TWENTY FOURTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

On Behalf Of:

Wright Ltd
232 Garrincha Street
Oceanside, Equatoriana

CLAIMANT

Against:

SantosD KG
77 Avenida O Rei
Cafucopa, Mediterraneo

RESPONDENT

COLUMBIA LAW SCHOOL

LUKE BUDIARDJO • WENDY CAI • ERIC IVES

KATE LEE • MATTHEW LIPTROT • JOE MARGOLIES • ALIZA RANA

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TABLE OF ABBREVIATIONS

Ans.	Answer
Art.	Article
Arb.	Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Claim(ant)
Com.	Comment
Comm.	Commencement
Ex.	Exhibit
Req.	Request
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
No(s).	Number(s)
Ord.	Order
PCA	Permanent Court of Arbitration
Proc.	Procedural
Pres.	President
Resp.	Respondent

SOC	Statement of Claim
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollars
VIAC	Vienna International Arbitral Centre

STATEMENT OF FACTS

1. Wright Ltd ("**Claimant**") is a highly specialized manufacturer of fan-blades for jet engines, incorporated in Equatoriana. SantosD KG ("**Respondent**") is a manufacturer of jet engines, incorporated in Mediterraneo. Both Claimant and Respondent were subsidiaries of Engineering International SA, a multinational business active in various fields of engineering. During June 2010, Claimant was sold to Wright Holding PLC. In July 2010, Respondent was sold to a private equity firm.

2. Throughout 2010, Claimant and Respondent were in negotiations to jointly develop a new model TRF 192-I fan blade that would lead to considerable noise reduction in jet engines. Respondent was also negotiating with a prestigious world renowned aircraft manufacturer, Earhart SP ("Earhart"). In order to offer a price for its jet engines to Earhart, Respondent insisted on fixing a maximum price on the fan blades that it was going to buy from Claimant. At this time, the actual production cost of the blades was unknown.

3. On 1 August 2010, Claimant and Respondent concluded a Development and Sales Agreement (the "Agreement"). Respondent contracted to purchase a minimum of 2,000 fan blades with a firm intention to purchase further units in subsequent years from Claimant for a price per blade between US $9,975 to US $13,125. The actual production cost of the fan blades was still unknown, so the price range reflected an estimate of the cost per blade adding on a profit between 0 to 5% percent. The higher the production costs, the lower the profits. If the production costs per blade exceeded US $13,125, then Claimant would make a 0% profit or suffer a loss. At this time, Claimant estimated that the production costs per blade would be around EQD 20,000 (Equatorianian Denar). Given the largely stable exchange rate that fluctuated between US $1 = EQD 2.00 and US $1 = EQD 2.02 over the past three years, the estimated cost per blade would be around US $10,000.

4. Section 21 of the Agreement contained a clause committing parties to settle disputes in Vindobono, Danubia, conducted "under the Rules of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("CAM-CCBC"). The clause also includes a provision guaranteeing "each party [the right] to initiate arbitration proceedings within 60 days after the failure of the negotiation".

5. Soon after the Agreement was signed, Respondent's separate purchase of clamps for the fan blades from another producer fell through. On 24 October 2010, Claimant agreed to provide the clamps to Respondent. Respondent suggested adding an addendum to the original Agreement,

which Claimant acquiesced to as well. The addendum was added to the contract on 26 October 2010. The addendum specified that Respondent could order 2,000 clamps which would be paid for in US $ with a fixed exchange rate of US $1 = EQD 2.01.

6. Claimant delivered 2,000 fan blades and clamps on 14 January 2015 attached with two invoices for the goods with prices of US $20,438,560 and US $183,343.28. On 15 January 2015, Respondent confirmed payment of US $20,438,560 for the fan blades and US $183,343.28 for the clamps.

7. Immediately after receiving that confirmation, Claimant realized that the price provided in the invoice for the fan blades was incorrect. The person who had prepared the invoice accidentally applied the fixed exchange rate noted in the addendum to both the prices of the clamps and the fan blades. Instead, the price of the fan blades were supposed to be based on actual production costs, and therefore calculated using the current exchange rate.

8. Immediately, Claimant informed Respondent that the price due for the fan blades was US $22,723,800 based on the cost per fan blade of EQD 19,586, which translated to US $ 10,941.90 using the current exchange rate of US $1 = EQD 1.79 instead of the lower price of US $9,744.28 per fan blade that Respondent paid. As a gesture of goodwill, Claimant offered to bear any additional costs that would result from the additional transfer.

9. On 29 January 2015, US $20,336,367.20 was credited to Claimant's account at the Equatoriana National Bank, Claimant notified Respondent of the deficient payment on 9 February 2015. Respondent responded on 10 February 2015 denying a deficiency in payment for the fan blades and a lack of knowledge regarding why US $102,192.80 had been deducted from the US $20,438,560 that Respondent had originally transferred.

10. Claimant inquired into the deduction. The Equatoriana Central Bank indicated that a 0.5% levy was deducted as per an Equatoriana anti-money laundering levy, specified in Section 12 of the Regulation.

11. As a gesture of goodwill, Claimant made several offers for a reduction in the sales prices for the 2,000 fan blades with a firm commitment for further fan blades to be delivered within the next five years. Respondent did not agree, and insisted on the use of the fixed exchange rate for the delivered fan blades. Confirming the failed negotiations on 1 April 2016, Claimant notified Respondent that it would initiate arbitration proceedings to resolve the conflict. On 31 May 2016, CAM-CCBC received a request for arbitration from Claimant against Respondent.

SUMMARY OF ARGUMENT

PART 1: CLAIMANT'S CLAIMS HAVE BEEN SUBMITTED IN TIME AND ARE ADMISSIBLE

The chosen law and the procedural rules provide a firm basis that Claimant has submitted its claims within an appropriate limitation period and that these claims are therefore admissible to be heard by the tribunal. The UNIDROIT Principles apply to the Agreement and do not allow limitation periods of less than one year in arbitral agreements. By initiating arbitration in accordance with Article 4.1 of the CAM-CCBC Rules, Claimant has asserted a right against Respondent therefore suspending the running of the limitation period. Moreover, Claimant fulfilled the underlying purpose of the arbitration clause by putting Respondent and the CAM-CCBC on notice.

PART 2: THE TRIBUNAL SHOULD REQUIRE FULL PAYMENT CALCULATED USING THE EXCHANGE RATE AT THE TIME OF PRODUCTION AND DELIVERY

The CISG ensures that Respondent must pay the full price for the fan blades, as required by the contract. The facts and circumstances of the case dictate that the contract should be interpreted to mean the Claimant is owed payment at the price set by the exchange rate at the time of delivery. Both the objective and subjective intentions of the parties shows the parties' intention to use the exchange rate at the time of delivery. Finally, the UNIDROIT principles also support Claimant's recovery of the price determined by the exchange rate at the time of production.

PART 3: THE TRIBUNAL SHOULD REQUIRE RESPONDENT TO BEAR THE COST OF THE MC/2010C LEVY

Respondent must pay the levy due to its obligations under the Development and Sales Agreement ("the Agreement") and under Articles 53, 54, and 57 CISG, which govern the Agreement. Thus, Claimant is entitled to specific performance under Articles 61 and 62 of the CISG and the Article 28 CISG limitations on specific performance are not applicable here. The Article 79 CISG exemption from liability for failure to perform does not prevent the seller from seeking specific performance.

PART 4: RESPONDENT'S REQUEST FOR SECURITY FOR COSTS IS INAPPROPRIATE AND FALLS OUTSIDE THE GRANTED POWERS OF THE TRIBUNAL

Neither the Terms of Reference, nor the CAM-CCBC rules applicable to this arbitration grant the tribunal the power to order Security for Costs. An order of security for costs does not fall under the "provisional measures" that the tribunal can grant under CAM-CCBC Article 8.1. Even if the tribunal finds that it does have the power to grant Respondent's request, Respondent has failed put forth credible evidence that Respondent's request is proper.

PART 1: CLAIMANT'S CLAIMS HAVE BEEN SUBMITTED IN TIME AND ARE ADMISSIBLE

1. Respondent asserts that Claimant has submitted its claim in an untimely manner, but this is not the case. The Agreement identifies the UN Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles as the chosen law for the contract of sale and the Rules of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) as the procedural rules governing all disputes arising out of the contract. The chosen law and the procedural rules provide a firm basis that Claimant has submitted its claims within an appropriate limitation period and that these claims are therefore admissible to be heard by the tribunal. In the first case, the UNIDROIT Principles prevent the Agreement from shortening the limitation period to less than one year **(I)**. Alternatively, Claimant commenced arbitration both in good faith and according to the CAM-CCBC Rules, which suspended the running of the limitation period pursuant to the UNIDROIT Principles **(II)**.

I. Limiting the period to initiate arbitration to 60 days is against UNIDROIT Principles, which govern the contract.

2. Section 21 of the Agreement provides that, if no settlement can be reached, the mechanism for dispute resolution shall be arbitration initiated within 60 days after the failure of negotiations, which Claimant acknowledges to have occurred on 1 April 2016. [*Cl. Ex. 2*; *Resp. Ex. 3*]. Section 20 stipulates that the Agreement is "governed by the [CISG]" and by the UNIDROIT principles for "issues not dealt with by the CISG." [*Cl. Ex. 2*]. The CISG does not apply time requirements to limitation periods of arbitration, but requires such periods to conform with all law applicable to a contract of sale **(A)**. The UNIDROIT Principles apply to the Agreement and do not allow limitation periods of less than one year in arbitral agreements **(B)**.

A. The CISG requires limitation periods to conform with law applicable to the Agreement, here including the UNIDROIT principles.

3. Although CISG does not discuss limitation periods, the Convention on the Limitation Period in the International Sale of Goods (CLP), which was harmonized with the CISG in 1980, "may be functionally seen as a part of the CISG." [*UNCITRAL*, *NY Convention*]. Under Article 22(3) of the CLP, parties may limit the period for initiating arbitration to less than four years, "provided that such clause is valid under the law applicable to the contract of sale." [Art. 22(3) *CLP*]. Limitation of the arbitration period is therefore valid under the CISG, but *only if valid under the law the parties deemed applicable to the Agreement*. Here, that law includes the UNIDROIT principles.

