ALBERT LUDWIG
UNIVERSITY OF FREIBURG

Memorandum for CLAIMANT

On behalf of	**Against**
Wright Ltd	SantosD KG
(CLAIMANT)	(RESPONDENT)

CHRISTIAN BÖTZEL • ELISABETH EBERLE • HELEN GOPPELT • SARAH GROSSMANN •
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Apr	April
Art./Artt.	Article/Articles
ASA	Swiss Arbitration Association
Aug	August
BGB	Bürgerliches Gesetzbuch
BGer	Bundesgericht (Swiss Federal Court of Justice)
BGH	Bundesgerichtshof (German Federal Court of Justice)
cf.	confer
Cir	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
CdA	Cour d'Appel
Ct	Court
Ct App	Court of Appeal
Ct Civ App	Court of Civil Appeals
DC	District Court
Dec	December
ECB	Equatoriana Central Bank
ed.	Edition
et al.	et alii (and others)
et seq.	et sequens (and that which follows)
EQD	Equatorianan Denar
Fed Ct	Federal Court
HG	Handelsgericht (Swiss Commercial Court)
HGB	Handelsgesetzbuch

ie	id est (that is)
ibid.	ibidem (in the same place)
ICC	International Chamber of Commerce
ICSID	International Centre of Investment Disputes
Int'l Arb	International Arbitration
Jan	January
Jun	June
Jul	July
KG	Kommanditgesellschaft (limited partnership business entity)
Ltd	Limited
Mar	March
MüKo	Münchener Kommentar
No.	Number
Nov	November
Oct	October
OLG	Oberlandesgericht (German Regional Court of Appeal)
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PLC	Public limited company
PO	Procedural Order
Req.	Request
R$	Brazilian Real
SA	Société anonyme (joint-stock company)
Sep	September
sec.	Section

Sup Ct	Supreme Court
UN	United Nations
UPICC	Unidroit Principles of International Commercial Contracts
US	United States of America
UNCITRAL	United Nations Commission on International Trade Law
US Ct App	United States Court of Appeals
US$	United States Dollar
v.	versus

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cited as: *HKZ 11 Nov 2003*
in para. 58

Handels-/Industrie-/ und Gewerbekammer des Kantons Tessin
X. SA v. A., B. and others
25 July 2003
Case No.: Ccia-Ti Nr. 103/00
cited as: *HIGKT 25 Jul 2003*
in para. 50

LEGAL SOURCES AND MATERIAL

CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
CAM-CCBC Rules	Rules of the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, 1 September 2011, with amendments on 28 April 2016
LCIA Rules	Arbitration Rules of the London Court of International Arbitration, London, 1 October 2014
HKIAC Rules	Arbitration Rules of the Hong Kong International Arbitration Centre, Hong Kong, 1 November 2013
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Awards, New York, 1958
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Vienna, 2008
UPICC	UNIDROIT Principles of International Commercial Contracts, Rome, 2010
ICC Rules	Arbitration Rules of the International Chamber of Commerce, 1 January 2012
DIS Rules	Arbitration Rules of the German Institution of Arbitration, 1 July 1998
SCC Rules	Arbitration Rules of the Swedish Chamber of Commerce, 1 January 2010
Swiss Rules	Swiss Rules of International Arbitration, 1 June 2012
CIETAC Rules	Arbitration Rules of the China International Economic and Trade Arbitration Commission, Beijing, 1 January 2015
CIArb	International Arbitration Practice Guideline: Application for Securtiy for Costs, Chartered Institute of Arbitratiors, London, 2016

STATEMENT OF FACTS

1 The parties to this arbitration are Wright Ltd [hereafter: CLAIMANT] and SantosD KG [hereafter: RESPONDENT].

2 CLAIMANT is a manufacturer of fan-blades for jet engines, incorporated in Equatoriana.

3 RESPONDENT is a manufacturer of jet engines, incorporated in Mediterraneo.

4 Both CLAIMANT and RESPONDENT [hereafter: the Parties] were originally subsidiaries of Engineering International SA, a multinational company based in Oceania. CLAIMANT provided RESPONDENT with 2,000 TRF 192-I swept fan blades [hereafter: the Blades], specially developed for RESPONDENT's new JE 76/TL14b jet engine.

27 Jul 2010	CLAIMANT is sold to Skymover, which then becomes Wright Holding PLC.	*PO 2, p. 54, para. 1*
1 Aug 2010	The Parties conclude the Development and Sales Agreement [hereafter: the Main Agreement]. It provides for joint development of the Blades by the Parties and subsequent production and delivery by CLAIMANT. It further implements a flexible calculation formula to ensure that both Parties generate profit. This formula does not provide for a fixed exchange rate.	*Exhibit C 2, p. 9*
26 Oct 2010	The Parties add a handwritten addendum [hereafter: the Addendum] to the Main Agreement for the purchase of 2,000 clamps [hereafter: the Clamps]. The Addendum contains a different pricing structure and a fixed exchange rate.	*Exhibit C 2, p. 11*
14 Jan 2015	CLAIMANT delivers the Blades and Clamps to RESPONDENT and encloses invoices.	*Req. for Arb., p. 5, para. 9*
15 Jan 2015	RESPONDENT effects payment in accordance with CLAIMANT's invoice. Immediately after that CLAIMANT informs RESPONDENT about a mistake in	*Exhibit C 5, p. 14*

	its accounting department regarding the applied exchange rate to the purchase of the Blades and sends a corrected invoice.	
9 Feb 2015	CLAIMANT reminds RESPONDENT of the corrected invoice and informs RESPONDENT that RESPONDENT's effected payment was only partially deposited into CLAIMANT's account.	*Exhibit C 6, p. 15*
10 Feb 2015	RESPONDENT rejects any responsibility for the partial deposit and claims the original invoice to correctly reflect the price in the Main Agreement.	*Exhibit C 7, p. 16*
12 Feb 2015	CLAIMANT was informed that the partial deposit is due to a levy deducted for money laundering investigations.	*Exhibit C 8, p. 17*
1 Apr 2016	CLAIMANT informs RESPONDENT that it has instructed its lawyer to initiate arbitration but remains open for negotiations.	*Exhibit R 3, p. 29*
31 May 2016	CLAIMANT initiates arbitration proceedings against RESPONDENT by submitting its Request for Arbitration to the CAM-CCBC.	*Req. for Arb., p. 3*
1 Jun 2016	The President of the CAM-CCBC [hereafter: President] sets a ten-day time frame for CLAIMANT to amend its Request for Arbitration.	*CAM-CCBC's Letter, p. 19*
7 Jun 2016	CLAIMANT amends its Request for Arbitration dated 31 May 2016 with the required documents.	*Fasttrack's Letter, p. 20*
22 Aug 2016	The Parties sign the Terms of Reference.	*Terms of Reference, p. 22*
6 Sep 2016	RESPONDENT requests the arbitral tribunal [hereafter: the Tribunal] to order CLAIMANT to provide security for costs.	*Req. for Sec. for Costs, p. 45*

SUMMARY OF ARGUMENTS

He who establishes his argument by noise and command shows that his reason is weak.
– Michel de Montaigne –

5 Noise reduction was of main focus for the Parties as they entered into the contract. However, the calm and successful business relationship between the Parties took a turn for the worse as RESPONDENT went and grasped every opportunity to make noise.

6 First, RESPONDENT refuses to pay the agreed purchase price in full although the pricing structure was in its interest. It was due to CLAIMANT that the deal worked out very well for both Parties. Under CLAIMANT's technical leadership, the Blades were developed successfully and the fuel and noise reduction required by RESPONDENT was achieved. Additionally, CLAIMANT made sure to keep the production costs low. But instead of being content and calmly fulfilling its obligations, RESPONDENT tries to dump the price even further by alleging that the Parties agreed upon a fixed exchange rate for the purchase of the Blades. However, if this exchange rate was applied, the purpose of the complex price formula would be distorted. Only, the exchange rate at the time payment is due complies with the formula (**Issue 3**).

