

GOETHE UNIVERSITY



FRANKFURT AM MAIN

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## MEMORANDUM FOR RESPONDENT

On behalf of

**SantosD KG**

77 Avenida O Rei  
Cafucopa  
Mediterraneo

**RESPONDENT**

Against

**Wright Ltd**

232 Garrincha Street  
Oceanside  
Equatoriana

**CLAIMANT**

Arbitration Proceeding No. 200/2016/SEC7

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MARIE S. BERGNER • BENEDICT DETEMPLE • VINCENT M. KURZ  
TORBEN C. V. SCHÖNLE • ROXANA A. P. SHARIFI • ANDREEA VELIS

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**INDEX OF ABBREVIATIONS**

AG	<i>Aktiengesellschaft</i> (Joint Stock Corporation under German law)
Ans. Ord. Pres.	Answer to the Order of the President of the CAM-CCBC
Ans. Req. Arb.	Answer to the Request for Arbitration
Ans. Req. Sec. Costs	Answer to the Request for Security for Costs
Art./Artt.	Article/Articles
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code)
BV	<i>Besloten vennootschap met beperkte aansprakelijkheid</i> (Private Company with Limited Liability under Dutch law)
CAM-CCBC	Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
CIETAC	China International Economic & Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
DAL	Danubian Arbitration Law
DIAC	Dubai International Arbitration Centre
DRC	Dispute Resolution Clause
DSA	Development and Sales Agreement
e.g.	<i>exempli gratia</i> (example given)
Ed./Eds.	Editor/Editors
EQD	Equatorianian Denar
et al.	<i>et alii</i> (and others)
Ex.	Exhibit
FAQ	Frequently Asked Questions
GLA	General Law on Agency of Equatoriana
HGB	<i>Handelsgesetzbuch</i> (German Code of Commercial Law)
i.e.	<i>id est</i> (that is)
ICAC	International Commercial Arbitration Court of the Russian Federation
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
KG	<i>Kommanditgesellschaft</i> (Limited Partnership under German Law)
lit.	<i>littera</i> (letter)
Ltd	Limited
MfC	Memorandum for CLAIMANT
ML Regulation	Regulation ML2010/C



No.	Number
Ord. Pres.	Order of the President of the CAM-CCBC
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
PoA	Power of Attorney
R\$	Brazilian Real
Req. Arb.	Request for Arbitration
Req. Sec. Costs	Request for Security for Costs
SA	<i>Société anonyme</i> (Joint Stock Corporation under French Law)
Sec.	Section
ToR	Terms of Reference
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
UN-Model Provision on Money Laundering	United-Nations Model Provision on Money Laundering, Terrorist Financing, Preventing Measures and Proceeds of Crime
US\$	United States Dollar
v.	versus
VIAC	Vienna International Arbitration Center



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## STATEMENT OF FACTS

- 1 SantosD KG (“**RESPONDENT**”) is a prestigious medium sized jet engine manufacturer seated in Mediterraneo. Wright Ltd (“**CLAIMANT**”) is an Equatorianian producer of fan blades for jet engines. CLAIMANT and RESPONDENT (collectively the “**Parties**”) originally were subsidiaries of Engineering International SA, a multinational engineering company based in Oceania.
- 2 In **September 2009**, Engineering International SA decided to sell RESPONDENT, directing a de-risk strategy. Accordingly, fixed exchange rates were to apply to contracts between RESPONDENT and other subsidiaries.
- 3 In **May 2010**, the Parties entered into negotiations regarding the development and sale of the fan blade type TRF 192 I. Thereby, the Parties aimed to enable RESPONDENT to produce the innovative JE 76/TL 14b jet engine and to offer them to the aircraft manufacturer Earhart SP.
- 4 On **1 August 2010**, the Parties signed the Development and Sales Agreement (“**DSA**”) concerning the sale of 2,000 blades. However, it became apparent that RESPONDENT needed suitable clamps for the blades. Therefore, on **26 October 2010**, the Parties concluded an Addendum to the DSA. While CLAIMANT’s expenses incur in EQD, the price was to be calculated in US\$. Absent an explicit exchange rate stipulation in the DSA, the Parties fixed the exchange rate for the agreement to US\$ 1 to EQD 2.01 as per the Addendum.
- 5 On **14 January 2015**, CLAIMANT delivered the blades and RESPONDENT paid the price based on the fixed rate, i.e. US\$ 20,438,560. However, as CLAIMANT now denies the application of the fixed rate, it demands payment of US\$ 22,723,800 based on a floating rate.
- 6 Meanwhile, the Financial Investigation Unit, an administrative authority under the auspices of the Equatoriana Central Bank, conducted a money laundering investigation leading to the deduction of a 0.5 % levy of the transaction.
- 7 On **31 March 2016**, the Parties engaged in a negotiation in order to settle their dispute amicably. However, no agreement was reached. Consequently, on **1 April 2016**, CLAIMANT’s COO Ms. Amelia Beinhorn wrote an email to RESPONDENT declaring that attorneys had been instructed to initiate arbitration proceedings against RESPONDENT. According to the Dispute Resolution Clause, the Parties had the right to initiate the proceedings within sixty days.
- 8 Sixty days later, on **31 May 2016**, CLAIMANT’s attorney Mr. Horace Fasttrack requested arbitration at the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (“**CAM-CCBC**”). Yet, Mr. Fasttrack’s power of attorney referred to the wrong company, i.e. Wright Holding PLC, CLAIMANT’s parent company. Apart from that, CLAIMANT



also failed to pay R\$ 3,600 of the registration fee for the initiation of the arbitral proceedings. Therefore, on **1 June 2016** the President of the CAM-CCBC held the Request for Arbitration to be incomplete. On **7 June 2016**, CLAIMANT eventually completed its Request for Arbitration.

- 9 On **22 August 2016**, the Parties signed the Terms of Reference. Carioca Business News, a reputable newspaper, published the article “*Turbulent times: Equatorian Producer of jet engine blades in bad weather*” on **5 September 2016**, illuminating CLAIMANT’s precarious financial situation. Immediately after RESPONDENT became aware of this article, it filed a Request for Security for Costs on **6 September 2016**.

### SUMMARY OF THE ARGUMENT

- 10 The Tribunal is kindly requested to grant RESPONDENT’s Request for Security for Costs (**A**, *see below paras. 14-34*). Firstly, the Tribunal has the power to order CLAIMANT to provide security for costs. Secondly, the Tribunal shall order CLAIMANT to provide security for costs, since otherwise RESPONDENT will be deprived of the opportunity to recover its costs. Lastly, RESPONDENT also submitted its Request in a timely manner.
- 11 Further, the Tribunal is kindly requested to dismiss the Claim as inadmissible (**B**, *see below paras. 35-56*). CLAIMANT initiated the arbitral proceedings too late. The Dispute Resolution Clause imposes a binding time limit for the initiation of the arbitral proceedings, which exceeded on 31 May 2016. When CLAIMANT provided the CAM-CCBC with a completed Request for Arbitration on 7 June 2016, the time window for initiating the arbitral proceedings had already closed. However, when CLAIMANT submitted the Request for Arbitration in due time on 31 May 2016, it did not comply with the requirements provided by the CAM-CCBC Rules.
- 12 Even if the Tribunal were to find the Claim to be admissible, it is kindly requested to find that RESPONDENT is not obliged to pay US\$ 2,285,240 for the sale of the blades (**C**, *see below, paras. 57-84*). The price accounts for US\$ 20,438,560, since it is to be calculated according to the fixed rate of US\$ 1 to EQD 2.01. The Parties explicitly agreed on the application of the fixed rate according to the Addendum to the DSA and implicitly agreed on pursuant to the DSA.
- 13 Lastly, the Tribunal is kindly requested to find that RESPONDENT is not obliged to pay US\$ 102,192.80 for the levy deducted by the Financial Investigation Unit (**D**, *see below, paras. 85-101*). RESPONDENT is not obliged to bear the levy, since it is no bank charge, pursuant to Sec. 4 (3) DSA. Such a duty cannot be derived from the CISG either. In any case, RESPONDENT would not be required to bear the levy as CLAIMANT breached its duty to inform RESPONDENT about the levy.



## ARGUMENT ON THE ISSUES

### A. Issue One: The Tribunal Is Requested to Grant Security for Costs

14 The Tribunal is kindly requested to grant RESPONDENT's Request for Security for Costs in the minimum amount of US\$ 200,000 for RESPONDENT's legal costs [*Req. Sec. Costs*, p. 45, para. 1]. Firstly, the Tribunal has the power to order security for costs (I). Secondly, the Tribunal shall grant RESPONDENT's Request, since otherwise RESPONDENT will be deprived of the opportunity to recover its legal costs (II). Finally and contrary to CLAIMANT's allegations [*MfC*, paras. 9, 23], RESPONDENT submitted its Request in a timely manner (III).

### I. The Tribunal Has the Power to Order Security for Costs

15 The Tribunal has the power to grant RESPONDENT's Request for Security for Costs. Firstly, Art. 8.1 CAM-CCBC Rules confers the power to order security for costs upon the Tribunal (1). Secondly, this power is not limited by the Terms of Reference ("ToR") (2).

#### 1. The CAM-CCBC Rules Confer the Power to Order Security for Costs on the Tribunal

16 Art. 8.1 CAM-CCBC Rules confers the power to order security for costs upon the Tribunal. In exercising their party autonomy [*cf. UNCITRAL Digest Case Law, Art. 19*], the Parties contractually agreed on the application of the CAM-CCBC Rules [*Ex. C2, p. 10*]. Pursuant to Art. 8.1 CAM-CCBC Rules, a tribunal is authorized to grant provisional measures. This approach is seconded by Art. 17 of the Danubian Arbitration Law ("DAL"), the *lex arbitri* [*PO 1, p. 53, para. 5*], which is a verbatim adoption of the UNCITRAL Model Law [*PO 2, p. 60, para. 37*]. Art. 17 (2)(c) DAL describes a provisional measure as a temporary measure by which the tribunal orders a party to provide a means of preserving assets out of which a subsequent award may be satisfied. This also applies to an order for security for costs [*Altenkirch, pp. 213, 214; Born Volume II, p. 2004; Gu, p. 167; Redfern/O'Leary, p. 419*]. Such an order requires a party to post security for legal costs, which the other party would be awarded in the event it was entitled to a refund [*Born Volume II, p. 2004*]. Therefore, the Tribunal is authorized to order CLAIMANT to provide security for RESPONDENT's legal costs pursuant to Art. 8.1 CAM-CCBC Rules.

#### 2. The ToR Do Not Limit the Tribunal's Power

17 Furthermore, unlike CLAIMANT alleges [*MfC, paras. 5, 11*], the Tribunal's power to order security for costs is not limited by the ToR. Pursuant to Art. 8.1 CAM-CCBC Rules, solely the parties' agreement limits the tribunal's power. Firstly, CLAIMANT asserts that Sec. 12.4 ToR limits the Tribunal's power, since it expresses the Parties' agreement on an equal cost allocation regarding the attorneys' fees [*MfC, para. 6*]. Yet, Sec. 12.4 ToR [*ToR, p. 43*] merely states, which costs the Parties bear during the proceedings but does not regulate the allocation of attorneys' fees after



the proceedings in the final award. In fact, in the absence of an agreed cost allocation, a tribunal shall be guided by the domestic arbitration and procedural law when deciding on a cost award [Redfern/Hunter, p. 349]. Both, the arbitration and the procedural law of Equatoriana, Danubia and Mediterraneo are based on the principle of “cost follow the event” [PO 2, p. 58, para. 26], which means that the prevailing party will be entitled to recover its legal costs against the losing party [van den Berg, p. 127]. Therefore, the Tribunal shall apply the principle of “cost follow the event” to the final award. Consequently, its power to order security for costs is not limited by Sec. 12.4 ToR.

18 Moreover, contrary to CLAIMANT’s assertions [MfC, paras. 5, 11], Sec. 12.3 ToR does not limit the Tribunal’s power to order security for costs. Pursuant to Sec. 12.3 ToR, the final award determines the Parties’ liability for costs [ToR, p. 43]. CLAIMANT erroneously concludes that a request for security for costs is excluded, as it anticipates the final cost award [MfC, paras. 5, 11]. Yet, security for costs does not even influence the final cost allocation. In fact, it merely secures the costs in the event that the requesting party is awarded a recovery [Redfern/Hunter, p. 349]. In other words, it safeguards a party against being dragged through an entire proceeding only to realize that it cannot access its awarded payments [Born Volume II, p. 2004]. Thus, Sec. 12.3 ToR does not exclude a request for security for costs. Hence, the ToR do not limit the Tribunal’s power to order security for costs.