4. Scholar Hans Smit notes that "Art. 22(3) thus seems to be wedded to the notion, prevalent in civil law countries, that limitation problems are problems of substance that are to be resolved under substantive law applicable to the contract of sale." [*Smit* 346]. This accords with commentary on the CAM-CCBC rules, which suggests those procedural rules yield to the applicable substantive law [Wald et al. 66]. The Agreement clearly indicates that conditions not stipulated by the CISG will be governed in accordance with the UNIDROIT Principles, making UNIDROIT "law applicable to the contract of sale," under the CLP. The limitation period in the Agreement must therefore be valid under UNIDROIT in order to "follow [the] spirit" of the CLP and, by extension, the CISG [*Id*.].

B. The UNIDROIT Principles require that the limitation period for initiating arbitration not exceed one year.

5. While Claimant and Respondent were free to modify the general limitation period on arbitral proceedings under the CLP to less time than the standard four years, the CLP requires the limitation period to be valid under the law applicable to the Agreement. The parties expressly made UNIDROIT applicable to the Agreement. The limitation period in the arbitration clause must, therefore, accord with UNIDROIT Principles. If the tribunal declines to look to the CLP, UNIDROIT undeniably still applies under Section 21 of the Agreement [*Cl. Ex. 2*].

6. Shortening the limitation period to 60 days does not accord with the UNIDROIT Principles. UNIDROIT Article 10.2 governs limitation periods in contracts. The general limitation period is "three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised" [Art. 10(2) *UNIDROIT*]. The parties may modify the limitation period pursuant to Article 10.3 of UNIDROIT, but according to Article 10.3(2), parties may not "shorten the general limitation period to less than one year." [Art. 10(2)(3) *UNIDROIT*]. By shortening the time to initiate arbitration to only 60 days, the Agreement invalidly limited the period for initiating proceedings. Following the UNIDROIT Principles, Claimant should have until 31 May 2017 to initiate arbitration proceedings. Therefore, submitting the Commencement of Arbitration to the CAM-CCBC on 31 May 2016 and amending the claim on June 7 2016 falls within the shortest permissible limitation period.

<u>II. Even if the period for initiating arbitration were limited to 60 days, Claimant commenced arbitration in good faith and in accordance with the CAM-CCBC Rules and the Agreement before the time elapsed, suspending the running of the limitation period pursuant to UNIDROIT Principles and the CLP.</u>

7. Respondent argues that Claimant's notification was inadequate because the Power of Attorney form issued from Wright Holding rather than Wright Ltd, and the Registration Fee had not been paid in full. These, however, are not adequate grounds to terminate the right to recourse through arbitration. Even if the limitation period were rightly set to 60 days, Claimant's Power of Attorney was adequate, and a clerical error in paying the full Registration Fee should not bar Claimant from arbitration. Claimant's Power of Attorney was sufficient to commence arbitration under Article 4.1 of the CAM-CCBC Rules, and partial payment of the Registration Fee does not preclude the CAM-CCBC from recognizing Claimant's assertion of a right against Respondent.

8. By initiating arbitration in accordance with Article 4.1 of the CAM-CCBC Rules, Claimant has performed an act recognized by the CAM-CCBC as asserting a specific right against Respondent, suspending the limitation period **(A)**. Moreover, Claimant fulfilled the underlying purpose of the arbitration clause by putting Respondent and the CAM-CCBC on notice **(B)**.

<u>A. Claimant initiated arbitration in accordance with CAM-CCBC Article 4.1, which is sufficient to toll the limitation period.</u>

9. Claimant put the CAM-CCBC on notice by satisfying the requirements of Article 4.1, suspending the limitation period according to CLP Article 14.1 and UNIDROIT Article 10.6. Article 4.1 of the CAM-CCBC Arbitration Rules requires that "the party desiring to commence an arbitration will notify the CAM-CCBC" of its intent [Art. 4(1) *CAM-CCBC Rules*]. Article 4.1 of the CAM-CCBC Rules requires "a document that contains the arbitration agreement," "a power of attorney," a "summary statement of the matter" in dispute, "the estimated amount in dispute," the names of the parties involved, and a statement of the seat, language, law or rules of law applicable [Art. 4(1) *CAM-CCBC Rules*]. According the Order of the President of the CAM-CCBC, "the requirements set forth in Article 4.1" are dispositive in initiating arbitration. [*Pres. Ord.* ¶ 2]. Claimant's Request for Arbitration satisfies all of these requirements, and the limitation period is therefore tolled in accordance with the law governing the Agreement.

10. Both the CISG and UNIDROIT include provisions for tolling the limitation period on this basis. CLP Article 14.1 suspends the limitation period "when either party commences arbitral proceedings in the manner provided for in the arbitration agreement or by the law applicable to

such proceedings." [Art. 14(1) *CLP*]. UNIDROIT Article 10.6 also suspends the running of a limitation period "when the obligee performs *any act* . . . that is recognised by the law of the tribunal as asserting the obligee's right against the obligor." [Art. 10(6) *UNIDROIT*]. Satisfying Article 4.1 in the Request for Arbitration therefore tolled the limitation period on 31 May 2016.

11. Respondent contests only the power of attorney requirement of Article 4.1. [*Ans.* ¶ 12]. Respondent argues that arbitration was not initiated in time because Claimant's power of attorney was for Wright Holding instead of Wright Ltd, but the power of attorney with Wright Holding was sufficient to provide for "adequate representation" according to Article 4.1(b) of the CAM-CCBC Rules **(1)** [Art. 4(1)(b) *CAM-CCBC Rules*]. Failure to pay the fee in full within the limitation period is not a factor contemplated in Article 4.1 and does not prevent CAM-CCBC from recognizing Claimant's assertion of a right by satisfying Article 4.1 alone **(2)**.

(1) The Power of Attorney with Wright Holding was sufficient to initiate arbitration.

12. Wright Holding can legitimately exercise Power of Attorney over Wright Ltd, without requiring separate authorization, under either a Group of Companies doctrine theory or an agency theory. According to Fouchard, Gaillard, and Goldman, "where it is clear from both the spirit of the disputed agreement and the conduct of the parties involved that the group itself is considered to be a party to the contract," the party within the group may exercise rights under the arbitration agreement [*Fouchard et. al.* 285]. Wright Holding was involved with Wright Ltd not only as a company generally, but with this dispute in particular. When the dispute arose, Claimant involved Wright Holding in order to determine "general policy" in the wake of customer complaints about the bank levy [*Proc. Ord.* 2 ¶ 22]. Claimant maintains that "all important decisions . . . beyond the day to day business" of the company are discussed with the Holding company and that "all important decisions are taken at the level of the Holding" company. [*Proc. Ord.* 2 ¶ 2; *Cl. Req.*]. In ICC Case No. 5721, the tribunal emphasized that "where a company or individual appears to be the pivot of the contractual relations in a particular matter, one should carefully examine whether the parties' legal independence ought not, exceptionally, be disregarded in the interests of making a global decision." [ICC Award 5721 ¶ 35]. The factual circumstances of Wright Holding and Wright Ltd's relationship and their conduct negotiating this dispute support the extension of the agreement based on the Group of Companies doctrine.

13. Further, the ICC found in Case No. 4131, *Dow Chemical*, that when a "group of companies constitutes one and the same economic reality" the Group of Companies doctrine should allow companies within the same group to exercise rights under an arbitration agreement [ICC Award

4131 ¶ 35]. Wright Holding and Wright Ltd are part of the same "economic reality," sharing a common corporate identity in name and with 88% share ownership at the parent company level. [*Proc. Ord.* 2 ¶ 2]. Following *Dow Chemical*, Wright Holding and Wright Ltd's shared economic reality provides a strong basis for Wright Holding's Power of Attorney to be "adequate representation" under CAM-CCBC Article 4.1 through the Group of Companies doctrine.

14. Moreover, the circumstances of the case support Wright Holding's intent to exercise agency over Wright Ltd as its parent company. Beyond the Group of Companies doctrine, "all developed legal systems recognize the power . . . of one individual or legal entity to enter into binding legal acts on behalf of another," including Equitoriana, where Wright Holding and Wright Ltd are incorporated. [*Born 2001 at* 215]. Under Equitoriana law, "powers of attorney are governed by the general law on agency which is a verbatim adoption of the relevant rules in the 2010 UNIDROIT Principles" [*Proc. Ord.* 2 ¶ 24]. According to UNIDROIT Article 2.2.2(2), "the agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted" [Art. 2.2.2(2) *UNIDROIT*]. Horace Fasttrack was granted agency over Wright Holding on April 2, the day after the negotiations were deemed to have failed. Based on the entities' corporate relationship and the timing of Fasttrack's empowerment, the purpose of his Power of Attorney was evidently to initiate arbitration with the CAM-CCBC on behalf of Claimant. Fasttrack was acting with "authority to perform all acts necessary in the circumstance to achieve the purposes for which the authority was granted," satisfying UNIDROIT Article 2.2.2(2) and the "adequate representation" requirement of Article 4.1(b) of the CAM-CCBC Rules [Art. 2.2.2(2) *UNIDROIT*; Art. 4(1)(b) *CAM-CCBC Rules*].

15. Wright Holding's Power of Attorney was sufficient to satisfy Article 4.1 of the CAM-CCBC Rules under both a Group of Companies doctrine theory and a theory of corporate agency. Claimant has therefore performed an act that the CAM-CCBC recognizes as an assertion of a right and tolled the limitation period under CLP Article 14.1 and UNIDROIT 10.6.

(2) Failure to pay the fee in full does not prevent the CAM-CCBC from recognizing Claimant's assertion of a right.

16. Article 4.2 specifies that the payment of the Registration Fee is "together with the notice," where the notice is the cognizable assertion of a right by Claimant. [Art. 4(2) *CAM-CCBC Rules*]. Payment of the Registration Fee is a necessary but *separate* procedural matter that does not prevent the CAM-CCBC from understanding Claimant's assertion of a right. Moreover, a minor clerical error in effecting full payment should not prevent Claimant from asserting a right and

would amount to dismissing a legitimate claim on a pure formality. This arbitral tribunal aims to "strengthen[] the institutes for Arbitration and Mediation, keeping them one of the most efficient and speedy methods to resolve conflicts." [*CAM-CCBC*]. Such a dismissal is incompatible with the CAM-CCBC's mission and it would not strengthen the legitimacy of international arbitration or represent arbitration as an efficient method of conflict resolution.

B. Claimant fulfilled in good faith the purpose of the Agreement's arbitration clause and the CAM-CCBC Rules, and properly put Respondent on notice of the initiation of arbitration.