7 Second, RESPONDENT refuses to comply with its obligation under the contract to pay the levy, even though it was RESPONDENT that agreed to bear all bank charges. Yet, instead of informing itself about arising expenses, RESPONDENT shifts the responsibility onto CLAIMANT arguing that it was CLAIMANT who should have informed RESPONDENT (**Issue 4**).

8 Third, after the failure of negotiations, CLAIMANT filed a Request for Arbitration with two formal inaccuracies. Again, RESPONDENT raises its voice and tries to make a big deal out of minor mistakes. However, contrary to RESPONDENT's allegations, CLAIMANT initiated arbitration proceedings in time and its claims are therefore admissible (**Issue 2**).

9 Fourth, after the Terms of Reference were signed, RESPONDENT requested security for costs. Bearing the burden of proof, RESPONDENT is obliged to demonstrate the necessity of the order for security for costs. However, now for the first time RESPONDENT remains quiet and ignores the fact that the requirements for such an order are not met in the present case (**Issue 1**).

10 Noise should not be misheard to embody legal arguments. The Tribunal is therefore kindly requested not to echo RESPONDENT's noise but to grant CLAIMANT's sound requests.

ARGUMENT ON THE PROCEEDINGS

ISSUE 1: THE TRIBUNAL DOES NOT HAVE THE POWER AND, EVEN IF, SHOULD NOT ORDER SECURITY FOR COSTS AGAINST CLAIMANT

11 The Parties had been business partners since 2003. In 2010 they signed the Main Agreement. Section 21 of the Main Agreement contains a dispute resolution clause [hereafter: the Arbitration Agreement], in which the Parties opted to have their disputes decided by an arbitral tribunal [*Exhibit C 2, p. 11*]. On 31 May 2016 CLAIMANT initiated arbitration proceedings to solve a dispute arising from the insufficient payment by RESPONDENT [*Fasttrack to CAM-CCBC, p. 2*]. After the Parties had agreed on the subject matter of the arbitration and signed the Terms of Reference together with the members of the Arbitral Tribunal [hereafter: the Tribunal], RESPONDENT filed a request to the Tribunal, asking it to order CLAIMANT to provide security for RESPONDENT's costs resulting from the arbitration proceedings [*Request for Security for Costs, p. 46, para. 1*].

12 The Tribunal is respectfully requested to reject RESPONDENT's request. The Tribunal does not have the power to order security for costs (**A**). Even if it had the authority to make such an order, it should not exercise its power as this would not be appropriate in the case at hand (**B**).

A. The Tribunal Does Not Have the Power to Order Security for Costs Against Claimant

13 First, the Parties did not authorise the Tribunal to make such an order (**I**). Second, the Tribunal cannot grant RESPONDENT's request for security for costs as it was submitted out of time (**II**).

I. The Parties Did Not Authorise the Tribunal to Order Security for Costs

14 Such an authorisation would have to be drawn from either the Arbitration Agreement or the applicable procedural rules. In accordance with Art. 19 (1) of the UNCITRAL Model Law, which is the *lex loci arbitri*, the Parties chose the Rules of the CAM-CCBC [hereafter: CAM-CCBC Rules] to govern their proceedings.

15 A tribunal only has the power to order security for costs if the parties *specifically* authorised it to do so [*ICC 28 Feb 1994; Arbitral Tribunal Zürich 12 Nov 1991; Riezler, p. 429*]. Art 7.8 CAM-CCBC Rules requires the Tribunal to decide the dispute under equal treatment of the Parties. It is thus not the role of an arbitral tribunal to provide for the financial welfare of one of the parties in such a protective manner [*Rüede/Hadenfeldt, p. 241*]. Contrary to litigation, security for costs is therefore fairly uncommon in arbitration [*Bucher/Tschanz, p. 161;*

Altenkirch, p. 229]. Hence, the parties' decision to have future disputes settled by an arbitral tribunal instead of a court constitutes an agreement to have proceedings without security for costs [*Reymond, Law Q. Rev. 1994, p. 503; Pörnbacher/Thiel, SchiedsVZ 2010, p. 18*]. Consequently, the Tribunal can only order security for costs if the Parties *specifically* authorised it to do so.

16 However, neither the Arbitration Agreement nor the CAM-CCBC Rules contain a provision granting the Tribunal the power to order a party to provide security for costs. While Art. 8.1 of the CAM-CCBC Rules authorises the Tribunal to grant provisional measures in general, there is no specific regulation concerning security for costs. Comparable provisions in other arbitration rules, such as the Rules of the LCIA (Art. 25.2) or the HKIAC (Art. 24), contain specific regulations granting the Tribunal the power to order security for costs. The choice of the CAM-CCBC Rules, which lack concrete legal ground for the order for security for costs, does not constitute a specific authorisation for the Tribunal to grant such a measure. Therefore, the Tribunal does not have the power to order security for costs against CLAIMANT.

II. In Any Case, the Request for Security for Costs Was Submitted Out of Time

17 Even if the Tribunal had the general power to order security for costs, it would still overstep its authority in ordering CLAIMANT to provide security for costs in the present case.

18 This is because RESPONDENT's request for security for costs was submitted after the signing of the Terms of Reference and therefore out of time. Art. 8.1 of the CAM-CCBC Rules only enables the tribunal to grant provisional measures at the request of a party [*Filho/Lacreta, in: Straube/Finkelstein/Filho, p. 151*]. According to Art. 4.21 CAM-CCBC Rules, the Parties can only submit new claims until the date the Terms of Reference are signed. The request for security for costs constitutes a claim [*Born, p. 2448 et seq.*].

19 RESPONDENT submitted its request on 6 September 2016, 16 days after the Terms of Reference were signed [*Request for Security for Costs, p. 45*]. Pursuant to Art. 4.21 CAM-CCBC Rules, RESPONDENT was therefore no longer able to submit its request to modify the Terms of Reference with its claim for security for costs. In absence of a valid request, the Tribunal does not have the power to order security for costs against CLAIMANT.

20 Even if the Tribunal were to find that Art. 4.21 CAM-CCBC Rules does not directly apply to RESPONDENT's request for security for costs, the Tribunal should consider the purpose of the provision and refrain from assuming the power to order security for costs.

21 It is the purpose of Art. 4.21 CAM-CCBC Rules to highlight the importance and binding nature of the Terms of Reference as the core document of the arbitration proceedings which fixes the subject matter of the arbitration [*Terashima/Gagliardi, in: Straube/Finkelstein/Filho, p. 111*]. The matters of dispute set out in the Terms of Reference are binding to the arbitrators [*Fouchard/Gaillard/Goldman, para. 1256; Redfern/Hunter, para. 5.91*]. The mandate of the tribunal is therefore limited to matters agreed upon by the parties in the Terms of Reference [*Beyeler, in: Arroyo, p. 777*]. An exception of this rule would only be possible if the matter in question could not have been introduced earlier [*Webster/Bühler, para. 19-11; Fry/Greenberg/Mazza, para. 3-906*].

22 In the Terms of Reference, the Parties explicitly agreed that the Tribunal shall establish the responsibility related to the payment of procedural costs [*Terms of Reference, p. 43, para. 12.3*]. However, even though the Parties discussed the allocation of costs in the Terms of Reference, RESPONDENT did not request security for costs at that time.

23 RESPONDENT claims it could not have requested security for costs earlier because CLAIMANT allegedly made it its business practice to conceal its financial situation [*Request for Security for Costs, p. 46, para. 4*]. This claim is false. For years, CLAIMANT has made its audited accounts publicly available [*PO 2, p. 58, para. 28*]. CLAIMANT's most recent financial statement for the year 2015 was released in April 2016. This was more than four months before RESPONDENT signed the Terms of Reference and hereby agreed to the subject matter of the arbitration. This financial statement as well as all previous financial statements listed CLAIMANT's complete assets, liabilities and equity as well as its total turnover and yearly profit [*PO 2, p. 58, para. 28*]. Hence, CLAIMANT did not conceal its financial situation but instead provided full disclosure to anyone who cared to look. Even if RESPONDENT was of the opinion that CLAIMANT's equity in the amount of US$ 2,225,000 might be insufficient to cover RESPONDENT's legal costs amounting to US$ 200,000, it could have requested security for costs at an earlier stage of the proceedings. However, after signing the Terms of Reference, RESPONDENT lost its opportunity to file such a request.

