "*governs only*" two matters, i.e., the formation of contract as well as the rights and obligations of both buyers and sellers. This legal provision has been considered too narrow [*Kroll p. 41; Viscasilas&Muñoz p. 64*]. As such, one must evaluate whether arbitration agreements are included in the CISG's scope.

62. First, it is understood that the lack of explicit mention of a certain matter entails its exclusion from the scope of the Convention. As there is not an explicit inclusion of arbitration agreements in the CISG, a deeper analysis seems to be necessary.

63. In this respect, it is fundamental to determine whether the CISG was at all intended to regulate the conclusion of arbitration agreements. Moreover, Arts. 1 through 3 of the CISG provide that the Convention governs only substantive matters regarding the contracts of sale of goods [*Schwenzer&Jaeger pp. 312-315; Garro p. 117*].

64. Even when the arbitration clause is included in the contract of sale of goods, or in general conditions, such as in this present case, the arbitration clause remains separate by the reasons stated above. Moreover, the incorporation of an arbitration clause into a contract of sales of good does not change its procedural nature. Therefore, since the CISG governs only substantive matters, an arbitration clause, due to its procedural nature, is not regulated by the CISG [*Koch p. 276; Schwenzer&Jaeger p. 312*].

65. Hence, even if the CISG applies to the main contract, it shall not be deemed applicable to the arbitration agreement.

66. Consequently, the arbitration agreement would be governed by the non-harmonized provisions of the national law that is applicable by virtue of the conflict of law rules [*Kroll p. 39; CLOUT Case No. 97*].

B) The Parties have not agreed on the application of the CISG to the arbitration agreement

67. CLAIMANT will demonstrate that the Parties have not agreed on the application of the CISG to the arbitration agreement. According to the *subjective interpretation of Art. 8 (1) CISG one must conclude that the Parties excluded the application of the CISG to the arbitration agreement* **(1)**. *The same conclusion is drawn according to the objective interpretation of Art. 8 (2) and (3) CISG* **(2).**

1) Parties excluded the application of the CISG to the arbitration agreement according to Art. 8 (1) CISG

68. Firstly, Mediterraneo is a Contracting State of CISG [*PO1, p. 46,* ¶ 3].

69. Secondly, the main contract in this present case is governed by the CISG [*PO2 p. 50 ¶16*].

70. In the event that a contract is governed by the CISG, the interpretation rules of Art. 8 are applicable to all its provisions, including those which concern subject matters not governed by the CISG - *in casu*, the arbitration agreement [*Brunner&Hurni&Kisslin p. 90; Staudinger&Magnus*].

71. Therefore, to interpret the Parties' willingness to exclude the application of the CISG to the arbitration agreement, one must focus on Art. 8 CISG, which provides the interpretation rules of statements and conducts of the Parties [*Brunner&Hurni&Kissling p. 90; Tissue Machine Case; MCC Case*].

72. Firstly, according to the Art. 8 (1) CISG, the true intent of the declaring party is determinative when the addressee knew what that intent was, or at least, could not have been unaware what that intent was [*Brunner&Hurni&Kissling pp. 91-92; Schwenzer; ICC Award No. 8324/1995*].

73. Therefore, to establish whether the Parties have excluded the application of the CISG, it is crucial to consider the facts of the present case. In specific, it is uncontestable that Mr. Chandra informed Ms. Bupati via phone that the new arbitration clause was the model clause of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) providing for the seat of the arbitration in Danubia [*PO2 p. 48 ¶7*].

74. Since Danubia is not a Contracting State of the CISG [*PO1 p. 47 ¶3*], the intention of CLAIMANT could never have been interpreted as a willingness to apply the CISG to the arbitration agreement, but just as an implicit exclusion of its application.

75. Also, since RESPONDENT was aware of the chosen seat of arbitration [*PO2 p. 48 ¶7*], it was also aware that the application of Danubian Law would not involve the application of the CISG.

76. Moreover, the seat of arbitration in Danubia was explicitly mentioned in Art. 9 of CLAIMANT's GCoS, which were validly included in the contract [*NoA p. 6 ¶14*].

77. Considering the above, it is undeniable that RESPONDENT knew or could not have been unaware of CLAIMANT's true intent to exclude the application of the CISG to the arbitration agreement.

2) Parties excluded the application of the CISG to the arbitration agreement according to Art. 8 (2) and (3) CISG

78. Even if the Tribunal does not consider so, one must reflect on the criterion established on Art. 8 (2) CISG. According to an objective interpretation, the meaning of a statement or other conduct by a Party is determined by the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*Brunner&Hurni&Kissling pp. 93-94; Achilles*].

79. In this regard, Art. 8 (3) presents the methods and rules of interpretation. Due consideration must be given to all circumstances relevant to the interpretation since there are no restrictions in this respect, such as, negotiations, practices which the parties have established between themselves, any subsequent conduct of the parties, and usages [*Brunner&Hurni&Kissling pp. 95-98; Piltz p. 187; Rock Resource v. Altos Hornos de Mexico; ICC Award No. 9187/1999;*].

80. In the present case, the only issue raised by RESPONDENT when discussing the arbitration agreement was the institution chosen [*C. Ex. 2 p. 12 ¶ 4*]. In addition, RESPONDENT did not contest the choice of the seat of arbitration in Danubia when it was informed by Ms. Bupati [*PO2, p. 48, ¶7*]. Moreover, the determination of the seat of arbitration in Danubia was explicitly stated in Art. 9 of CLAIMANT's GCoS and yet, it was not rejected.

81. Regarding the determination of the seat of arbitration in Danubia, any reasonable person of the same kind would understand such choice of law as

an implied exclusion of the CISG to the arbitration agreement. If CLAIMANT chose the law of a non-signatory state of the CISG, its application could have never been contemplated.

82. To analyse the practice between the Parties, it is crucial to acknowledge that between 2016 and 2018 Mr. Chandra and Ms. Bupati concluded eight contracts, all based on CLAIMANT's template and GCoS providing for the arbitration clause with the express mention of the seat of arbitration in Danubia [*PO2 p. 48 ¶ 7*]. Moreover, CLAIMANT and Southern Commodities had entered into an arbitration whose seat was Danubia [*PO2 p. 51 ¶24*].

83. In line with this background, it is undoubtful that any reasonable person would perceive such circumstances as an implied exclusion of the CISG, given the fact that the Parties have never considered the application of the CISG to the arbitration agreement, as they have always chosen the Danubian Law.

84. As mentioned above, RESPONDENT did not reject CLAIMANT's suggestion regarding the choice of the seat of arbitration when informed by Ms. Bupati via phone [*PO2, p. 48, ¶7*], nor did it reject Clause 9 of CLAIMANT's GCoS. In this respect, when considering the subsequent conduct of the Parties, the lack of objection must be seen as consent, thus, because the choice of law was not contested by RESPONDENT it can be interpreted as implied consent [*Brunner&Hurni&Kissling; Bucher p. 97*].

85. Moreover, considering the trade usages in the palm oil industry, the exclusion of the application of the CISG to the arbitration agreements is a common business practice [*PO2 p. 49 ¶ 11*].

86. As the Parties have impliedly excluded the application of the CISG to the arbitration agreement, the Tribunal must consider the Danubian Law and the NY Convention when applying the Law of Mediterraneo. This is the case since the Law of Mediterraneo is a verbatim adoption of the Model Law and the State is a signatory of the NY Convention [*PO1 p. 47 ¶3*].

87. Therefore, based on the above, Parties have validly concluded an arbitration agreement.

88. To sum up, the Parties have concluded a valid arbitration agreement which has been submitted to the law of Danubia and incorporated into the contract by reference to CLAIMANT's GCoS. In the event that this Tribunal finds the law of Mediterraneo to be applicable, the CISG must be excluded and the agreement will still be validly concluded under the national arbitration standards.

III. The parties concluded a contract in 2020, pursuant to the CISG

89. Now that CLAIMANT has proven the jurisdiction of this Arbitral Tribunal, will hereinafter address the merits of the case and demonstrate that a contract for a sale of goods was concluded in April 2020, irrespectively of the approach chosen.

90. The law governing the conclusion of the contract is the CISG pursuant to agreement of the parties [*PO2 p. 52* ¶*33*] and the scope of the CISG.

91. The Contracting States, where the parties have their places of business, have not declared any reservation according to Arts. 92, 94, 95 or 96 of the CISG [*PO2 p. 52* ¶ *34*] and, thus, all the rules of the Convention are applicable to the formation, performance, and termination of contracts.

92. In the case before this Tribunal, a contract was concluded pursuant to the terms proposed by CLAIMANT, considering that *RESPONDENT indicated assent to CLAIMANT's offer pursuant to Art. 18 CISG* **(A)** and there were no additions, limitations or other modifications proposed by RESPONDENT. Nevertheless, if the Tribunal considers that the communication from RESPONDENT [*C. Ex. 2 p.12*] contain additions, limitations, or other modifications that materially alter the terms of the agreement, then, *it must hold that the Contract was concluded with the immaterial modifications proposed by CLAIMANT* **(B)**. *In any event, RESPONDENT accepted contract conclusion pursuant to the practice established between the parties* **(C)**.

A) RESPONDENT has expressly indicated assent to CLAIMANT's offer, pursuant to Art. 18 CISG

93. A contract governed by the CISG is not required to be in a written form, pursuant to its Art. 11, considering that "(…) *conclusion of the contract, i.e. by 'offer' (Art. 14(1)) and 'acceptance' (Arts. 18 and 19(2)), is not subject to any requirements as to form.*" [*Schlectriem&Schwenzer p. 429 ¶ 7*].

94. The Contracting States where the Parties have their places of business have not declared any reservation pursuant to Art. 96 of the CISG to this rule.

95. Thus, the fact that the contract has not been signed is irrelevant for its formation. For a contract to be concluded, according to Art. 23 of the CISG, the acceptance of an offer by any means is sufficient.

96. In the present case, *CLAIMANT's approach at the Palm Oil Summit was an offer to conclude a Contract* **(1)** and *RESPONDENT expressly accepted it with no additions, limitations or modifications* **(2)**.

1) CLAIMANT's approach at the Palm Oil Summit was an offer to conclude a Contract

97. According to Art. 14 CISG, a proposal for concluding a contract constitutes an offer "*if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance*". An offer is sufficiently definite when it establishes the goods to be delivered, the amount and its price, considered "*essentialia negotii*" [*Murray; Giannini Chp. 1; Pilar Perales p.377*].

98. In the present case, the initial offer was made by Mr. Chandra, CLAIMANT' COO, who offered a 5 (five) year supply contract of 20,000t per year of RSPO Certified Palm Oil, with a price of USD 900/t on the first year, and thereafter 5% of the Market Price [*NoA p. 5 ¶ 5; C. Ex. 1 p. 10 ¶12; C. Ex. 2 p. 12*].

99. Thus, CLAIMANT's communication can only be qualified as an offer, because it was sufficiently definite, as well as indicated CLAIMANT's clear intention to be bound.

2) RESPONDENT expressly accepted it with no additions, limitations or modifications.

100. Art. 18 CISG states that "*A statement made by (…) indicating assent to an offer is an acceptance*".

101. "*The acceptor, in fact, may restrict himself to a simple indication of assent or repeat the offer in whole or in part*." [*Giannini Chp. 5*].

102. Furthermore, additional statements or suggestions do not necessarily mean a rejection of the offer and a counter-offer pursuant to Art. 19 (1) CISG [*Lookofsky p. 38; Alstine p. 8; Farnsworth p. 176*].

103. In fact, the original proposal of the Secretary-General on the wording of Art. 19 (1) CISG, suffered alterations by adding: "*which purports to be an acceptance*" [*Yearbook, IX (1978) ¶ 42*].

104. Such alteration intended to make clear that "*a reply to an offer that merely makes inquiries or suggests, but does not insist on, possible additional terms does not invoke the rule of Art. 19(1).*" [*Alstine p. 22*].

105. Thus, such alteration aimed "*to ensure that a reply which merely made inquiries or suggested the possibility of additional or different terms did not constitute a counter-offer*" [*Farnsworth, p. 176; Yearbook, IX (1978) ¶ 42*].

106. In the present case, RESPONDENT expressly accepted CLAIMANT's offer by repeating it in whole as per the email dated 3rd April 2020 [*C. Ex. 2 p. 12 ¶ 4*]. In such email, RESPONDENT placed an order of "*20,000t of RSPO-certified segregated palm oil per annum for the years 2021-2025, cif Oceanside – delivery up to 6 instalments; at USD900/t for first year; thereafter market price – 5%.*" [*C. Ex. 2 p. 12 ¶ 4*].