17. Claimant has acted in the spirit of good faith and fair dealings in resolving this dispute. Claimant acted in accordance with the arbitration clause of the Agreement following good faith attempts to settle the dispute with Respondent. Claimant satisfied all requirements of Article 4.1 of the CAM-CCBC Rules and remedied all minor errors in a timely manner in order to exercise its right to arbitration and toll the limitation period. Substantial injustice would result if Claimant were barred from arbitration on the basis Respondent alleges **(1)**. Moreover, Respondent was sufficiently put on notice well in advance and fails to show any resulting prejudice **(2)**.

(1) Substantial injustice would result if Claimant were barred from arbitration because of a minor clerical error.

18. Respondent has raised the issue of admissibility in bad faith. Claimant made a good faith effort to satisfy the terms of the CAM-CCBC Rules and it was only a minor secretarial error that resulted in partial payment of the Registration Fee. [*Cl. Req*.]. Article 7(1) of the CISG provides that the CISG should be interpreted "to promote … the observance of good faith in international trade." [*Art.* 7(1) *CISG*]. Scholar Nives Povrzenic argues that this provision "should be given a broad interpretation in the sense that it is addressed to the parties to each individual contract of sale as well as to the Convention itself" in order to further the goals of the CISG. [*Povrzenic* ¶ 36]. Moreover, even if the CISG does not stipulate that the parties' conduct must be in accordance with good faith, the UNIDROIT Principles do and are applicable as stipulated in the Agreement. Article 1.7 of UNIDROIT states that "[e]ach party must act in accordance with good faith and fair dealing in international trade [*Art.* 1(7) *UNIDROIT*].

19. While it is true that Article 12.5 requires payment of the Registration Fee "at the time of the notice" and "*in the amount stated* in the Table of Expenses," Claimant remedied the error as soon as it recognized the mistake, and the delay did not prejudice Respondent. [Art. 12(5) *CAM-CCBC Rules* (emphasis added)]. Although Claimant recognizes that the full registration fee is required to deter frivolous complaints, its full payment upon realizing the error demonstrates its

good-faith assertion of a legitimate claim [Wald et al. 67]. In the *Automobiles case*, the court invoked good faith to prevent a party from terminating a contract two-and-a-half years after the non-delivery of goods. The court reasoned that "it would be against the principles of good faith if the [buyer] were entitled to claim any rights with regard to the non-performance of the sales contract." [*Automobiles case* ¶ 36]. Similar reasoning should apply here. Respondent's attempt to extinguish Claimant's right to arbitration based on a minor mistake should not be allowed to accord with the interests of good faith in international trade according to the CISG and fair dealing in the conduct of parties according to UNIDROIT.

20. Claimant made a good faith effort to initiate arbitration and reasonably fulfilled all requirements set out by the CAM-CCBC Rules with only two minor deviations. Both deviations were corrected in a timely manner so as not to prejudice Respondent and to efficiently resolve the dispute. These deviations were the result of ambiguous language in the Rules as to the proper power of attorney and a clerical error in paying the full Registration Fee, but neither deviation should be sufficient to bar Claimant from a right agreed to by contract between the parties.

21. As discussed above, the Power of Attorney submitted by Claimant was sufficient for initiating arbitration proceedings and the correction was a matter of "good order." [*Cl. Req.*]. Claimant paid $120 of a $1200 fee in a good faith effort to initiate arbitration. [*Pres. Ord.* ¶ 2]. The partial payment of the Registration Fee was a mere misplaced digit, and it would be unconscionable to bar Claimant from arbitration based on such a minor mistake by a single, non-executive employee. The outcome of a multimillion-dollar arbitration claim should not hinge on an outstanding $1000 Registration Fee paid in a timely manner once the mistake was realized.

22. Barring Claimant from arbitral relief would result in substantial injustice and Respondent has not produced evidence of prejudice caused by the one-week delay. To preclude arbitration on this basis would be to dismiss Claimant's right on pure formality and severely prejudice Claimant.

(2) Respondent was sufficiently put on notice of the arbitration proceedings.

23. All countries involved in this dispute are member states of the New York Convention. [*Proc. Ord.* 2 ¶ 35]. Aside from the rules of the CAM-CCBC, international arbitration proceedings are bound by certain due process requirements under the New York Convention. Article V(1)(b) requires that the party against whom an award is invoked be given "proper notice … of the arbitration proceedings" in order for an award to be recognized and enforceable. [Art. V(1)(b) *NY Convention*]. Respondent was well aware of and involved in the resolution of the dispute and should not be allowed to rely on the dismissal of Claimant's right based on clerical error.

24. These arbitration proceedings neither came as a surprise to Respondent nor prejudiced Respondent by a one-week delay. Respondent first acknowledged the dispute on 10 February 2015 in an email to Amelia Beinhorn. [*Cl. Ex.* 7]. The parties then negotiated the discrepancies over the next year to no avail. Claimant gave Respondent constructive notice of arbitration months in advance. In an email from Amelia Beinhorn on 1 April 2016, Claimant indicates that they have "instructed [their] lawyer to take the necessary steps to initiate arbitration proceedings." [*Resp. Ex.* 3]. This email clearly indicates the intent of Claimant to pursue their right to arbitration. Because of Beinhorn's senior position and knowledge of Wright Ltd's prior usage of arbitration, Respondent should have known that Claimant was seriously pursuing legal remedy and, therefore, received credible constructive notice on 1 April 2016. Moreover, professor Albert Jan van den Berg notes that "the notice need not be in a specific (official) form as is laid down in certain laws for domestic arbitration or court proceedings." [*Jan van den Berg* 15]. The facts surrounding the initiation of arbitration indicate that Respondent knew of the arbitration even if the CAM-CCBC did not request its answer until 7 June 2016.

25. There was no ambiguity in either the email or the Agreement as to the mode of recourse or the forum, and from that date Respondent knew to prepare for arbitration. Respondent was familiar with the Agreement's arbitration clause as the parties had used the clause in a previous contract and was "the standard dispute resolution clause used in all contracts between companies belonging to the Engineering International SA group of companies." [*Proc. Ord.* 2 ¶ 21].

26. Claimant would encourage Respondent to work in the spirit of good faith required by Article 21 of the Agreement. Moreover, Claimant does not contest the validity of Respondent's answer, but notes that Respondent potentially failed to comply with Article 4.3 of the CAM-CCBC Rules. Article 4.3 requests Respondent's answer within 15 days, and the Case Manager indicates that Respondent's answer "must be received within fifteen (15) days." [Art. 4(3) *CAM-CCBC Rules*; *Comm. Arb.*]. The case manager's correspondence was sent on 8 June 2016, and Respondent submitted its answer potentially one day late on 24 June 2016. [*Ans.*]. Just as having its answer barred would prejudice Respondent, so too would dismissal prejudice Claimant. Respondent was properly put on notice of the commencement of arbitration and has failed to show any material prejudice caused by Claimant's amendment. Respondent should not be allowed to rely on this defense to extinguish Claimant's right to arbitration agreed to in the Agreement.

27. Claimant has therefore submitted its claims in time based on the substantive law governing the Agreement and the CAM-CCBC Rules. UNIDROIT does not allow limitation of arbitration

agreements to less than one year. Even if the limitation in the Agreement were valid, Claimant commenced arbitration in accordance with Article 4.1 and tolled the limitation period pursuant to CLP Article 14.1 and UNIDROIT Article 10.6. The tribunal should not hesitate to hear the dispute and afford due relief.

PART 2: THE TRIBUNAL SHOULD REQUIRE FULL PAYMENT CALCULATED USING THE EXCHANGE RATE AT THE TIME OF PRODUCTION AND DELIVERY.

28. The Tribunal should require the Respondent to pay the price determined by the exchange rate at the time of production and delivery. This is the price owed to the Claimant by the Respondent under the partnership and exchange outlined in the Agreement and in consideration of the surrounding circumstances and intentions [*Cl. Ex.* 2]. The Tribunal should determine the price owed under CISG guidelines of interpretation **(I)**. Additionally, the Tribunal should refer to the UNIDROIT Principles, which further support the Claimant's request of payment at the price set by the exchange rate at the time of production and delivery **(II)**.

I. The CISG ensures that the Respondent pays the price for the good as required by the contract.

29. The CISG governs disputes related to the price owed by the Respondent to the Claimant **(A)**. As governed by Articles 53, 54, and 62 of the CISG, the price owed is that which is specified in the contact (B). In order to determine the contract price, the subjective and object intent of the parties as well as their past performance must be evaluated **(C)**.

A. The CISG governs as the applicable law.

30. The parties agreed in Section 20 of the Agreement that the CISG would govern all disputes arising from the agreement [Cl. Ex. 2]. The UNIDROIT Principles apply to issues not reached by CISG [Id.]. Although the Convention does not directly address the currency in which payment is to be made, Chapters II and III in Part III provide sufficient guidance to determine the price to be paid by the Respondent [Sevón 332, Vincze].

B. The Claimant is owed the contract price from the Respondent under the CISG.

31. The CISG outlines the buyer's responsibilities. Articles 53 and 54 require a buyer to pay the price of goods determined by the contract to comply with the obligations required under the contract or any other applicable laws and regulation **(1)**. Further, Article 62 entitles the seller to specific performance of the contract, in this case payment of the price of goods **(2)**.

(1) Under Articles 53 and 54, the Tribunal should refer to the contract to determine the price owed by the Respondent to the Claimant.

32. The Respondent must pay the price determined by the contract and the CISG according to Article 53 [*Art. 53 CISG*]. In situations where the contract and CISG conflict, the Tribunal should defer to enforcing the contract price [*Secretariat Commentary CISG Art. 53*]. Commentators have identified, under Article 53, that the payment of price, in addition to the acceptance of delivery, are the most important obligations of a buyer [*Id.*].

33. Article 54 extends the buyer's obligation of payment to include conforming with the requisite formalities under the contract [*Art. 54 CISG*]. The primacy of the contract in defining these obligations and formalities has been long recognized [*Gabriel* 273; *Maskow* 385]. One of these responsibilities read in by commentators is an adherence to the good faith execution of the contract, regardless of whether the benefit enjoyed meets the buyer's expectations; stated by Tallon in reference to Article 54, "if a party has promised to do something and then does not take the necessary preliminary steps he clearly acts in bad faith" [*Tallon* 7-8].