## **II. Without Security for Costs, RESPONDENT Will Be Deprived of the Opportunity to Recover Its Legal Costs**

19 Without security for costs, RESPONDENT will be deprived of the opportunity to recover its legal costs in the minimum amount of US\$ 200,000, after being dragged in this arbitration by CLAIMANT in the first place. In general, a tribunal shall grant a request for security for costs if there is reason to believe that the party requesting security for costs will be unable to recover an award on costs [Jirehouse Capital & ANR v. Beller & ANR; Regia Autonoma de Electricitate Renel v. Gulf Petroleum International; Gu, p. 189; Needham, p. 123; Redfern/O’Leary, p. 411; Soo, pp. 29, 30]. In the present case, there is reason to believe that RESPONDENT will be deprived of the opportunity to recover an award on costs, since CLAIMANT will be unable to cover the costs in the future (1). Even if the Tribunal were to find otherwise there is reason to believe that CLAIMANT will not be willing to adhere to an award on costs (2).

### **1. There Is Reason to Believe That CLAIMANT Will Be Unable to Cover a Forthcoming Award on Costs in RESPONDENT’s Favor**

20 Contrary to CLAIMANT’s assertions [MfC, paras. 24-28], there is reason to believe that CLAIMANT will not have the means to cover a forthcoming award on costs in RESPONDENT’s favor. As even



acknowledged by CLAIMANT [*MfC, para. 25*], tribunals consider the financial state of the party resisting a request for security for costs [*Born Volume II, p. 2005; Gu, p. 190; Needham, p. 123; Redfern/O’Leary, p. 411*]. Yet, CLAIMANT alleges that it could pay an award on costs, since it is not insolvent [*MfC, para. 25*]. However, solvency solely indicates that a company will be able to meet long-term obligations. Instead, the key question is whether a plaintiff will have liquid means readily available to pay an award on costs [*Gu, p. 190; cf. May/Mueller/Williams, pp. 725, 726*]. Firstly, CLAIMANT will not have liquid assets to cover an award on costs (a). Secondly, CLAIMANT already experiences severe cash flow problems (b). Thirdly, CLAIMANT’s illiquid assets are not to be taken into account (c). Fourthly, the Carioca Business News report constitutes sufficient evidence (d). Lastly, contrary to CLAIMANT’s allegations, RESPONDENT does not bear the risk of non-recollection (e).

**a. CLAIMANT Will Not Have Liquid Assets to Cover an Award on Costs**

21 CLAIMANT will not have liquid assets to cover an award on costs as affirmed by its current ratio. The current ratio is the most common financial matrix to measure a company’s ability to pay its short-term debt, which arbitrators should consider [*Gu, p. 190*]. It consists of a company’s current assets divided by its current liabilities [*“current ratio” in: Dictionary of Accounting*]. Current assets are easily liquidated [*May/Mueller/Williams, p. 188; Thomas/Ward, p. 234*] whereas current debts are short term debts that fall due in the near future [*May/Mueller/Williams, pp. 188-189; Thomas/Ward, p. 234*]. A current ratio of less than 1.0 suggests that a company can or will become unable to pay its debts [*May/Mueller/Williams, pp. 725, 726*]. CLAIMANT’s current ratio results from its current assets and current liabilities as follows:

<u>Current Assets</u>	<u>Current Liabilities</u>	<u>Current Ratio</u>
<ul style="list-style-type: none"> <li>▪ US\$ 199,950 Cash and cash equivalent</li> <li>▪ US\$ 478,000 Other assets</li> </ul>	<ul style="list-style-type: none"> <li>▪ US\$ 21,000,000 Bank loan</li> <li>▪ US\$ 3,000,000 Parent company loan</li> <li>▪ US\$ 16,532,950 Other liabilities</li> </ul>	US\$ 677,950 US\$ 43,032,950
<b>US\$ 677,950</b>	<b>US\$ 43,032,950</b>	<b>0.016</b>

**Figure 1:** CLAIMANT’s finances as of 31 December 2015 [*PO 2, p. 59, para. 29*]

22 CLAIMANT’s latest accounts as of 31 December 2015 reveal that its current assets amount to US\$ 677,950 [*PO 2, p. 59, para. 29*]. In contrast, all of CLAIMANT’s liabilities are current, totaling to US\$ 43,032,950 [*PO 2, p. 59, para. 29*]. Thus, the current ratio equals as little as 0.016. Accordingly, CLAIMANT will not be able to satisfy its existing obligations, as its current assets



only cover 1.6 % of its current debts. Hence, CLAIMANT will not have liquid assets to cover an award on costs. Therefore, without security for costs, RESPONDENT will be deprived of the opportunity to recover its costs.

**b. CLAIMANT Already Experiences Severe Cash Flow Problems**

23 Additionally, CLAIMANT's cash flow is at an all-time low, already barely covering the minimum amount RESPONDENT claims. Since a payment obligation can only easily be fulfilled with cash and cash equivalents, arbitrators shall consider the cash flow of the party that objects to a request for security for costs [*Altaras*, p. 86; *Gu*, p. 190]. Even CLAIMANT admits having a shortage of liquidity [*MfC*, para. 27]. Nevertheless, CLAIMANT alleges that “*the existence of cash flow problems within a company does not constitute a basis for awarding security for costs*” [*MfC*, para. 27]. CLAIMANT relies on the case of *Bank Mellat v. Helliniki Techniki*, where the Court of Appeal of England and Wales had to consider a request for security for costs. Yet, the court did not find that cash flow problems do not constitute a basis for security for costs. Instead, it ultimately rejected the request, since *Helliniki Techniki*, the defendant in these proceedings, seemed to receive financial support from the National Bank of Greece. This is the largest bank by deposits and the second largest bank by total assets of the defendant's main place of business. Thus, *Helliniki Techniki* seemed to be able to cover an award on costs. In contrast to *Helliniki Techniki*, CLAIMANT does not receive any further financial support, let alone backing by one of the largest financial institutions of Equatoriana, and is left with its US\$ 199,950 in cash and cash equivalents [*PO 2*, p. 59, para. 29]. Thus, the ruling is not applicable to the present case. Instead, the lack of any financial support and CLAIMANT's severe cash flow problems stresses that, without security for costs, RESPONDENT will be deprived of the opportunity to cover an award on costs.

24 Furthermore, contrary to what CLAIMANT might have argued, the fact that it tried to obtain third party funding confirms the need for an order for security for costs. Typically, where a party lacks assets but is pursuing a claim with the funding of a third party, a strong indication for security for costs exists [*Born Volume II*, p. 2005]. In the present case, CLAIMANT itself admits that it tried to obtain funding as a result of its strained liquidity [*Ex. C9*, p. 50]. Accordingly, CLAIMANT does not only lack assets but even failed to obtain third party funding [*PO 2*, p. 59, para. 29]. Thus, CLAIMANT's unsuccessful attempts to obtain for third party funding further emphasizes that its severe cash flow problems remain unsolved.

**c. CLAIMANT's Illiquid Assets Are Not to Be Taken into Account**

25 Moreover, CLAIMANT alleges that its remaining illiquid assets suffice to cover a cost award [*MfC*, para. 28]. However, CLAIMANT is left with no means to cover an award on costs, since its





remaining illiquid assets are not to be taken into account. Likewise, the High Court of Justice of England and Wales granted a request for security for costs as the only assets, which could be enforced against, were illiquid [*High Court of Justice, 7 May 2013*]. In the absence of security, the court concluded that there was a severe risk that any cost award rendered could not be enforced without considerable delay and expense [*High Court of Justice, 7 May 2013; Longstaff International v. Baker & McKenzie*]. In the case at hand, CLAIMANT's latest accounts reveal that its total assets amount to US\$ 42,757,950, out of which US\$ 42,080,000 are attributable to non-current assets [*PO 2, p. 59, para. 29*]. Non-current assets are illiquid, as they cannot be easily converted into cash or cash equivalents and used for payments [*Thomas/Ward, p. 234*]. In line with the finding of the High Court of Justice, CLAIMANT's remaining illiquid assets could also only be enforced against with considerable delay and expense. Hence, as they are not to be taken into account, CLAIMANT is left with no means to satisfy an award on costs. Thus, there is reason to believe that, without security for costs, RESPONDENT will be deprived of the opportunity to recover its legal costs.

#### **d. The Carioca Business News Report Constitutes Sufficient Evidence**

26 In addition, the Carioca Business News report constitutes sufficient evidence. Contrary to CLAIMANT's allegations [*MfC, para. 15*], such a news report is sufficient evidence to substantiate a request for security for costs. Evidence, in particular a newspaper article, is considered sufficient if it creates a "rational belief" that the respective party would be unable to cover the costs [*Warren Mitchell Pty. v. Australian Maritime Officers' Union; cf. ICC Case No. 1434; David, p. 290; Needham, p. 125*]. Carioca Business News has reported that CLAIMANT suffers "turbulent times" and is in "bad weather" [*Ex. R6, p. 47*]. Particularly, the author reports that the CAM-CCBC published that CLAIMANT refused to comply with a recent CAM-CCBC award [*Ex. R6, p. 47*]. Relying upon insider connections, the author reports on CLAIMANT's unsuccessful attempts to obtain third party funding for this arbitration [*Ex. R6, p. 47*]. The author further explains how CLAIMANT was solely awarded US\$ 12 million in an investment arbitration against the government of Xanadu. This was only a fraction of the US\$ 203 million claimed [*Ex. R6, p. 47*], causing a serious drop in CLAIMANT's shares [*Ex. R6, p. 47*]. Therefore, the article creates rational belief concerning CLAIMANT's turbulent financial situation. Thus, it constitutes sufficient evidence that CLAIMANT will be unable to cover an award on costs.

#### **e. RESPONDENT Does Not Bear the Risk of Non-Recollection**

27 Moreover, unlike CLAIMANT alleges [*MfC, paras. 26, 27*], RESPONDENT does not bear the risk of non-recollection. A party solely bears the risk of non-recollection that is associated with the counterparty's financial situation at the time of the conclusion of the contract [*Karrer/Desax, p. 345, para. 33; Sandrock, Cautio Judicatum Solvi, p. 37; Veit, p. 116*]. At the time of the conclusion



of the DSA, RESPONDENT could rely on the impression created by CLAIMANT that it was about to receive a payment in the minimum amount of US\$ 100 million. Pursuant to Art. 7 CISG, applicable according to Sec. 20 DSA [*Ex. C2, p. 10*], a contract is to be performed in good faith [*VLAC Case No. SCH-4318; Oberlandesgericht Karlsruhe, 25 June 1997; Bonell in: Bianca/Bonell, Art. 7 CISG, para. 2.4.1; Magnus in: Staudinger, Art. 7 CISG, para. 10*]. Accordingly, a party may rely on a basis of trust created by the counterparty. On 9 November 2009, CLAIMANT's CEO Mr. Sacadura Coutinho declared during a meeting with RESPONDENT's CEO Mr. Paul Romario that an investment arbitration award in the minimum amount of US\$ 100 million against the government of Xanadu would be rendered in CLAIMANT's favor [*Ex. R1, p. 27; PO 2, p. 60, para. 34*]. This substantial amount equaled more than twice CLAIMANT's assets at that time and 55 times of its annual profits. Additionally, while discussing the basic principles of their forthcoming co-operation [*Ex. C1, p. 8*], CLAIMANT again announced to remain "*still very confident in receiving a substantial award in its favor*" [*PO 2, p. 60, para. 34*]. Absent any indications to the contrary until the signing of the DSA on 1 August 2010, RESPONDENT could rely on this impression. Consequently, as CLAIMANT solely received a fraction of US\$ 12 million on 7 June 2010 [*Ex. R6, p. 47; PO 2, p. 61, para. 39*], RESPONDENT does not bear the risk of non-recollection regarding CLAIMANT's current financial situation.

## **2. Even if the Tribunal Were to Find Otherwise, There Is Reason to Believe That CLAIMANT Will Not Be Willing to Adhere to the Tribunal's Award on Costs**

28 In any case, there is reason to believe that CLAIMANT will not adhere to an award on costs. In fact, CLAIMANT already refused to comply with a recent CAM-CCBC award, resulting in an outstanding payment in the amount of US\$ 2.5 million. Pursuant to Art. 11.1 CAM-CCBC Rules, "*the parties are obliged to comply with the award*". The acceptance of the tribunal's ruling, in particular the award in one party's favor stipulates a core mechanism of arbitration [*Filbo/Lacreta in: CAM-CCBC Commentary, p. 185; Fouchard/Gaillard/Goldman, p. 12, para. 15*]. Even CLAIMANT admits that it did not pay the required amount, but alleges this to be "*completely justified*", since the award's creditor owed an even larger sum to CLAIMANT [*MfC, para. 18*]. However, this contradicts CLAIMANT's statements in the Answer to Request for Security for Costs. There, CLAIMANT clearly states that the award's creditor does, in fact, not owe any money to CLAIMANT [*Ans. Req. Sec. Costs, p. 49*]. Instead, CLAIMANT's parent company Wright Holding alleges that the award's creditor owes money to Wright Holding [*Ans. Req. Sec. Costs, p. 49*]. The claim is still pending in the courts of Ruritania [*Ans. Req. Sec. Costs, p. 49*]. Thus, CLAIMANT's non-payment was, indeed, not "*completely justified*". Instead, in not complying, CLAIMANT breached Art. 11.1 CAM-CCBC Rules. Therefore, this non-compliance shows that there is reason to



believe that CLAIMANT will not be willing to adhere to a forthcoming award on costs in RESPONDENT's favor. Hence, without security for costs, RESPONDENT will be deprived of the opportunity to recover its costs.