24 Considering the conclusive nature and the purpose of the Terms of Reference, the Tribunal should refrain from assuming the power to rule on RESPONDENT's request.

B. The Tribunal Should Not Order Claimant to Provide Security for Costs

25 Even if the Tribunal were to find it had the authority to grant RESPONDENT security for costs, it should not exercise its power in the case at hand. In international arbitration, security for costs

is only ordered in exceptional circumstances [*ICSID Apr 6 2007; ICSID 6 Sep 2005; House of Lords 5 May 1994*]. The criteria as to whether or not the situation at hand is exceptional and therefore justifies an order for security for costs are to be derived from international arbitration practice (**I**). However, RESPONDENT fails to show that the common conditions for the order for security for costs are met in the present case. Thus, the Tribunal should refrain from ordering security for costs against CLAIMANT (**II**).

I. The Tribunal Should Consider the Common Requirements in International Arbitration Practice for Ordering Security for Costs

26 When deciding on RESPONDENT's request, the Tribunal is requested to consider whether RESPONDENT is likely to sustain harm if the measure is not ordered. This includes the prospect of success of RESPONDENT's defence and the probability of an adverse costs award against CLAIMANT as well as CLAIMANT's willingness and ability to comply with such an award. Additionally, the Tribunal needs to evaluate whether ordering CLAIMANT to provide security for RESPONDENT's costs would be fair in light of all the circumstances of the case.

27 While the Tribunal may have the general authority to order security for costs under Art. 8.1 CAM-CCBC Rules, the regulation does not offer any criteria specifying when to exercise that power. However, these kinds of provisions "*do not purport to leave provisional measures entirely to the arbitrators' unguided discretion*" [*Born, p. 2466*]. According to the Arbitration Agreement, the arbitration shall be conducted "*in line with international arbitration practice*" [*Exhibit C 2, p. 11*]. The Tribunal should therefore refrain from making unguided use of its discretion but adhere to the intention of the Parties expressed in the Arbitration Agreement and consider the common requirements for the order for security for costs established in international arbitration practice. While there is no uniform test for determining when to order security for costs, there are criteria that are widely accepted in evaluating security for costs requests [*Göler, p. 335; Born, p. 2466*]. Arbitral tribunals, institutions and legal scholars have developed harmonious requirements for the order of security for costs [*ICC 19 Dec 2003; Henderson, Asian Int'l Arb. J. 2011, pp. 72-75; CIArb, Art. 1 (2)*].

28 It is the primary purpose of any provisional measure to protect one of the parties from harm [*ECJ 17 Nov 1998; Born, Cases and Materials, p. 870; Yesilirmak, p. 47*]. In the case of security for costs, this means "*to ensure that the winning party recovers any costs that might be awarded to it in the future award*" [*Ad hoc Tribunal 21 Dec 1998; Gerbay/Richman/Scherer, p. 268; Gu, J. Int'l Arb. 2005, p. 168; Wirth, ASA Bull. 2000, p. 38*]. Therefore, the most substantial

requirement for the order for security for costs is that the winning party might be unable to recover its legal costs [*English Ct App 8 Jun 1983; US Dist Ct NY 15 Sep 1987; Rubins, Am. Rev. Int'l Arb. 2005, p. 373*]. This presupposes that an adverse costs award is rendered in the first place, which can only happen if the requesting party succeeds on its defence. Therefore, the likeliness of harm incorporates the likeliness of success on the merits [*US Sup Ct 18 Jun 2003*; *ICSID 28 Oct 1999; HKZ 20 Nov 2003; Greenberg/Kee, p. 50*]. If an adverse costs award is rendered, RESPONDENT will only fail to recover its legal costs if CLAIMANT is either unwilling or unable to comply with it.

29 However, the inability to recover legal costs is not the sole criterion for the order for security for costs [*cf. Rubins, Am. Rev. Int'l Arb. 2005, p. 373; Fouchard/Gaillard/Goldman, para. 1256*]. Additionally, the tribunals consider the general fairness of the measure in light of all circumstances, weighing the respective interests of the parties against each other [*ICC 9 Nov 1999; ICC 3 Aug 2012; English High Ct London 6 Nov 1972; Rutherford/Sims, para. 38.13; Born, p. 2502 et seq.*].

30 The burden of proof that the order for security for costs is necessary and appropriate in the case at hand falls on the party requesting the measure [*ICSID 28 Oct 1999; English Ct App 18 Apr 2002; Waincymer, p. 653; Needham, J.C.I. Arb. 1997, p. 122 et seq.*]. Hence, RESPONDENT has to satisfy the Tribunal that all relevant requirements have been met: First, RESPONDENT has to show that it is likely to sustain harm if security for costs is not ordered. This includes the demonstration of why RESPONDENT will succeed on its defence and the Tribunal will render an adverse costs award as well as why CLAIMANT will be either unwilling or unable to comply with an adverse costs award. Second, RESPONDENT needs to present convincing arguments as to why, in light of all the circumstances of the case, it would be just to order CLAIMANT to provide security for RESPONDENT's costs.

31 This test corresponds to the Guidelines for Applications for Security for Costs by the Chartered Institute of Arbitrators, which "*sets out the current best practice in international arbitration in relation to applications for security for costs*" [*CIArb, p. 1*].

II. Respondent Fails to Demonstrate that the Requirements Are Met

32 The Tribunal will only order CLAIMANT to provide security for costs if RESPONDENT is able to demonstrate that all of the aforementioned criteria are met. However, RESPONDENT fails to show why it would sustain harm if security for costs is not ordered (**1**). Further, ordering CLAIMANT to provide security for RESPONDENT's costs would be unjust in the case at hand (**2**).

1. Respondent Is Unable to Demonstrate Why It Would Sustain Harm

33 RESPONDENT claims it is likely to incur damages if its request for security for costs is not granted because CLAIMANT might not comply with an adverse costs award [*Request for Security for Costs, p. 46, para. 2*]. Yet, RESPONDENT is unable to demonstrate why an adverse costs award would be rendered against CLAIMANT (**a**). Contrary to RESPONDENT's statements, CLAIMANT would neither be unwilling (**b**) nor unable (**c**) to comply with such an award.

a) Respondent Fails to Show Why an Adverse Costs Award Is Likely to Be Rendered

34 The Tribunal will only render an adverse costs award against CLAIMANT if RESPONDENT succeeds on its defense. However, RESPONDENT's statements are insufficient to establish a probability of CLAIMANT losing the arbitration. In fact, as is demonstrated in greater detail below [*Argument on the merits*], CLAIMANT's claims are substantiated and the Tribunal will likely rule in favour of CLAIMANT.

35 But even if the Tribunal found RESPONDENT's statements to be sufficient to establish a probability of success on the merits, RESPONDENT still fails to show why the final award would include the allocation of RESPONDENT's legal costs to CLAIMANT. Contrary to RESPONDENT's deposition, the Tribunal does not "*have to render an award on costs*" [*Request for Security for Costs, p. 46, para. 2*] in favour of RESPONDENT. In fact, the Tribunal has considerable discretion when deciding how to allocate the costs [*PO 2, p. 58, para. 26*]. RESPONDENT makes no statements as to why the Tribunal should render an adverse costs award against CLAIMANT in the present case. RESPONDENT does not suffice its burden of proof in demonstrating the possibility of an adverse costs award being rendered against CLAIMANT.

b) Respondent Fails to Show Claimant's Unwillingness to Comply with Such an Award

36 RESPONDENT further claims not to be able to recover its legal costs as CLAIMANT allegedly has no intention to comply with a potential adverse costs award. RESPONDENT bases this allegation on CLAIMANT's non-compliance with an award from January 2016 [*Request for Security for Costs, p. 46, para. 2*]. While it is true that CLAIMANT has not yet paid US$ 2,500,000 awarded to one of its suppliers in different CAM-CCBC arbitration proceedings, RESPONDENT draws the wrong conclusion from this fact. The actual reason why CLAIMANT has not yet complied with said award is that the supplier in question owes a much larger sum to CLAIMANT's parent company, Wright Holding PLC, as compensation for damages caused by the delivery of non-conforming goods [*Letter President of Tribunal - Claimant, p. 49*]. This dispute is currently

pending before the courts of Ruritania. CLAIMANT has not yet paid the US$ 2,500,000 to its supplier as it intends to offset the award against the sum granted by the Ruritanian courts. This cautiousness can therefore not serve as ground for CLAIMANT's alleged unwillingness to comply with awards.