(2) Article 62 entitles the Claimant to specific performance of the contract.

34. Article 62 authorizes the seller to enforce payment of the price due under Articles 53 and 54. Rather than creating a new right in the seller, Article 62 simply enforces the original obligations outlined in the contract [*Knapp* 453]. Tribunals have held that when the seller delivers the goods in accordance with the contract, as is undisputed in the case at hand, it is the buyer's responsibility to pay the price stipulated [*Ziegel* 9–30; *Schlechtriem* 84; *Pharmaceutical products case*]. Commentators have indicated that specific performance through Article 62 applies "with full force" once the buyer is in possession of the goods [*Honnold* 381]. Rather than being limited to cases of full nonpayment, Tribunals often rely on Article 62 to support a seller's recovery of partial non-payment [*Queen Mary case*]. Since the Respondent is in possession of the fan blades, the Claimant is entitled to specific performance of full payment through Article 62 [*Cl. Ex.* 3].

C. The facts and circumstances of the case dictate that the contract can be interpreted to mean the Claimant is owed payment at the price set by the exchange rate at the time of delivery.

35. The guidelines in Article 8 must be followed to determine the contract price to which the Claimant is entitled **(1)**. Attention must be placed on the parties' actual intent, "where the other party knew or could not have been unaware of what the intent was" according to Article 8(1) **(2)**. Beyond this, when the subjective intentions of the parties cannot be discerned, the objective understanding of the contract by a reasonable person can be considered through Article 8(2) **(3)**.

In determining both the subjective and objective intention of the contract, past usage and established practices between the parties must receive due consideration **(4)**.

(1) Article 8 guides contract interpretation under the CISG.

36. The Tribunal should look to Article 8 to determine the price owed to Claimant. This is due to the real or perceived misunderstanding between Claimant and Respondent regarding the appropriate contract price [*Zeller* 631]. Article 8 clearly outlines the steps and criteria for interpreting the statements and conduct of parties in privity [*Id.*]. The underlying principle of Article 8 is the determination of the "true intent" of the parties, arrived at through consideration of all the facts and circumstances surrounding the case [*CISG Advisory Op. No. 3* ¶ 2.8].

(2) The parties intended to use the exchange rate at the time of delivery.

37. Under Article 8, the Tribunal must consider the intent of both the Claimant and the Respondent that was either known or that should have been known **(a)**. The fixed exchange rate clause was not intended to apply to the main agreement **(b)**. There was no intention on the part of the Claimant to assume the entire currency risk **(c)**. The partnership was intended to be profitable and beneficial for both parties, where disputes would be resolved "amicably and in good faith" **(d)**. Furthermore, the request by Engineering International SA to de-risk the Respondent was not the responsibility of the Claimant at the time when the contract in question was signed **(e)**.

(a) Under Article 8 of the CISG, the Tribunal must consider the intent of both the Claimant and the Respondent, that was either known or that should have been known.

38. This subjective test considers the actual meaning the parties gave the Agreement as well as their intentions during contract formation [*Lookofsky 2000* ¶ 84]. This is limited to the intentions that both parties were, or should have been, aware of [*Id.*]. As a result, if the parties shared a common understanding of the meaning of language or other conduct, that understanding will prevail regardless of what a reasonable person might have understood [*Farnsworth* 98].

(b) The fixed exchange rate stated in the Addendum was not intended to apply to the main contract regarding fan blades.

39. The intention behind the Addendum was to simplify the purchase of 2000 clamps, not to draft a new contract with terms bearing on the main Agreement [*Proc. Ord. 2*]. Respondent explicitly shared this intention in an email to Claimant stating "as discussed, we think the easiest way to regulate the purchase of the clamps is to sign an addendum to our Development and Sales Agreement and not to enter into a separate contract for the clamps" [*Resp. Ex. 2*]. Clearly, there

was no intention to modify the main Agreement or to apply the Addendum's terms to the sale of fan blades.

40. The Addendum does not indicate in any way that the Respondent's subjective intention differs from the objective reading of the contract. Furthermore, the Claimant's Chief Financial Officer only accepted the fixed exchange rate term for the clamps due to the limited nature of the sale [*Cl. Ex. 9*]. If the Claimant's understanding had been that the fixed exchange rate was to apply to the entire Agreement, including the sale of fan blades, it would have cleared this application with the Chief Financial Officer, which it did not [*Id.*]. Rather, the Claimant offered a good faith concession to fix the exchange rate for price of the much lower value clamps, which Respondent would not have been able to obtain through any other means.

(c) The currency risk was not assumed by the Claimant.

41. Within their outlining of the scope of the partnership, the parties intended to distribute the risk associated with developing the TRF 192-I [*Cl. Ex. 1*]. At Respondent's insistence, the currency of sale was USD while the Claimant's expenses were in EQD [*Id.*]. Additionally, Claimant bore the risk of setting a maximum price without knowing how much the final costs would be [*Id.*].

42. The currency risk here was borne by both parties—if the EQD strengthened in relation to the USD, Respondent would benefit from impact of the exchange rate fluctuation whereas if the EQD fell with respect to the USD, as occurred here, Claimant would benefit from the impact of the exchange rate fluctuation. During their initial discussion regarding the development of the TRF 192-I, the parties agreed to pricing on a "'cost + basis' with risk sharing elements", where the currency risk was minimal due to the stable exchange rate at the time [*Id.*]. Through this pricing mechanism, the parties assumed the risk that the exchange rate could fluctuate in either direction. The fact that the exchange rate negatively impacted the Respondent is not a valid reason to distort the intentions set out by the parties at the time of contracting.

(d) The contract was designed for the creation of a long-term, mutually beneficial partnership that would be profitable for both parties and executed in good faith.

43. It is implied within contracts governed by the CISG that individuals are motivated by mutual benefit and economic gain [*Kastely* 591]. The formula in Section 4 outlines the parties' intentions of maintaining a fair profit margin for the Claimant and a fair unit price for the Respondent through the sliding profit scale, where the lower the costs, the higher the profit margin [*Cl. Ex. 2*]. The cost-plus basis for price determination secured the Respondent's requested maximum price while maintaining a flexible price structure based on the Claimant's unknown costs [*Cl. Ex.*

1]. The Respondent's intention was to incentivize the Claimant to lower costs and designed the pricing mechanism to this effect. The Claimant was to be rewarded for minimizing production costs, not punished for an unforeseen change in exchange rates.

44. Section 4 of the Agreement states that the parties should "enter into good faith negotiations to determine a price which is financially acceptable to both parties" should the Claimant suffer "unbearable hardship" [*Cl. Ex. 2*]. This clear intention to avoid a loss borne by the Claimant should prevent the use of the fixed exchange rate in pricing the fan blades. If the fixed exchange rate were used to determine the contract price, the Claimant would suffer a loss as that price would be *below the minimum price clearly stated in the contract*.

45. This is further emphasized by the parties' explicit intention to maintain a good faith partnership. Section 21 of the Agreement demonstrates to this intention by affirming that disputes amongst the parties should be addressed amicably and in good faith [*Id.*]. Furthermore, the partnership structure outlined in Section 2 of the Agreement as well as by the parties' conduct during the contracting and developmental stage has the implication of repeated sales between the two parties [*Id.*]. Respondent's "firm intention to purchase further units in subsequent years" highlights this intention of a long-term partnership [*Id.*]. This contract was meant to begin a fuller partnership, where the parties would "eventually [have a joint interest in developing] other engines" [*Id.*]. As the relationship was intended to be long-term, it is imperative that parties follow through on the intention of the contract whereby both the Respondent and Claimant benefit from the sale rather than unfairly burdening the Claimant with a loss.

(e) At the time of contracting for the TRF 192-I, the Claimant was under no obligation to, and had no intention of, de-risking the Respondent.

46. After a meeting in November 2009, when both parties were informed that the Respondent was to de-risk its contracts, Claimant was not responsible for undertaking this risk in the contract at hand [*Resp. Ex. 1*]. The email distributed by Engineering International SA requested that other subsidiaries, including the Claimant, reduce the risk to the Respondent in contracts already entered into by November 2009 [*Id.*]. There was no reference to future contracts [*Id.*].

47. In addition, negotiations for the sale of the Claimant started in February 2010 [*Proc. Ord. 2*]. After this point, the Claimant's responsibility was to ensure its own risk mitigation in order for its sale to go through. Thus, when contracting for the TRF 192-I in May 2010, the Claimant had no requirement to de-risk the Respondent. Instead, this duty fell solely on the Respondent.

(3) A reasonable understanding of the contract suggests the use of the exchange rate at the time of production.

48. The Tribunal should also evaluate the contract through the understanding of a reasonable person **(a)**. The fixed exchange rate in the addendum does not apply to the contract for fan blades **(b)**. Instead, the Agreement includes an explicit mechanism to determine price **(c)**.

(a) The contract should be evaluated according to a reasonable person's understanding.

49. Commentators explain that "where the other party was unaware or could not have been aware that the subjective intention was different from the objective meaning, then the statement is to be interpreted according to the understanding that a reasonable person 'of the same kind' as the addressee would have had in the same circumstances (Article 8(2))." [*Schwenzer 26 Art 14*]. As it is often difficult to determine and agree upon the subjective intent of the parties, the Tribunal should consider the objective understanding of the contract in its evaluation of the contract price regardless of the strength of the subjective arguments [*Farnsworth*]. Although not the only factor in this consideration, evaluating the writing is crucial in accurately interpreting the meaning of a contract [*CISG Advisory Op. No. 3* ¶ 2.2].

(b) The fixed exchange rate in the Addendum is separate from the pricing mechanism in Section 4 of the Agreement.

50. The price agreed upon for the sale of the clamps was to be on a cost coverage basis, paid in US $ at the fixed exchange rate of US $1 = EQD 2.01 [*Resp. Ex. 2*]. The Addendum does not state that it modifies the pricing mechanism nor any part of the main Agreement.

51. The Addendum refers to the terms of the "main Agreement" as binding with the exception of the pricing mechanism [*Id.*]. The Addendum references the Agreement as "the main Agreement" with an emphasis on the capitalization of Agreement, whereas the fixed exchange rate is to apply to only the "agreement" [*Id.*]. This distinction, made in the original Addendum offer by the respondent, differentiates the "agreement" that the fixed exchange rate applies to from the Development and Sales Agreement. It follows that the fixed exchange rate would apply to the Addendum only and thus, only to the price of the clamps.