### III. RESPONDENT's Request for Security for Costs Was Submitted in a Timely Manner

29 Contrary to CLAIMANT's allegations [*MfC*, paras. 9, 23], RESPONDENT's Request for Security for Costs was submitted in a timely manner. The ToR do not entail a time limit for a request for security for costs (1). In any event, RESPONDENT's Request was submitted in time (2).

#### 1. The ToR Do Not Entail a Time Limit

30 Contrary to CLAIMANT's assertions [*MfC*, paras. 4, 5], the ToR do not entail a time limit for a request for security for costs in accordance with Art. 4.21 CAM-CCBC Rules. Pursuant to Art. 4.21 CAM-CCBC Rules, solely a party's right to amend its claim is limited. However, a request for security for costs is not a claim. Firstly, this already follows from the wording of the CAM-CCBC Rules. The CAM-CCBC Rules expressly distinguish claims, e.g. in Art. 4.21 CAM-CCBC Rules, from provisional measures, e.g. in Art. 8 CAM-CCBC Rules. Secondly, the purpose of Art. 4.21 CAM-CCBC Rules confirms this understanding. Art. 4.21 CAM-CCBC Rules aims to establish the ToR as an instrument to fix the subject-matter, i.e. the merits of the substantive dispute [*Greenberg/Kee*, p. 95; *Terashima/Gagliardi*, in: *CAM-CCBC Commentary*, p. 111]. In contrast, security for costs is a procedural instrument dealing with the legal costs of a party [*Greenberg/Kee*, p. 95] and thus does not affect the subject-matter [*cf. Lindow v. Barton McGill Marine*; *Greenberg/Kee/Weeramantry*, pp. 369, 370; *Huntley*, p. 82]. On the same grounds, CLAIMANT's enumeration of various rules, such as the ICC Rules or the CEPANI Rules [*MfC*, paras. 8, 9], is no proof for an international practice. Thus, RESPONDENT's Request for Security for Costs does not constitute a claim and Art. 4.21 CAM-CCBC Rules does not entail a time limit for a request for security for costs.

#### 2. In Any Event, RESPONDENT's Request Was Submitted in Time

31 In any event, RESPONDENT's Request was submitted in time. Security for costs can always be requested after gaining knowledge of new information that arise during the proceedings [*CLArb*, p. 11; *Heilbron*, p. 40]. RESPONDENT filed its Request directly after gaining knowledge of new information, raising serious doubts as to CLAIMANT's financial situation (a). Further, unlike CLAIMANT alleges, RESPONDENT was not required to be aware about the outcome of the Xanadu award when it filed its Answer to Request for Arbitration (b).



**a. RESPONDENT Filed Its Request Immediately after Gaining Knowledge of New Information, Raising Serious Doubts as to CLAIMANT's Financial Situation**

32 RESPONDENT filed its Request immediately after gaining knowledge of new information, raising serious doubts as to CLAIMANT's financial situation. RESPONDENT first gained knowledge of CLAIMANT's "*turbulent*" financial situation due to a report of Carioca Business News on 5 September 2016 [Ex. R6, p. 47]. In particular, it reported that CLAIMANT did not comply with a payment order issued by a tribunal under the CAM-CCBC in January 2016. Secondly, CLAIMANT tried to obtain third party funding. Lastly, CLAIMANT was awarded US\$ 12 million in an investment arbitration against the government of Xanadu. This was only a fraction of the US\$ 203 million claimed [Ex. R6, p. 47; PO 2, p. 58, para. 28]. Promptly, on the following day, RESPONDENT filed its Request for Security for Costs [Req. Sec. Costs, p. 45]. Thus, immediately after gaining knowledge of new information, RESPONDENT filed its Request. Hence, it was submitted in time.

**b. RESPONDENT Was Not Required to Be Aware of the Outcome of the Xanadu Award When It Filed Its Answer to Request for Arbitration**

33 Unlike CLAIMANT alleges [MfC, para. 23], RESPONDENT was not required to be aware of the outcome of the Xanadu award already when it filed its Answer to Request for Arbitration. CLAIMANT alleges that RESPONDENT was obliged to conduct a due diligence and thus should have been aware of the award, which was published shortly before the Answer to Request for Arbitration [MfC, para. 23]. However, even if RESPONDENT was obliged to conduct a due diligence, the relevant point in time would have been the conclusion of the DSA [cf. Rossmann/Moskin, Sec. 15.02, para. 12]. At that time, it was impossible for RESPONDENT to gain knowledge about the outcome of the award as it was not published [Ex. R6, p. 47]. Moreover, RESPONDENT was not obliged to conduct ongoing due diligence investigations throughout its entire co-operation with CLAIMANT. There was no occasion for RESPONDENT to investigate whether possible awards against CLAIMANT had been made public as it could rely on the impression created by CLAIMANT (*see above, para. 27*). Thus, RESPONDENT was not required to be aware of the outcome of the Xanadu award when it filed its Answer to Request for Arbitration.

**IV. Conclusion: RESPONDENT Is Entitled to Security for Costs**

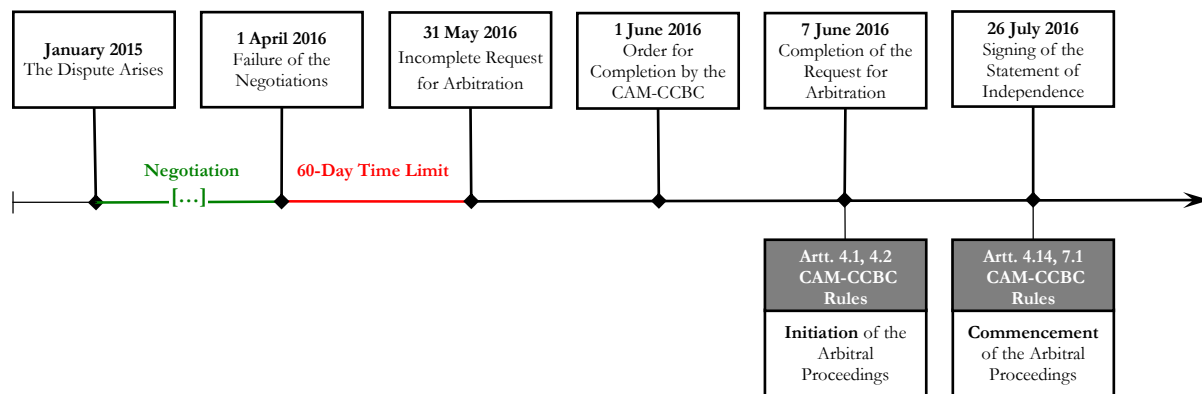
34 Counsel for RESPONDENT submit that the Tribunal has the power to grant RESPONDENT's Request for Security for Costs. Accordingly, the Tribunal should order CLAIMANT to provide security for costs, since otherwise RESPONDENT will be deprived of the opportunity to recover its legal costs, after being dragged into this arbitration by CLAIMANT in the first place. RESPONDENT



also submitted the Request in a timely manner. In conclusion, the Tribunal is kindly requested to grant RESPONDENT’s Request for Security for Costs.

**B. Issue Two: The Claim Is Inadmissible**

35 The Claim is inadmissible, as the arbitral proceedings had not been initiated in due time. When CLAIMANT completed the previously submitted Request for Arbitration on 7 June 2016, the time window for initiating the arbitration had already closed (I). Further, the Claim is inadmissible, since CLAIMANT’s Request for Arbitration of 31 May 2016 did not comply with the requirements of the CAM-CCBC Rules (II).



**Figure 2:** Timeline on the chain of events leading to the arbitral proceedings

**I. CLAIMANT Failed to Complete Its Request for Arbitration in Due Time**

36 CLAIMANT failed to submit a complete Request for Arbitration to the CAM-CCBC in due time. The Dispute Resolution Clause (“DRC”) imposes a binding time limit for the initiation of the arbitral proceedings (1). When CLAIMANT completed its previously submitted Request for Arbitration on 7 June 2016, the time limit had already expired (2). Finally, RESPONDENT is not prevented from relying on the exceedance of the contractual time limit (3).

**1. The DRC Imposes a Binding Time Limit for the Initiation of Arbitral Proceedings**

37 The DRC imposes a binding time limit for the initiation of arbitral proceedings. A contractual time limit is binding if it is sufficiently defined [Boog, p. 106; Jolles, p. 336; Krauss, p. 151; Lew/Mistelis/Kröll, p. 509, para. 20-15; Mećar, p. 28]. The DRC states:

*“All disputes [...] shall be settled amicably and in good faith between the parties. If no agreement can be reached each party has the right to initiate arbitration proceedings within sixty days after the failure of the negotiation to have the dispute decided by an arbitrator [emphasis added]” [Ex. C2, p. 11, Sec. 21].*

The clause stipulates the dispute settlement efforts as a multi-tiered or “escalation” [Born/Šćekić, p. 229] process. Before resorting to arbitration, the Parties must negotiate to find an amicable solution. If the Parties cannot resolve their dispute amicably, they are entitled to initiate arbitral



proceedings within sixty days. While the failure of negotiations triggers the time limit, the initiation of arbitral proceedings stops it from running [cf. *Bell Canada v. The Plan Group*]. Hence, the DRC stipulates the termination of the first tier as well as the advancement to the second tier of the dispute resolution process. However, a non-compliance with the time limit leads to each Party being prevented from using arbitration to resolve this particular dispute [cf. *Fustar v. Sinochem*; *Thyssen v. Calypso*; *Boog*, p. 108; *Jolles*, p. 336; *Terashima/Gagliardi in: CAM-CCBC Commentary*, p. 66]. Thus, a Party wishing to arbitrate has to initiate the proceedings within sixty days. Hence, the DRC sufficiently defines the Parties' rights and obligations. Consequently, it imposes a binding time limit of sixty days.

38 CLAIMANT asserts that the time limit is not binding, since the escalation process was “*merely aspirational*” and the time limit therefore could not even have been triggered [MfC, paras. 45, 46]. However, the DRC stipulates that “*all disputes shall be settled amicably*” [emphasis added] [Ex. C2, p. 11, Sec. 21]. The mandatory nature of this clause directly arises from the usage of the word “*shall*” [cf. *Baizéau/Loong*, p. 1456; *Born/Šćekić*, p. 238; *Krauss*, pp. 146, 151]. Therefore, the DRC compels the Parties to engage in negotiations. This failure triggers the binding time limit.

39 Unlike CLAIMANT asserts, the fact that the DRC does not stipulate details such as the manner or duration of the negotiation does not render the escalation process “*aspirational*” [MfC, para. 45]. However, the contrary applies, as parties may freely arrange the procedure of their negotiations [Mečar, p. 5]. This characteristic serves as a filter, allowing only the crucial disputes to reach arbitration as the final step of dispute resolution [Baizéau/Loong, p. 1453; Jones, p. 188]. Hence, the alleged lack of details regarding the negotiation process [MfC, para. 45] does not undermine its mandatory nature. Thus, the escalation process is a pre-arbitral procedural requirement, composed of the duty to negotiate and to initiate arbitration within a binding time limit.

40 Finally, contrary to CLAIMANT's assertions, adhering to the Parties' own agreement is not an “*excessive formalism*”, which “*must be avoided*” [MfC, paras. 47, 48.]. In fact, the DRC creates legal certainty. It stipulates the Parties' rights and obligations (*see above*, para. 37) and ensures that claims are raised in a timely manner [cf. *Lew/Mistelis/Kröll*, p. 507, para. 20-10]. In particular, the DRC marks a precise point in time from which on the Parties can rely on the fact that the arbitration can no longer be initiated. Yet, if the escalation process was an “*excessive formalism*” and “*merely aspirational*”, the Parties would no longer be able to anticipate this point in time. This would lead to constant uncertainty about the state of the Parties' dispute resolution process. Thus, CLAIMANT's approach would render the time limit and the entire escalation process obsolete. Therefore, the Tribunal shall find that the DRC contains a binding time limit.