107. In this communication RESPONDENT has clearly indicated assent on the exact same terms CLAIMANT offered. Such email expressly states that RESPONDENT would like to "*place the following order*" [*C.Ex.2 p.12 ¶ 4*]. The letter of this communication clearly shows that the contract has been concluded.

108. In similar cases, it has been held that "*A buyer was found to have indicated its intent to be bound when it sent the seller an "order" that stated "we order"*

[*UNCITRAL DG 2016 p. 86 ¶ 5*]. In the decision from the Commercial Court of Switzerland, it rendered that the phrasing "*we order*" indicated the intention to be bound [*CLOUT 330*].

109. Furthermore, Ms. Bupati understood that no further discussions would be necessary by stating that "*She* [Ms. Adrienne Fauconnier] *will take care of the further discussions, **if any**, and the implementation of the contract*" [C. Ex.1 p. 12 ¶5 l. 3) (emphasis added).

110. Thus, RESPONDENT's approach was undoubtedly an acceptance of all the terms agreed upon in the summit [*NoA p. 5 ¶ 5; C. Ex. 1 p. 10 ¶12; C. Ex. 2 p. 12*] with no additions, limitations, or other modifications, being an *ipsis verbis* repetition of the original offer proposed by CLAIMANT.

111. The remaining content of the email, pertaining to the arbitration clause, must be understood as an independent communication.

B) Alternatively, the Contract was concluded with the immaterial modifications proposed by CLAIMANT

112. If this Tribunal does not interpret RESPONDENT's e-mail [*C. Ex.2 p.12*] as a contractual acceptance, it must be deemed as a counter-offer, as explained infra.

113. Art. 19 (1) provides that "*a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer, and constitutes a counter-offer*".

114. And paragraph (2) of the same Art. reads that a "*reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance*".

115. In the present case, the hypothetical alterations proposed by RESPONDENT are material and, thus, constitute a rejection and a counter-offer pursuant to Art. 19 (1) CISG.

116. The alterations in "*settlement of disputes*" are a material alteration, considering that there is a practice established between the Parties in submitting eventual disputes to arbitration. This makes such alteration from RESPONDENT to be material, contrary to CLAIMANT's as argued *infra* in **¶119.** *et seq*.

117. Moreover, CLAIMANT has accepted RESPONDENT's counter-offer by adding immaterial alterations, pursuant to Art. 19 (2) CISG. [*C. Ex.1 p. 17*].

118. Thus, considering that *the modifications proposed by CLAIMANT are immaterial pursuant to Art. 19 (2)* **(1)** and *RESPONDENT has not objected to the immaterial alterations* **(2)**, the contract would nonetheless be concluded with the exact terms proposed by CLAIMANT.

1) The modifications proposed by CLAIMANT are immaterial pursuant to Art. 19 (2) CISG

119. Even though Art. 19 (3) CISG states that the "settlement of disputes" is a material alteration, paragraph (3) poses as a rebuttable presumption [*Schlectriem&Schwenzer, p. 602; Steel Case*].

120. In fact, "*an arbitration clause that reflects the Parties' practices or an applicable trade usage should not make a material modification in an offer that does not deal with dispute settlement. Thus, such a reply could close a contract if the offeror fails to object to this added term*." [*Honnold p. 187*].

121. Furthermore, pursuant to what is stated infra, in **¶136.**, the practices established between the parties prevail over the CISG provisions [*Honnold p. 130; Schlechtriem&Schwenzer p. 461; VURAL p. 139; Alstein, p. 16; Secretariat's Commentary on Art. 8 ¶ 5; Case 1 U 69/92*].

122. In the present case, the settlement of disputes through arbitration and the incorporation of the GCoS is a practice established between the parties, considering that in all the contracts agreed between them there was an arbitration agreement included in the GCoS [*PO2 p. 49 ¶ 11; CLOUT 189*].

123. Thus, the submission to arbitration and the inclusion of GCoS, which were widely known by RESPONDENT (*cf.* **IV/B**), constitutes an immaterial alteration. This is evidenced by the fact that the alleged opposition from RESPONDENT only regarded the arbitration Institution, it did not wish to have an "*institution which exclusively deals with palm oil*" [*C. Ex. 2 p. 12 ¶ 6 l. 5*].

124. The arbitration Institution agreed by the Parties was the AIAC, which does "*not only deal with palm oil*" [*C. Ex.1 p. 10 ¶ 13 l. 4*]. The GCoS were known to be incorporated in all of CLAIMANT's contracts. RESPONDENT knew the existence and inclusion of the arbitration agreement into the GCoS. Moreover, it was expressly reminded to Ms. Bupati by CLAIMANT [*C. Ex. 4 p.17 ¶ 4*].

125. Thus, according to Art. 19 (2) CISG, an acceptance with immaterial modifications is effective and the alterations are part of the contract unless the offeror objects, without undue delay.

2) RESPONDENT did not object to the immaterial alterations

126. Art. 19 (2) CISG prescribes that the contract is concluded following the terms of the offer with the immaterial alterations, "*unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect*". In the present case, there were no objections or dispatches of notice opposing such immaterial alterations.

127. In fact, the answer from RESPONDENT came 24 days after CLAIMANT's acceptance. Such response, firstly, cannot be seen as without undue delay. It has already been considered that an objection raised 5 days upon receipt was not considered as "without undue delay" [*CISG/2002/02*]. The same reasoning should be followed by this Tribunal.

128. Secondly, RESPONDENT did not object at any time in said communication to the terms offered by CLAIMANT in the contractual documents.

129. In fact, RESPONDENT even undertook initial acts of performance, such as the inquiries on the banks to issue the letter of credit [*R. Ex. 2 p. 30*].

130. As such, if the Tribunal does not consider the moment of contract formation as 1st April 2020 [*C. Ex. 2 p. 12*], and considers this an acceptance with material modifications, thus, a counter-offer, CLAIMANT submits that it accepted them with modifications that pose as immaterial. As there was no objection from RESPONDENT, these terms are part of the concluded contract.

C) In any event, RESPONDENT accepted contract conclusion pursuant to the practice established between the Parties

131. Nonetheless, if the Tribunal considers that there was no acceptance in the *supra* mentioned terms, acceptance should be inferred by the conduct of the Parties, pursuant to Art. 18 (1) and Art. 9 of the CISG.

132. In fact, there is a practice established between the parties, in which the contract would be concluded if Ms. Bupati did not raise any objections to the contractual documents in a reasonable period of time [*NoA p. 7 ¶19 in fine; C. Ex. 1 p. 10 ¶ 13*].

133. Art. 18 (1) states that "Silence or inactivity does not in itself amount to acceptance".

134. However, the practices established between the parties must be considered for the interpretation of any statement or conduct, pursuant to Art. 8 (3). Furthermore, "*the wording of the provision ('in itself') clearly shows that silence in conjunction with other circumstances can indeed indicate a declaration and, on the basis of Art. 8(3), take effect as an acceptance without a statement to that effect having reached the offeror.*" [*Schlechtriem&Schwenzer p. 580*].

135. "*Under Art. 6, "The parties may...derogate from or vary the effect" of the provisions of the Convention. An applicable practice or usage has the same effect as a contract.*" [*Honnold p. 62*].

136. Thus, in the present case, silence must be interpreted as an acceptance, considering that the parties' practices prevail over the provisions of the

Convention [*Honnold p. 62; Schlechtriem & Schwenzer p. 461; VURAL p. 139; Alstein p. 16; Secretariats Commentary on Art. 8 ¶5; DiMatteo p. 76 Chp. 6; Case 1 U 69/92; CLOUT 313; CVBAL. V. E.G. BV*].

137. In fact, when negotiating with CLAIMANT, RESPONDENT acted in accordance with such practices [*C. Ex. 1 p. 10 ¶ 13 l.1*]. Ms. Bupati stated that it was good to "(…) *re-establish our long-lasting and successful business relationship in my new function*." [*C. Ex. 1 p. 12 ¶ 2*]. Such assertion by Ms. Bupati is an acknowledgement that there is a practice established between the parties that should be considered. It also led CLAIMANT to believe that those practices would be applied, in the negotiations, conclusion and performance of the contract.

138. In fact, Mr. Chandra was not worried that the contractual documents had not been returned, precisely based on previous conduct of the parties [*NoA p. 5 ¶8 l. 8*].

139. Furthermore, JAJA Biofuel is a subsidiary company of Southern Commodities. As such, and according to the group of companies' doctrine, the fact that the companies belong to the same group creates a "group personality" as explained infra in ***IV/B/2)***.

140. In the present case, following the practices between the parties, no objections were raised by RESPONDENT. This fact shows the Tribunal that the contract was concluded, pursuant to the practice established between the parties, to which they are bound pursuant to Art. 9 [*CLOUT 120*].

141. In sum, the Tribunal will find that the contract was concluded regardless of the approach followed.

142. Art. 23 CISG states that "*A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.*".

143. In the case at hand, there are 3 alternative moments where a contract can be interpreted as concluded:

- 1st April 2020, with the communication from RESPONDENT as argued in ***A)***
- 9th April 2020, considering that no objection has been raised to CLAIMANTS immaterial alterations, as Argued in ***B);*** or
- 16th April 2020, one week after the receipt of the contractual documents, as argued in ***C).***

144. In any of these hypothesis, all CLAIMANT's conditions were included in the contract conclusion, including the GCoS.

145. Thus, a contract has been concluded pursuant to Art. 23 CISG and the inherent acceptance cannot be revoked considering that in any of the hypothesis, acceptance reached CLAIMANT before the revocation dated 30th October 2020 [*C. Ex. 7 p. 20*].

IV. Claimant's General Conditions of Sale were validly included into the concluded contract.

146. The prerequisites for the effective incorporation of standard terms in a contract are determined under the rules for the formation and interpretation of the contract, pursuant to arts. 8, and 9 of the CISG [*Schwenzer p. 372 ¶ 56; CISG Advisory Council Opinion no.13*].

147. CLAIMANT submits that according to the CISG, *the GCoS were validly incorporated into the concluded contract through a practice established between the parties, pursuant to Art. 9 CISG* **(A)** and *RESPONDENT could not have been unaware of the GCoS* **(B)**.

A) CLAIMANT´s General Condition of Sale, were incorporated into the concluded contract through a practice established between the parties, pursuant to Art. 9(1) of the CISG

148. Contrary to RESPONDENT´s allegations, the General Conditions of Sale were duly included in the concluded contract, pursuant to Arts. 8 and 9 of the CISG [*ANoA ¶ 20; Schlechtriem&Schwenzer p. 370 ¶ 57*].

149. The CISG does not define "practices established between the parties". Contrary to usages, which must be observed in at least one branch of the

industry, practices within the meaning of Art. 9(1) CISG are established only between the parties [*UNCITRAL DG 2016 p. 63,64 ¶ 1,7; Ferrari p. 273 ¶ II.1,2; Schlechtriem&Schwenzer p.370 ¶ 56; Pamboukis p. 3 ¶ B3]*.

150. In specific, practices are conducts that occur with a certain frequency and during a certain period of time that Parties can assume, in good faith, will be observed again in a similar instance [*UNCITRAL DG 2016, p 64 ¶ 7;* Case 7 Ob 175/05v; *High People's Court of Guangdong Province]*.

151. Pursuant to Art. 8(2) CISG, these conducts that establish a practice also create an expectation that this conduct will be continued, except when their application for the future is expressly excluded [*Pamboukis p.3 ¶ B.3;* Case *AR/16/00*]. This never happened in the present case.

152. The Tribunal must consider that so far, 40 contracts were concluded between Mr. Chandra and Ms. Bupati. All of these not only were based on CLAIMANT's template, but also declared the GCoS to be applicable [*ANoA ¶18; R. Ex. 3 ¶ 2*].

153. In addition, CLAIMANT's GCoS were made available to Ms. Bupati, and she was also aware of them in a reasonable manner according to the *ratio* of Art. 8(2) CISG [*CISG Advisory Council Opinion no.13 ¶ 2.2; PO2 ¶ 18; Schlechtriem&Schwenzer p.519 ¶ 58,59*].

154. Furthermore, when there is a long-term business relationship such the one between Mr. Chandra and Ms. Bupati, the CISG does not require a party to provide the standard terms to the other when this has already occurred in previous occasions [*Schwenzer p. 519 ¶ 58,59*]. Indeed, providing the GCoS in each transaction would be considered a mere formality *[Netherlands Arbitration Institute, 10 February 2005, CISG-online 1621, YB Comm Arb 2007, 93, 103]*.