(c) The pricing mechanism in Section 4 of the Agreement clearly stipulates the price for the fan blades, requiring the use of the exchange rate at the time of production/delivery.

52. The contract clearly outlines a cost-plus pricing mechanism, offering the Claimant a minimum profit margin as long as production costs per blade were below US $13,125 [*Cl. Ex. 2*]. The pricing mechanism is based on production costs that were incurred at an exchange rate of US $1

= EQD 1.79 [*Proc. Ord. 2*]. The exchange rate was the same at the time of delivery [*Id.*]. The costs per blade totaled to EQD 19,586 [*Cl. Ex. 5*]. Using the prevailing exchange rate, the costs per blade equates to US $10,941 [*Id.*]. At this cost, the Claimant is entitled to receive a profit of US $420 per blade or US $840,000 in total profit.

53. At the total fixed exchange rate price of US $10,219.28 paid by the Respondent, however, the Claimant takes a loss of US $721.72 per blade or US $1,443,440. This result should occur only if the costs per blade exceed US $13,125, at which point the parties would remedy the situation by determining a price financially acceptable to both parties [*Cl. Ex. 2*]. Beyond this, the fixed exchange rate price of US $9,744.28 per blade is less than the minimum price stated in Section 4 [*Id.*]. Alternatively, using the exchange rate of US $1 = EQD 1.79, the claimants would make a modest 3.7% profit for their efforts, in line with the formula in the contract. Therefore, the use of a fixed exchange rate in this contract is fundamentally incompatible with the part of the contract that stipulates a minimum price. It cannot be reasonably understood that the Claimant would agree to be paid less than the minimum price stated in the contract nor can it be reconciled that the Claimant would agree to bear a loss of US $721.72 per blade even though it contained its costs to within the anticipated range.

(4) The prior relationship and past performance do not support the use of the fixed exchange rate for pricing the fan blades.

54. Under the governing CISG principles, as the parties had previously contracted with each other, their established practices and conduct must be considered by the Tribunal **(a)**. The execution of all prior contracts between the two parties resulted in the Claimant, at minimum, recovering costs and earning a 1% profit on the sale **(b)**.

(a) The Tribunal should consider the prior relationship and past performance between the parties in determining the contract price.

55. Article 8(3) instructs that due consideration be given to any practices established between the parties [*Art. 8(3) CISG*]. This is furthered by Article 9, which binds the parties to their prior usage and practices [*Art. 9 CISG*]. The course of dealings between parties supplements the terms of the contract and helps determine the parties' intent [*Bonell, CISG Commentary* 106]. This application of past usage does not need to be expressly stated in the contract; rather, it is implied [*Id.*].

56. As the parties had previously contracted with each other and, until 2010, were part of the same parent company, there exist prior practices the Tribunal must consider[*Proc. Ord. 2*]. Although

the parties' prior relationship was directed by the parent company, there is no reason to believe that their established practices would not apply to the contract in question. Negotiations for the Agreement had started when the parties were both owned by the parent company and the current Agreement stemmed from this existing relationship [*Cl. Ex. 1; Proc. Ord. 2*].

(b) Considering the execution of prior contracts, the exchange rate at the time of production/delivery should be used.

57. In their previous two contracts, the parties executed deals with a price clause similarly structured to Section 4 of the Agreement [*Proc. Ord. 2*]. The minimal differences in the contracts included the actual pricing and thresholds as well as no mention of a minimum and maximum price in the previous pricing arrangements [*Id.*]. Due to the close resemblance of Section 4 of the Agreement to prior pricing clauses employed by the two parties, the Tribunal should consider their past performance in executing these contracts.

58. There was no prior use of fixed exchange rates in the execution of contracts between the Claimant and Respondent [*Id.*]. With respect to exchange rates, the pricing mechanisms of the previous contractual arrangements were governed by Engineering International SA, which focused on tax optimization while ensuring the Claimant received a minimum 1% profit [*Id.*]. The exchange rate most favorable to the Respondent was chosen due to the beneficial tax regime in Mediterraneo [*Id.*]. However, the parent company prioritized the Claimant's recovery of costs and minimum 1% profit, ensuring the Claimant's profit margin was secured as long as it reached a certain threshold [*Id.*].

59. At present, when there is no obligation to a parent company, it cannot be assumed that the exchange rate chosen to dictate the price would unilaterally benefit the Respondent while stripping the Claimant of all profit. There is no past performance that justifies this; To the contrary, the prior exchange rates chosen ensured that costs plus profits were awarded to Claimant, suggesting the exchange rate at the time of production/delivery was the default.

II. The UNIDROIT Principles support the Claimant's recovery of price determined by the exchange rate at the time of production.

60. Section 20 of the Agreement designates the UNIDROIT Principles as the governing law for issues not resolved by the CISG [*Cl. Ex. 2*]. In light of this, the Tribunal should consider support offered by the UNIDROIT Principles to determine the price owed by the Respondent. The UNIDROIT Principles rely on the CISG as a point of reference and align closely with the interpretive guidance in the CISG [*Bonell, UNIDROIT Principles*]. UNIDROIT provides the

Tribunal with additional guidance on addressing the problem of determining the contract price by directly addressing currency of payment ambiguities in Article 6.1.9 [*Bonell, UNIDROIT Principles* 36] **(A)**. Additionally, UNIDROIT relies on the *Contra Proferentum* rule in Article 4.6 when evaluating unclear terms **(B)**.

A. Article 6.1.9 supports that the exchange rate at the time of production should be used to determine the price owed to the Claimant by the Respondent.

61. Article 6.1.9 specifies that the payment should be made at the exchange rate applicable when the payment is due if the parties did not explicitly agree on an exchange rate [*Osuna-González* 320-321]. The Claimant and Respondent agreed on a pricing mechanism and, as outlined above, this dictates use of the exchange rate at the time of delivery [*Cl. Ex. 2*]. Article 6.1.9 further supports this interpretation, as the goal of this Principle is to provide aggrieved sellers with a remedy for declining exchange rates [*CISG Advisory Op. No. 6*]. In the case at hand, the payment was due after the goods had been delivered and the Respondent received the invoice. The exchange rate at that time was US $1 = EQD 1.76 [*Proc. Order 2*]. This is also the average exchange rate at the time of production [*Id.*]. Though Article 6.1.9, the Claimant is entitled to payment in the exchange rate at the time of delivery and as such, the Respondent has not performed according to the contract [*Art. 6.1.9 UNIDROIT*].

B. The *Contra Proferentum* rule would deter the application of the fixed exchange rate in pricing the fan blades.

62. Additionally, the UNIDROIT Principles recognize the *Contra Proferentem* rule, which, according to Article 4.6, directs the interpretation of unclear terms against the party that supplied them [*Art. 4.6 UNIDROIT*]. Commentators have interpreted this rule as a mechanism to discourage strategic behavior and incentivize explicit drafting by the more knowledgeable party [*Rau* 982]. With reference to the case in question, the *Contra Proferentem* rule should apply to the strategic and ambiguous drafting of the Addendum by the Respondent. Since the Respondent was the party that proposed the fixed exchange rate term in the Addendum, it should bear the risk of a possible lack of clarity surrounding its application [*Art. 4.6 UNIDROIT*]. As such, the term should be interpreted against the Respondent and instead be applied to the price of the clamps only rather than the price of the fan blades as well. This would mirror the intent of Article 4.6 by deterring the Respondent's strategic attempt to cut the profits of the Claimant through ambiguous wording in the Addendum as explained in Part I(C)(3)(a) above.

PART 3: THE TRIBUNAL SHOULD REQUIRE RESPONDENT TO BEAR THE COST OF THE MC/2010C LEVY.

63. The Tribunal should require the Respondent to bear the cost of the levy. Respondent must pay the levy because it is part of Respondent's obligations under the the Agreement and the CISG **(I)**. Claimant is entitled to specific performance from the Respondent for the outstanding amount of the payment **(II)**. Article 79 of the CISG does not exempt the Respondent from liability for its failure to make full payment of the price **(III)**.

I. Respondent must pay the bank fee because it was part of its obligation to pay the price according to the Agreement and CISG.

64. The CISG governs the Agreement and its interpretation, with issues not addressed by the CISG resolved under the UNIDROIT principles **(A)**. The levy is a bank charge assessed on Respondent's payment by the Equitoriana Central Bank before Claimant received the funds **(B)**. The Agreement requires Respondent to bear the cost of bank charges on the transfer of payment **(C)**. CISG Articles 53, 54, and 57, require Respondent to bear the cost of the levy **(D)**.

A. The CISG governs the contract as the applicable law.

65. The parties stipulated in section 20 of the Agreement that the UN Convention on the International Sale of Goods (CISG) govern the Agreement with UNIDROIT principles providing supplemental authority "for issues not dealt with in the CISG" [*Art. 20 Agreement*].

B. The levy is a bank charge assessed on Respondent's payment by the Equitoriana Central Bank before Claimant received the funds.

66. On 1 January 2010, the Equitoriana government enacted a new regulatory scheme called ML/2010C to combat money laundering [*Proc. Ord. 2*]. Under this provision, all bank payments into Equitoriana greater than US $2,000,000 are routed via the Equitoriana Central Bank (the "ECB") for inspection by the Bank's Financial Intelligence Unit to ensure the funds are not connected to any illicit activity. The ECB then takes a 0.5% levy to fund the operation [*Cl. Ex. 8*] before releasing the cleared funds to the intended recipient. News sources in Claimant's home state of Equitoriana reported on the new policy, as did sources in Respondent's home state of Mediterraneo [*Proc. Ord. 2*].

67. On 15 January 2015, Respondent made payment in the amount of US $ 20,438,560 [*Cl. Ex. 5*]. Claimant's bank, the Equitoriana National Bank, did not credit the account Claimant had designated in the Agreement until 29 January when Claimant received $20,336,367.20 [*Cl. St. 13*]. During the intervening two weeks, the ECB had intercepted the payment to conduct the anti-

money laundering examination mandated by ML/2010C and taken a levy of $102,192.80 pursuant to that regulation [*Cl. Ex. 8*].

68. Claimant notified Respondent of the deficient payment on 9 February 2015 [*Cl. Ex. 6*]. Respondent, however, claimed "they did not have any idea why" the sum dispatched had not arrived whole [*Cl. Ex. C 7*].