## 2. The Time Limit Had Already Expired When CLAIMANT Completed Its Claim

41 CLAIMANT did not initiate arbitration with its completed Request for Arbitration on 7 June 2016, since the time window for initiating the arbitral proceedings had already expired on 31 May 2016. In accordance with the DRC, the time limit expires sixty days after the failure of negotiations [Ex. C2, p. 11, Sec. 21]. On 31 March 2016, CLAIMANT and RESPONDENT negotiated in order to settle their dispute. However, the Parties' hardened fronts [PO 2, p. 58, para. 23] resulted in the failure of the attempt to settle the dispute amicably. Hence, CLAIMANT's COO Ms. Beinhorn sent an email to RESPONDENT declaring the failure of the negotiation on 1 April 2016:

*“[T]he outcome of yesterday's meeting shows that it is presently not possible to find an amicable solution. Consequently, we have instructed our lawyers to take the necessary steps to initiate arbitration proceedings against you. [emphasis added]” [Ex. R3, p. 29].*

With the instruction of its attorneys and the announcement of the looming arbitration proceedings CLAIMANT firmly dismissed an amicable solution for good. This applies all the more, as CLAIMANT demanded RESPONDENT to bear its attorneys' fees in any case [Ex. R3, p. 29]. Thus, CLAIMANT's email of 1 April 2016 marks the point of the failure of the negotiations. Hence, the sixty-day time limit was triggered on 1 April 2016 and expired on 31 May 2016. Therefore, on 7 June 2016, CLAIMANT attempted to initiate the arbitral proceedings too late.

42 Further, CLAIMANT could not have argued that the negotiations did not fail as Ms. Beinhorn allegedly remained open for further discussions. In fact, Ms. Beinhorn's offer was unacceptable and made an amicable solution unattainable. Her email further reads: *“Should you reconsider your view I am always at your disposal and we remain open for further meaningful negotiations [emphasis added]” [Ex. R3, p. 29].* CLAIMANT dictated RESPONDENT to reconsider its view as a pre-condition for further negotiations. Thus, CLAIMANT under no circumstances was willing to deviate from its own intransigent negotiating position. Therefore, CLAIMANT prevented finding an amicable solution and thereby declared the failure of negotiations.

43 Even if the Tribunal were to find that CLAIMANT had still been willing to find a compromise on 1 April 2016, the negotiations failed. If parties disagree on whether their dispute settlement efforts have failed, they have failed [Karrer, p. 125]. Hence, even if CLAIMANT's email were to be qualified as an invitation to further negotiate, RESPONDENT did not reply, since it deemed the engagement in further negotiations to be fruitless. Therefore, the Parties disagreed on whether their amicable dispute settlement efforts had failed. Thus, the negotiations failed on 1 April 2016. Consequently, the time limit of sixty days had already lapsed, when CLAIMANT completed its Request for Arbitration on 7 June 2016.



### 3. RESPONDENT Is Not Prevented from Relying on the Exceedance of the Time Limit

44 Finally, CLAIMANT could not have argued that RESPONDENT was obliged to reply to the email and thus would be prevented from relying on the exceedance of the time limit. The Swiss *Bundesgericht* overruled an ICC tribunal in a case in which a dispute resolution clause required that arbitration had to be initiated within thirty days following a failure of negotiations [*Vekoma v. Maran*]. After the parties unsuccessfully negotiated, the plaintiff sent a letter to the defendant stating: “*If you have any questions, we are, of course, prepared to answer them for you. [...] If [...] you are not prepared to settle the claim, we shall most regrettably have to apply for arbitration*”. The letter remained unanswered and arbitration was requested several months later. The plaintiff argued that the defendant was obliged to reply to the letter. Furthermore, it asserted that the time limit was triggered only when the defendant made its position known as well. Thus, in the plaintiff’s view, the defendant was prevented from relying on the exceedance of the time limit. However, the court denied the plaintiff the access to arbitration, since its letter had to be understood as a last take-it-or-leave-it offer that could be rejected by silence. Based on this reasoning, CLAIMANT’s email of 1 April 2016 triggered the contractually agreed upon time limit of sixty days. Thus, RESPONDENT was not obliged to reply to CLAIMANT and is not prevented from relying on the exceedance of time limit. Therefore, CLAIMANT did not initiate the proceedings in due time.

## II. CLAIMANT Failed to Initiate the Arbitral Proceedings on 31 May 2016

45 Contrary to CLAIMANT’s allegations [*MfC, para. 30*], it failed to timely initiate the arbitration with its Request for Arbitration of 31 May 2016. To initiate an arbitration as per the DSA, CLAIMANT was obliged to submit a request in line with the requirements of the CAM-CCBC Rules (1). Yet, the Request for Arbitration did not fulfill the requirements of the CAM-CCBC Rules (2).

### 1. CLAIMANT Was Obligated to Comply with the Requirements of the CAM-CCBC Rules

46 To initiate the arbitral proceedings, CLAIMANT was obliged to comply with the requirements of Artt. 4.1, 4.2 CAM-CCBC Rules. According to the DRC, a Party to the DSA has to “*initiate*” the arbitration [*Ex. C2, p. 11, Sec. 21*]. Yet, Art. 4.1 CAM-CCBC Rules reads: “*The party desiring to commence an arbitration will notify the CAM-CCBC*”. The distinction between the terms arises from the fact that the initiation is a preliminary and necessary step on the procedural path leading to the commencement of the arbitration (*see above, Figure 2, para. 35*). The DRC, however merely requires CLAIMANT to initiate the arbitration. The requirements for the initiation can be found in the CAM-CCBC’s FAQ, published on its website [*CAM-CCBC, FAQ*]. There, the question “*how to initiate an arbitration proceeding at the CAM-CCBC*” is answered by listing all requirements of Art. 4.1 CAM-CCBC and demanding proof of payment pursuant to Art. 4.2 CAM-CCBC Rules





[CAM-CCBC, FAQ]. Accordingly, CLAIMANT was obliged to comply with all requirements of Artt. 4.1, 4.2 CAM-CCBC Rules in order to initiate the arbitration proceedings.

## 2. The Request for Arbitration Did Not Fulfill the Requirements

47 CLAIMANT failed to initiate the arbitral proceedings, as its Request for Arbitration of 31 May 2016 did not comply with Artt. 4.1, 4.2 CAM-CCBC Rules. Pursuant to Art. 4.1 (b) CAM-CCBC Rules, a request for arbitration has to include a power of attorney providing for “adequate representation”. Additionally, a proof of payment has to be attached, whereby “the claimant must pay to the CAM-CCBC the registration fee”, pursuant to Artt. 4.2, 12.5 CAM-CCBC Rules [CAM-CCBC, FAQ; cf. Timm in: CAM-CCBC Commentary, p. 192]. Yet, firstly, Mr. Fasttrack could not initiate the arbitral proceedings (a). Secondly, CLAIMANT failed to pay the registration fee in due time (b). In any case, the additional time limit granted by the President of the CAM-CCBC is not an approval to the admissibility of the Claim (c).

### a. Mr. Fasttrack Could Not Initiate the Arbitral Proceedings

48 Mr. Horace Fasttrack could not initiate the arbitration proceedings, since firstly, he did not adequately represent CLAIMANT as required by Art. 4.1 (b) CAM-CCBC Rules (aa). Secondly, even according to the *lex arbitri* Mr. Fasttrack was not authorized to initiate the arbitral proceedings (bb).

#### aa. The Power of Attorney Does Not Provide for Adequate Representation

49 The arbitral proceedings were not initiated on 31 May 2016, since CLAIMANT was not adequately represented by the attorney Mr. Fasttrack. Art. 4.1 (b) CAM-CCBC Rules requires the submission of a power of attorney providing for adequate representation. To provide for adequate representation, a power of attorney must at least be issued upon a party to the particular arbitration. However, the power of attorney submitted by CLAIMANT solely authorized Mr. Fasttrack to act “in the matter of Wright Holding” [PoA, p. 18], CLAIMANT’s parent company, against SantosD KG, i.e. RESPONDENT [Ord. Pres., p. 19]. However, no arbitration in the matter Wright Holding against RESPONDENT exists. Thus, the power of attorney is void. Hence, the power of attorney did not adequately represent CLAIMANT, as required by Art. 4.1 (b) CAM-CCBC Rules. Thus, he could not initiate the arbitration proceedings on CLAIMANT’s behalf.

50 Contrary to CLAIMANT allegations, this inadequate representation is not “justified” due to the assertion that the “arbitral proceedings should be instituted in the name of the holding company” [MfC, para. 35]. Firstly, according to Art. 7 (a) DAL, the arbitration clause is an agreement “*by the parties to submit to arbitration all or certain disputes [...] between them* [emphasis added]”. Thus, only the parties



to the agreement are bound by the agreement and capable of exercising their contractual rights such as the initiation of the arbitration [*AT&T Technologies v. CWA; Born Volume I, p. 1133; Redfern/Hunter, p. 6*]. Here, unlike Wright Holding, only CLAIMANT is a party to the arbitration agreement [*Ex. C2, p. 11, Sec. 21*]. Further, only CLAIMANT is named in the Request for Arbitration implying that only CLAIMANT intended to enter into the arbitration [*Req. Arb., p. 3*]. Thus, only CLAIMANT was entitled to initiate the arbitration against RESPONDENT. Consequently, due to the lack of adequate representation, CLAIMANT did not initiate the arbitral proceedings.

**bb. Mr. Fasttrack's Actions Had No Binding Effect According to the *Lex Arbitri***

51 Even according to the *lex arbitri*, Mr. Fasttrack was not authorized to initiate the arbitral proceedings. The contents and the validity of the power of attorney are subject to the law of Equatoriana [*PoA, p. 18*], particularly the General Law on Agency of Equatoriana (“GLA”), which is a verbatim adoption of the 2010 UNIDROIT Principles [*PO 2, p. 58, para. 24*]. According to Art. 2.2.2 (1) GLA, the principal's grant of authority to an agent may be expressly or impliedly. Yet, Art. 2.2.5 (1) GLA states that acts of an unauthorized agent have no binding effect [*UNIDROIT Principles, p. 83*]. The power of attorney was solely issued upon CLAIMANT's parent company [*PoA, p. 18*]. CLAIMANT acknowledges this by stating that it submitted an “*incorrect signature in the power of attorney*” [*MfC, para. 51*]. Accordingly, the power of attorney neither expressly nor impliedly authorized Mr. Fasttrack to act on CLAIMANT's behalf. Thus, Mr. Fasttrack had no binding effect. Therefore, he could not initiate the arbitral proceedings.

52 Unlike CLAIMANT alleges, the arbitration agreement is not binding upon Wright Holding due to the so-called “*group of companies doctrine*” [*MfC, paras. 38, 39*] and therefore does not cure CLAIMANT's missing authorization. The doctrine seeks to enable the extension of an arbitration agreement to third parties of the same group of companies [*Born Volume I, p. 1138*]. However, contrary to CLAIMANT's allegations [*MfC, para. 38*], the doctrine has given rise to “*very substantial controversy*” [*Born Volume I, p. 1167; Habegger, pp. 398-404; Poudret, pp. 390-397; Sandrock, Group of Companies, p. 6; Wilske/Shore/Abrens, p. 77*]. In fact, it has been solely applied by French courts [*Born Volume I, p. 1167*], whereas it is internationally widely rejected: For instance, English courts unequivocally declined the doctrine [*Petersen Farms, Inc. v. C&M Farming; Caparo Group v. Fagor Arrasate Sociedad Cooperativa; Gaffney, p. 27; Leadley/Williams, p. 6; Wilske/Shore/Abrens, p. 82; Woolhouse, p. 436*]. Likewise, Swiss courts did not recognize it [*Bundesgericht, 29 January 1996; Bundesgericht, 16 October 2003*]. Moreover, the Dutch *Hoge Raad der Nederlanden* annulled an arbitral award which was based on the doctrine [*Hoge Raad der Nederlanden, 20 January 2006*]. Similarly, it was rejected by numerous arbitral tribunals [*ICC Case No. 2138; ICC Case No. 3742; ICC Case No. 4402; ICC Case No. 4504; ICC Case No. 5281; ICC Case No. 6610; ICC Case No. 9839; ICC*



*Case No. 10818*]. Hence, unlike CLAIMANT tries to establish [*MfC, para. 38*], the group of companies doctrine does not constitute an international arbitration practice. Thus, the doctrine does not cure CLAIMANT's missing authorization.

53 Even if the Tribunal were to find this doctrine to apply, its requirements would not be fulfilled. As acknowledged by CLAIMANT [*MfC, paras. 38, 39*], the doctrine was developed in the case of *Dow Chemical v. Isover Saint Gobain*. However, contrary to CLAIMANT's allegations [*MfC, paras. 38, 39*], it does not universally bind all companies belonging to the same group [*MfC, para. 38*]. Instead, according to the doctrine, an arbitration clause may bind the companies of a group only in case they had engaged in the negotiations or performance of the respective contract [*Dow Chemical v. Isover Saint Gobain; ICC Case No. 5103; ICC Case No. 5721; ICC Case No. 6519*]. CLAIMANT had not even been a subsidiary of Wright Holding at the time the Parties negotiated the DSA [*PO 2, para. 22, p. 57; Req. Arb., p. 3, para. 2*]. Hence, Wright Holding had neither participated in its negotiations nor in its performance, wherefore Wright Holding was not involved at all. Consequently, even if the Tribunal were to find the doctrine to apply, its requirements would not be fulfilled. Thus, the arbitral proceedings were not initiated.