155. In the present case, is possible to verify that in the past seven contracts concluded between the Parties the GCoS were not delivered, however, the

obligations derived from the concluded contracts were performed [*PO2 ¶ 7; CISG Advisory Council Opinion no.13*].

156. CLAIMANT acted accordingly, in good faith, by concluding seven contracts in a similar instance with Ms. Bupati by not delivering the GCoS since it already did in 2016, with the already amended version [*UNCITRAL DG 2016, p 64 ¶ 7; Case 200.127.516-01; PO2 ¶ 7]*.

157. The Tribunal must also be aware that the last contract concluded between Mr. Chandra, e.g. (representative of CLAIMANT) and Ms. Bupati, e.g. (representative of Southern Commodities), took place in June 2018 [*PO2 ¶ 8]*.

158. Furthermore, an outer time limit can be derived from art. 39 (2) CISG, since this provision's purpose is to enable the Parties to "*finally regard the transaction as finished*" when two years have passed. "*This general rationale means that no party has to be aware of the other party's standard terms once two years have passed since the last contract subject to these terms was concluded*" [*Schlechtriem&Schwenzer p. 519,520 ¶ 59]*. In the present case, *in contrariu sensu*, Ms. Bupati has to be aware of CLAIMANT GCoS considering that no more than 2 years had lapsed from the previous contract [*PO2 ¶ 8]*.

159. Thus, the facts presented clearly demonstrate that there is an undeniable business relationship between Mr. Chandra and Ms. Bupati along with a knowledge by RESPONDENT of the standard terms. This is because these were not only made available previously but were also in their possession since 2016 [*Schlechtriem&Schwenzer p. 519 ¶ 59; PO2 ¶ 7*].

160. Indeed, such practice established between the parties, naturally makes it unnecessary the need to provide the standard terms in every single transaction [*Schlechtriem&Schwenzer, p. 524 ¶ 78,79*].

161. In other words, and from a practical perspective, it is expected that such practices will lower the formal requirements regarding an incorporation of

standard terms in cases in which a reference to it is missing, pursuant to Art. 9(1) CISG [*Schlechtriem&Schwenzer p. 524 ¶ 79; Ferrari p. 273 ¶ II. 3,4]*.

162. In the current case, where the requirement to make these terms available, is in contrast, fulfilled by a practice, since the standard terms text was made known to Ms. Bupati, resulting in a sufficient awareness pursuant to Art. 8 CISG [*Schlechtriem&Schwenzer p. 524 ¶ 79,80; Case 93/4126; PO2 ¶ 7*].

163. Furthermore, pursuant to Art. 8(2) CISG, the incorporation of the standard terms was clear since it was not only readable and understandable by a reasonable person but also drafted in English as it was in the contract [*CISG Advisory Council Opinion no.13; Schlechtriem&Schwenzer, p. 372 ¶ 62*].

164. Thus, the GCoS were not only drafted according to the requirements of understandability of a reasonable person but also provided to Southern Commodities [*R. Ex 4; PO2 ¶ 7; Schlechtriem&Schwenzer, p. 372 ¶ 62*]

165. Therefore, it is undisputed that Ms. Bupati had knowledge of CLAIMANT's GCoS and an incorporation through a practice established between the parties is fulfilled pursuant to Art. 9(1) CISG.

1) The fact that CLAIMANT removed the arbitration clause from the contract template, and kept it only in the GCoS, is considered a usage in international business practice, pursuant to Art. 9 (2) CISG

166. CLAIMANT's removal of the arbitration clause from the contract and keeping it only on the GCoS was based on a usage in international business practice context, pursuant to Art. 9(2) CISG.

167. The term "usage" is not defined in the CISG, which allows it to be autonomously interpreted, as is the case with most terms used in the CISG. In other words, interpreted on its own without resorting to national law or particular national concepts *[Ferrari p. 273 ¶ II.2]*.

168. Pursuant to Art. 9(2) CISG, when the existence of standard terms are qualified as international usage, the prerequisite of a reference in the offer as well as the awareness of the standard terms for their incorporation into a contract

governed by the CISG is not required [*Schlechtriem&Schwenzer p. 524 ¶ 80; Case C05-5538FDB*].

169. Hence, those international usages are considered impliedly applicable to the contract's formation. Thus, beyond the effect of Art. 8(3), which merely relates to the interpretation of declarations [*Schlechtriem&Schwenzer p. 524 ¶ 80*].

170. Accordingly, usages within the meaning of the CISG, include "…*actions or omissions which are generally and regularly observed in the course of business transactions in a specific area of trade*…" *[Ferrari p 273, 274 ¶ II. 2,3]*.

171. Moreover, trade usages are considered rules of commerce regularly observed by those involved in a particular industry or marketplace [*Schlechtriem&Schwenzer p. 187 ¶ 12,13; Case A2 2001 105; CISG/1990/01*].

172. Art. 9(2) CISG sets two requirements for the identification of usages and their applicability [*Pamboukis p. 5 ¶ A. 2; Schlechtriem&Schwenzer p. 189 ¶ 16,17*].

173. Firstly, based on a subjective element, it is required that for contract supplementation to exist, Parties at the time of contract formation, knew or ought to have known of the trade usage [*Pamboukis p. 5 ¶ A.2-4; Schwenzer p. 403 ¶ 16*].

174. Secondly, based on an objective element, usages must be regularly observed by the Parties to contracts of the type involved [*Pamboukis p. 525 ¶ A; Schlechtriem&Schwenzer, p.189 ¶ 16-18*].

175. Moreover, it is undeniable considering what as supa mentioned [*see previous chapter ¶ 162-164*], that Ms. Bupati could not have been unaware of such usage. Indeed, the subjective element is fulfilled.

176. In any case, the transaction must have a sufficient relation to the usage's sphere of observance, whether place or industry [*Schlechtriem&Schwenzer p. 403,404 ¶ 17,18; Case 2 Ob 191/98x; CISG/2008/02*].

177. Furthermore, Art. 9(2) CISG aids in the application of trade usages which implicitly incorporate choice of forum or arbitration clauses into the contract,

albeit in certain industries the arbitration agreement itself is considered a trade usage [Schlechtriem&Schwenzerp. *406 ¶ 26; Farnsworth ¶ 21; Staudinger/Magnus ¶ 28; Graffi ¶ 31; Perales Viscasillas, ¶ 20*].

178. In the present case, removing the arbitration clause from the contract template, keeping it only in the GCoS, is a practice often used in international sales contracts in this industry [*ECJ, Case C-106/97*; *Farnsworth, Art 9, note 3.5; PO2 ¶ 11*]. Based on this, the objective element of usage is met.

179. Meeting this standard, CLAIMANT´s inclusion of the arbitration clause in its GCoS amount to a common business practice in the palm oil industry [*PO2 ¶ 11*].

B) RESPONDENT could not have been unaware of the General Conditions of Sale

180. The GCoS were duly provided to Southern Commodities, not only in 2011 but also in 2016 as recognized by RESPONDENT [*ANoA ¶ 11,13*].

181. The request made by Ms. Bupati on April 1st, 2020, cannot be based on the previous version of the GCOs, because she was duly informed by Mr. Chandra that some amendments were made to the arbitration clause, along with the alteration of the governing law to that of Mediterraneo [*ANoA ¶ 13; PO2 ¶ 18*].

182. CLAIMANT submits that RESPONDENT was aware of the GCoS considering that *Ms. Bupati knowledge must be attributed to RESPONDENT* **(1)**, and *due to their status as parent company, the knowledge of Southern Commodities must be attributed to RESPONDENT* **(2)**.

1) Ms. Bupati's knowledge must be attributed to RESPONDENT

183. CLAIMANT concluded in total, eight contracts with Ms. Bupati – e.g. (RESPONDENT representative) between 2016 and 2018 [*PO2 ¶ 7*].

184. It is undeniable that all contracts were based on CLAIMANT's template, used also for the contract in dispute, and declared CLAIMANT's GCoS to be applicable, as also did the pre-2016 contracts [*PO2 ¶ 7*].

185. Furthermore, the revised GCoS with the new arbitration clause were sent to RESPONDENT with the first contract back in 2016.

186. Moreover, Mr. Chandra informed Ms. Bupati via phone that the new arbitration clause was the model clause of the KLRCA (AIAC) [*PO2 ¶ 7*].

187. After that, the only change made to the arbitration clause after it was sent in 2016, was the name of the institution to AIAC. However, this is irrelevant for the current case since the content of the Institution's rules remained the same.

188. Thus, by concluding the first contract in 2016 with the amended GCoS validly incorporated, the following seven contracts were concluded in the same circumstances, with the exception CLAIMANT's GCoS were not delivered, despite being duly incorporated, and performed [*PO2 ¶ 7*].

189. RESPONDENT's allegations, therefore, have no grounds. This is because the amended GCoS were duly sent, and Ms. Bupati had the opportunity to consult them [*PO2 ¶ 7*].

190. It is CLAIMANT position that if back in 2016, no problems were raised due to such amendment, it is unconceivable that after 5 years, and eight contracts duly performed on this basis, that CLAIMANT's GCoS are surprising to RESPONDENT.

191. This is particularly important since Ms Bupati was involved in the negotiations of all 40 contracts concluded so far, some of which even signed by her. Moreover, the ones which had not been signed, were still duly performed.

192. Moreover, these personal interconnections may lead to knowledge attribution as such may increase the flow of information [*The Court of Appeal of England and Wales*; *Chandler v. Cape plc; Fogt*].

193. Thus, she had knowledge of the scope and template used as she played a leading role in the negotiations between CLAIMANT and Southern Commodities.

194. For all these reasons, it is undeniable that there is a practice established between Ms. Bupati and CLAIMANT and such practice could not be ignored in the current case since it entails crucial knowledge.

195. Furthermore, Ms. Bupati performed the leading role always under and on behalf of Southern Commodities. In fact, the present dispute even being on behalf of RESPONDET, remain under Southern Commodities roof since it is RESPONDENT's parent company.

196. Alternatively, although art. 79 CISG does not specifically address the question of knowledge attribution, it is analogically possible to apply its underlying principle. Art. 7(2) CISG, allows the application of a general principle of the CISG. This allows CLAIMANT to conclude that Ms. Bupati, even as a third person, has to carry the risk related to the obligations carried out by third parties due to beneficials from the advantages [*BRUNNER ET AL; Kröll, in: Kröll et al., Art. 79 ¶ 60; Fogt*].

197. Therefore, this general principle is applicable to the attribution of knowledge of third parties that the obligor used in relation to contract is to be attributed to RESPONDENT [*Coke Case; Kaiser, in: Staudinger, Art. 79 ¶ 43; Fogt*]. Indeed, Ms. Bupati knowledge must be attributed to RESPONDENT.

2) Due to its status as parent company, the knowledge of Southern Commodities must be attributed to RESPONDENT

198. Being Southern Commodities the sole parent company of RESPONDENT with a strict structural link, this fact alone is telling to prove the reasonable knowledge imputation to RESPONDENT [*PO2 ¶ 4]*.

199. Such rationale that knowledge can be imputed on the basis of the status of parent and daughter companies is sustained by the *ratio* of the "group of companies doctrine" [*Fogt; Derains; J. Sagar Associates]*.

200. According to this doctrine, a non-signatory of an arbitration agreement can be bound by what? if belonging to the same group but also if it plays an

important role in the negotiation, conclusion, performance or termination of the contract [*Dow Chemical France & Ors. v. ISOVER Saint Gobain*].

201. Furthermore, pursuant to the supra-mentioned doctrine, it is not required to hold control of the companies, being sufficient that the companies belong to the same corporate group. All companies that belong to the group share the same "group personality" [*Manuchar Steel Hong Kong Ltd. V. Star Pacific Line Pte Ltd; J. Sagar Associates*], which is the case of RESPONDENT since it was acquired by Southern Commodities.

202. Thus, pursuant to the "group of companies" doctrine, declarations of will can be attributed into a subsidiary company [*Fogt; Derains; J. Sagar Associates*].

203. Pursuant to this rationale, the same attribution must indeed be applied to knowledge.

204. Consequently, the fact that RESPONDENT is a 100% subsidiary company of Southern Commodities is sufficient to establish attribution of knowledge.