C. The Agreement requires Respondent to bear the cost of bank charges on the transfer of payment.

69. Both the CISG and UNIDROIT hold that the contract should be interpreted according to the common intent of the parties or, failing that, the meaning a reasonable person in the same position as the parties would ascribe to it. Article 8 of the CISG mandates that a party's statements "be interpreted according to his intent where the other party knew or could not have been unaware of what that intent was" [*Art. 8(1) CISG*]. This provision requires an inquiry into the subjective intent of the party making the statement. Though Article 8 focus on an individual party, it is practically undisputed that the provision also regulates the interpretation of contracts" [*Schwenzer* 143]. Contract interpretation presupposes agreement of the parties, thus leading to an examination of the "common intent of the parties" [*Schwenzer* 154]. Where this common intent cannot be ascertained, the interpreter must apply the "hypothetical understanding of a reasonable third person" involved in the same type of business as the parties [*Schwenzer* 155].

70. Contractual interpretation under UNIDROIT is controlled by Article 4.1. Under that rule, contracts are "interpreted according to the common intention of the parties" [*Art. 4(1) UNIDROIT*] or, if that common intent cannot be established, the meaning a "reasonable person of the same kind as the parties would give to it in the same circumstances" [*Art. 4(2) UNIDROIT*]. The focus on common intention allows a contractual term to be given a meaning entirely different from what the words would ordinarily have if a "different understanding was common to the parties at the time of the conclusion of the contract" [*Art. 4(1) UNIDROIT Comment*]. Determining the common intent of the parties requires an examination of their circumstances, particularly those laid out in Article 4.3. These include the preliminary negotiations, practices the parties have established among themselves, the conduct of the parties subsequent to the conclusion of the contract, the nature and purpose of the contract, common meaning given to the terms and expressions in the contract, and usages.

71. Applying the CISG and UNIDROIT common meaning or reasonable person standards of interpretation to the contractual text shows that the Agreement requires Respondent to bear the

cost of the levy. In concluding the Agreement, the parties set out the specific terms according to which the Buyer is to make payment in Section 4.3. That provisions requires that "the bank charges for the transfer of the amount are to be borne by the BUYER" [*Cl. Ex. 2*]. The contractual language strongly indicates an intent by the parties that the Buyer should pay for charges such as the levy. The levy, as a charge assessed against the payment by a bank, falls within the category of charges contemplated by section 4.3. Nothing in the parties' circumstances indicates any intent to be bound by a common meaning so different from the ordinary understanding of the words that the ECB levy would fall outside the Respondent's responsibility. Indeed, Respondent's own answer to the request for arbitration indicates that it understood itself to have agreed to bear the cost of charges like this. By insisting that it would have "taken the levy into account in the price calculations" [*Resp. Ans. 18*] or required an explicit provision shifting the burden to Claimant, Respondent demonstrates its regret at *having agreed to pay for bank charges* such as the levy.

D. Under CISG Articles 53, 54, and 57, which require Respondent to make full payment and to take all steps and formalities necessary to ensure that payment is made at the seller's place of business, Respondent is obligated to pay the bank levy.

72. Article 54 defines the scope of the Buyer's obligation to pay the price as including those steps and formalities necessary to pay the price. Respondent did not comply with all necessary steps to ensure full payment **(1)**. Respondent failed to satisfy its Article 53, 54, and 57 requirements to make full and complete payment at the time payment is due **(2)**.

(1) Respondent is liable for failing to take all steps necessary to enable payment to be made as required by article 54.

73. Article 54 expands the scope of the buyer's obligation to include "taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made" [*Art. 54 CISG*] Failure to satisfy this requirement leads to a breach of contract under article 53 as payment will not be made either in full or on time without them.

74. The Buyer's obligation to pay the price "includes whatever steps and costs that are necessary to ensure that the payment is actually made" [*Gabriel* 273]. The obligatory steps and formalities are divided into two types: commercial and administrative requirements. Commercial requirements are those in which the buyer must deal with another commercial entity like a bank. For these, the Buyer's "standard of performance is that he must achieve a specific result" [*Osuna-Gonzalez* 305;

Maskow 395*; Goods Case* ¶ 3.4; *Fashion Products Case* ¶ 36-42*; Styrene monomer case*]. In such cases the tribunals have considered the buyer necessarily at fault for failing to satisfy the requirement.

75. Administrative formalities are those in which the Buyer must comply with some requirement of a statutory or regulatory nature or otherwise interact with a governmental body. Governmentally imposed tariffs and charges on the transfer of money, such as the government export tariff referenced in Henry Gabriel's paper on Buyer Performance under the CISG fall within this category [*Gabriel*]. Respecting the fact that that "obtaining an administrative authorization is not completely within the buyer's control" [*Osuna-Gonzalez* 304] buyers are held to a best reasonable effort standard. A contrary result was found in *Equipment (automatic diffractameter) case*. In that case, the tribunal considered the Buyer "automatically responsible if a prerequisite to payment, whatever its nature, is not satisfied." [*Art. 54 UNCITRAL Digest*].

76. The Equitoriana Central Bank levy assessed against Respondent's payment of $20,438,560 under Section 12 Regulation ML/2010C is a hindrance to the Buyer's paying fully for the fan blades. In imposing the Levy, the ECB presented Respondent with an administrative formality. Regardless of whether the Buyer is strictly liable for a failure to satisfy an administrative requirement **(a)** or held to the best reasonable effort standard, Respondent has not met its duty **(b)**.

(a) Respondent failed to satisfy the full payment.

77. That Claimant received $102,192.80 less than its due is sufficient to hold Respondent in breach under the strict liability program. Respondent directed its bank to dispatch funds to Claimant in the amount of US $20,438,560 [*Cl. Ex. C 3*], but on January 29th claimant's account was credited US $20,336,367.20 [*Cl. St.* ¶*13*]. That the ECB levy prevented Claimant from receiving its due payment suffices to render Respondent liable.

(b) Respondent failed to meet a best reasonable effort standard in effecting payment as well.

78. Likewise, Respondent fails to satisfy the best reasonable effort standard. Respondent merely directed its bank to make a transfer in the amount of invoice [*Cl. Ex. C 3*]. Mr. Lindbergh admitted to being unaware of the cause of the deduction after it was made [*Cl. Ex. C7*], but once Respondent *became* aware of the deduction it did not seek to rectify the error. Instead, it argues that its ignorance of the levy at the time of contract should allow it to avoid the obligation to bear the cost [*R. Ans.* ¶*18*]. Thus, respondent failed to take all necessary steps to enable payment because it failed to account for the ECB levy even after it became aware of the deduction.

(2) Respondent did not meet its obligation to pay the price under articles 53, 54, and 57.

79. Article 53 mandates that the buyer "pay the price for the goods. . . as required by the contract and this convention" [*Art. 53 CISG*]. Article 54 expands the scope of the buyer's obligation to include "taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made" [*Art. 54 CISG*]. Article 57 obliges the Buyer to make payment at the place designated or at the seller's place of business.

80. According to commentary, the Article 53 obligation to pay the price extends to making full payment at the required time. At the most basic level, the buyer must "pay the price either as fixed in the contract or as determined according to the contractual terms" [*Schlechtriem* 79]. The Buyer must honor the contractual agreement which determines the price it is to pay [*Schwenzer* 822]. To satisfy the requirement, Respondent must make full and complete payment at the time which it is due [*Lookofsky 2008* 88]. Where the buyer "performs a partial payment, his partial performance constitutes a breach of payment" [Schwenzer, 831]. If the parties dispute "the amount of the contractual payment, the seller must prove the payment" [*Marble Slab Case*].

81. By expanding the scope of the Buyer's obligation to include whatever intermediate steps ensure payment is actually made, Article 54 creates some confusion regarding electronic fund transfers. On occasions where payment is made via computer-to-computer credit transfers, ascertaining what steps "enable payment" and what processes occur after the buyer had discharged its obligation can be difficult. Under the CISG any delineation between steps taken before and after payment is made must be based on Article 57 requirements that payment be made "at the seller's place of business" [*Schwenzer* 827]. Where the parties, as here, have agreed to payment by "telegraphic transfer to the seller's bank, entry of credit to the seller's account will be decisive" [*Schwenzer* 827]. Within a bilateral transaction such as this, the Buyer's obligation is to present payment *at the specified account*. As such, the Buyer's duty cannot be relieved prior to the seller's receipt of notice of said credit to the account. The determination of the precise moment is fact-specific and should be guided by the principle that "an amount of money equivalent to the purchase price needs to be placed unconditionally at the seller's disposal" [*Schwenzer* 827].

82. In the present case, Claimant has met its burden of proving deficient payment. Claimant received $20,226,267.20, a fact Respondent does not contest. Though Respondent transferred US $ 20,438,560, the ECB deducted $102,192.80 before crediting Claimant's account. Under article 53, Claimant has shown that Respondent breached the Agreement by providing only a portion of the sum owed at the time it was due. At no point was the requisite sum placed in the

seller's account at the Equitoriana National Bank as required by the Agreement. Under these circumstances, Respondent has failed to satisfy the Article 53 requirement to pay the price.

II. Claimant is entitled to relief in the form of specific performance from the Respondent for the outstanding amount of the payment, with interest.

83. Claimant is entitled to specific performance under Articles 61 and 62 of the CISG **(A)**. The Article 28 limitations on specific performance are not applicable here **(B)**.

A. Articles 61 and 62 of the CISG entitle the claimant to seek specific relief from the tribunal for Respondent's breach of contract.

84. Under Article 61, "if the buyer fails to perform any of his obligations under the contract or this convention provides the Seller may" [*Art. 61(1) CISG*] exercise his right to a variety of remedies. One of these is the article 62 right to require the buyer to "pay the price…unless the seller has resorted to a remedy which is inconsistent with this requirement" [*Art. 62 CISG*]. Enforcing this right would constitute specific performance, or "requiring the other party to perform its obligations under the contract through court action" [Art. 28 UNCITRAL ¶2].