37 In any case, RESPONDENT's attempt to show that CLAIMANT is unwilling to comply with an adverse costs award has no argumentative value in the issue at hand. RESPONDENT would only suffer a loss if CLAIMANT did not pay an adverse costs award rendered against it. CLAIMANT is based in Equatoriana [*Request for Arbitration, p. 3, para. 1*]. Equatoriana is a signatory to the New York Convention [*PO 2, p. 60, para. 35*]. Any award rendered against CLAIMANT is enforceable by Equatorian courts under Art. III of the New York Convention. The only scenario in which RESPONDENT might end up bearing its own legal costs would unfold if CLAIMANT became factually insolvent due to an adverse costs award. Even then, security for costs should only be granted if the insolvency assets might be insufficient to cover the requesting parties' legal costs [*Ad hoc Tribunal 27 Nov 2002; Berger, ASA Bull. 2004, p. 15*].

c) Respondent Fails to Show Claimant's Inability to Comply with Such an Award

38 However, none of the arguments brought forward by RESPONDENT are able to even raise doubts as to CLAIMANT's financial situation, much less establish the risk of an insolvency. Neither the alleged unsuccessful search for third party funders (**aa**) nor a supposed unexpectedly low damage compensation payment by the Government of Xanadu (**bb**) can serve as grounds for RESPONDENT's arguments. In any case, CLAIMANT has sufficient assets to cover a potential adverse costs award (**cc**).

aa) The Search for Third Party Funding Bears No Relevance to Claimant's Finances

39 Apart from the fact that a newspaper article, which is factually flawed [*PO 2, p. 61, para. 39*], is a questionable source to base allegations on, the search for outside funding does not justify conclusions regarding CLAIMANT's financial situation. Attempting to collect external means to fund arbitration proceedings before investing own assets constitutes a commercially sensible and responsible business practice [*Göler, p. 82 et seq.*]. After all, arbitration funding is commonly used by financially stable parties that simply wish to share risk and maintain liquidity [*idem, p. 341*]. Furthermore, it is not relevant that CLAIMANT's efforts to receive funding were unsuccessful. This was merely due to the size of the case and has no connection

to CLAIMANT's finances [*PO 2, p. 59, para.* 29]. Thus, the unsuccessful search for third party funding does not justify any conclusions as to CLAIMANT's financial situation.

bb) The Unexpectedly Low Compensation by the Government of Xanadu Did No Lasting Damage to Claimant's Financial Situation

40 Contrary to RESPONDENT's claims, the aforementioned damage compensation award against the government of Xanadu cannot establish any reasonable doubts regarding CLAIMANT's financial situation. Such conclusions could only be drawn if the unexpectedly low sum had torn a hole in CLAIMANT's budgeting plan. While it is true that the award was lower than CLAIMANT had hoped for, CLAIMANT's 2010 balance sheet only reflected a very conservative calculation of US$ 15,000,000, which is fairly close to the US$ 12,000,000 ultimately awarded [*Exhibit C 9, p. 50*]. This did not substantially affect CLAIMANT's budgeting plans. While the low award caused some deficits back in 2010, CLAIMANT's financial situation has since well recovered and CLAIMANT has even managed to pay back US$ 10,000,000 worth of bankloans [*PO 2, p. 58 et seq., para. 28*].

cc) Claimant Has Sufficient Assets to Cover a Potential Adverse Costs Award

41 In conclusion, none of the allegations brought forward by RESPONDENT are able to raise doubts regarding CLAIMANT's willingness or capability to pay a potential adverse costs award, even less establish that CLAIMANT's assets are insufficient to cover such an award. This is unsurprising, as a look into CLAIMANT's finances makes clear that CLAIMANT's financial situation is stable. First, CLAIMANT has total assets in the amount of US$ 42,757,950 but liabilities only in the amount of US$ 40,532,950 [*PO 2, p. 59 et seq., para. 28*]. Thus, if necessary, CLAIMANT can liquefy assets in the amount of US$ 2,225,000 without having its finances out of balance. This is more than ten times enough to cover RESPONDENT's legal costs. Second, CLAIMANT has invested over US$ 4,000,000 into the development of the new TRF-305 fan for small engines. As development was in its final phase in February 2015, it will be completed any day now and the sale of the TRF-305 will most likely have started by the time the Tribunal renders an award, further improving CLAIMANT's liquidity [*Exhibit C 6, p. 15*]. Given this amount of assets, it is inconceivable how RESPONDENT could possibly be unable to enforce a potential US$ 200,000 claim to its legal costs. Even if RESPONDENT would have been able to establish doubts regarding CLAIMANT's solvency, CLAIMANT has in fact more than enough financial means to satisfy a potential adverse costs award.

42 Yet, RESPONDENT fails to demonstrate why such an award is likely to be rendered against CLAIMANT in the first place. RESPONDENT further fails to establish convincing reasons as to why CLAIMANT would not comply with such an award if it was rendered. Hence, there is no cause for ordering CLAIMANT to provide security for RESPONDENT's legal costs and the Tribunal should refrain from granting RESPONDENT's request.

2. An Order for Security for Costs Would Be Unjust

43 As mentioned, the probability of harm to RESPONDENT is not the sole criterion. Regardless of the probability of harm, security for costs should not be ordered if it was unjust in the particular circumstances of the case [*English High Ct London 6 Nov 1972*].

44 Apart from RESPONDENT failing to comply with its burden of proof, ordering CLAIMANT to provide security for RESPONDENT's costs would in fact be unjust for several reasons and the Tribunal should reject RESPONDENT's request. First, any deterioration of CLAIMANT's financial situation would be part of RESPONDENT's normal commercial risk (**a**). Second, the potential harm to CLAIMANT caused by the order would outweigh the harm RESPONDENT suffered if the measure was not granted (**b**). Third, CLAIMANT's right to be heard might be endangered if the request for security for costs was granted (**c**). Finally, RESPONDENT is responsible for any disturbances in CLAIMANT's current financial situation (**d**).

a) In Any Case, a Deterioration of Claimant's Financial Situation Would Be Part of Respondent's Normal Commercial Risk

45 Even if the Tribunal were to follow RESPONDENT's line of arguments and found that CLAIMANT's financial situation might render it unable to comply with an adverse costs award, the Tribunal should not order security for costs against CLAIMANT as any deterioration of CLAIMANT's finances would fall into the sphere of RESPONDENT's normal commercial risk.

46 A respondent that has agreed to arbitrate with a claimant that was in financial struggle at the time the arbitration agreement was signed should not be able to obtain security for its costs [*ICC 29 May 2009; Waincymer, p. 650*]. Therefore, in order to succeed, the party seeking security for costs must show that the prospect of the claimant honouring a potential adverse costs award has substantially and unforeseeably deteriorated since the conclusion of the arbitration agreement [*Gu, J. Int'l Arb. 2005 p. 187 et seq.; Sandrock, J. Int'l Arb. 1997, p. 37*].

47 As shown above, there is no such deterioration, but even if there was, RESPONDENT was well aware of CLAIMANT's size and business model at the time of the conclusion of the Main Agreement as they had contracted before and were both subsidiaries of the same parent company [*Request for Arbitration, p. 3, para. 2*]. RESPONDENT therefore also knew that there are time periods where CLAIMANT's freely available financial means might temporarily be exhausted due to new development projects [*Exhibit C 9, p. 50*].