205. In any event, if the Tribunal considers that although both companies belong to the same group, a connection between them is required to attribute knowledge, this condition is verified in the current case.

206. Despite RESPONDENT being legally independent, strategic decisions, such as the acquisition by Southern Commodities, type of business activity and also allocation of human resources from one company to another, are taken at a group level [*PO2 ¶ 3,5*].

207. Moreover, the fact that Ms. Bupati worked as head of purchasing of palm kernel for Southern Commodities and took over the negotiations of all previous concluded 40 contracts along with the negotiations of the concluded contract with RESPONDENT, demonstrates a close bond between the two companies [*R. Ex. 3 p.31 ¶ 2]*.

208. Furthermore, the transaction involved the collaboration of both companies on whether centralize both palm kernel and palm oil under RESPONDENT business activities.

209. Therefore, it is undeniable that the aforementioned strategic decisions were taken as group level, which is sufficient to prove reasonable knowledge attribution to RESPONDENT.

210. In sum, RESPONDENT is attempting to avoid the performance of the contract to which it willingly agreed to. It should be clear to this Tribunal that a contract has been concluded by the Parties with the inclusion of the GCoS, according to the practice that has been established between the parties over the last 10 years. These must be considered on the interpretation, conclusion and inclusion of GCoS to the contract.

REQUEST FOR RELIEF

In light of the submission above, counsel for CLAIMANT respectfully invites the Tribunal to declare that:

I. the Arbitral Tribunal has jurisdiction to hear the case;
II. Parties entered into a valid contract for the delivery of RSPO-certified Palm Oil for the year 2021-2025;
III. Claimant's GCoS were validly included into the Contract;

In addition, counsel for CLAIMANT respectfully invites the Tribunal to order RESPONDENTS to bear the costs of the Arbitration and cover CLAIMANT's legal fees.

CERTIFICATE

We hereby confirm that only the persons whose names are listed below have written this memorandum.

Mafalda Estácio

Guilherme Pina Cabral

Mafalda Vila Nova

Paulo Queirós

29th Willem C. Vis International Commercial Arbitration Moot

27th January 2022

Lisbon

MEMORANDUM FOR RESPONDENT

NOVA SCHOOL OF LAW

on behalf of		*Against*
JAJA Biofuel Ltd 9601 Rudolf Diesel Street Oceanside Equatoriana **- RESPONDENT -**	***v.***	**ElGuP plc** 156 Dendé Avenue Capital City Mediterraneo **- CLAIMANT -**

COUNSELS

Mafalda Estácio | Mafalda Vila Nova | Guilherme Pina Cabral | Paulo Queirós

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT — MCMXCIII — VIENNA

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REQUEST FOR RELIEF **35**

LIST OF ABBREVIATIONS

AIAC	Asian International Arbitration Center
ANoA	Answer to the Notice of Arbitration
Art./Arts.	Article/Articles
Cl.Ex.	CLAIMANT's exhibit
CEO	Chief executive officer
cf.	Conferre (confer)
Chp.	Chapter
CISG	1980 United Nations Convention on Contracts for the International Sale of Goods
Co.	Company
contrario sensu	in the opposite sense or meaning
DAL	Danubian Arbitration Law [UNCITRAL Model Law of International Commercial Arbitration]
ed./eds.	Edition/editor/editors
e.g.	Exempli gratia (for example)
et al.	Et alii (and others)
et seq.	Et sequens (and that which follows)
et seqq.	Et sequentes (and those which follow)
ibid.	Ibidem (in the same place)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
i.e.	Id est (that is)
Inc.	Incorporation

ipsis verbis	In the same words
KLRCA	Kuala Lumpur Regional Center for Arbitration
l.	line
Ltd.	Limited
MfC	Memorandum for Claimant
NoA	Notice of Arbitration
No.	Number(s)
NY Convention	1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OGH	Oberster gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Regional Court of Appeals)
p./pp.	Page/pages
per se	By or in itself or themselves; intrinsically
¶	Paragraph/paragraphs
PO1	Procedural Order 1 of 8 October 2021
PO2	Procedural Order 2 of 8 November 2021
R. Ex.	Respondents' exhibit
SCC	Supreme Court of Canada
supra	Above
UN	United Nations
UNCITRAL	United Nations Commision on International Trade Model Law
v.	Versus

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STATEMENT OF FACTS

RESPONDENT *JAJA Biofuel Ltd* *9601 Rudolf Diesel Street* *Oceanside* *Equatoriana*	Is a pioneer in the production of sustainable biofuels in Equatoriana.
CLAIMANT *ElGuP plc* *156 Dendé Avenue Capital City* *Mediterraneo*	Is a producer of RSPO-certified palm oil and palm kernel oil based in Mediterraneo.
December 2019	Ms. Youni Lever announced the future plans of RESPONDENT and its commitment to sustainability.
March 2020	The Palm Oil Summit was held, where RESPONDENT and CLAIMANT discussed the potential terms of the contract.
1st April 2020	Ms. Bupati reaffirmed the importance of not referring the dispute to a palm oil specific institution.
3rd May 2020	RESPONDENT sent an email to CLAIMANT with the purpose of continuing to negotiate the terms of the contract
30th October 2020	Ms. Youni Lever terminated the negotiations as CLAIMANT could not guarantee the certification of the palm-oil to be sold.

SUMMARY OF ARGUMENTS

The present dispute is a straightforward case. The Tribunal should find that the Parties never concluded a contract but were still in a negotiation stage. Furthermore, RESPONDENT respectfully submits that the Arbitral Tribunal does not have jurisdiction since there was no inclusion of CLAIMANT's General Conditions in the contract.

- **(I)** The Parties have agreed to apply the Law of Mediterraneo to the Arbitration Agreement. RESPONDENT will demonstrate that it cannot be considered otherwise as this is the law chosen by the Parties to govern the alleged contract. However, should the Tribunal consider differently (*quod non*) the Arbitration Agreement does not meet the relevant requirements under the Law of Danubia since it is not "*in writing*" nor has it been incorporated by reference to the GCoS.
- **(II)** The CISG is applicable to the conclusion of the Arbitration Agreement since it is governed by the law of Mediterraneo. Firstly, given that Arbitration Agreements falls within the scope of the CISG. Secondly, the separability principle allows for the application of the same law to the main contract and to the Arbitration Agreement. Lastly, the Parties have agreed on the application of the CISG.
- **(III)** Turning to the merits, contrary to CLAIMANT's allegations, there is no practice established between the Parties, considering that this is the first contract they ever negotiated. Furthermore, CLAIMANT cannot rely on the practice established between itself and Southern Commodities considering that the Parties have derogated from its application.
- **(IV)** The parties never concluded a binding sales contract. In fact, the Parties were only in a negotiation stage, as RESPONDENT will demonstrate by proving that the CISG requirements for contract conclusion were not met. Furthermore, CLAIMANT cannot rely on an alleged practice established between Southern Commodities and CLAIMANT, as there was none.

- **(V)** The General Conditions of Sale were not validly included into the contract since RESPONDENT never agreed with the amended version of the GcoS. Not only did CLAIMANT never make them available, not complying with the making available test, but also the GCoS were not easily accessible online as RESPONDENT never received any hyperlink via email referring to the text of the standard terms.

Thus, RESPONDENT will prove that the requirements for an implied incorporation of the GCoS into the concluded (*quod non*) contract are not met, and that, contrary to CLAIMANT's allegations, RESPONDENT could not have been aware of the GCoS content as the knowledge of Southern Commodities must not be attributed to RESPONDENT.

PROCEDURAL

1. RESPONDENT will respectfully demonstrate that the Arbitral Tribunal does not have jurisdiction to hear this case. RESPONDENT submits that *it never agreed on the applicability of the Law of Danubia* **(I).** Instead, it *is undisputed that the Parties have agreed on the Law of Mediterraneo* **(II)** *with the inclusion of the CISG* **(III)**.

I. The Arbitral Tribunal does not have jurisdiction to hear this case

A) The parties have not concluded an Arbitration Agreement under the Law of Danubia

2. It is CLAIMANT's position that the Parties to these proceedings are bound by the 2016 version of the Arbitration Agreement. Consequently, CLAIMANT argues that there is an express choice to apply the law of Danubia to the Arbitration Agreement.

3. However, RESPONDENT will demonstrate that, unlike CLAIMANT's allegations, the Parties have never agreed on the applicability of Danubian Law. Even if the Tribunal decides on the applicability of Danubian Law (*quod non*) the agreement would be invalid.

1) There is no agreement between the Parties to apply the Law of Danubia to the Arbitration Agreement

4. Consent is the cornerstone of International Arbitration [*BORN TO p. 2; Scherer p. 1 ¶1; Art. II NY Convention; Art. 8 UNCITRAL ML; PO2. ¶18*]. As CLAIMANT argues, the principle of party autonomy and the possibility to choose the law applicable to the proceedings are fundamental characteristics of International Arbitration [*NoA, p. 10, ¶11; Cl. Ex. 5*]. However, in order for these principles to apply, both parties need to have expressed their agreement and consent [*Waincymer, p. 131*], a requirement that is not fulfilled in the present case.

5. *In casu*, RESPONDENT could not have agreed on the applicability of the law of Danubia since at the time of the negotiations between the Parties it had no knowledge of the changes made to the Arbitration Agreement pertaining to this law [*ANoA, p. 27, ¶12*].

6. Firstly, CLAIMANT did not prove that it sent this clause to RESPONDENT at the time when the Parties were negotiating. Until this day, RESPONDENT has not received this clause nor any proposal to amend the Arbitration Agreement [*NoA, p. 9, ¶4*] nor has a copy of the new clause been sent to RESPONDENT [*PO2, p. 47, ¶7; p. 50, ¶18*].

7. Secondly, RESPONDENT repeatedly demonstrated its discontent to submit any potential dispute to palm oil specialized institutions [*NoA, p. 9, ¶ 4*]. Contrary to CLAIMANT'S allegations, RESPONDENT was not aware that this was no longer the law allegedly applicable to the arbitration clause [*Cl. Ex. 1, p. 10, ¶ 11; Cl. Ex. 5, p. 18, ¶5; ANoA, p. 27, ¶12*]. Hence, it is indisputable that RESPONDENT did not agree on the application of Danubian Law.

8. Instead, the Parties have agreed on the applicability of the Law of Mediterraneo as will be demonstrated below. Firstly, *there was an express agreement between the Parties* **(2)**. Secondly, *if the Tribunal considers*

otherwise, the parties have implicitly consented to apply Mediterranean Law to the arbitration agreement **(3)**.

2) There was an express agreement between the Parties to apply the law Mediterraneo to the Arbitration Agreement

9. RESPONDENT strongly believes, as it will demonstrate, that the Parties have expressly agreed on the law of Mediterraneo to govern the arbitration agreement. Indeed, as CLAIMANT states [*MfC, p. 18 ¶82*], the Tribunal shall decide with respect of parties' autonomy regarding the choice of Law governing the Arbitration Agreement [*Redfern/Hunter II, p. 315*].

10. In the present case, it was CLAIMANT's decision to change the applicable law from the Law of Danubia to the Law of Mediterraneo as the latter "would be more favorable to us [CLAIMANT] than the previously selected law of Danubia" [*Cl. Ex. 1, p. 10 ¶13*]. Mr. Chandra also stated that this change was in accordance with CLAIMANT's new policy [*Cl. Ex. 2, p. 12*].

11. Additionally, throughout the negotiations of this alleged contract, never once did CLAIMANT refer the applicability of the Law of Danubia to the Arbitration Agreement. Not even when RESPONDENT showed discontent in submitting to arbitration under a palm-oil specialized institution [*NoA, p. 5, ¶5, 7*].

12. As RESPONDENT was unaware of CLAIMANT's alleged choice of Danubian Law and the only law that Parties agreed upon was the Law of Mediterraneo, it is by applying the latter that the Tribunal will respect and comply with the principle of party autonomy.

13. Hence, it is undeniable that the Law applicable to the Arbitration Agreement is the Law of Mediterraneo, which was chosen by CLAIMANT and agreed by RESPONDENT.

3) If the Tribunal considers that there was no express agreement, it must hold that there was an implied choice by the Parties to have the Mediterranean law governing the interpretation of the Arbitration Agreement

14. Even if the Tribunal considers that there was no express choice by the parties, it must hold that there was an implied choice to have the Law of Mediterraneo governing the Arbitration Agreement since it was the law chosen to govern the contract **(a)** and such conclusion is in accordance with the widely recognized principle of separability **(b)**.

a) The Law of Mediterraneo is the law applicable to the contract

15. It is widely accepted that when parties choose the law applicable to the main contract, their intention is to apply such law to every aspect of the contract, including the Arbitration Agreement [*National Thermal Case; Kabab-ji case; Fiona Trust case; Redfern&Hunter, p. 159, ¶3,12; Ashford, p. 288; Lew, p. 144; Waincymer, p. 136-137*].