85. To activate its Article 61 privilege, a seller need only show "failure on the part of the buyer to perform any one of its obligations" [*Art. 62 UNCITRAL Digest*]. Even the cause of the buyer's breach does not matter; the seller does not need to show fault by the buyer [*Computer Chip Case*]. Pursuant to Article 62, the seller may demand performance from the buyer for any outstanding amount of the payment [*Marble Slab case*; *Pharmaceutical implements case*; *Artificial turf case*]. Where the buyer provides only partial payment, the seller may assert a claim for the remainder [*F.E.G.H.C. v. T., S.r.o.*]. Article 62 qualifies the seller's right to enforce payment where he has resorted to an inconsistent remedy. "The inconsistent remedy is avoidance, since, by definition, a party who rightly avoids (terminates) a contract puts an end to both parties' right to demand specific relief [*Lookofsky 2008* 135]. Likewise, if the seller had resort to the Article 63 remedy of fixing an additional time for performance he may not enforce performance during that time [*Art. 63 UNCITRAL Digest*]

86. In the present case, Claimant manifestly satisfies the requirements of Article 61 and 62 to require specific performance. Responded provided a payment fully $102,192.80 less than the price even though Claimant turned over all of the goods in a timely manner. Claimant did not avoid the contract or fix an additional time for Respondent to make the outstanding performance. Claimant merely seeks that Respondent make good on his obligation to make payment by providing the outstanding sum.

B. Article 28 does not limit the Seller's access to specific performance here.

87. According to Article 28, the Tribunal does not need to require specific performance from a party if it would not "do so under its own law in respect of similar contracts of sale not governed by this convention" [*Art. 28 CISG*].

88. As a compromise between domestic and international principles, Article 28 must be interpreted as obliging the Tribunal to turn to the domestic law of the country in which it sits [*Art. 28 UNCITRAL Digest* ¶1]. Danubia has adopted the UNCITRAL Model Law as amended in 2006. The Model Law does not prescribe the remedies a tribunal may award in the event of a breach [*McKendrick and Maxwell* 209]. The legal regime's silence should not be interpreted as barring the remedy. So narrow an interpretation would contradict the dominant practice among arbitral rules that generally allow for specific performance as a remedy [*McKendrick and Maxwell* 209–10].

III. Article 79's exemption from liability for failure to perform does not prevent the seller from seeking specific performance.

89. Article 79 provides grounds of exemption from liability for failure to perform under very limited circumstances—only when the party that did not uphold its obligations "proves that the failure was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." [*Art 79(1) CISG*]. This protection, however, does not prevent the non-breaching party "from exercising any right other than to claim damages [*Art 79(5) CISG*]. Article 79 is a "limitation to the principle of strict liability for non-performance of the contract which otherwise underlies the CISG" [*Schwenzer*, 1129]. It is, however, a narrowly cabined exception. The final clause "restricts the sphere of application of the exemption to claims for damages" [*Schwenzer*, 1129].

90. The Tribunal does not need to reach the question of whether the ECB levy was an impediment beyond the respondent's control or that it could not reasonably have been expected to take it into account because Claimant does not seek damages for Respondent's delinquency. Claimant merely asks the Tribunal to order Respondent to render specific performance.

PART 4: RESPONDENT'S REQUEST FOR SECURITY FOR COSTS IS INAPPROPRIATE AND FALLS OUTSIDE THE GRANTED POWERS OF THE TRIBUNAL

91. Respondent's request for security for costs is inappropriate on both procedural and substantive grounds. First, the Terms of Reference and the applicable arbitration rules do not grant the Tribunal the power to order Security for Costs **(I)**. Second, even if the Tribunal did have the authority to order this extraordinary measure, Respondent has not met its burden of proof of showing that security for costs is reasonable in this case **(II)**.

I. Neither the Terms of Reference nor the applicable arbitration rules permit this Tribunal to order Security for Costs.

92. The powers of the arbitral tribunal stem directly from the parties' consent and the powers granted in the arbitration rules. Under the CAM-CCBC rules, the parties sign a Terms of Reference before commencing the arbitration [*Art. 4.17, CAM-CCBC*]. Under the CAM-CCBC rules, the tribunal should look to either the arbitration rules or the parties' Terms of Reference to investigate whether the parties intended to grant it certain procedural powers.

93. The Terms of Reference applicable to this arbitration do not grant the tribunal the power to order Security for Costs **(A)**. Additionally, the CAM-CCBC rules do not grant the tribunal the power to order security for costs, and an order of security for costs does not fall under the "provisional measures" that the tribunal can grant under CAM-CCBC Article 8.1 **(B)**. Therefore, the tribunal is not empowered to order Claimant to pay Security for Costs because this power has not been granted by any of the relevant sources of authority.

A. The Terms of Reference do not grant the Tribunal the power to order security for costs.

94. The Terms of Reference is a contract that governs the procedure of the arbitration, and the Terms of Reference generally cover procedural issues related to the costs of the proceedings. If parties intend to grant the tribunal the power to order security for costs, this power should be granted in the Terms of Reference **(1)**. The parties' Terms of Reference does not grant the Tribunal power to grant security for costs and Respondent's request for security is a unilateral attempt to modify its contract with Claimant. **(2)**.

(1) The Terms of Reference are the appropriate device through which parties should consent to extraordinary powers to grant to a CAM-CCBC tribunal.

95. In preparation for an arbitral proceeding governed by the CAM-CCBC rules, the parties must sign the Terms of Reference [*Art. 4*.17, *CAM-CCBC*]. The Terms of Reference, a procedural

device used by both the CAM-CCBC rules and the ICC rules [*Romero/Sierra* ¶ 19], govern the proceeding and serve as a contract between the parties, reflecting their understanding of and consent to the procedure of the arbitration [*Art. 4.17--18*, *CAM-CCBC*; *Öhlberger/Pinkston* 112].

96. Parties are free to change or modify the claims and causes of action only until the Terms of Reference are signed [*Art. 4.21 ,CAM-CCBC*]. However, once the terms of reference are signed, the structure and rules governing the proceedings are final [*Id.*] Provisions of the CAM-CCBC rules invite the parties to use the Terms of Reference to set out specific procedural timeframes and consent to expanded powers to grant to the Tribunal. Importantly, the CAM-CCBC rules instruct the parties to include any "authorization for the arbitrators to decide *ex aequo et bono*" [*Art. 4.18(d), CAM-CCBC*]. The CAM-CCBC rules further provide that "[p]ermission for the Arbitral Tribunal to decide *ex aequo et bono* must be expressed either in the arbitration agreement or in the Terms of Reference" [*Art. 9.4.1, CAM-CCBC]*. The power to decide *ex aequo et bono* allows the arbitrators "to resolve the parties dispute without being bound by strict rules of law" [*Born 2013* ¶123]. In other words, the parties may, in the Terms of Reference, grant to the tribunal broad equitable powers which extend the power of the tribunal beyond the powers expressly granted by the arbitration rules. Accordingly, all extraneous procedural powers that the parties wish to grant to the arbitral tribunal should be set out in the Terms of Reference.

97. The Tribunal's ability to order Claimant to pay security for costs before a final decision on the merits, like all other powers, must stem from an agreement between the parties. The power can either stem from the arbitral rules (in this case, the CAM-CCBC rules) adopted via the arbitration agreement or from the explicit invocation of these powers through the Terms of Reference. Commentators confirm that a tribunal ordering security for costs is an exceptional procedural step [*Ho* 3]. Because the CAM-CCBC rules do not expressly grant the Tribunal the power to order security for costs, the Tribunal must look to the Terms of Reference to determine whether the parties intended to grant it this extraordinary power.

(2) The Terms of Reference does not grant the Tribunal power to grant security for costs, and Respondent's request is a unilateral attempt to create an authority not granted by the Terms of Reference.

98. The Terms of Reference signed by the parties declines to grant the Tribunal broad equitable powers beyond those granted by the arbitral rules. Because the parties already agreed on how to allocate the expense burden during the course of the proceedings, and because the parties'

declined to grant the Tribunal the power to decide *ex aequo et bono*, the Tribunal is left without the authority to order Claimant to pay security for Respondent's costs.

99. Allowing parties to unilaterally amend or incorrectly interpret the Terms of Reference after it is signed to include security costs defeats the purpose of instituting such a document in the first place, which is to bring "clarity and safety to the arbitration process" [*Carreteiro* ¶10]. These terms govern the proceedings, and have been decided beforehand to ensure efficient and just arbitration. Allowing the terms to be amended would diminish the parties' reliance on the terms, disregarding the reasons behind drafting them completely.

B. The CAM-CCBC rules do not affirmatively grant the tribunal the power to order security for costs, and an order for security for costs does not constitute a provisional measure.

100. The applicable arbitration rules, the CAM-CCBC, do not grant the tribunal the authority to order security for costs **(1)**. Though the rules grant the tribunal the power to order provisional measures, an order for security for costs is an extraordinary procedural power which is not appropriately categorized as a provisional measures **(2)**.

(1) The CAM-CCBC does not grant the tribunal the authority to order security for costs.

101. In general, arbitration rules that grant the Tribunal the power to order security for costs make the grant explicit. For example, Article 25 of the London Court of International Arbitration Rules ("LCIA") provides that the Tribunal has the power to order a party to "provide security for all or part of the amount in dispute" [*Art. 25, LCIA*]. Rule 27(j)(k) of the Singapore International Arbitration Centre rules (SIAC) authorizes the tribunal to "order any party to provide security for legal or other costs in any matter the Tribunal thinks fit" and "order any party to provide security for all or part of any amount in dispute in the arbitration" [*Rule 27(j)(k), SIAC*]. Such a grant of authority is "unusual" [*Born 2015,* §11.01[C]].

102. CAM-CCBC addresses all other aspects of costs in Chapter III. Chapter III deals with the treatment of administrative fees, arbitrators' fees, and expenses incidental to or incurred during the arbitration *[Art. 12, CAM-CCBC]*. The same chapter governs which party is responsible for administrative costs at the beginning of the arbitration and the course of action to take when payment is not made. The express inclusion of a security for costs clause in other rule sets indicates that if the CAM-CCBC intended to grant that authority, it would have been included in Chapter III of the arbitration rules. The absence of a grant of power to order security for costs indicates that the designers of the rules, and the parties who chose them, did not intend for tribunals to have this power during a proceeding governed by the CAM-CCBC rules.

(2) The CAM-CCBC allows for provisional measures, but an order for security for costs is not a provisional measure.

103. The Tribunal should not interpret the CAM-CCBC provision providing authority to order provisional measures as a grant of authority to order security for costs. Traditionally, the purpose of provisional, or interim measures, is to "provide a form of temporary and urgent relief to protect or preserve the status quo, or a party's assets or the evidence, or to avoid irreparable harm or prejudice to the conduct of the arbitration" [*Heilborn* 241]. Typical provisional measures ordered in international arbitration include preventing a party from publicizing the proceedings, ordering performance of a contract, or protecting a shareholder's voting rights. [*Id.* at 256].