#### **b. CLAIMANT Failed to Pay the Registration Fee in Due Time**

54 Unlike CLAIMANT asserts [*MfC, para. 40*], it did not initiate the arbitral proceedings on 31 May 2016, as it failed to pay the registration fee. Art. 4.2 CAM-CCBC Rules requires proof of payment of the registration fee. Thus, the fee has to be paid. In addition, the proof of payment must be in accordance with Art. 12.5 CAM-CCBC Rules. Accordingly, at “*the time of presentation of the notice for commencement of arbitration, the claimant must pay [...] the Registration Fee*” amounting for R\$ 4,000 [*CAM-CCBC, Table of Expenses*]. The fee serves to enable the CAM-CCBC to administrate the communications between the parties and the arbitrators in a cost covering manner [*Haddad/Coelho in: CAM-CCBC Commentary, p. 29*]. CLAIMANT however failed to transfer R\$ 3,600, remitting merely 10% of the fee, i.e. R\$ 400 [*Ord. Pres., p. 19; Ans. Ord. Pres., p. 20*]. This marginal amount does not suffice to cover the costs arising. Consequently, CLAIMANT did not initiate the arbitration proceedings.

#### **c. In Any Case, the Additional Time Limit Is No Approval of the Admissibility**

55 Contrary to CLAIMANT's allegations [*MfC, para. 34*], the mere fact that the President of the CAM-CCBC granted an additional time period for the completion of the Request for Arbitration, does not constitute an approval of the admissibility of the Claim. In CAM-CCBC arbitrations, a plaintiff's failure to either submit the required documents or to pay the registration fee on the last day of a time limit can lead to the inadmissibility of a claim as “[*e*]ven if days later the claimant amends



his request for arbitration, [...] the claim is statute barred' [Terashima/Gagliardi in: CAM-CCBC Commentary, p. 66]. The additional time limit granted by the President of the CAM-CCBC serves to ensure that the required documents are submitted in order to provide the CAM-CCBC with the necessary documents and payment. Yet, the additional time limit does not interfere with the contractual time limit of sixty days, agreed on by the Parties in the DSA. On the same grounds, CLAIMANT's enumeration of various rules, such as the ICC Rules, the ICDR Rules or the LCIA Rules [MfC, para. 33], is no proof for an international practice. Hence, the order of an additional time limit is no approval of the admissibility of the Claim.

### III. Conclusion: The Claim Is Inadmissible

56 Counsel for RESPONDENT submit that the time window for initiating the arbitration had closed on 31 May 2016. Thus, when CLAIMANT completed its Request for Arbitration on 7 June 2016, the time limit had already expired. However, the Request of 31 May 2016 did not fulfill the requirements of the CAM-CCBC Rules. Thus, the arbitral proceedings were not initiated in due time. In conclusion, the Tribunal is kindly requested to dismiss the Claim as inadmissible.

### C. Issue Three: RESPONDENT Is Not Obligated to Pay an Additional Amount of US\$ 2,285,240 for the Purchase of the Blades

57 Even if the Tribunal were to find the Claim to be admissible, RESPONDENT is not obliged to pay an additional amount of US\$ 2,285,240 for the purchase of the blades according to the DSA in conjunction with Art. 53 CISG. Unlike CLAIMANT alleges [MfC, para. 4; Req. Arb., p. 5, para. 12], the purchase price does not account for US\$ 22,723,800 but amounts to US\$ 20,438,560. RESPONDENT paid this amount on 15 January 2015. The payment was credited to CLAIMANT's account on 29 January 2015 [Req. Arb., p. 5, para. 13]. In order to calculate the price, CLAIMANT had to convert its expenses incurred in EQD into US\$ [Ex. C1, p. 8]. Accordingly, the Parties explicitly agreed that "the exchange rate for the agreement is fixed to US\$ 1=EQD 2.01" [Ex. C2, p. 11]. However, CLAIMANT asserts that a floating rate applies to the blades [MfC, para. 94]. As recognized by CLAIMANT [MfC, para. 96], the Parties' common intent regarding the exchange rate cannot be found. Hence, the interpretation of the DSA is governed by Art. 8 (2) CISG. It is determined by the understanding that a reasonable person of the same kind as the parties would have had under the same circumstances at the time of contracting [Bundesgericht, Chemical products case; Oberlandesgericht München, Leather goods case; CSS Antenna v. Ampenol-Tuchel Electronics; Secretariat Commentary, Art. 7 CISG, para. 2]. Firstly, a reasonable person would have understood the price to amount to US\$ 20,438,560, as the Parties agreed on the application of a fixed rate of US\$ 1 to EQD 2.01 in the Addendum to the DSA (I). Even if the Tribunal were to find otherwise, also



the DSA, absent the Addendum, requires the application of the fixed rate (II). Lastly, contrary to CLAIMANT's assertions, it is not entitled to damages (III).

### I. The Fixed Rate of US\$ 1 to EQD 2.01 Agreed on in the Addendum Governs the DSA

58 Contrary to CLAIMANT's allegations [*MfC, para. 95*], the Parties agreed to apply the fixed rate of US\$ 1 to EQD 2.01 stipulated in the Addendum not only to the sale of the clamps but also to the sale of the blades. In order to interpret a contract pursuant to Art. 8 CISG, the exact wording and the context are particularly important [*Handelsgericht Aargau, Fruit and vegetables case; Saenger in: Ferrari/Kieninger/Mankowski, Art. 8 CISG, para. 5*]. On 1 August 2010, the Parties signed the DSA regulating the purchase of the blades [*Ex. C2, pp. 9-11*] but did not explicitly agree on an exchange rate in the DSA [*MfC, para. 72*]. On 26 October 2010, after it became apparent that RESPONDENT needed suitable clamps for the blades, the Parties added a handwritten Addendum on the last page of the DSA [*Req. Arb., p. 8, para. 5; Ex. C2, p. 11; Ex. R2, p. 28*]. On this occasion, the Parties further stipulated that “*the exchange rate for the agreement is fixed to US\$ 1=EQD 2.01*” [*Ex. C2, p. 11; Ex. R5, p. 31*]. Both the wording (1) and the context (2) of the Addendum express that the fixed rate of US\$ 1 to EQD 2.01 governs both the sale of the clamps and the blades. Further, CLAIMANT's subsequent conduct reveals the aforementioned understanding (3). Lastly, any ambiguity of the Addendum is not to be interpreted *contra proferentem* to RESPONDENT (4).

#### 1. The Wording Expresses That the Fixed Rate Governs the Sale of the Blades

59 The wording of the Addendum expresses that the fixed rate of US\$ 1 to EQD 2.01 also governs the sale of the blades. The Parties explicitly agreed that “*the exchange rate for the agreement is fixed to US\$ 1=EQD 2.01 [emphasis added]*” [*Ex. C2, p. 11*]. The term “*agreement*” refers to the entire DSA including the sale of the blades, as the fixed rate is the only explicit agreement on an exchange rate in the entire DSA (a). Even if the Tribunal were to find that the DSA and the Addendum would not form one single contract, the term “*agreement*” also refers to the sale of the blades (b).

##### a. The Term “*agreement*” Refers to the Entire DSA

60 The term “*agreement*” refers to the entire DSA. Thus, the only explicit exchange rate of US\$ 1 to EQD 2.01 also applies to the sale of the blades. Firstly, contrary to CLAIMANT's allegations [*MfC, para. 100*], the DSA and its Addendum constitute one single contract. This is primarily expressed by the use of the term “*Addendum*” [*Ex. C2, p. 11*]. When interpreting the meaning of a term, the interpretation follows the common understanding [*Handelsgericht Zürich, Mattress case; Schmidt-Kessel in: Schlechtriem/Schwenzer, Art. 8 CISG, para. 40*]. An Addendum is defined as “*extra information*



added at the end of a [...] contract” [“*addendum*” in: *Cambridge Business English Dictionary*]. The handwritten Addendum was added on the last page of the DSA [Ex. C2, p. 11]. Therefore, the DSA and its Addendum constitute one single contract. This reflects the fact that the sale of the blades and the clamps are linked. Hence, the clamps and the blades share one legal fate. Thus, it follows from a reasonable understanding that the Parties did not conclude a second contract but amended the DSA.

61 This interpretation is further confirmed by the Parties’ negotiations. According to Art. 8 (3) CISG, the parties’ negotiations are particularly relevant to find the reasonable understanding [ICC, *Fashion products case*; Ferrari in: *Münchener Kommentar HGB, Art. 8 CISG, para. 13*; Huber/Mullis, p. 13; Witz in: *Witz/Salger/Lorenz, Art. 8 CISG, para. 11*]. Mr. Romario, RESPONDENT’s CEO, summarized the results of previous negotiations in his email of 22 October 2010. In particular, he expressed “*not to enter into a separate contract for the clamps* [emphasis added]” [Ex. R2, p. 28; cf. PO 2, p. 57, para. 16]. Ms. Beinhorn, COO of CLAIMANT, approved RESPONDENT’s “*suggestion to link*” the sale of the blades and the clamps [Ex. R4, p. 30]. Thus, absent any objection or clarification, a reasonable understanding entails the Parties’ negotiations to confirm that the sale of the clamps and the blades constitute one single contract.

62 Accordingly, contrary to CLAIMANT’s assertions [MfC, paras. 95, 100], the fixed rate applies to the entire DSA, as it constitutes the only explicit agreement regarding the exchange rate. Again, this interpretation is affirmed by the Parties’ negotiations. CLAIMANT alleges that the aforementioned email only refers to the sale of the clamps, as its subject line reads “*Clamps*” [MfC, para. 99; Ex. R2, p. 28]. Yet, the fact that the email primarily concerned the sale of the clamps does not exclude the possibility that the negotiations also referred to the entire DSA. In fact, RESPONDENT suggested to add the Addendum “*by hand to the agreement* [emphasis added]” [Ex. R2, p. 28], using “*agreement*” as a synonym for the only contract between the Parties, the DSA. Hence, by agreeing on the fixed exchange rate [Ex. R4, p. 30], CLAIMANT agreed to apply the fixed rate to the DSA. Hence, the fixed rate of US\$ 1 to EQD 2.01 governs the entire DSA.

**b. Even If the Addendum Were to Be a Legally Separate Contract, the Term “*agreement*” Also Refers to the Sale of the Blades**

63 Even if the Tribunal were to find the Addendum to be a legally separate contract, a reasonable person would have understood the fixed rate to apply also to the sale of the blades. CLAIMANT alleges that the term “*agreement*” could only refer to the second contract concerning the clamps [MfC, para. 100]. Yet, the Parties referred to the sale of the clamps using the term “*addendum*” [Ex. C4, p. 13; Ex. C5, p. 14; Ex. C7, p. 16; Ex. R2, p. 28; Ex. R4, p. 30; Ex. R5, p. 31; Ex. C9, p. 50]. In fact, the Parties defined their co-operation to be a “*Development and Sales*



*Agreement*” [emphasis added] [Ex. C2, p. 9]. The fact that this co-operation was expanded by the Addendum does not change the character of the co-operation as an “*Agreement*” on the development and the sale of supplies for RESPONDENT’s jet engines. Hence, a reasonable person would have understood the “*agreement*” to refer to the whole co-operation, including the sale of the blades.

64 This interpretation is also affirmed, since the Parties distinguished between the “*main Agreement*” and the “*agreement*” [Ex. C2, p. 11]. The Parties stipulated that the fixed rate applies to the “*agreement*” whereas in general all terms should be adopted from the “*main Agreement*”. CLAIMANT correctly recognizes that the distinct adjective “*main*” limits the scope of the term “*main Agreement*” to the predominant sale of the blades, the DSA [MfC, para. 100]. In case the Parties intended to limit the scope of the term “*agreement*” to the sale of the clamps, they would have equally added a distinct adjective, e.g. “*subsequent agreement*”. In the absence of such a limitation, a reasonable person would have understood the term “*agreement*” to have a broader scope than the term “*main Agreement*”. Therefore, the wording of the Addendum shows that the fixed rate of US\$ 1 to EQD 2.01 governs the sale of the clamps and the sale of the blades.

## 2. The Context Requires to Apply the Fixed Rate to the Sale of the Blades

65 Moreover, a contextual interpretation of the Addendum provides for the application of the fixed rate to both the sale of the blades and the clamps. The Addendum contains two agreements. On the one hand, the sale of suitable clamps for the blades regulated by the first and the second provision. On the other hand, the explicit stipulation of a fixed exchange rate for both the sale of the clamps and the sale of the blades. The Addendum reads:

*“The Buyer may request the Seller to [...] deliver 2,000 clamps [...]. The Price for the clamps shall be on a cost coverage base and be paid in US\$.*

*Other terms as per main Agreement.”* [Ex. C2, p. 11].

Hence, the first provision regulates the details of the sale of the clamps, i.e. the subject of performance, the purchase price and the payment. The second provision stipulates that all other terms of the DSA should be applied. This includes *inter alia* the date of delivery, the choice of the applicable law and the applicable exchange rate. Consequently, the first two clauses conclusively regulate the sale of the clamps.