48 Contrary to RESPONDENT's statements [*Request for Security for Costs, p. 46, para. 4*], CLAIMANT was under no obligation to inform about the outcome of the proceedings against the government of Xanadu. First, there is no rule requiring CLAIMANT to disclose the results of its legal proceedings to RESPONDENT. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are, as their name suggests, not applicable to this private commercial arbitration, neither directly nor indirectly. In investor-state arbitration, transparency is sensible as, due to the participation of a state, the cases are of public interest and involve taxpayers' money. This is not the case in private arbitration, where confidentiality is in fact a primary reason why parties choose to arbitrate [*Bühring-Uhle, p. 136; Smeureanu, p. XV; Denoix De Saint Marc, J. Int'l Arb. 2003, p. 210*]. Second, it has already been established that the low compensation did no lasting damage to CLAIMANT's finances. Thus, there was no reason to inform RESPONDENT. Third, on 7 June 2010, the date the award was rendered, the Parties were still part of their former common parent company [*PO 2, p. 54, para. 1*]. Hence, CLAIMANT could trust that the outcome of the proceedings had been communicated internally. The Tribunal should therefore not grant RESPONDENT's request for security for costs.

b) The Potential Harm to Claimant Outweighs the Potential Harm to Respondent

49 An order for security for costs would harm CLAIMANT significantly more than it might potentially harm RESPONDENT to be denied such a request. When considering whether to grant the request for security for costs, an arbitral tribunal needs to observe the relative hardship to each party when the request is granted or denied [*ICC 9 Nov 1999; Born, p. 2470*]. If security for costs is not ordered, the worst case for RESPONDENT would be having to pay its own legal costs. CLAIMANT, however, is currently in a phase of development of the TRF-305 fan blades [*Exhibit C 6, p. 15*]. A lack of liquidity in this crucial period would render CLAIMANT unable to finish development, effectively depriving it of the yields of the sale of the TRF-305. Consequently, even if CLAIMANT's financial situation was indeed dire, the harm to CLAIMANT

would outweigh the harm to RESPONDENT and the Tribunal should still refrain from granting the request for security for costs.

c) An Order for Security for Costs Endangers Claimant's Right to Be Heard

50 According to Art. 7.8 CAM-CCBC Rules the Parties have to be able to present their case. Security for costs should not be ordered if it endangers a party's right to be heard [*HIGKT 25 Jul 2003; ICSID 28 Oct 1999; ICC 9 Nov 1999; Miles/Speller, p. 32*]. CLAIMANT reserved enough funds to pay for the normal costs of the arbitration set out in Art. 12 CAM-CCBC Rules [*PO 2, p. 60, para. 32*]. However, if the Tribunal grants the request for security for costs, a potential lack of liquidity might disable CLAIMANT to proceed with its legitimate claims as the payment might not be manageable for CLAIMANT at this time. Being unable to proceed with arbitration would prevent CLAIMANT from presenting its case in front of the Tribunal. Thus, if the Tribunal assumes that CLAIMANT's financial situation renders it unable to comply with an adverse costs award, it should nevertheless reject RESPONDENT's request, as an order for security for costs endangers CLAIMANT's right to be heard.

d) Respondent Is Responsible for Claimant's Financial Situation

51 Last, the order would not withstand considerations of fairness because CLAIMANT's financial situation is caused by RESPONDENT's insufficient payment. If the respondent is co-responsible for the financial situation of a claimant, the request for security for costs should not be granted [*Henderson, 7 Asian Int'l Arb. J. (2011), p. 73; Göler, p. 336*]. RESPONDENT did not pay the outstanding US$ 2,387,430.80 [*Argument on the Merits*]. Any issues regarding CLAIMANT's financial situation would therefore be caused by RESPONDENT's insufficient payment. Thus, the Tribunal should not grant RESPONDENT's request.

CONCLUSION OF THE FIRST ISSUE

52 The Tribunal does not have the authority to order security for costs against CLAIMANT. Even if it had the power to do so, it should not exercise this power as RESPONDENT fails to provide convincing reasons as to why it might be unable to recover its legal costs. In addition, ordering CLAIMANT to provide security for RESPONDENT's costs would be unjust in the present case. The Tribunal is therefore urgently requested to reject RESPONDENT's request and refrain from ordering security for costs against CLAIMANT.

ISSUE 2: CLAIMANT'S CLAIMS ARE ADMISSABLE

53 The Arbitration Agreement provides that each party *"has the right to initiate arbitration proceedings within sixty days after the failure of negotiations"* [*Exhibit C 2*, *p. 11, sec. 21*]. After a dispute arose about RESPONDENT's payment obligation, CLAIMANT initiated arbitration proceedings by submitting the Request for Arbitration dated 31 May 2016. Unfortunately, two mistakes occurred when the Request for Arbitration was filed. First, the enclosed power of attorney solely referred to CLAIMANT's parent company instead of CLAIMANT itself [*Power of Attorney by Wright Holding PLC, p. 18*]. Second, the secretary of CLAIMANT's lawyer made a mistake which led to insufficient payment [*Fasttrack to CAM-CCBC, p. 20*]. On 1 June 2016, the President informed CLAIMANT about those mistakes and demanded correction of the defects within ten days [*CAM-CCBC's letter to the Claimant, p. 19*]. Six days later, on 7 June 2016, CLAIMANT paid the full registration fee and endorsed a correct power of attorney [*Fasttrack to CAM-CCBC, p. 20*].

54 RESPONDENT asserts that CLAIMANT's claims are inadmissible as the arbitration proceedings were initiated out of time. Allegedly, the Request for Arbitration dated 31 May 2016 did not comply with Artt. 4.1, 4.2 CAM-CCBC Rules and the amendment was not within the sixty-day limit.

55 However, these allegations are unfounded. Contrary to RESPONDENT's argumentation, CLAIMANT's claims are admissible and were submitted in time. First, the sixty-day limit is null and void (**A**). Second, even if the sixty-day limit was valid, the initial Request for Arbitration dated 31 May 2016 complied with this time limit (**B**). Third, assuming but not conceding that CLAIMANT had not validly submitted the Request for Arbitration, it admissibly amended the Request for Arbitration within the time limit (**C**).

A. The Sixty-Day Limit Is Null and Void

56 The Tribunal should consider the notion of Art. 10.3 (2) lit. a UPICC and declare the sixty-day limit null and void.

57 The wording of the Arbitration Agreement restricts the time for raising a claim to sixty days [*Exhibit C 2, p. 11, sec. 21*]. It is disputed whether a contractual time limit for the initiation of arbitration is of substantive or procedural nature [*SCC 15 Dec 1994; SCC 20 May 2010; Redfern/Hunter, para. 4.07; Prime/Scanlan, p. 370*]. However, irrespective of the legal nature of the clause, the legal consequences are the same. Within the sets of rules agreed upon by the

Parties the only regulation containing a provision dealing with time limits is Art. 10.3 (2) lit. a UPICC.

58 Generally, Art. 10.3 (1) UPICC allows the parties to modify limitation periods which effect the unenforceability of the parties' legal remedies or even rights [*Mew, p. 4*]. However, Art. 10.3 (2) lit. a UPICC forbids them to shorten limitation periods to *less than one year*. Thus, Art. 10.3 UPICC guarantees the parties adequate time to present their case. The right to be heard is considered one of the basic principles of arbitration [*ICSID 17 Nov 2014; HKZ 11 Nov 2003; ICSID 23 Dec 2010; c.f. US Sup Ct 30 Apr 1950; BGH 26 Mar 1992*]. Where the parties have chosen the UPICC to govern their contract, Art. 10.3 (1) UPICC is mandatory and cannot be excluded [*UPICC Commentary, p. 15, para. 3; Wintgen, in: Vogenauer, Art. 10.3, para. 1*].

59 It is our submission that the notion of Art. 10.3 (2) lit. a UPICC must be applied to the problem in the case at hand, regardless of whether the clause is of procedural or substantive nature. After the expiration of the time limit stipulated in the clause, the Parties would be barred from raising their claims in *any* possible forum regardless of the validity of their substantive claims [*HK Ct App 4 Jul 2001; HK Ct 1st Inst 28 Oct 2002; Born/Scekic, p. 252; Michaelson/Blanke, p. 18*]. This is due to the fact that parties who consented to an arbitration agreement exclude the jurisdiction of national courts [*US Ct App 30 Jul 2009; Fouchard/Gaillard/Goldman, p. 402, para. 661; Steingruber, para. 5.70; van den Berg, p. 135*].