16. This "*host contract theory*" [*Ashford, p. 281*] proposes that a reference to a system of law governing a contract includes the totality of the contract's elements [*Arsonia case; Kabab Ji case; Sumitomo case*]. The rationale behind the extension of the Parties' choice of law is that it "would be artificial to assume that the choice of law clause, whose purpose is to fix the law for the whole contract, does not cover the arbitration clause, which is an integral part of that contract" [*Berger, p. 318; Kabab Ji case*].

17. CLAIMANT argues that the Law of Danubia should allegedly be applicable as the law of the seat [*MfC, p.19, ¶91*]. However, when parties decide on the law applicable to the contract, a simple choice of the seat is not sufficient to deny the parties' intention to have the former, rather than the latter, applicable to their arbitration agreement [*Lew&Mistelis, p. 107; Habas Sinai case; Tonicstar case*].

18. Additionally, the choice of law of the contract has been considered preferable to the law of the seat since the latter concentrates on the sheer

activity of arbitration and not on the content of the matter under dispute [*Waincymer, p. 136*].

19. In the present case, it was CLAIMANT who decided to change the law applicable to the contract and to adopt the law of Mediterraneo, as it would be "*more favorable*" following the advice of its counsel [*NoA, p. 5, ¶7; Cl. Ex. 1*]. By claiming that this law would apply to the contract and not explicitly mentioning that the Arbitration Agreement would be excluded, it is reasonable to assume that the Parties have agreed that the law of the contract would apply to the arbitration agreement.

20. Since CLAIMANT failed to prove that the Parties intended to choose a specific law to govern the Arbitration Agreement [*MfC, p. 20, ¶97*], RESPONDENT submits that it is the Law of Mediterraneo that should apply to the arbitration agreement as it is the law chosen by the parties to govern their agreement.

b) The principle of separability does not contradict this reasoning

21. The principle of separability entails that the Arbitration Agreement and the main contract are presumably separable, meaning they **may** (emphasis added) be considered separable [*BORN, p. 476; Scherer&Jensen, p. 3*]. This, however, does not change the nature of the arbitration agreement as "collateral and ancillary" from the main contract [*Ashford, p. 291*]. On the contrary, it intends to safeguard the jurisdiction of the arbitral tribunal when the main contract is deemed invalid [*Lew&Mistelis, p. 102*]

22. As prescribed by Art. 16 of the UNCITRAL ML, an Arbitration Agreement and the main contract shall be treated as independent agreements "*for that purpose(of) (...) objections of validity and existence of the arbitration agreement*". Meaning that the separability of these two "*agreements*" shall not be considered for all purposes but only when the main contract is invalid, non-existent or ineffective [*Ashford, p. 289; Born, p. 476*].

23. Furthermore, as stated by Lord Moore Bick in *Sulamerica*, the concept of separability is intended to safeguard the dispute resolution mechanism of the Parties if the underlying contract is considered ineffective.

24. Its purpose is not to "insulate the arbitration agreement from the substantive contract for all purposes" *[Sulamerica, ¶26]*. Meaning that the doctrine of separability should not be used without limitations, as this would overlook the very own nature of the Arbitration Agreement (dependent from a previous relationship) and would be used in a sense contrary to its original purpose, that is to safeguard the Parties' dispute resolution mechanism [*Chuprunov, p. 34; Born, p. 476*].

25. To conclude, as RESPONDENT's claim does not concern the validity of the alleged contract, the Law applicable to the Arbitration Agreement in the present case is the Law of Mediterraneo as the law governing the contract.

B) If the Tribunal considers the Law of Danubia to be applicable, it must conclude that the Arbitration Agreement has not been validly concluded under Danubian Law

26. CLAIMANT argues that the Arbitration Agreement fulfills the necessary formal and substantive validity requirements since RESPONDENT has agreed to it when it allegedly accepted the main contract.

27. RESPONDENT respectfully disagrees. Not only has RESPONDENT not accepted the contract [*infra* ¶***88-125***] But also, the formal and substantive requirements for the validity of the Arbitration Agreement are not fulfilled.

1) The alleged Arbitration Agreement does not fulfill the relevant validity requirements

28. RESPONDENT submits that under the Law of Danubia, which is a verbatim adoption of the UNCITRAL ML [*PO1, p. 47* ¶3] and the New York Convention to which Danubia is a member State, *the Arbitration Agreement is not valid since it is not in writing nor has it been signed or exchanged by the Parties* **(a)** and a

mere reference to the applicability of the GCoS is not enough to determine the validity of the Arbitration Agreement **(b)**.

a) The Arbitration Agreement is not in writing, nor has it been signed or exchanged by the parties

29. Article II (1) of the New York Convention establishes a uniform international form requirement which dictates that the arbitration agreement shall be concluded "*in writing*" [*Born V, p. 10; Mistelis&Di Pietro, p. 11; Schramm p. 50*]. Article II (2) goes further to describe "*in writing*" as either being signed by the Parties or contained in an exchange of documents.

30. This requirement has been understood as a minimum form requirement [*Schramm p. 48*] meaning that a State Court "*cannot impose more stringent requirements (...) Neither may a court go below the minimum*" [*Berger, ¶414; Born V, p. 13*].

31. The signature requirement is considered fulfilled when the parties to the contract that contains the arbitration agreement have signed the contract [*UNCITRAL Guide; Bothell case*]. On the other hand, the exchange of documents requirement will only be met when the arbitration agreement is included in documents exchanged by the parties in a mutual transmission of documents. One party's unilateral conduct is considered insufficient for this purpose [*Oberlandesgericht case; Moscow case*].

32. In the case at hand, it is undisputed that the alleged contract has not been signed by the Parties [*NoA, p. 5, ¶8; Cl. Ex. 3, p. 16*]. Additionally, the GCoS have not been sent to RESPONDENT [*ANoA, p. 27, ¶12*] nor has any document with the new Arbitration clause ever been exchanged between CLAIMANT and RESPONDENT.

33. Hence, the formal validity requirements for the Arbitration Agreement under the Law of Danubia are not met.

b) A mere reference to the applicability of the GCoS is not enough to determine the validity of the Arbitration Agreement

34. Article 7 (6) of the UNCITRAL ML establishes that "*a reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing*". This incorporation by reference may take two different forms.

35. The first, when parties make specific reference to the Arbitration Agreement contained in another document. The second, when parties make reference to a document which contains an arbitration agreement although there is no specific reference, which is the case at hand [*Di Pietro, p. 430; Mistelis&Di Pietro, p.12,* ¶6].

36. Although the first has been highly recognised, the latter cannot be accepted as easily [*Schramm, p. 9; Bomar Oil case*]. On the contrary, it has been considered that when a specific reference does not exist, the validity requirements of the arbitration agreement under the NY Convention are not met [*Dreyfus case; Mistelis &Di Pietro, p. 12; Schram, p. 86*].

37. Furthermore, even in situations where an arbitration clause stipulated by general reference to a document such as Standard Terms is considered valid, it can only be so when "*the party against which the clause invoked was aware of the contents of this document (...) and when it has accepted the incorporation of the document in the contract*" [*Gaillard, p. 278*].

38. In the present case, CLAIMANT did not mention to RESPONDENT that the Arbitration Agreement was present in the GCoS. Furthermore, even if a specific reference had been made (*quod non*) RESPONDENT could not have been aware since the GCoS were never brought to its knowledge [*PO2, p. 50 ¶18*]. Hence, the Arbitration Agreement was not incorporated by reference, and it fails to comply with the necessary validity requirements.

II. The CISG is applicable to the conclusion of the Arbitration Agreement in the event it is governed by the law of Mediterraneo

39. CLAIMANT alleges that the CISG is not applicable to the Arbitration Agreement since it is not included in its scope [*MfC, p. 22, ¶108*].

40. RESPONDENT will demonstrate that, if the Arbitral Tribunal considers the law of Mediterraneo to be applicable in this case, the CISG is applicable to the Arbitration Agreement.

41. The reasons for RESPONDENT's position are the following: Firstly, *the CISG governs the main contract, and therefore also the Arbitration Agreement* **(A).** Secondly, *the Parties have agreed on the application of the CISG to the Arbitration Agreement* **(B)**.

A) The CISG is applicable to the Arbitration Agreement as the law governing the main contract

42. RESPONDENT will demonstrate that the *Arbitration Agreement falls within the scope of the CISG* **(1).** In addition, *the separability principle allows for the application of the same law to the main contract and the Arbitration Agreement* **(2)**. Lastly, *the full application theory allows for the applicability of the CISG to the Arbitration Agreement when it governs the main contract* **(3).**

1) The Arbitration Agreement falls within the scope of the CISG

43. Contrary to CLAIMANT's allegations [*MfC, p. 22, ¶108*], the Arbitration Agreement falls within the scope of the CISG, as RESPONDENT will demonstrate.

44. The fact that the CISG does not expressly address the applicability of the Convention to arbitration agreements contained in sale contracts [*Fillers, p. 668*] is not sufficient to assume that the CISG does not regulate arbitration agreements, as CLAIMANT declares.

45. The material scope of the CISG must be determined through the interpretation of its provisions [*Fillers, p. 666*]. Consequently, Articles 19 (3) and 81 (1) CISG

must be interpreted to determine whether the CISG intends to regulate arbitration agreements. Both articles refer to terms or provisions for the settlement of disputes. Hence, "*settlement of disputes*" encompasses both settlement before courts and Arbitral Tribunals [*Fillers, p. 668*]. Moreover, both provisions treat dispute resolution clauses as a part of a sales contract [*Fillers, p. 680*].

46. Looking to Article 19 of the CISG, this provision mentions "*settlement of disputes*" and, as argued *supra*, this expression includes settlement before arbitral tribunals. Therefore, through an extensive interpretation of Art. 19 CISG, this provision must be interpreted to cover dispute settlement clauses as part of a CISG contract. [*Fillers, p. 681; Schwenzer/Tebel, p. 743*]

47. In addition, Article 81 (1) CISG also mentions "*settlement of disputes*" and pursuant to an extensive interpretation method employed above, it follows that the CISG does not limit the effects of the sales contract on dispute resolution clauses, but also regulates their termination and some other aspects [*Flecke-Giammarco/Grimm, p. 49*]. Therefore, if the CISG provides that the avoidance of the main contract does not terminate an arbitration agreement, then it must regulate both of them – the CISG contract and the arbitration agreement [*Flecke-Giammarco/Grimm, p. 49; Computer equipment case*].

48. Based on the above, the Tribunal must find that the scope of the CISG extends to arbitration agreements. Also, according to this understanding, the CISG takes precedence over otherwise applicable domestic law. In that case, the CISG will govern the formation, formal validity, interpretation, and enforcement of an arbitration agreement forming part of a CISG contract [*Fillers, p. 668; Schwenzer/Tebel, p. 745; Jeffrey Waincymer, p. 583*].

49. Furthermore, such rationale is hereby applicable on what concerns the inclusion of the arbitration agreements in standard terms. In a multitude of cases, adjudicators have decided that incorporation of standard terms into

the sale contract is governed by the CISG, even with regards to arbitration clauses contained therein [*Fillers, p. 670; Printed Goods Case; Krogmann v. Vierto; Case 2977/1996]*.

50. In conclusion, CLAIMANT has failed to demonstrate that the Arbitration Agreement does not fall under the scope of the CISG. It did not provide any case law that supports their position.

2) The separability principle allows for the application of the same law to the main contract and the arbitration agreement

51. CLAIMANT alleges that an "*arbitration agreement is a dispute resolution clause, not a contract for sale*" [*MfC, p. 22, ¶111*] to justify the non-applicability of the CISG to the Arbitration Agreement, while failing to provide any doctrinal or jurisprudential support. This allegation leads to the conclusion that the Arbitration Agreement is totally separate from the main contract.