66 However, the fixed rate is stipulated in the third provision. The Addendum states:

*“The exchange rate for the agreement is fixed to US\$ 1=EQD 2.01”* [Ex. C2, p. 11].



Thus, this additional clause does not solely regulate the sale of the clamps as it is already conclusively regulated. Therefore, it can only refer to both sales. This applies all the more, since the clause stipulating the fixed rate is the final clause of the entire co-operation, which is incorporated in the contractual document of the DSA. Hence, the Addendum contains two agreements whereby the fixed rate of US\$ 1 to EQD 2.01 also applies to the sale of the blades.

67 Secondly, contrary to CLAIMANT's assertions [*MfC, para. 95*], the fixed rate does not solely regulate the sale of the clamps as an exemption from the reference to the DSA. CLAIMANT alleges that the Parties agreed on a floating rate in the DSA [*MfC, para. 98*]. Due to the reference in the second clause, this rate would be applied to the sale of the clamps. Thus, the stipulation of the fixed rate would constitute an exemption of this reference. Yet, the Parties stipulated all exemptions in the first clause. Thus, one could only have understood the fixed rate to also be an exemption, if it was stipulated in the first clause, in connection with the payment of the price. Otherwise, the Addendum would express an inconsistent sequence of clauses. It would begin with the details, followed by the finalizing reference while ending on additional details. In other words, the fixed rate would be an amendment to the Addendum, i.e. an inherent addendum to the Addendum to the DSA. Hence, a reasonable person could only have understood the fixed rate to constitute a separate, additional agreement which also governs the sale of the blades.

### 3. CLAIMANT's Subsequent Conduct Affirms That the Fixed Rate Applies to the DSA

68 Furthermore, CLAIMANT's subsequent conduct affirms that the fixed rate applies to the sale of the blades. On 14 January 2014, CLAIMANT sent an invoice applying the fixed rate of US\$ 1 to EQD 2.01 to the calculation of the blades and the clamps [*Ex. C3, p. 12*]. CLAIMANT alleges the invoice to be irrelevant for the interpretation pursuant to Art. 8 (2), (3) CISG, being a mistake of an employee [*Req. Arb., p. 5, para. 12*]. However, exactly this employee considered the DSA for the first time and did not take part in the negotiations. Therefore, his understanding is to be considered as the understanding of a reasonable person. Consequently, CLAIMANT's subsequent conduct, i.e. the invoice, affirms that a reasonable person could only have understood the interaction of the Addendum and the DSA to require the application of the fixed rate.

### 4. The Addendum Is Not to Be Interpreted *Contra Proferentem* to RESPONDENT

69 If the Tribunal were to find the Addendum to be ambiguous, it may not to be interpreted detrimental to RESPONDENT, contrary to CLAIMANT's allegations [*MfC, paras. 101-104*]. CLAIMANT asserts that the principle of *contra proferentem* applies, since RESPONDENT had "*superior bargaining power*" and supplied the Addendum [*MfC, para. 103*]. However, a clause may only be interpreted *contra proferentem* to a party in case this party introduced the ambiguous clause





[CIETAC, *Cysteine case*; Bundesgerichtshof, 28 May 2014; Schmidt-Kessel in: Schlechtriem/Schwenzer, *Art. 8 CISG, para. 47*]. Accordingly, the principle of *contra proferentem* does not apply if the parties mutually contributed to the ambiguity of the clause in particular by negotiating [*Doucet v. Doucet; Sykes, pp. 66, 67; UNIDROIT Principles, p. 144*]. RESPONDENT merely suggested a possible wording of the Addendum in Mr. Romario's email of 22 October 2010, summarizing their previous negotiations [*Ex. R2, p. 28*]. Moreover, RESPONDENT expressly invited CLAIMANT to discuss the suggested terms [*Ex. R2, p. 28*]. Even after two days of consideration, CLAIMANT renounced from discussing the terms any further [*Ex. R4, p. 30*]. It even copied the Parties' mutual agreement in handwriting on the last page of the DSA [*Ex. R4, p. 30*]. Hence, as CLAIMANT was similarly responsible for the wording as RESPONDENT, the Addendum may not be interpreted *contra proferentem* to RESPONDENT. Thus, a reasonable understanding entails that the Parties agreed to apply the fixed rate of US\$ 1 to EQD 2.01 to the sale of the blades.

## II. In Any Event, the DSA Requires the Application of the Fixed Rate

70 Even if the Tribunal were to find that the fixed rate in the Addendum solely applies to the sale of the clamps, the Parties would have implicitly agreed on the application of the fixed rate of US\$ 1 to EQD 2.01 in the DSA. Firstly, a reasonable person would have understood the conversion to be based on the fixed rate of US\$ 1 to EQD 2.01, since RESPONDENT should not be exposed to any risk associated with the expenses of CLAIMANT incurring in EQD (1). Secondly, CLAIMANT bears the risk of currency fluctuations (2). Thirdly, the de-risk strategy of Engineering International provides for the fixed rate (3). Further, contrary to CLAIMANT's allegations, the fixed rate does not unfairly burden CLAIMANT (4). Lastly, CLAIMANT's assertion that an implicit floating rate applies to the blades but an explicit fixed rate to the clamps is inconsistent (5).

### 1. RESPONDENT Should Not Be Exposed to Any Risk Associated with the Expenses of CLAIMANT Incurring in EQD

71 A reasonable person would have understood the fixed rate to apply, since RESPONDENT should not be exposed to any risk associated with the expenses of CLAIMANT incurring in EQD. Both Parties knew that CLAIMANT's expenses would incur in EQD [*Ex. C1, p. 8*]. However, regarding the price calculation in Sec. 4 (1) DSA, the Parties refrained from the effortless possibility to refer to CLAIMANT's expenses in EQD. Instead, they denominated the contract in US\$ [*Ex. C2, p. 10, Sec. 4 (1)*], the neutral currency of the world's largest economy [*World Bank, GDP Ranking Table*]. This is a common standard in the aircraft industry [*PO 2, p. 57, para. 14*] in order to ensure that each party solely bears the risk of fluctuation of its domestic currency against the US\$ [*Borstell/Hülster in: Vögele/Borstell/Engeler, Sec. 5, para. 121*]. Therefore, a reasonable person would



have understood that RESPONDENT should not be exposed to the risk of the CLAIMANT's expenses incurring in EQD, CLAIMANT's domestic currency.

72 RESPONDENT should all the more not be exposed to any risk associated with the EQD, since CLAIMANT induced these risks to the DSA. In the case at hand, the common practice in both the international aircraft industry and the Engineering International Group is to keep the accounts and to denominate all contracts in US\$ [PO 2, p. 57, para. 14]. CLAIMANT diverges from this standard, choosing instead to keep its accounts and to produce its goods in EQD, the currency of a country famous for being a "safe haven for dubious financial activities" [PO 2, p. 55, para. 7]. Consequently, since CLAIMANT chose to induce the currency risk of the EQD to the DSA, RESPONDENT should not be exposed to this risk. Solely the fixed rate ensures that RESPONDENT is not exposed to the price development of the EQD. Therefore, a fixed rate has to be applied.

## 2. CLAIMANT Bears the Risk of Currency Fluctuations

73 Additionally, contrary to CLAIMANT's assertions [MfC, para. 66], the fixed rate applies, since CLAIMANT bears the risks of currency fluctuations according to Sec. 4 (1) DSA. CLAIMANT was aware that the DSA contained the risk of currency fluctuations, as its expenses incurred in EQD [Ex. C1, p. 8]. Accordingly, it bears the risk of increasing production costs in US\$ (a), including the risk of currency fluctuations (b). Contrary to CLAIMANT's allegations, RESPONDENT is not obliged to cover CLAIMANT's expenses in EQD (c).

### a. CLAIMANT Bears the Risk of Increasing Production Costs in US\$

74 As conceded by CLAIMANT [MfC, para. 67], a reasonable person would have understood that CLAIMANT bears the risk of an increase in production costs in US\$. The purchase price in US\$ is composed of the production costs and an additional margin, both denominated in US\$ [Ex. C2, p. 10, Sec. 4 (1)]. Following the aircraft industry's practice to share the risks of an increase in production cost [Req. Arb., p. 6, para. 21], the Parties had agreed on a price calculation in their previous co-operations, which in any case provided for the coverage of the production costs in US\$ [PO 2, p. 54, para. 5]. Yet, the Parties diverged from this practice in Sec. 4 (1) DSA. Sec. 4 (1) DSA stipulates a maximum price in the amount of US\$ 13,125 per fan blade [Ex. C2, p. 10, Sec. 4 (1)]. In case of an exceedance of the maximum price, CLAIMANT would not even recover its production costs in US\$, inevitably incurring a loss. Consequently, CLAIMANT bears the risk of the production costs in US\$ exceeding the maximum price.

75 Moreover, this divergence from the practice expresses that in general CLAIMANT bears the production cost risk. At first glance, CLAIMANT only bears the risk of production costs exceeding the maximum price, since, below this threshold of US\$ 13,125, the purchase price increases



according to the production costs [*Ex. C2, p. 10, Sec. 4 (1)*]. CLAIMANT, however, could not reliably expect to produce at costs below the maximum price of US\$ 13,125. The price calculation was based on CLAIMANT's production costs of the previous type of blades, i.e. around US\$ 10,000 [*Req. Arb., p. 4, para. 7*]. Despite the fact that the predecessor was the most innovative blade on the market, it did not meet the requirements in order to be included into RESPONDENT's engines. In fact, it needed improvements concerning the noise reduction [*Ex. C2, p. 9*]. Accordingly, the development costs, necessary to further improve the best product on the market, could not have been estimated reliably. Thus, at the time of contracting, the risk that the final costs would exceed the maximum price of US\$ 13,125 was plausible. Hence, based on a reasonable understanding, the stipulation of the maximum price shifts the production cost risk primarily to CLAIMANT. Consequently, CLAIMANT bears the production cost risk.

**b. The Production Cost Risk Includes the Risk of Currency Fluctuations**

76 Furthermore, based on a reasonable understanding, CLAIMANT bears the risk of currency fluctuations, as it is inherent to the risk of increasing production costs in US\$. The production costs in US\$ are composed of CLAIMANT's expenses in EQD and the agreed exchange rate.

$$\text{Production Cost}_{US\$} = \text{Expenses}_{EQD} \times \text{Exchange Rate}$$

Thus, the risk of increasing production costs in US\$ could have materialized either by increasing expenses in EQD or by exchange rate fluctuations. Hence, the risk of a fluctuation of the exchange rate is inherent to the calculation of production costs in US\$. Here, the Parties did not agree on a different allocation of the risk of currency fluctuations [*PO 2, p. 54, para. 4*]. Thus, CLAIMANT's production cost risk includes the inherent risk of exchange rate fluctuations. Since the fixed rate transfers the risk of currency fluctuations to CLAIMANT [*cf. Ex. C7, p. 16; Ex. R1, p. 27*], a reasonable person would have understood the fixed rate to apply.

**c. RESPONDENT Is Not Obligated to Cover CLAIMANT's Expenses in EQD**

77 Lastly, contrary to CLAIMANT's allegations [*Req. Arb., p. 7, paras. 21, 22; MfC, paras. 61-64, 67, 71*], RESPONDENT is not required to cover CLAIMANT's expenses in EQD nor to guarantee a profit. CLAIMANT asserts that a floating rate applies, as it did not assume the risk of currency fluctuations, based on an alleged general nature of cost-plus contracts [*MfC, paras. 60-68*]. Yet, for an interpretation in accordance with Art. 8 CISG, the contract at hand is crucial to interpret its meaning [*Schmidt-Kessel in: Schlechtriem/Schwenzer, Art. 8 CISG, para. 31; Secretariat Commentary, Art. 7 CISG, paras. 5, 7*]. Firstly, the price should be calculated on a mere cost-plus "basis" [*Ex. C2, p. 10, Sec. 4 (1)*]. Thus, the alleged general nature does all the more not determine the interpretation of the DSA. Secondly and absent the implication of the EQD but the



denomination in US\$ (*see above, para. 71*), RESPONDENT is only obliged to cover CLAIMANT's production costs in US\$. Consequently, regardless of the agreed exchange rate, CLAIMANT would always be reimbursed as per the DSA. Hence, the coverage of the production costs in US\$ is incapable of indicating any exchange rate. Consequently, CLAIMANT's allegations do not change the reasonable understanding that CLAIMANT bears the risk of currency fluctuations.

### 3. The De-Risk Strategy Provides for the Application of the Fixed Rate

78 Furthermore, the de-risk strategy of Engineering International provides for the application of a fixed rate. Due to the global financial crisis, Engineering International decided to sell several subsidiaries including RESPONDENT [*Req. Arb., p. 3, para. 2*]. Accordingly, RESPONDENT was directed to diminish its contractual risks. In particular, a fixed rate was to be applied to all contracts in order to exclude potential currency risks [*Ex. R1, p. 27; Ans. Req. Arb., p. 24, para. 9*]. Moreover, all subsidiaries of Engineering International were required to support RESPONDENT's de-risking [*Ex. R1, p. 27*]. RESPONDENT was sold after the conclusion of the DSA [*PO 2, p. 54, para. 1*]. Therefore, the de-risk strategy had to be applied to the DSA, resulting in the application of a fixed rate.