60 Consequently, the sixty-day limit has the same effect as a limitation period: The Parties lose their entitlement to claim and are barred from exercising any substantive rights. Since the sixty-day limit significantly undercuts the one-year limit stipulated in Art. 10.3 (2) lit. a UPICC, the Parties' fundamental right to be heard is infringed.

61 Therefore, the Tribunal is kindly requested to consider the notion of Art. 10.3 (2) lit. a UPICC and declare the sixty-day limit null and void.

B. Even If the Sixty-Day Limit was Valid, the Initial Request for Arbitration Would Have Complied with It

62 First, the Arbitration Agreement solely requires the arbitration to be *initiated* (**I**). Second, CLAIMANT commenced the arbitration proceedings in line with Art. 4.1 and Art. 4.2 CAM-CCBC Rules (**II**).

I. Claimant Initiated Arbitration Proceedings in Time

63 According to the Arbitration Agreement, *initiation* within the sixty-day limit is sufficient to start arbitration proceedings in time. To determine the condition attached to the sixty-day limit, the clause has to be interpreted. This shall be done in light of the ordinary rules of contract interpretation [*cf. ICC 1993; US Ct App 23 Apr 1999; US Dist Ct NY 8 May 1990; Born, p. 1320*]. The parties' intent thereby controls the interpretation of their agreement [*ICC 2003; CRCICA 22 Mar 2013; US Sup Ct 27 Apr 2010; US Sup Ct 2 Jul 1985; BG 22 Jan 2008; Caron/Schill/Smutny/Triantafilou, p. 259*]. The common intent of the parties can be found by interpreting the wording of the arbitration agreement [*ICC 1995; Sup Ct NJ 27 Apr 1953; OGH 26 Aug 2008; High Ct Delhi 5 Sep 2013; Jarvin, p. 53*].

64 First, in the Arbitration Agreement the Parties chose the wording *initiate* when referring to the start of the arbitration proceedings. Contrary to the Parties' choice of words, Art. 4 CAM-CCBC Rules states the wording "*commence"* to regulate the start of arbitration proceedings. A comparison with international arbitration practice shows that commencement generally refers to the formal start of arbitration proceedings [*Art. 4.2 ICC; Sec. 6.1 DIS, Art. 1 HKIAC; Art. 4 SCC*]. The modification from the standard term *commence* reveals that the Parties did not intend for *initiate* to address the formal start of arbitration proceedings in the sense of Art. 4 CAM-CCBC Rules and international arbitration practice. *Initiation* exclusively describes the process of taking the first step towards arbitration [*cf. Dietl/Lorenz, p. 404*]. Submitting a request for arbitration and thereby expressing the will to commence the arbitration is therefore sufficient.

65 Second, only this interpretation of the Arbitration Agreement ensures the Parties' right to present their case when following to the basic principle of restrictive interpretation. Clauses that potentially ban parties from presenting their case must be interpreted restrictively [*Sultan, p. 294; cf. Häberlein, p. 2*]. Hence, in order to ensure that CLAIMANT's right to be heard is obtained, the requirement *initiate* must be interpreted restrictively.

66 The interpretation of the Arbitration Agreement leads to the conclusion that the wording chosen by the Parties - *initiate* - does not set the same requirements as the wording of Art. 4 CAM-CCBC Rules. By submitting in the Request for Arbitration within the sixty-day limit, CLAIMANT complied with the conditions of the Arbitration Agreement and demonstrated its intent to enter into arbitration proceedings.

II. In Any Case, Claimant Commenced Arbitration Proceedings in Time

67 RESPONDENT alleges the Request for Arbitration was invalid as it lacked a proof of payment of the full registration fee and the enclosed power of attorney was formally flawed [*Answer to Request for Arbitration, p. 25, para. 12*]. Moreover, RESPONDENT claims that CLAIMANT's lawyer did not have the authority to file the Request for Arbitration. Yet, this argumentation is unfounded. It is uncontested that the first power of attorney was issued by CLAIMANT's parent company. However, a formal error in the document does not affect the validity of the Request for Arbitration.

68 First, the submission of the Request for Arbitration was valid (**1**). Second, the proof of payment requested in Art. 4.2 CAM-CCBC Rules is dispensable for commencement (**2**).

1. The Submission of the Request for Arbitration Was Retroactively Valid

69 The submission of the Request for Arbitration by CLAIMANT's lawyer, who acted as CLAIMANT's agent, was subsequently ratified.

70 Powers of attorney are governed by the *general law on agencies* in Equatoriana which is a verbatim adoption of the relevant regulations in the UPICC [*PO 2, p. 58, para. 24*]. Section two of the UPICC governs the authority of agents. If the agent acts without authority or exceeds it, the principal may ratify the act, Art. 2.2.9 (1) UPICC. Ratification is generally retrospective [*Krebs, in: Vogenauer, Art. 2.2.9, para. 13*]. If ratified, the act produces the same effects as if it had initially been carried out with authority [*UPICC Commentary, p. 91, para. 2*].

71 CLAIMANT's lawyer submitted the Request for Arbitration dated 31 May 2016 on behalf of CLAIMANT [*Request for Arbitration, p. 3*]. When doubts were raised as to CLAIMANT's lawyer's power of attorney, CLAIMANT formally appointed him in the second power of attorney [*Power of Attorney by Wright Ltd, p. 21*]. At the same time, the document approved *"any actions already undertaken by the Lawyer"* [*ibid.*].

72 Consequently, the submission of the initial Request for Arbitration has to be viewed as valid from the moment it was filed to the CAM-CCBC. Therefore, the submission of the Request was retroactively valid.

2. Proof of Payment of the Registration Fee Is Not Required for Commencement

73 To commence arbitration proceedings, proof of payment of the registration fee is not required. This becomes clear with regard to the purpose and structure of Art. 4 CAM-CCBC Rules.

74 The purpose of the registration fee is to discourage manifestly inappropriate requests to the CAM-CCBC [*Wald/Gerdau Borja, et al., in: Straube/Finkelstein/Filho, p. 67*]. The payment of the registration fee is required by the arbitral institution to cover initial administrative costs [*Timm, in: Straube/Finkelstein/Filho, p. 191 et seq.; cf. Schwarz/Konrad, Art. 33, para. 3*]. Thus, the proof of this payment is only relevant to the CAM-CCBC as it primarily acts as a service provider [*cf. CdA 22 Jan 2009; Born, p. 1984; Li, in: Hanotiau/Mourre, p. 113*]. Arbitral institutions are responsible for the administration of the proceedings and hence have limited impact on the legal situation. Since Art. 4.2 CAM-CCBC Rules solely protects the CAM-CCBC, this requirement cannot be mandatory for the legal commencement of arbitration proceedings.

75 The same conclusion has to be drawn considering the structure of Art. 4 CAM-CCBC Rules. The exclusive list of necessary documents in Art. 4.1 CAM-CCBC Rules forms the basis for commencing arbitration for all parties involved in an arbitration. It is noteworthy that Art. 4.2 CAM-CCBC Rules separates the proof of payment from that list. This suggests that it is dispensable. The minor importance of Art. 4.2 within in Art. 4 CAM-CCBC Rules can also be seen in the President's letter to CLAIMANT from 1 June 2016, where he only explicitly calls for Art. 4.1 CAM-CCBC Rules to be satisfied [*CAM-CCBC's letter to the Claimant, p. 19*].

76 In any case this particularity and the separation from Art. 4.1 CAM-CCBC Rules emphasise that the sole purpose of proof of payment is to protect the CAM-CCBC. Consequently, RESPONDENT does not fall within the scope of Art. 4.2 CAM-CCBC Rules. RESPONDENT thus cannot invoke the violation of the aforementioned Article to demonstrate that CLAIMANT did not commence arbitration.

77 For all the above reasons, it has to be concluded that a non-compliance of Art. 4.2 CAM-CCBC Rules cannot bar commencement.

C. Even If Claimant Had Not Validly Submitted the Request on 31 May 2016, Claimant Admissibly Amended the Request Within the Time Limit

78 CLAIMANT amended the Request within the sixty-day limit (**I**). In any event, the arbitration was commenced with an incomplete Request for Arbitration as this is in line with international arbitration practice (**II**).