52. However, the separability principle must be understood in a more modest way. This principle has only one effect: invalidity or avoidance of the main contract will not lead to the loss of the chosen method of dispute settlement [*Viscasilas/Muñoz, p. 74; 280/1999 case; 30/2006 case*]. In this way, the separability principle does not, *per se*, mandate that the main contract and the arbitration agreement are to be considered as two separate contracts [*Fillers, p. 680*]

53. Moreover, the separability principle does not exclude the application of the same law to the main contract and to arbitration agreements [*Fillers, p. 680; Viscasillas/Muñoz, p. 75*]. *A contrario sensu* the separability principle allows for the application of the same law to the main contract and to the Arbitration Agreement.

54. Also, the application of the same law to the main contract and the Arbitration Agreement may grant a much more harmonized application [*Fillers, p. 690*].

55. Thus, the separability principle allows for the application of the same law to the main contract and to the Arbitration Agreement.

3) The full application theory confirms the applicability of the CISG to the Arbitration Agreement as the law governing the main contract

56. The full application theory extends the applicability of the CISG to arbitration agreements and proves that the scope of this Convention is equal for substantive matters of the contract as well as arbitration agreements [*Fillers, p. 675; Walker, p. 159*]. The reasoning behind this theory is simple: the CISG must apply to all arbitration agreement related issues as part of a CISG contract [*Fillers, p. 675; Walker, p. 159; Koch, p. 281*].

57. To support this understanding, one must consider, on one hand, the scope of the CISG, and on the other hand, the separability principle both explained [*supra* ¶***46–48***; ¶***52-55***]. The combination of these two arguments leads to the conclusion that the CISG may be applicable to the Arbitration Agreement forming part of a CISG-contract.

58. Therefore, when parties agree on the application of the CISG to the main contract containing an arbitration agreement, the CISG applies to the contract as a whole, including the arbitration agreement [*Fillers, p. 675; Walker, p. 159*].

B) The Parties have agreed on the application of the CISG to the Arbitration Agreement

59. RESPONDENT will demonstrate that the Parties have not excluded the application of the CISG to the Arbitration Agreement. According to the subjective interpretation standard enshrined in Art. 8 (1) CISG the Tribunal must conclude that the *Parties have not excluded the application of the CISG to the Arbitration Agreement* **(1)**. *The same conclusion is drawn pursuant to the objective interpretation of Art. 8 (2) and (3) CISG* **(2)**.

1) CLAIMANT knew or could not have been unaware of RESPONDENT's intent to apply the CISG

60. Mediterraneo is a Contracting State of the CISG [*PO1, p. 46, ¶3*]. As will be discussed below, the main contract in this present case, is governed by the CISG [*PO2, p. 50, ¶16*]. Therefore, the interpretation rules of Article 8 are applicable to all its provisions [*Christoph Brunner, p. 90; BTC-USA v. Novacare*].

61. Consequently, to interpret the Parties' will to apply the CISG to the Arbitration Agreement, one must focus on Art. 8 CISG, which provides the interpretation rules of statements and conducts of the Parties [*Brunner&Hurni&Kissling, p. 90; Tissue Machine Case; MCC Case]*.

62. According to Article 8 (1) CISG, the true intent of the declaring party is determinative when the addressee knew what that intent was, or at least, could not have been unaware what that intent was [*Brunner&Hurni&Kissling, pp. 91-92; Schwenzer p. 184; ICC Award No. 8324/1995*]. To establish whether the Parties included the application of the CISG, it is crucial to consider the facts of the present case.

63. First, CLAIMANT changed the law governing the contract to the law of Mediterraneo [*C. Ex. 4, p. 17, ¶2*].

64. Second, CLAIMANT never mentioned to RESPONDENT that the application of the law of Mediterraneo would not include the CISG [*PO2, p. 50, ¶16*].

65. Third, CLAIMANT followed the advice of Mr. Langweiler which was based on the assumption that the reference to the law of Mediterraneo would include the CISG [*PO2, p. 50, ¶16*].

66. Due to this alteration, RESPONDENT was convinced that the application of the law of Mediterraneo would include the CISG, and that this convention would govern the Sales Contract including the Arbitration Agreement.

67. Considering the above, it is undeniable that CLAIMANT knew or could not have been unaware of RESPONDENT's true intent to extend the applicability of the CISG to the Arbitration Agreement.

2) A reasonable person of the same kind as RESPONDENT would interpret CLAIMANT's actions as an implied choice of the CISG

68. Even if the Tribunal does not adopt RESPONDENT's reasoning, one must reflect on the criteria of Art. 8 (2) CISG. According to this objective interpretation criteria, the meaning of a statement or other conduct by a Party is determined by the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*Brunner&Hurni&Kissling pp. 93-94; Achilles pp. 267-268*].

69. In this regard, Art. 8 (3) provides the methods and rules for this interpretation. This article provides that due consideration must be given to all circumstances relevant to the interpretation and clarifies that there are no restrictions in this respect, such as negotiations, practices which the parties have established between themselves, any subsequent conduct of the parties, and usages. [*Brunner&Hurni&Kissling, pp. 95-98; Piltz, p. 187; Rock Resource v. Altos Hornos de Mexico; ICC Award No. 9187/1999*].

70. In the present case, CLAIMANT altered the law governing the contract to the law of Mediterraneo [*C. Ex. 4, p. 17, ¶2*]. Any reasonable person of the same kind as RESPONDENT would understand the choice of the law of Mediterraneo, a contracting state of the CISG, as an implied choice of the CISG to apply to the alleged contract, and therefore also to the Arbitration Agreement. If CLAIMANT chose the law of a signatory state of the CISG, its application seems undeniable. Moreover, CLAIMANT never excluded the application of the CISG [*PO2, p. 49, ¶11*].

71. To analyse the practice between the Parties, it is crucial to acknowledge that the contract here in discussion is the first contract celebrated between the Parties, as argued *infra* [¶***75-87***]. Therefore, it cannot be used as an interpretation criterion.

72. Furthermore, when parties want to exclude the application of the CISG, they expressly provide for that exclusion. In the present case, CLAIMANT never

excluded the application of the CISG [*PO2, p. 49, ¶11*]. As the Parties have not excluded the application of the CISG to the Arbitration Agreement, the Tribunal must consider the CISG when applying the Law of Mediterraneo.

73. To conclude, the Arbitral Tribunal does not have jurisdiction to hear this case **(I)** since the GCoS were never included in the contract. Parties have chosen the Law of Mediterraneo instead of the Law of Danubia to apply to these proceedings **(I/A/1)**. This is the case since the Law of Mediterraneo is the law governing the main contract **(I/A/2)**, including the CISG **(II)**. According to the CISG, the Arbitration Agreement was never included in the contract as it was never made available to RESPONDENT.

MERITS

74. Now that RESPONDENT has addressed the lack of Jurisdiction of this Arbitral Tribunal, it will demonstrate that contrary to CLAIMANT's wrongful allegations [*MfC, p. 3, ¶2*], and following a preliminary point **(III)**, a contract was never concluded by the Parties **(IV)**, as they were only in the negotiation stage, and the GCoS were never validly included in the allegedly concluded contract **(V)**.

III. Preliminary issue – There is no practice established between CLAIMANT and RESPONDENT

75. To correctly analyse and judge the case at hand, this Tribunal must acknowledge that there is no practice established between the parties.

76. CLAIMANT's case is based on the sole fact that there is a practice established between CLAIMANT and Southern Commodities which demonstrates the weakness of its position and RESPONDENT will extend on its incorrectness. In fact, CLAIMANT largely and extensively argues that there is a practice established between the parties [*MfC, p. 8, ¶27; p. 10, [A]; p. 11, [B]*] to prove

that a contract was concluded and the GCoS were validly included into the contract.

77. CLAIMANT misinterprets the CISG provisions and mistakes practices as usages. Under the CISG, practices are "*manners of conduct that are regularly observed by the parties to a specific transaction (...). Thus, the individual practice between the parties, rather than the general practice, is decisive*" [*Ferrari, p. 572*]. On the contrary, usages must be observed in at least one branch of the industry while practices, within the meaning of Art. 9(1) CISG, are established only between the parties [*UNCITRAL DG 2016, pp. 63-64, ¶1,7; Ferrari, p. 273, ¶II.1,2; Schlechtriem&Schwenzer, p.370, ¶56; Pamboukis, p. 3, ¶B3*].

78. Moreover, the Tribunal must bear in mind that this is the first contract ever negotiated between CLAIMANT and RESPONDENT. The fact that CLAIMANT had a legal relationship with Southern Commodities is irrelevant for the present case. Southern Commodities is a third party to the negotiations, like RESPONDENT was always a third party to the contracts concluded between CLAIMANT and Southern Commodities.

79. Additionally, the individual practice from Southern Commodities and CLAIMANT in previous contracts must be disregarded, considering that the negotiations taking place entailed a whole new paradigm. In fact, there was a whole new political environment in Equatoriana that inhibited RESPONDENT from acting in accordance with the alleged previous practices. This political environment led to the potential acquisition of different goods (RSPO certified Palm Oil) and to an alteration on the will to submit eventual disputes to arbitration. All these facts were known by CLAIMANT [*Cl. Ex. 1, p. 10, ¶8,11; Cl. Ex. 2, p. 12; Cl. Ex. 5, p. 18, ¶4; Cl. Ex. 6, p. 19; R. Ex. 3, p. 31, ¶5*].

80. On a similar case as the one before this tribunal, the Cour d'Appel de Paris [*Syral Belgium N.V. v. U.S. Ingredients Inc.*] found that the parties could not rely on a practice established between themselves because the goods sold

were different from the ones previously negotiated. Both goods were fabrics but, as in the case before this Tribunal, the fabrics negotiated in said contract had special characteristics that justified the derogation of the practice established between themselves.

81. Furthermore, "*it must be established that similar situations have always been handled by the parties in the same manner and that this has never given reason for complaint by either party*" [*Case OR.960-001*]. In the present case, the objections and complaints have been duly raised by RESPONDENT thus CLAIMANT cannot rely on said practices.

82. Additionally, it must be noted that all the negotiations were led by the Assistants of Mr. Chandra and Ms. Bupati, who albeit duly empowered [*PO2, p. 49, ¶12, l.2*], did not have knowledge of any practice and did not establish any practice between themselves. In fact, Ms. Bupati was the only employee of RESPONDENT that had knowledge of these previous practices [*PO2, p. 51, ¶20, l.3*], considering that she was the only employee from RESPONDENT that had previously concluded contracts with CLAIMANT.

83. The communications between Mr. Chandra and Ms. Bupati only took place in the initial stage of negotiations at the Palm Oil Summit, and in the first email dated 1st April 2020 [*Cl. Ex. 2; p. 12*]. Thereafter, all communications were led by their Assistants. CLAIMANT is wrongfully trying to invoke such alleged practices to bind RESPONDENT into a contract which was never concluded, with an Arbitration Agreement that it never accepted, and GCoS that it had no knowledge of.

84. CLAIMANT also bases the existence of alleged practices on the fact that Ms. Bupati stated that it was good to establish their long-lasting business relationship [*MfC, p. 11, ¶47; C. Ex. 2, p. 12,* ¶2]. Such fact cannot be interpreted as binding practices for RESPONDENT. This statement is to be interpreted in the context of the personal relationship between Mr. Chandra and Ms. Bupati.

85. CLAIMANT also had the intention to vary from the previous practices. In fact, CLAIMANT altered the Arbitration Institution and the law applicable to the contract by including the CISG in the relevant contractual clause.

86. Thus, the goods to be sold were different from previous contracts; the applicable law to the contract was different, by including the CISG; the Arbitration Institution was different from previous contracts.

87. Taking these circumstances into account, it is clear that CLAIMANT cannot rely on an alleged practice between it and Southern Commodities, considering that RESPONDENT and Southern Commodities are two different legal entities. Furthermore, CLAIMANT knew or could not have been unaware that RESPONDENT wished to derive from the previous practices.

IV. The Parties have not concluded a contract

88. RESPONDENT will now demonstrate that contrary to CLAIMANT's false allegations [*MfC, p. 3,* ¶2], a contract was never concluded by the parties, as they were only in the negotiation stage.

89. RESPONDENT does not dispute the fact that the law applicable to the interpretation of contract conclusion is the CISG [*MfC, p. 4, ¶ 1; PO2, p. 52,* ¶33]. However, CLAIMANT wrongly interprets the CISG provisions, and ignores the doctrinal approach that does not suit its case.

90. Thus, contrary to the allegations from CLAIMANT, *the communication from RESPONDENT, dated 1st April 2020, does not meet the requirements of an offer pursuant to Article 14 CISG* **(A)**. In any event, if said communication is interpreted as an offer (*quod non*), alternatively *CLAIMANT's communication dated 9th April 2020 is a counter-offer, which RESPONDENT did not accept* **(B)**.