79 CLAIMANT might have argued that it was not required to comply with the de-risk strategy of Engineering International, as it was sold to Wright Holding five days before the conclusion of the DSA [*PO 2, p. 54, para. 1*]. The Parties originally intended to conclude the DSA on 27 July 2010 [*PO 2, p. 54, para. 1*]. Hence, the negotiations concerning the DSA had to be terminated on 27 July 2010. At that time, CLAIMANT was part of the Engineering International Group. Further, CLAIMANT did not even mention its forthcoming sale during the negotiations. Yet, the signing date had to be postponed to 1 August 2010, as CLAIMANT's representatives preferred to attend the signing of the Share Purchase Agreement between Engineering International and CLAIMANT's new parent company [*PO 2, p. 54, para. 1*]. Nonetheless, absent any further negotiations, a reasonable person would have understood the DSA to express the Parties' agreements as of 27 July 2010. Thus, a reasonable person could only have understood that both Parties still intended to adhere to the de-risk strategy, fixing the exchange rate, prevailing on 27 July 2010, i.e. to US\$ 1 to EQD 2.01 [*PO 2, p. 56, para. 12*]. Hence, the Parties agreed on the fixed rate.

### 4. The Application of the Fixed Rate Is Not Unfairly Burdensome to CLAIMANT

80 Apparently being surprised that the risks it agreed to bear actually materialized, CLAIMANT asserts that the fixed rate is unfairly burdensome as it does not allow CLAIMANT to draw a profit [*M/C, para. 71*]. However, the DSA enables CLAIMANT to profit. Given the expenses of EQD 19,586



per blade [*Req. Arb.*, p. 5, para. 12], converted according to the fixed rate, CLAIMANT would have drawn a profit unless the exchange rate depreciated below US\$ 1 to EQD 1.917 at the time of performance. In fact, its profit would have increased even more if the EQD depreciated against the US\$. Further, neither party expected the exchange rate to depreciate, since the exchange rate had been stable in the past [*Ex. C1*, p. 8; *Ex. R5*, p. 31]. Thus, they perceived the risk transferred to CLAIMANT even smaller. Therefore, the application of the fixed rate was not unfairly burdensome at the time of contracting.

81 Moreover, contrary to CLAIMANT's assertions [*MfC*, para. 73], the application of the fixed rate is not unfair, as it does not shift the "*equilibrium of the contract unfairly against CLAIMANT*". CLAIMANT presumes that the Parties agreed on an equal distribution of risks [*MfC*, paras. 67, 73]. However, in particular the exchange rate significantly contributes to the intended allocation of risks. Thus, without presuming any exchange rate, the equilibrium of the contract cannot be established. Accordingly, an equal distribution of risks would only become apparent if the Parties had applied a floating rate. Yet, presuming that the floating rate applies to justify the application of the floating rate would be circular reasoning. Hence, the equilibrium of the contract cannot indicate any exchange rate. Thus, the fixed rate is not unfairly burdensome for CLAIMANT. Its allegations do not change the reasonable understanding of applying the fixed rate of US\$ 1 to EQD 2.01.

#### **5. The Fixed Rate Applies to the Sale of the Blades as CLAIMANT's Assertions to the Contrary Are Inconsistent**

82 The fixed rate applies to the sale of the blades as CLAIMANT's assertions to the contrary are inconsistent. CLAIMANT alleges that the Parties explicitly agreed to apply the fixed rate to the clamps whereas the floating rate for the blades was agreed on implicitly [*MfC*, paras. 95, 100]. However, this understanding is inconsistent as firstly, the Parties applied a fixed rate to both of their previous co-operations [*PO 2*, p. 54, para. 5]. Thus, it is daring to assume that the Parties implicitly diverged from their previous contracts. Secondly, the value of the blades would account for over a hundred times more than the clamps' value, comparing around US\$ 20 million to around US\$ 180,000. Even CLAIMANT acknowledges that the sale of the blades therefore incorporates a more significant risk [*MfC*, para. 95; *Req. Arb.*, p. 7, para. 22]. Yet, based on CLAIMANT's assumption [*MfC*, paras. 95, 100], the Parties did not deem it necessary to at least orally clarify the divergent floating rate regarding the blades whereas explicitly stating the fixed rate for the sale of the clamps on the same contractual document. Since the risk assumption in long-term contracts is usually "*broadly defined*" [*Saidov*, p. 120], a reasonable person would have understood such conduct to be inconsistent. Consequently, the price for the blades accounts for US\$ 20,438,560, as it is based on the fixed rate of US\$ 1 to EQD 2.01.



### III. CLAIMANT Is Not Entitled to Damages

83 Finally, contrary to CLAIMANT's belief [*MfC, paras. 74-93*], the suggested additional payment in the amount of US\$ 2,285,240 is not to be remedied as damages. As expressed in CLAIMANT's Request for Arbitration [*Req. Arb., p. 6, para. 20*], it claims full performance of the DSA according to Artt. 53, 62 CISG. Yet, it is contradictory to simultaneously claim damages instead of the requested outstanding performance, rejecting the performance of the DSA [*cf. Oberster Gerichtshof, Propane case; Mohs in: Schlechtriem/Schwenzer, Art. 61 CISG, para. 13; Huber in: Münchener Kommentar BGB, Art. 74 CISG, paras. 9, 12*]. In any case, the claim for damages would be unsubstantiated, since CLAIMANT's demand for performance would render damages obsolete [*cf. Oberster Gerichtshof, 22 April 2010; Oberlandesgericht Schleswig, 22 August 2002; Huber in: Münchener Kommentar BGB, Art. 74 CISG, para. 7; Mankowski in: Münchener Kommentar HGB, Art. 74 CISG, para. 4; Magnus in: Staudinger, Art. 61 CISG, para. 23; Mohs in: Schlechtriem/Schwenzer, Art. 61 CISG, para. 13*]. In any event, RESPONDENT did not breach the DSA, since it paid the correct price (*see above, paras. 58-82*). Consequently, CLAIMANT is not entitled to damages.

### IV. Conclusion: RESPONDENT Paid the Agreed Purchase Price

84 Counsel for RESPONDENT submit that the purchase price amounts to US\$ 20,438,560, since the Parties explicitly agreed to apply the fixed rate of US\$ 1 to EQD 2.01 to the conversion of the production costs of the blades by concluding the Addendum to the DSA. In any event, as per the DSA, the Parties implicitly agreed that the fixed rate governs the DSA. Lastly, CLAIMANT is not entitled to damages. In conclusion, the Tribunal is kindly requested to dismiss the Claim for an additional payment of US\$ 2,285,240.

### D. Issue Four: RESPONDENT Is Not Obligated to Compensate CLAIMANT for the Levy in the Amount of US\$ 102,192.80 Deducted by the Financial Investigation Unit

85 RESPONDENT is not obliged to compensate CLAIMANT for the levy in the amount of US\$ 102,192.80 deducted by the Equatorianian Financial Investigation Unit ("FIU"). After RESPONDENT had effected payment of the full purchase price accounting for US\$ 20,438,560, a 0.5% levy was subtracted from the transaction due to a money laundering investigation conducted by the FIU. CLAIMANT alleges that RESPONDENT has to bear this additional amount, erroneously asserting that the levy is part of RESPONDENT's payment obligation [*MfC, para. 105*]. However, RESPONDENT is not required to effect any further payment, as neither the DSA (I) nor the CISG (II) obliges RESPONDENT to bear the levy.



## I. The DSA Does Not Oblige RESPONDENT to Bear the Levy

86 The DSA does not oblige RESPONDENT to bear the levy. The Parties agreed in Sec. 4 (3) DSA that RESPONDENT is obliged to deposit the purchase price in full into CLAIMANT's account while bearing the bank charges for the transaction [*Ex. C2, p. 10, Sec. 4 (3)*]. CLAIMANT asserts that this clause stipulates an obligation for RESPONDENT to bear the levy [*MfC, para. 118*]. The DSA obliges RESPONDENT to bear only the bank charges of the transaction (1). However, the levy is not to be borne by RESPONDENT as it is not a bank charge but an administrative fee (2). In any event, an alleged duty of RESPONDENT to bear the levy would contradict the purpose of the DSA (3). Lastly, Sec. 4 (3) DSA is not to be interpreted *contra proferentem* to RESPONDENT (4).

### 1. The DSA Obliges RESPONDENT to Bear Only the Bank Charges

87 The DSA obliges RESPONDENT to bear only the bank charges. Regarding the payment of the price the Parties agreed:

*“The BUYER will deposit the purchase price in full into the SELLER's account [...].*

*The bank charges for the transfer of the amount are to be borne by the BUYER [emphasis added]”*  
*[Ex. C2, p. 10, Sec. 4 (3)].*

Based on a reasonable understanding, the Parties agreed on two cumulative obligations concerning the payment. Firstly, the price was to be deposited “*in full*”, meaning in one singular transaction into CLAIMANT's account. This clarification was necessary as instalment payments are allowed under the CISG [*Mankowsky in: Ferrari/Kieninger/Mankowski, Art. 64 CISG, para. 38*]. However, CLAIMANT could not have argued that RESPONDENT's obligation to deposit the purchase price in full into CLAIMANT's account would include its obligation to bear all transaction costs. Yet, this understanding would interfere with a consistent interpretation of Sec. 4 (3) DSA. In order to give effect to all contractual terms, they have to be interpreted internally consistent [*Schmidt-Kessel in: Schlechtriem/Schwenzler, Art. 8 CISG, para. 49*]. If RESPONDENT's obligation to deposit the price in full into CLAIMANT's account was meant to stipulate an obligation to ensure payment without any discount, all potential transaction costs would have already been covered. The second sentence, explicitly stipulating the obligation to bear the bank charges, would be redundant. Hence, this clause would be deprived of any effect. Secondly, RESPONDENT was obliged to bear the bank charges but no further transaction costs in addition to the price. Consequently, the DSA only obliges RESPONDENT to bear the bank charges.



## 2. The Levy Is Not to Be Borne by RESPONDENT, As It Is Not a Bank Charge but an Administrative Fee

88 The levy is not a bank charge but an administrative fee and is not to be borne by RESPONDENT. As CLAIMANT rightly states [*MfC, para. 118*], a bank charge is an amount of money debited by a bank for the performance of its services [*“bank charge” in: Cambridge Business Dictionary*]. The levy was charged by the FIU due to the Equatorianian Regulation ML/2010C (“**ML Regulation**”) which is based on the UN-Model Provision on Money Laundering [*PO 2, p. 55, para. 7*]. Sec. 5 ML Regulation requires the FIU to examine any transactions to Equatoriana exceeding US\$ 2 million for potential money laundering. Pursuant to Sec. 12 ML Regulation, the FIU conducts further investigations if deemed necessary and subtracts a 0.5% levy of the investigated amount as occurred in the case at hand [*PO 2, p. 56, para. 10*]. Pursuant to Sec. 28 (2) of the UN-Model Provision on Money Laundering, the “*FIU may be located within a police service, the prosecutor’s office, the Central Bank or a ministry of finance or justice [...] or it may be established as an independent office*”. Thus, the FIU is meant to be either a public authority or part of such an authority. Hence, the levy is an administrative fee but is not a bank charge and is not to be borne by RESPONDENT.

89 Moreover, contrary to CLAIMANT’s allegations [*MfC, para. 119*], the levy is not a bank charge despite the fact that the FIU is under the auspices of the Central Bank. Apparently, CLAIMANT draws its conclusion based on the sole fact that the term bank is mentioned in the name “*Equatoriana Central Bank*”. CLAIMANT recognizes that the term “*charge*” has a broad meaning [*MfC, para. 118*]. Unfortunately, it does not recognize that the same cannot be said about the term “*bank*”. Based on the common understanding, a commercial bank is a financial institution where people or businesses borrow from or store their money [*“bank” in: Cambridge Business Dictionary*]. A central bank, however, is responsible for monetary policy and may also perform supervisory functions in the financial markets [*“central bank” in: Cambridge Business Dictionary*]. Thus, even if service charges were observed to include investigation charges as alleged by CLAIMANT [*MfC, para. 118*], the levy would not be charged in order to pay a bank for its services. In fact, the levy is an administrative fee of a public authority and is not to be considered a bank charge. Thus, it is not to be borne by RESPONDENT.