I. The Sixty-Day Limit Had Not Expired When Claimant Amended the Request for Arbitration

79 The Request for Arbitration was amended within the sixty-day limit as the negotiations only failed in regard to CLAIMANT's submission on 31 May 2016.

80 Pursuant to the Arbitration Agreement, arbitration proceedings shall be initiated after the failure of negotiations, *"if no agreement can be reached"* [*Exhibit C 2, p. 11, sec. 21*]. Negotiations are considered to be failed once they have become futile or completely deadlocked [*ICSID 8 Feb 2013; ICSID 9 Sep 2008*; *ICSID 10 Jan 2005*].

81 In the email to RESPONDENT dated 1 April 2016, CLAIMANT stated that it *"remains open for any meaningful negotiations"* [*Exhibit R 3, p. 29*]. This shows that there was still room for negotiations and further joint discussion would have still been successful. Ergo, negotiations have not become futile or deadlocked at this point of time. However, RESPONDENT did not react to this offer. As a consequence, negotiations failed when CLAIMANT finally submitted the Request for Arbitration on 31 May 2016. CLAIMANT amended the missing documents on 7 June 2016, seven days later and within the sixty-day limit.

82 Consequently, the Request for Arbitration was lawfully amended within the sixty-day limit.

II. In Any Case, Arbitration Has Commenced with an Incomplete Request

83 In any case, completing an insufficient request for arbitration within adequate time leads to commencement once the CAM-CCBC received the initial version.

84 Artt. 4.1, 4.2 CAM-CCBC Rules require a written power of attorney and a proof of payment to the Request for Arbitration. Nevertheless, no provision of the CAM-CCBC Rules states the consequences of a non-compliance with said articles. Thus, this issue constitutes a regulatory gap of the CAM-CCBC Rules.

85 Confronted with this regulatory gap of the CAM-CCBC, international arbitration practice must be consulted as a guidance [*Exhibit C 2, p. 11, sec. 21*]. Across different sets of arbitration rules around the globe, a common approach can be identified: Art. 3 (5) Swiss Rules, Sec. 6.4 and 7.2 DIS Rules, Art. 4.7 HKIAC Rules, Art. 13 (3) CIETAC Rules explicitly regulate the possibility for the claimant to complete the defect formalities of the request within an adequate period of time. If the claimant completes the request within the given time limit, the request for arbitration shall be deemed to have been validly filed on the date on which the initial version

was received by the secretariat [cf. *Elsig/Bredow/Mulder, in: Böckstiegel/Kröll/Nacimiento, pp. 611, 614; cf. Zuberbühler/Muller/Habegger, p. 31*].

86 In the case at hand, CLAIMANT amended all required documents within the set time period. The President set a ten-day frame for CLAIMANT to amend the Request for Arbitration [*CAM-CCBC's letter to the Claimant, p. 19*]. Six days after the President's order, on 7 June 2016, CLAIMANT's lawyer handed in a new power of attorney [*Power of Attorney by Wright Ltd, p. 21*]. Further, the remainder of the registration fee was paid [*Fasttrack to CAM-CCBC, p. 20*]. Thereby CLAIMANT complied with the ten-day frame.

87 Hence, applying international arbitration practice, the arbitration is to be deemed commenced on 31 May 2016.

CONCLUSION OF THE SECOND ISSUE

88 The contractual time limit is to be considered null and void as it violates Art. 10.3 (2) lit. a UPICC and CLAIMANT's right to be heard. Even if the time limit of sixty days was valid, CLAIMANT complied with it. CLAIMANT initiated the arbitration proceedings in line with the Arbitration Agreement. In any case, CLAIMANT commenced proceedings in accordance with Art. 4 CAM-CCBC Rules. Assuming but not conceding that CLAIMANT had not validly submitted the Request on 31 May 2016, it amended the Request for Arbitration admissibly within the time frame. Amicable negotiations between the Parties have failed with CLAIMANT's submission of the Request for Arbitration on 31 May 2016, thus the amendment dated 7 June 2016 was made in a timely manner. In any case, even an incomplete request can commence arbitration. Therefore, CLAIMANT's claims are admissible.

ARGUMENT ON THE MERITS

ISSUE 3: CLAIMANT IS ENTITLED TO THE OUTSTANDING PAYMENT OF US$ 2,285,240

90 On 1 August 2010, the Parties agreed upon the development and sale of 2,000 Blades. The final production costs of the Blades were not yet certain when the Parties entered into the Main Agreement. Thus, they agreed on a formula to calculate the purchase price based on the production costs. However, since RESPONDENT wanted to make a binding offer to a third party, a maximum price was set [*Exhibit C 2, p. 10; Exhibit R 5, p. 31*]. Subsequently, the Parties contracted for the sale of 2,000 Clamps and attached a handwritten Addendum to the Main Agreement. In the Addendum, the Parties set a fixed exchange rate of US$ 1 = EQD 2,01 [hereafter: Fixed Exchange Rate] [*Exhibit C 2, p. 10*]. When CLAIMANT successfully completed the production of the Blades, CLAIMANT attached an erroneous invoice due to a mistake in the accounting department. The final purchase price of the Blades was calculated on the basis of the Fixed Exchange Rate [*Exhibit C 4, p. 13*]. Due to this more favourable calculation for RESPONDENT, it only effected US$ 20,438,560 to CLAIMANT's bank account [*Exhibit C 3, p. 12*]. Immediately after noticing the mistake, CLAIMANT informed RESPONDENT about the incorrect calculation [*Exhibit C 5, p. 14*]. RESPONDENT now refuses to effect further payments and argues that the Fixed Exchange Rate in the Addendum also refers to the purchase of the Blades.

91 However, this assumption is incorrect. CLAIMANT is entitled to the outstanding payment according to Art. 62 CISG. First, the Main Agreement requires RESPONDENT to pay the purchase price for the Blades according to the exchange rate at the time payment is due (**A**). Second, the Addendum does not change the price calculation of the Main Agreement (**B**). Third, the invoice does not constitute an offer to modify the purchase price (**C**).

A. The Main Agreement Requires Respondent to Pay the Purchase Price According to the Exchange Rate at the Time Payment Is Due

92 The Main Agreement, which is governed by the CISG (**I**), requires RESPONDENT to pay the purchase price according to the exchange rate at the time payment is due. Only this exchange rate complies with the purpose of the calculation formula (**II**). RESPONDENT cannot rely on de-risking considerations in the former parent company (**III**). The same conclusion has to be drawn considering former co-operations between the Parties (**IV**).

I. The Main Agreement Is Governed by the CISG

93 The CISG is applicable since the prerequisites of Art. 1 (1) lit. a CISG are met. First, CLAIMANT and RESPONDENT are domiciled in different states that are both contracting states to the CISG [*PO 1, p. 53 para. 5*]. Second, the Main Agreement is a sales contract in terms of Art. 1 (1) CISG. This might be disputed as CLAIMANT is required to not only sell but also develop the Blades [*Exhibit C 2, p. 9*]. However, according to Art. 3 CISG, mixed contracts are also governed by the CISG unless the preponderant contractual obligation is the supply of services. As is evidenced by Section 3 (*"delivery"*) and Section 4 (*"purchase price"*) of the Main Agreement, CLAIMANT's preponderant obligation is not the development, but the delivery of the Blades. Hence, the Main Agreement is a contract for the sale of goods.

94 In any case, the CISG is applicable as it was explicitly chosen by the parties [*Exhibit C 2, p. 10, sec. 20*]. The principle of party autonomy enables the parties to choose the CISG to be applicable to their contract even outside the CISG's regular scope of application [*Huber, in: MüKo BGB Art. 6, para. 36*]. Thus, the Main Agreement is governed by the CISG.

II. Only the Exchange Rate at the Time Payment Is Due Complies With the Purpose of the Calculation Formula

95 An interpretation of the calculation formula shows that the exchange rate at the time payment is due must be applied. In contrast, applying a fixed exchange rate would lever out the purpose of the formula.