A) The communication from RESPONDENT, dated 1st April 2020, does not meet the requirements of an offer pursuant to Article 14 CISG

91. Article 14 states that, a proposal for concluding a contract constitutes an offer "*if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance*".

92. In the present case, RESPONDENT submits that the *communication was not sufficiently definite to constitute an offer* **(1)** and *there was no intention from RESPONDENT to be bound in case of acceptance* **(2).**

1) The communication was not sufficiently definite to constitute an offer

93. Article 14 *in fine* provides that "*a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price*". Such provision must be interpreted as stating only the "*minimum requirements*" [*Schlechtriem&Schwenzer, p. 270; Giannini, p. 3*].

94. Thus, "*other elements such as the time and the place of delivery may also be 'essentialia negotii' in the particular case in which* ***previous negotiations*** (...) *show that an offer must specifically refer to such additional details*" (emphasis added) [*Giannini, p. 3*]. That means that a communication that indicates the goods, quantity, and price, does not meet the requirements of Article 14 CISG if other elements are seen by the parties as essential for contract conclusion [*Schlechtriem&Schwenzer, p. 282*].

95. To interpret the parties' intentions and communications the interpretation criteria of the CISG must be used, as already argued [¶***61-62*** *and* ¶***68-69***]. Therefore, one must firstly follow the subjective criteria set forth in Article 8 (1) CISG. In the present case, the dispute resolution clause, which was not accepted by RESPONDENT, is an essential detail of the contract. CLAIMANT knew, and could not have been unaware, that RESPONDENT did not want to submit eventual disputes to Arbitration [*Cl. Ex. 1, p. 10, ¶8,11; Cl. Ex. 2, p. 12; Cl. Ex. 5, p. 18, ¶4; Cl. Ex. 6, p. 19; R. Ex. 3, p. 31, ¶5*].

96. In fact, the records shows that RESPONDENT expressly told CLAIMANT that it "could eventually be necessary to adapt some of the "*legal*" *terms which had been used in the previous contracts (…) in particular the dispute resolution mechanism given the wide-spread hostility to arbitration in Equatoriana*" [*Cl. Ex. 1, p. 10, ¶11*].

97. Furthermore, upon receiving the communication dated 1st April 2020 [*Cl. Ex. 2, p. 12*], RESPONDENT expressly reiterated its position, by stating that the submission to arbitration was a problem for RESPONDENT, considering the political environment in Equatoriana.

98. Thus, in light of the above, the agreement on the dispute resolution mechanism, being an essential term for RESPONDENT, which CLAIMANT knew and could not have been unaware, was a prerequisite for the offer to be considered definitive pursuant to article 14 CISG.

99. Following the subsidiary objective criteria and considering the negotiations and the letter of the email, a reasonable person of the same kind as CLAIMANT, would know that the agreement on the dispute resolution method was essential, and a prerequisite for the definitiveness of the proposal.

2) There was no intention to be bound in case of acceptance

100. Furthermore, due to the non-agreement on the *supra* referred terms, the only possible conclusion is that RESPONDENT had no intention to be bound in case of acceptance.

101. As CLAIMANT correctly points out "*the intention to be bound in case of acceptance marks the borderline between the stage of non-binding negotiations and binding commitment*" [*MfC, p. 6, ¶13, l. 3*].

102. In order to conclude that there is an intention to be bound, the "*offer must make it clear that, if accepted, the offeror intends to be bound otherwise there is in law no offer at all but just an invitation for the addressee to make an offer or to start bargaining*" [*Gianinni, p. 2*].

103. Following the subjective criteria provided in Article 8 (1) CISG used for interpretation of the parties' conduct, CLAIMANT knew and could not have been unaware that RESPONDENT had no intention to be bound.

104. In fact, as many times stated, RESPONDENT had serious problems in submitting eventual disputes to Arbitration and wished to make sure that the goods delivered were RSPO Certified. As already argued [*supra* ¶***75-87***], the practices established between Southern Commodities and CLAIMANT do not bind RESPONDENT and shall not be used to interpret the content of the alleged proposal.

105. RESPONDENT made it clear in every communication with CLAIMANT [*Cl. Ex. 1, p. 10, ¶11; Cl. Ex. 2, p. 12, ¶6; Cl. Ex. 5, p. 18, ¶5; R. Ex. 2, p. 30, ¶4*] that there were additional issues to be discussed, not only regarding the legal terms of the agreement, but also in relation to the RSPO Certification. Even if the subsidiary objective criteria set forth in Article 8 (2) CISG was followed, a reasonable person the same kind as CLAIMANT would understand that RESPONDENT had no intention to be bound without the full agreement of these terms.

106. Moreover, CLAIMANT argues that "*CLAIMANT signed CONTRACT in order to prove his intent to be bound by it*" [*MfC, p. 8, ¶24, l. 3*]. Mirroring such an argument, unlike CLAIMANT, RESPONDENT never signed the contract, thus, it had no intent to be bound by it.

107. Furthermore, following the explanation of reputed scholars on this issue, if a contractual term is considered essential for contract conclusion, no intention to be bound can be inferred in case of acceptance. On that basis, "*Where the parties regard such additional details as material, a proposal omitting them may have been made without intention to be bound*" [*Schlechtriem&Schwenzer, p. 272; Case 2R 23/02y*]. RESPONDENT will further demonstrate infra [¶***112-118***] that the submission of eventual disputes to Arbitration is a material alteration.

B) Alternatively, CLAIMANT's communication dated 9th April 2020 constitutes a counter-offer pursuant to article 19 CISG

108. Article 19(1) CISG provides that "*A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer*"

109. As such, CLAIMANT is correct when it states that "*The terms of the acceptance shall fully correspond to those of the offer to count as an acceptance and lead to the conclusion of the proposed contract*" [*MfC, p. 7, ¶20*].

110. In the present case, the alleged offer from RESPONDENT was answered in the communication from CLAIMANT dated 9th April 2020. In said communication, CLAIMANT added conditions that were not accepted by RESPONDENT, such as the Arbitration Agreement and GCoS that were never made available to RESPONDENT. Thus, *CLAIMANT's additions materially alter the terms of the alleged offer* **(1)** which *RESPONDENT did not accept* **(2)**

111. Contrary to CLAIMANT's allegations, the practice between Mr. Chandra and Ms. Bupati was that "*if the terms of my* [Ms. Bupati] *offer were acceptable to him* [Mr. Chandra] *he would prepare the necessary contractual documents and send them to me for* ***acceptance*** *and signing*" (emphasis added) [*R. Ex. 3, p. 31, ¶3*]. Therefore, according to said practice an act of acceptance would take place **after** the contractual documents had been received. In the present case, it never happened.

1) CLAIMANT's additions materially alter the terms of the alleged offer

112. Article 19 (2) CISG provides that a "*reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance*".

113. In the present case, CLAIMANT's response contained additions to the alleged offer, and those additions materially alter the terms of the agreement, as RESPONDENT will demonstrate.

114. Material alterations are "*changes to terms of an offer which affect the significance of the offer under article 8 CISG*" [*Giannini, p. 13*]. Article 19 (3) provides some examples that are considered to materially alter the terms of the agreement, such as the "*settlement of disputes*".

115. In the present situation, the additional term CLAIMANT added in the GCoS, that was not known to RESPONDENT, was precisely an Arbitration Agreement. Such addition by CLAIMANT amounts to a material alteration [*Farnsworth, pp. 71,179; Honnold, p. 186*], thus a counter-offer. Furthermore, several courts have found that an alteration regarding the addition of an arbitration agreement is always deemed as a material alteration [*Printed Goods Case; S.A. Les Verreríes de Saint-Gobain v. Martinswerk GmbH; Belcher-Robinson, L.L.C. v. Linamar Corporation, et al.; Solae, LLC v. Hershey Canada, Inc.*].

116. RESPONDENT always stated, during the negotiation process, its problem in submitting eventual disputes to arbitration as well as the importance of the RSPO Certification. In fact, there was a whole new political environment which made the submission of eventual disputes to arbitration very difficult for RESPONDENT. Furthermore, with the new environmental concerns, and considering that RESPONDENT is one of the "*darlings of the supporters of a green economy*" [*R. Ex. 1, p. 29, ¶1*], the RSPO certification played a major role.

117. CLAIMANT alleges that these terms were not different considering a practice established between Southern Commodities and CLAIMANT which, as already proved in **(III)**, does not bind RESPONDENT.

118. Such addition may only be interpreted as a material alteration to the original terms, that is, a counter-offer.

2) RESPONDENT did not accept CLAIMANT's counter-offer

119. According to Article 18 CISG "*A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance*"

120. In light of such provision, acceptance may either be done by an express statement, or by conduct [*Murray, p. 7; Gianinni, p. 10; Schlechtriem&Schwenzer, p. 332*]. In the present case, the Tribunal will find that there was no acceptance by statement nor conduct.

121. In fact, in interpreting the communication from RESPONDENT [*R. Ex.2, p. 30*], using the primary subjective criteria set forth in Article 8 (1), CLAIMANT knew and could not have been unaware that contract conclusion was dependent on the agreement on the dispute resolution method and on the guarantees regarding RSPO Certification.

122. In fact, Ms. Fancouniere expressly states: "*There are also two other issues where I would suggest changes to the existing terms of the contractual documents to take into account particularities of JAJA Biofuel's present situation*". Such assertion by Ms. Fancouniere clearly shows that there were additional terms that altered the terms of the agreement materially as argued *supra* **(1)**, to which an agreement was essential for contract conclusion.

123. Furthermore, there was no conduct from RESPONDENT from which one could infer any type of acceptance, on the contrary.

124. As there is no practice established between the parties [*supra* ¶***75-87***] that derogates the provisions of the convention, RESPONDENT's silence cannot be interpreted as contractual acceptance. In fact, pursuant to article 18 (1) CISG *in fine* "*silence or inactivity does not in itself amount to acceptance*". Thus, the fact that RESPONDENT did not raise any objections within a week is irrelevant.

125. As such, this Tribunal must render that there is no practice established between the parties in dispute and that there was no contract conclusion, considering that there was no offer **(A)**, and even if there was (*quod non*), CLAIMANT has rejected it **(B)**, by adding material modifications which RESPONDENT did not accept.

V. If the Tribunal considers that a contract was concluded (*quod non*), the General Conditions of Sale were not validly included into the contract

126. The RESPONDENT will evidence in this section that for the incorporation of standard terms to be effective under the CISG, specific criterion must be met. Firstly, the offeror must make the standard terms text available to the offeree and secondly, the offeror must make a reference to the standard terms and the offeree must have reasonable awareness of its text, pursuant to Art. 8 (1), (2) and (3) CISG [*Schlechtriem&Schwenzer, pp. 517, 518, ¶48-52]*. This will be expanded upon below.

127. Contrary to CLAIMANT's allegations [*MfC, pp. 14-16, ¶65,69*], RESPONDENT will demonstrate that the GCoS were not validly included into the concluded contract since *RESPONDENT never agreed with the incorporation of the GCoS as they were never made available to it* **(A)** and in the current case, *there is no implied incorporation of the GCoS into the concluded contract (quod non)* **(B)**.

A) RESPONDENT never agreed with the incorporation of the GCoS as they were never made available to it

128. According to the CISG, the inclusion of standards terms in a contract is determined under the rules for the formation and interpretation of contracts. For the standard terms to be included, parties must expressly or impliedly agree on their inclusion at the time of the formation of the contract and the other party must have a reasonable opportunity to take notice of the terms [*CISG Advisory Council Opinion No. 13; Kröll ET AL, p. 167, ¶41; Schlechtriem&Schwenzer, p. 372, ¶62]*.

129. Turning to the requirements related to interpretation, pursuant to Art. 8 (1), (2) CISG, a reference by the offeror to the standard terms is required along with a reasonable awareness of its text by the offeree. In other words, any statement or conduct of the offeror is to be interpreted according to the

understanding that a reasonable person of the same kind as the other party would have had [*CISG Advisory Council Opinion No.13; Schlechtriem&Schwenzer, p. 372 ¶62; Staudinger ET AL, Art 8, ¶4-6; UNCITRAL DG 2016, p. 75, ¶11*].