104. Even if the tribunal considers an order for security for costs to be within the CAM-CCBC's definition of "provisional measures" under Article 8, Respondent's request should be denied because the parties have agreed to bear their expenses "during the course of the proceedings" and have thus agreed that the tribunal lacks the power to force one party to pay the other party's costs until after the arbitration award is issued [*Terms of Reference, Art. 12.4*]. The CAM-CCBC gives the Tribunal the authority to grant provisional measures unless "the parties have *otherwise agreed*" *[Art. 8, CAM-CCBC].* An order requiring Claimant to pay security for Respondents costs would be in direct conflict with the provision in the parties' Terms of Reference which indicates that "[d]uring the course of the arbitration proceedings, each party shall bear the fees of its respective attorneys. . . ." [*Terms of Reference, Art. 12.4]*. Such a provision indicates that the parties did not intend for the Tribunal to shift the burden of these expenses during the proceedings. By agreeing to this clause in the Terms of Reference, the parties have "otherwise agreed" that pre-award expense shifting is not within the provisional measures powers of the Tribunal.

<u>II. Respondent's request is inappropriate because Respondent has not met its burden of proof in showing that security for costs is reasonable in this case.</u>

105. Assuming that the Tribunal has the power to order security for costs under the CAM-CCBC rules, the Tribunal should still decline to order Security for its Costs because Respondent has not presented facts sufficient to justify such an order under the applicable standards. Respondent has failed to meet the standards set by international practice for security for costs. Respondent has failed to submit credible evidence that Claimant will be unable to comply with an award issued by the Tribunal **(A)**. Even if Respondent's evidence were credible, Respondent has failed to demonstrate Claimant's inability to pay any award issued by the Tribunal **(B)**. Lastly,

Respondent's request should be rejected because there has been no material, unforeseeable change in Claimant's financial position since the arbitration clause was signed **(C).**

A. Respondent has failed put forth credible evidence that Claimant will be unable to comply with an award issued by the Tribunal.

106. The international community adheres to three conditions that the Respondent must meet in order to justify the tribunal's consideration of security for costs. The Respondent first must "provide credible testimony from sources having knowledge of the claimant's financial affairs, relevant and persuasive documents including, the annual accounts and statutory returns of the claimant" [*Gu* 188]. These materials must "give rise to a reason to believe that the claimant will be unable to pay the respondent's costs if successful in the defense" [*Id.*] Finally, the respondent "must demonstrate that the claimant will be unable to pay, not a probability of the same" [*Id.*; *Needham* 122-129]. The burden on the Respondent to establish the three conditions are high.

107. Respondent has failed to provide credible sources to demonstrate that Claimant will be unable to comply with an award issued by this Tribunal **(1).** Respondent's arguments based on the status of other, unrelated arbitration proceedings are irrelevant to the inquiry regarding whether Claimant will be able to comply with an arbitral award **(2).** Respondent's suggestion that a lack of third party funding success indicates an inability to pay future costs is also baseless **(3).**

(1) Respondent has failed to provide any credible sources to demonstrate that Claimant will be unable to comply with an award issued by this Tribunal.

108. Respondent relies on only one article written by Carioca Business News to assert that Claimant will be unable to comply with an award issued by this Tribunal. Respondent alleges that the author is "usually well informed," although the author is not listed on the article [*Resp. Request for Security for Cost* ¶ 3]. An unknown author is not credible testimony, since there is no way to ascertain whether the author had knowledge of the Claimant's financial affairs. Respondent's conclusory assertions about the credibility of the author are not sufficient to meet its burden under the applicable standard of credible testimony. The source, a small regional website, also cannot be accepted as a credible source. Respondent has failed to prove that this website is well-established and fact checked by a neutral source to ensure accuracy.

(2) Respondent's arguments based on the status of other, unrelated arbitration proceedings are irrelevant to the inquiry regarding whether Claimant will be able to comply with an arbitral award issued by this Tribunal.

109. Even if the Tribunal accepted the credibility of the Carioca Business News article, Respondent still would not have satisfied the credible testimony requirement. The article's references to Claimant's activities and awards in other, unrelated arbitration proceedings are irrelevant to the question of whether Claimant will be able to comply with an award issued by this tribunal.

110. Respondent has based its request on an award issued by another tribunal that the Claimant has not paid [*Resp. Ex. 6*]. In January 2016, another tribunal awarded US $ 2,500,000 to one of Claimant's suppliers. [*Resp. Ex. 6*] As stated in our objection to Respondent's request for security for costs, Claimant has not complied with this award because Claimant is owed an even larger amount in damages by that same company [*Cl. Letter to Tribunal*, 16 Sept. 2016]. Noncompliance with this award was not based on financial hardship. That dispute has no bearing on this arbitration, and there is no reason to believe that the Claimant will not comply with any future awards issued in this proceeding, especially since Claimant nor Claimant's parent company has any other outstanding disputes with Respondent. Therefore, the tribunal should disregard this set of circumstances when evaluating Respondent's request for security.

111. Respondent also highlights that Claimant received a lower award than expected in an unrelated arbitration. Receiving a lower award in damages than expected is unrelated to whether or not the Claimant can pay an issued award in this proceeding. Respondent has requested security for at least US $200,000. Even the smaller amount that Claimant received from the unrelated arbitration proceeding, US $12 million, is larger than any costs Respondents may claim.

(3) Respondent's suggestion that a lack of third party funding success indicates an inability to pay costs in the future is also baseless.

112. Respondent seems to imply that Claimants requests for third party funding indicates that the Claimant does not have adequate resources to fund the arbitration [*Resp. Ex. 6*]. Third party funding is unrelated to Claimant's ability to pay any award issued in this proceeding. Third party funding is used as a method of spreading risk for companies [*Khouri/Hurford/Bowman* ¶ 1; *Massini* 2]. Seeking third party funding does not indicate a poor financial state or frivolous claims. In fact, Claimant was only rejected from receiving third party funding because the funding they needed was too limited for the third party funders' funding guidelines [*Proc. Ord. II* ¶ 29].

B. Even if Claimant was in financial straits as Respondent claims, the Claimant's financial situation alone is insufficient grounds to award costs.

113. Even if Respondent had put forth credible testimony demonstrating Claimant's weak financial standing, a showing of a weak financial position alone does not "give rise to a reason to believe

that the claimant will be unable to pay the respondent's costs if successful in the defense" [*Gu* 188; *Needham* 122-129]. Security for costs is a measure that should be granted with extreme caution in only the most exceptional circumstances [*Gu* 186; *Karrer/Desax* 343; *Sandrock* 34]. The tribunal should consider commentary which has indicated that tribunals should generally not order security for costs outside of extreme circumstances [*Gu* 186*, Ho* 334].

114. Most cases granting security involve parties who have become insolvent [*Havbulk case; Oilex case*] In some cases, even insolvency has not been an adequate reason to grant security [*Geneva Decision*]. In one British ICC case in which security for costs was granted, the tribunal justified the grant solely because the nonmoving party was unable to pay the advance on administrative costs required under the arbitral rules *[Coppee-Lavalin Case* 110]. That case illustrates that the weak financial situation of a nonmoving must be sufficiently drastic to raise a justifiable inference that that party will be unable to comply with an arbitral award. In denying a request for security for costs in another arbitration, a British court indicted that while insolvency may be sufficient to prove that a party will be unable to comply with a final arbitral award, cash-flow problems or a temporary lack of means cannot, by itself, justify an order for security for costs [*Bank Mellat Case* 317]. The tribunal should recognize that while there may be limited situations in which security for costs is appropriate, this situation does not call for such an extreme procedural order.

C. Respondent's request for security for costs should be rejected because Claimant's financial position has not changed materially and unforeseeably since the arbitration clause was signed.

122. Even if the tribunal finds that Claimant is in a weak financial position, the tribunal should decline to order Claimant to pay security for costs because Claimant's position has not changed in an unforeseeable way since Claimant and Respondent signed the Development and Sales Agreement on 1 August 2010. Several ICC cases which considered requests for security for costs have confirmed that the "central inquiry" regarding the propriety of the request is "whether the financial situation of the claimant has materially and unforeseeably changed since the conclusion of the arbitration agreement." [*ICCA-QMUL Task Force* 13*; XXX Case, ICC 10032, X v. Y and Z Case]*. Because Respondent knew, or ought to have known, of the general circumstances that it alleges prove Claimant's weakened financial position at the time it signed the Development and Sales Agreement, it should not be able to obtain security for its costs based on non-credible and marginally relevant facts which do not indicate a change in those general circumstances.

123. As stated by Claimant's CFO, Claimant's financial situation has not changed substantially or unexpectedly between the signing of the Contract and the time of Respondent's request [*Cl. Ex. 9*]. Claimant experienced a liquidity squeeze during January 2010, which was 6 months before Respondent signed the Agreement with Claimant [*Cl. Ex. 9*]. In addition, information regarding the closure of Claimant's Xanadu subsidiary (in January 2008), and the related investment claim against the government of Xanadu was readily available at the time Respondent signed the Agreement. *[Resp. Ex. 6]*. The two facts disclosed between the date of the signing of the Agreement (in August 2010) and Respondent's Request for Security for Costs (in September 2016) and which are relevant to Claimant' financial position are, first, that Claimant has not complied with the January 2016 tribunal award of $2,500,000, and second, that Claimant's arbitration against the government of Xanadu resulted in a payment of $12 million, rather than $203 million as originally claimed [*Resp. Ex. 6*]. Neither of these facts is sufficient to justify the assertion that Claimant's financial situation has changed "materially and unforeseeably".

124. Respondent has failed to show that their request for security for costs is appropriate. Even if procedural grounds were to grant authority to issue such a measure, Respondent has not provided sufficient justification to support this extreme and inappropriate request.

PRAYER FOR RELIEF

In light of the foregoing submissions, counsel respectfully submits that the Tribunal should order Respondent to:

1. Pay Claimant the outstanding purchase price of US $2,285,240.00
2. Pay the bank charge of US $102,192.80

Claimant also requests that the Tribunal order Respondent to bear all costs of this arbitration.

(signed)

Luke Budiardjo   Wendy Cai   Eric Ives

Kate Lee   Matthew Liptrot   Joe Margoies   Aliza Rana