## 3. RESPONDENT Bearing the Levy Would Contravene the Purpose of the DSA

90 Additionally, RESPONDENT’s alleged obligation to bear the levy would contravene the purpose of the DSA. The DSA was meant to pave the way for RESPONDENT to offer its innovative jet engine to Earhart [*Ex. C2, p. 9*]. The preamble, which is of particular importance when interpreting a contract [*Schmidt-Kessel in: Schlechtriem/Schwenzer, Art. 8 CISG, para. 29*], confirms that the DSA was supposed to enable RESPONDENT to calculate its costs very precisely in order





to make a binding offer to Earhart. Accordingly, the Parties agreed on a maximum price of US\$ 13,125 per blade [Ex. C2, p. 10]. Thus, RESPONDENT could have expected to pay no more than US\$ 26,250,000 for 2,000 blades. This amount would only be increased by the regular bank charges, the foreign transfer costs, which are in general negligible and easy to determine [cf. Barclays, List of Prices; BNP Paribas, List of Prices; Deutsche Kreditbank, List of Prices]. However, an implicit obligation to bear the levy in addition to the bank charge would have made it impossible for RESPONDENT to calculate its costs at the time of contracting. CLAIMANT did not inform RESPONDENT about the levy and the newspapers in Mediterraneo barely reported about the ML Regulation without mentioning the significant costs involved [PO 2, p. 55, para. 7]. As RESPONDENT was neither aware of the existence nor of the amount of the levy, which can be as high as US\$ 131,250, these costs were by no means predictable. Thus, RESPONDENT's alleged obligation to bear the levy would contravene the purpose of the DSA.

#### 4. Sec. 4 (3) DSA Is Not to Be Interpreted *Contra Proferentem* to RESPONDENT

91 Unlike CLAIMANT alleges, [MfC, para. 117], any ambiguity of Sec. 4 (3) DSA is not to be interpreted detrimental to RESPONDENT. The principle of *contra proferentem* is only applicable if solely one party is responsible for the ambiguity of a clause (cf. above, para. 69). Although RESPONDENT drafted the original clause incorporated in Sec. 4 (3) DSA [MfC, para. 117], CLAIMANT acknowledges that it “specifically proposed the importing of the bank charge provision” [MfC, para. 116; PO 2, p. 55, para. 6]. Thus, as even CLAIMANT considers the clause to be its suggestion, Sec. 4 (3) DSA has been negotiated and is not to be interpreted *contra proferentem* to RESPONDENT.

## II. RESPONDENT Is Under No Duty to Bear the Levy According to the CISG

92 RESPONDENT is under no duty to bear the levy according to the CISG. Contrary to CLAIMANT's allegations [MfC, para. 106], the levy is not covered by Art. 54 CISG. The levy does not fall within the scope of Art. 54 CISG (1). In any event, since RESPONDENT is not required to comply with Equatorian regulations, it is not required to bear the levy (2).

### 1. The Levy Does Not Fall within the Scope of Art. 54 CISG

93 RESPONDENT is not required to bear the levy as the levy does not fall within the scope of Art. 54 CISG. As CLAIMANT acknowledges [MfC, para. 112], Art. 54 CISG refers to preparatory steps in order to enable the payment process, e.g. opening a letter of credit, providing a bank guarantee or applying for the necessary prior authorizations in order to transfer the money [CIETAC, Styrene monomer case; ICAC Case No. 12 JI 1992; Butler/Harindranath in: Kröll/Mistelis/Viscasillas, Art. 54 CISG, para. 6; Huber/Mullis, p. 304; Strobbach in: Enderlein/Maskow, Art. 54 CISG, para. 1]. Contrary to CLAIMANT's allegations [MfC, para. 113], the levy does not



constitute a step to enable the payment process. The levy had been deducted only after RESPONDENT had successfully effected the payment. Hence, the levy does not influence the initiation of the payment process. Thus, it does not fall within the scope of Art. 54 CISG and is not to be borne by RESPONDENT.

94 Additionally, RESPONDENT is not obliged to bear the levy, as it is not of preparatory nature. CLAIMANT recognizes that the amount cannot be deposited in CLAIMANT's account without the authorization of the FIU [*MfC, para. 114*]. This authorization however is not granted prior to the execution of the payment but during the transfer to CLAIMANT's account. RESPONDENT could not have applied for the FIU's permission in advance. Thus, it is not a preparatory step. This applies all the more, since the FIU does not always deduct the levy. It only does so occasionally. Contrary to CLAIMANT's allegations [*MfC, para. 111*], the FIU only examines transactions to Equatoriana exceeding US\$ 2 million. Yet, the levy is only subtracted if further investigations are considered [*PO2, p. 56, para. 10*]. Consequently, a levy is not even necessarily involved in the authorization process. Thus, RESPONDENT is not required to bear the levy as it does not fall within the scope of Art. 54 CISG.

## **2. In Any Event, As RESPONDENT Is Not Required to Comply with Equatorianian Regulations, It Is Not Required to Bear the Levy**

95 Even if the levy were to fall under the scope of Art. 54 CISG, RESPONDENT is not required to bear the levy as it is not obliged to comply with regulations from Equatoriana, CLAIMANT's seat of business. Therefore, it is not required to comply with the Equatorianian ML Regulation. RESPONDENT is only required to comply with regulations from Mediterraneo (a). In any event, RESPONDENT is not required to comply with regulations from Equatoriana, as CLAIMANT did not inform RESPONDENT about the levy (b).

### **a. RESPONDENT Is Only Required to Comply with Regulations from Mediterraneo**

96 RESPONDENT only has to comply with regulations from Mediterraneo and is not required to bear the levy based on an Equatorianian regulation. According to Art. 54 CISG, the buyer has to comply with the formalities required under the relevant laws and regulations in order to effect the payment [*ICAC Case No. 12 JI 1992; Downs Investments v. Pervaja Steel; Bezirksgericht Saane, Spirits case*]. Contrary to CLAIMANT's allegations [*MfC, para. 108*], it is not a rule of banking that in general the domestic law of the receiving bank shall apply. In fact, it is a mere suggestion by UNCITRAL regarding the interpretation of Art. 1 UNCITRAL Model Law on International Credit Transfers [*Geva, p. 255*]. Yet, it was not adopted by either of the relevant jurisdictions in the case at hand. Accordingly, CLAIMANT itself seems to be unsure whether only the regulations



of the buyer's country are relevant or if the buyer must also comply with foreign regulations [MfC, para. 109]. As it often constitutes an unreasonable effort for the buyer to observe foreign formalities, the buyer only has to comply with the law of the country from which the payment is made [Maskow in: Bianca/Bonell, Art. 54 CISG, para. 2.7; Strobbach in: Enderlein/Maskow, Art. 54 CISG, para. 5]. Consequently, RESPONDENT, seated in Mediterraneo, is not required to bear the levy based on an Equatorianian regulation.

**b. In Any Event, RESPONDENT Would Not Be Required to Comply with the Equatorianian ML Regulation, As CLAIMANT Did Not Inform It About the Levy**

97 In any event, RESPONDENT would not be obliged to comply with the Equatorianian ML Regulation, as CLAIMANT did not inform RESPONDENT about it. In accordance with Art. 54 CISG, the specific regulations of the seller's place of business are solely relevant if he informed the buyer about them [Benicke in: Münchener Kommentar HGB, Art. 54 CISG, para. 3; Maskow in: Bianca/Bonell, Art. 54 CISG, para. 2.7; Mobs in: Schlechtriem/Schwenzer, Art. 54 CISG, para. 4]. This duty to inform arises from the general duty to co-operate with the counterparty pursuant to Artt. 7, 60 lit. a CISG [Mobs in: Schlechtriem/Schwenzer, Art. 53 CISG, para. 39; cf. Butler/Harindranath in: Kröll/Mistelis/Viscasillas, Art. 54 CISG, para. 5; Honnold, p. 106], in order to enable it to properly perform its obligations [Mobs in: Schlechtriem/Schwenzer, Art. 53 CISG, para. 39]. Even assuming that the levy had to be paid in order to enable the transaction, RESPONDENT would not have been able to perform its obligation under the DSA without bearing the levy. Further, the levy is very specific as only five other countries worldwide oblige private parties to pay similar administrative fees for governmental money laundering investigations [PO 2, p. 55, para. 7]. Yet, although CLAIMANT was aware of the ML Regulation and the levy at least since mid-June 2010 [PO 2, p. 55, para. 8], it never shared this information with RESPONDENT [Ans. Req. Arb., p. 26, para. 18]. Consequently, RESPONDENT was not required to comply with the specific Equatorianian ML Regulation regarding the levy. Hence, the levy is not to be borne by RESPONDENT.

98 This applies all the more, since Art. 35 (2) CISG contains the comparable general principle that the creditor has to inform the obligor about the public law regulations in its place of business in order to constitute their relevance for the conformity of the performance. This principle was established by the German *Bundesgerichtshof* in its renowned decision regarding the conformity of New Zealand mussels delivered by a Swiss seller to a German buyer [*Bundesgerichtshof, New Zealand mussels case*]. The cadmium content of these mussels was higher than allowed under German public law regulations. Nevertheless, the court ruled that “a foreign seller can simply not be required to know the [...] public law provisions or administrative practices of the country to which he exports”. However,



the domestic creditor can be expected to have this knowledge and is obliged to share this information with the foreign obligor. Consequently, the mussels were held to be in conformity with the contract. A vast majority of scholars also confirms this decision [*Bianca in: Bianca/Bonell, Art. 35 CISG, para. 2.5.1; Ferrari in: Ferrari/Kieninger/Mankowski, Art. 35 CISG, para. 14; Gruber in: Münchener Kommentar BGB, Art. 35 CISG, para. 24; Kröll in: Kröll/Mistelis/Viscasillas, Art. 35 CISG, paras. 88-89; Strobbach in: Enderlein/Maskow, Art. 35 CISG, para. 8*] and it was affirmed by numerous courts worldwide [*Bundesgerichtshof, Frozen pork case; Oberster Gerichtshof, Frozen pork liver case; Oberster Gerichtshof, Scaffold books case; RJ & AM Smallmon v. Transport Sales; Caito Roger v. Société française de factoring; Cour d'appel de Versailles, Caterpillar toys case; Landgericht Ellwangen, Spanish paprika case; Medical Marketing International v. Internazionale Medico Scientifica; Eyroflam v. P.C.C. Rotterdam*]. Consequently, the general principle that the creditor has to inform the obligor about the public law regulations in its place of business deducted from Art. 35 (2) CISG is affirmed by international practice.

99 Accordingly, CLAIMANT was obliged to inform RESPONDENT about the levy, as this principle is applicable to the case at hand. The principle determines the conformity of performance. The fact that the present case deals with a payment obligation instead of the obligation to deliver goods does not change the underlying reasoning. Conformity is defined as the accordancy of the performance with the contract [*Zamir, p. 17*]. A performance is not in conformity with the contract if it differs from the party's agreement in quality or quantity [*Schwenzer in: Schlechtriem/Schwenzer, Art. 35 CISG, para. 4*]. Since CLAIMANT asserts that RESPONDENT did not pay the full price [*MfC, para. 59*], RESPONDENT's performance allegedly differed in quantity and would not be in conformity with the DSA. Hence, the principle is applicable to the case at hand. As CLAIMANT did not inform RESPONDENT, the levy is not to be borne by RESPONDENT.

100 CLAIMANT might have alleged that it was not obliged to inform RESPONDENT about the levy due to the Parties' long-term business relationship. In the *New Zealand Mussels case*, the court held that the buyer might be expected to comply with the public law regulations at the seller's place of business if the parties maintained a business connection for a longer time [*Bundesgerichtshof, New Zealand mussels case*]. The purpose is that the creditor shall not have a duty to inform the obligor about regulations he had already been subject to [*Ferrari in: Ferrari/Kieninger/Mankowski, Art. 35 CISG, para. 14*]. Although CLAIMANT and RESPONDENT maintained co-operations until 2008, the ML Regulation had not yet been in force [*PO 2, p. 55, para. 7*]. Contrary to CLAIMANT's allegations [*MfC, para. 123*] RESPONDENT was under no duty to run any investigations. Thus, as CLAIMANT did not inform RESPONDENT, the levy is not to be borne by RESPONDENT.



### III. Conclusion: RESPONDENT Is Not Obligated to Bear the Levy

101 Counsel for RESPONDENT submit that RESPONDENT is not obliged to bear the levy according to the DSA, as it is not a bank charge but an administrative fee. Moreover, the levy does not fall within the scope of Art. 54 CISG. Even if the levy were to fall within the scope of Art. 54 CISG, RESPONDENT would not be required to comply with the Equatorianian ML Regulation, as CLAIMANT did not inform RESPONDENT about the levy. In conclusion, the Tribunal is kindly requested to dismiss the Claim for an additional payment of US\$ 102,192.80.

#### PRAYER FOR RELIEF

Counsel for RESPONDENT respectfully request the Tribunal:

- to grant RESPONDENT's Request for Security for Costs;
- to find that CLAIMANT's Claim is inadmissible;
- to dismiss CLAIMANT's Claim to order RESPONDENT to pay US\$ 2,285,240 for the purchase of the blades;
- to dismiss CLAIMANT's Claim to order RESPONDENT to pay US\$ 102,192.80 for the levy deducted by the FIU.

Respectfully submitted by Counsel for RESPONDENT,

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Frankfurt am Main, 26 January 2017