130. CLAIMANT failed to address and demonstrate this first requirement, by stating that, the mere fact that Mr. Chandra (representative of CLAIMANT) informed Ms. Bupati (representative of RESPONDENT) at the SUMMIT is proof of his intention to subject the contract to the standards terms, and therefore binds the applicability of the GCoS to the contract [*MfC, p. 14, ¶59,62*]. However, the intent of including the GCoS into a contract, without making the respective text available, is inconceivable under any possible understanding of a reasonable person of the same kind, according to Art. 8 CISG.

131. Thus, RESPONDENT will prove that *CLAIMANT did not comply with "the making available" test* **(1)**, which applies pursuant to Art. 8 (2), (3) and Art. 14 of the CISG, and that *CLAIMANT's GCoS were not easily accessible online* **(2).**

1) CLAIMANT did not comply with the "making available" test

132. The rationale behind this test consists of the offeror ensuring that the offeree is aware of the text of the standard terms, which the offeror intended to incorporate into the contract. In other words, this means that it is incumbent on the offeror to make the standard terms part of its offer, and it is not the offeree's duty to enquire about their content [*Schlechtriem&Schwenzer, p. 517, ¶48; Staudinger/Magnus, Art 14, ¶48; Mittmann, pp. 103-105; Rubber sealing members case; Machinery Case*].

133. Pursuant to Art. 8 (2), (3) and Art. 14 CISG, it is abundantly supported that for the incorporation of standard terms into international sales contracts, CLAIMANT was required to send the text of the GCoS or make it otherwise available to RESPONDENT [*CISG Advisory Council No. 13, Eiselen; Schlechtriem&Schwenzer, pp. 517, 518, ¶50-57; Machinery Case; Takap B.V. v. Europlay S.r.l; Material for metal covers case; Feinbäckerei Otten GmbH &*

Co. KG v. Rhumveld Winter & Konijn B.V.; Heat allocators case; Kapiteyn B.V. v. Kurt Weiss Greenhouses Inc.; Roser Technologies, Inc. v. Carl Schreiber GmbH].

134. CLAIMANT's allegations have no legal basis since RESPONDENT has no obligation to ask for CLAIMANT's GCoS under the CISG [*Schlechtriem&Schwenzer, p. 312, 518, ¶83*]. Moreover, CLAIMANT relies on the fact that by having informed RESPONDENT, at the SUMMIT, that it wanted the contract to be subjected to its GCoS, they should be applicable [*MfC, p. 16, ¶74*]. CLAIMANT's allegations are contradictory on this point.

135. On the one hand, RESPONDENT would only be sufficiently aware of the standard terms if the full text was made available in the offer, which never happened. On the other hand, CLAIMANT stated that the offer was only made in April 2020 [*MfC, p. 14, ¶62*]. Following this logic, any possible understanding of a reasonable person of the same kind back to the SUMMIT is precluded.

136. Furthermore, a reference to the inclusion of standard terms is considered to be clear to a reasonable person of the same kind when they are readable and understandable [*CISG Advisory Council Opinion No.13*]. Thus, CLAIMANT's alleged reference at the SUMMIT, along with the wording of the accompanying letter, do not fulfill these requirements as the text of the GCoS were never made available to RESPONDENT [*Cl. Ex. 4, p. 17; CISG Advisory Council Opinion No.13; Schlechtriem&Schwenzer, p. 518, ¶51-54*].

137. Alternatively, it would suffice, for example, that CLAIMANT's GCoS be made available through an attachment to an email that contains the offer [*Schlechtriem&Schwenzer, p. 518, ¶51*]. This never happened in the present case.

138. Contrary to CLAIMANT's allegations, on April 1st, 2020, RESPONDENT did question CLAIMANT on whether the documents for the sale of palm oil would be comparable to those for the sale of palm kernel, previously known to

RESPONDENT [*Cl. Ex. 2, p. 12*]. Moreover, RESPONDENT also stated, "*As already indicated at the Summit, the submission of the sales contract to Mediterranean law (…) is less a problem for us than the submission to arbitration*…" [*Cl. Ex. 2, p. 12*]. Nevertheless, CLAIMANT stated that the only change made to the previous template was the governing law of the sale contract, but still did not provide an attachment with the GCoS [*Cl. Ex. 4, p.17*].

139. Therefore, it is undisputed that RESPONDENT never agreed with the amended version of the GCoS as CLAIMANT never made them available, and therefore did not comply with the requirements of the "*making available test*".

2) CLAIMANT'S GCoS were not easily accessible online

140. Following the rationale of the "*making available test*", the GCoS text may be otherwise made available to the offeree. CLAIMANT stated that "*it is acknowledged that international sales contracts can be concluded by electronic means*" [*MfC, p. 15, ¶68*]. However, CLAIMANT failed to address that it is necessary to distinguish between two different scenarios of contract conclusion.

141. The first scenario consists of the sales contract being concluded over the internet (e.g., through an electronic order form submitted via an internet homepage). In this scenario, it would be sufficient for the standard terms text to be made available for download via a hyperlink on the homepage [*Schlechtriem&Schwenzer, p. 519, ¶55-56*]. However, access to the GCoS must be arranged in a way that makes it easy for a reasonable person of the same kind as the other party in the same circumstances to find and download it, pursuant to Article 8 (2) CISG [*CSS Antenna, Inc. v. Amphenol-Tuchel Electronics GmbH Case; Schlechtriem&Schwenzer, p. 519, ¶56-57*]. This never happened in the current case considering that, a hyperlink was never sent to RESPONDENT and the contract was being concluded via email, not over a form via internet homepage.

142. The second scenario consists of the sales contract being concluded via individual emails [*Schlechtriem&Schwenzer, p. 519, ¶56; Pilar Perales, p. 377, ¶33*]. Even though this is the applicable scenario in the current case, the requirement that the offeror's email contain a hyperlink leading to the standard terms text is not met [*Scheldebouw B.V. v. Hero Glas GmbH Case; Schlechtriem&Schwenzer, p. 519, ¶56-57*].

143. Furthermore, the burden of proof for the accessibility of the standard terms over the internet as well as for the fact that they can be downloaded and printed lies with CLAIMANT [*Pamboukis, pp. 3-5 ¶B3-7; Schlechtriem&Schwenzer, p. 519, ¶56-57*]. This is because it is CLAIMANT who relies on the incorporation of the standard terms into the contract.

144. Moreover, it is accordingly CLAIMANT who bears the burden of proof for RESPONDENT's awareness of the GCoS by requiring a confirmation (e.g., the so-called "click-wrap") before an order can be placed over an internet website [*Dried onions case; Dutch-Italian sales contracts case; Schlechtriem&Schwenzer, p. 519, ¶56-57*].

145. Therefore, contrary to CLAIMANT's allegations, the GCoS were not easily accessible online [*PO2, p. 50, ¶18*] as RESPONDENT never received any hyperlink via email referring to the text of the standard terms.

B) There is no implied incorporation of the GCoS into the concluded contract (quod non)

146. As supra demonstrated by RESPONDENT, CLAIMANT failed to fulfill the requirements of the "*making available test*" which naturally led to RESPONDENT's unawareness of the standard terms text. Moreover, CLAIMANT´s "*plan B*" consists of demonstrating that RESPONDENT impliedly agreed with the incorporation of the GCoS through a practice established between the parties.

147. Therefore, RESPONDENT will prove that *the requirements for an implied incorporation of the GCoS into the concluded (quod non) contract are not*

met **(1)**, and that, contrary to CLAIMANT's allegations, *RESPONDENT could not have been aware of the GCoS content as the knowledge of Southern Commodities must not be attributed to RESPONDENT* **(2)**.

1) The requirements for an implied incorporation of the GCoS into the concluded contract (quod non) are not met

148. CLAIMANT relies on the fact that the standard terms have been used in prior agreements between the Parties and by that they were available at the time of the contract conclusion (quod non) [*MfC, p. 16, ¶71*]. However, RESPONDENT's awareness of the GCoS can only be assumed under the condition that the terms have been validly incorporated into the sales contract between the Parties.

149. Moreover, the Tribunal must consider that this is the first contract between CLAIMANT and RESPONDENT and that the standard terms used in prior agreements were different from the amended version CLAIMANT advocates for. Therefore, none of the Parties had to be aware of standard terms that never became legally binding in the legal relationship in this case [*Schlechtriem&Schwenzer, p. 519, ¶58*].

150. Furthermore, CLAIMANT once again stated that RESPONDENT should have asked for the text of the standard terms. However, the Tribunal must bear in mind that this is not a question of merely indicating to the other party that the GCoS will be applicable to the contract. CLAMAINT bears the burden of proof [*supra p. 31, ¶143*], although RESPONDENT has clearly questioned the content of the standard terms [*supra p. 30, ¶138; Cl. Ex. 4, p. 17*].

151. Moreover, practices are conducts that occur during a certain period and that will be observed again in a similar instance between the parties [*UNCITRAL DG 2016, p. 64 ¶7*]. In the current case, not only is the first contract negotiated between the Parties, but it is also the first time that the Parties deal with palm oil goods. Therefore, this is not a similar instance when comparing

to past negotiations between CLAIMANT and Southern Commodities where the subject was palm kernel oil.

152. Alternatively, an outer time limit can be derived from Art. 39 (2) CISG, since this provision's purpose is to enable the Parties to "*finally regard the transaction as finished*" when two years have passed. This general rationale means that no party has to be aware of the other party's standard terms once two years have passed since the last contract subjected to these terms was concluded [*Schlechtriem&Schwenzer, p. 520, ¶59-60*].

153. In the current case, not only two years have lapsed from the previous contract concluded between CLAIMANT and Southern Commodities (not RESPONDENT) but also no previous contract was subject to the new 2020 version of the GCoS [*PO2, pp. 48-49, ¶8*].

154. Therefore, the requirements for an incorporation through practice established between the parties are not met.

2) RESPONDENT could not have been aware of the content of the CLAIMANT's GCoS as the knowledge of Southern Commodities must not be attributed to RESPONDENT

155. The Tribunal must be aware that even though RESPONDENT is a subsidiary company of Southern Commodities, it remained an independent legal entity after the acquisition [*PO2, p. 48, ¶4; J. Sagar Associates; Derains; Fogt*]. Moreover, Southern Commodities has no palm oil activities on its own [*PO2, p. 48, ¶6*]. Nevertheless, all prior agreements concerned palm kernel oil goods. Furthermore, it is only the first time that RESPONDENT concluded a contract with CLAIMANT as there had been no negotiations with Ms. Bupati in her new role of head of purchasing by RESPONDENT since 2018. Therefore, the Tribunal must indeed be aware that this is the first contract between the parties.

156. Contrary to CLAIMANT's allegations, the new amended version of the GCoS could never have been sent to RESPONDENT, as the amendments to the arbitration clause were only made in November 2020 [*PO2, p.50, ¶15*].

Therefore, the requirements for valid incorporation of the standard terms are not met as RESPONDENT could not have been reasonably aware of their content [*supra p. 29, ¶136]*.

157. Thus, CLAIMANT once again failed to analyse the requirements for a valid incorporation of the GCoS to the (quod non) concluded contract [*MfC, p. 16, ¶74*]. Otherwise, if by merely communicating the intention of applying standard terms to a contract, parties would be bound to any unknown content which will lead to high numbers of consequent breaches of contracts.

158. To conclude, RESPONDENT have never agreed with the incorporation of the GCoS as they were never made available and there is no practice established between the parties due to lack of fulfilled requirements.

159. Contrary to CLAIMANT's allegations, there is no practice established between CLAIMANT and RESPONDENT **(III)**. Thus, it should be clear for the Honourable Members of this Tribunal that the Parties never concluded a contract **(IV)**. Alternatively, if this Tribunal considers that the Parties have concluded a contract, which RESPONDENT respectfully disagrees, the Tribunal must decide that the GCoS were not validly included into the alleged contract **(V)**.

REQUEST FOR RELIEF

In light of the submission above, counsel for RESPONDENT respectfully invites the Tribunal to declare that:

I. the Arbitral Tribunal does not have jurisdiction to hear the case;
II. the Parties never concluded a contract, as they were only in the negotiation stage;
III. Alternately, if the Tribunal considers that a contract was concluded (*quod non*), the GCoS were not validly incorporated as they were never made available to RESPONDENT.

In addition, counsel for RESPONDENT respectfully invites the Tribunal to order CLAIMANT to bear the costs of the Arbitration and cover RESPONDENT's legal fees.

CERTIFICATE

We hereby confirm that only the persons whose names are listed below have written this memorandum.

Mafalda Estácio

Guilherme Pina Cabral

Mafalda Vila Nova

Paulo Queirós