96 According to the calculation formula in the Main Agreement, the purchase price depends - within a certain range between a fixed minimum and maximum price - on the production costs incurred by CLAIMANT [*Exhibit C 2, p. 10, sec. 4, para. 1*]. The formula takes the production costs into account in US$ [*idem.*], whereas CLAIMANT actually incurs them in EQD [*Request for Arbitration, p. 4, para. 5*]. Thus, in order to calculate the purchase price with the formula, it is necessary to convert the production costs into US$. Yet, the Parties did not explicitly agree on an exchange rate for this conversion. In lack of an explicit settlement, the applicable exchange rate shall be determined by interpretation.

97 Statements and other conduct of the parties are to be interpreted under Art. 8 CISG. Pursuant to Art. 8 (1) CISG, all interpretation must emanate from the intent of the parties. If an intent is not determinable, pursuant to Art. 8 (2) CISG, the understanding a reasonable person of the same kind as the other party would have had in the same circumstances has to be considered.

98 According to the understanding of a reasonable person, the calculation formula in principle governs two possible scenarios. In the first scenario, the final production costs are below the maximum price. If this scenario materialise, CLAIMANT would be able to cover its production costs and to make profit. The profit thereby increases with the decrease of the production costs [*Exhibit C 2, p. 10, sec. 4, para. 1*]. This cost-plus mechanism sets an incentive for CLAIMANT to keep the production costs as low as possible and provides an economically reasonable dependency of performance and counter-performance. In the second scenario, the production costs exceed the maximum price. Only when this second scenario occurs, CLAIMANT would not be able to cover its production costs and incur losses.

99 Thus, to fulfil the purpose of the formula, it must be ensured that CLAIMANT is able to cover its production costs and make profit whenever it kept the production costs low and RESPONDENT therefore has to pay less than the maximum price. In the case at hand, the final production costs amount to EQD 19,586 per Blade. Regardless of whether the rate at the time payment is due (US$ 10,941.90) or the Fixed Exchange Rate (US$ 9,744.28) is applied, CLAIMANT kept the production costs far below the maximum price of US$ 13,125.

100 However, applying the Fixed Exchange Rate as suggested by RESPONDENT would circumvent the purpose of the formula. CLAIMANT would only receive US$ 10,219.28 per Blade whereas the *actual* production costs per Blade amount to US$ 10,941.90. Thus, CLAIMANT would incur a loss of US$ 722.62 per Blade, even though it kept the production costs in the lower third of the cost range of the formula. This is due to the fact that a fixed exchange rate does not reflect the *actual* costs of CLAIMANT. The application of a fixed exchange rate instead of the current rate prevailing at the time payment is due can lead to a distortion of the actual production costs and therefore lever out the cost-plus mechanism of the formula.

101 In order to serve the purpose of the formula, the exchange rate at the time payment is due, thus a rate of US$ 1 = EQD 1.79 [*PO 2, p. 56, para. 12*] must be applied. Only this way the *actual* production costs CLAIMANT incurred are effectively taken into account.

III. Respondent Cannot Rely on De-Risking Considerations in the Former Parent Company

102 RESPONDENT cannot allocate the currency risk to CLAIMANT due to considerations in their former parent company about de-risking RESPONDENT [*Answer to Request for Arbitration*, *p. 2, para. 9*].

103 First of all, CLAIMANT is not bound by the de-risking considerations within the former parent company. CLAIMANT was already sold before the conclusion of the Main Agreement [*PO 2, p. 54, para. 1*]. CLAIMANT and RESPONDENT entered into the Main Agreement as independent business partners. Thus, their business interests were no longer aligned and CLAIMANT was not bound by the de-risking considerations in the former parent company. Also, RESPONDENT had to be aware that the Main Agreement would not provide any further benefits than the fixed maximum price.

104 In any case, the Main Agreement already contains sufficient de-risking elements in favour of RESPONDENT. Under the Main Agreement, the final purchase price stays within a range between a minimum and a maximum price already fixed in US$ [*Exhibit C 2, p. 10, sec. 4, para. 1*]. RESPONDENT therefore has the certainty not to pay more than the maximum price. CLAIMANT, on the other hand, bears the risk of the production costs ranging above this maximum price and thus incurring losses. By contrast, in their two former co-operations the Parties did not agree on a maximum price. Those contracts ensured that CLAIMANT was able to cover the production costs and to make profit of at least 1% [*PO 2, p. 54, para. 5*]. Unlike the current co-operation, there was no risk for CLAIMANT to incur losses but the risk of CLAIMANT was limited to incurring the small profit of 1%. The Parties actually shared the risk of increasing production costs whereas in this case, the risk of increasing production costs is capped to the maximum price for RESPONDENT. Yet, CLAIMANT bears the entire risk of the production costs exceeding the maximum price. Thus, under the Main Agreement the risk is already minor for RESPONDENT. Therefore, risk considerations do not indicate the use of the Fixed Exchange Rate.

IV. Former Practices Do Not Indicate the Application of the Exchange Rate at the Time of Contract Conclusion

105 RESPONDENT argues that it has been the understanding of the Parties when they entered into the Main Agreement that the rate prevailing at the time of contract conclusion, thus a rate of US$ 1 = EQD 2.01, is applicable. RESPONDENT states that this would *"reflect the practice between the parties during their two previous co-operations"* [*Exhibit R 5, p. 31*]. However, this claim is unfounded. The two former co-operations between the Parties do not indicate the use of the exchange rate at the time of contract conclusion.

106 Applying a certain exchange rate in two prior contracts is not sufficient to establish a binding practice in terms of Art. 9 (1) CISG between the Parties. According to Art. 9 (1) CISG, the

parties are bound by any practices which they have established between themselves. Such practices indicate either the intent of the parties or the understanding of a reasonable person in terms of Art. 8 CISG [*Gruber, in: MüKo-BGB Art. 8, para. 20; Schmidt-Kessel, in: Schlechtriem/Schwenzer Art. 9, para. 1*]. In order to establish a practice, a certain frequency and duration is necessary [*HGer Aargau 26 Sep 1997; LG Frankenthal 17 Apr 1997; Honnold Art. 9 para. 116*]. Repeating a particular circumstance only once does not establish a practice [*ZGer Basel-Stadt 3 Dec 1997; AG Duisburg 13 Apr 2000; Witz, in: Witz/Salger/Lorenz Art. 9, para. 17; Saenger, in: Ferrari/Kieninger/Mankowski Art. 9, para. 3*]. As the Parties only repeated to apply the exchange rate at the time of contract conclusion once [*Answer to Request for Arbitration, p. 24, paras. 7, 8*], there is no binding practice concerning exchange rates in terms of Art. 9 (1) CISG. Thus, CLAIMANT could not assume that RESPONDENT intended to apply the exchange rate at the time of contract conclusion.

107 Moreover, while it is true that in the end the Parties agreed on the exchange rate at the time of contract conclusion in their two former contracts [*Answer to Request for Arbitration, p. 24, para. 8*], this was only due to economic considerations. For the Main Agreement however, the only economically reasonable solution is to apply the exchange rate at the time payment is due [*see para. 100*]. In the former contracts, the exchange rate at the time of contract conclusion was only applied in order to save taxes for the parent company. The tax regime at RESPONDENDT's place of business was more favourable [*PO 2, p. 55, para. 5*]. Thus, the parent company decided to apply the more favourable exchange rate for RESPONDENT in order to lose the smaller amount of profit [*ibid*]. Hence, the exchange rate at the time of contract conclusion was only applied due to economic reasons. Now, after the separation from the parent company [*PO 2, p. 54, paras. 1, 5*] there was no reason for the Parties to adhere to that decision. In fact, as independent business partners, the only solution to ensure an advantageous outcome for both sides is to apply the exchange rate at the time payment is due.

B. The Addendum Does Not Change the Price Calculation of the Main Agreement

108 The Addendum exclusively refers to the purchase of the Clamps and does not modify the Main Agreement. This becomes clear when considering the intent of the Parties (**I**). Even if the Tribunal decided not to follow this interpretation, RESPONDENT would bear the risk of the ambiguity of the Addendum as RESPONDENT drafted the exact wording (**II**).

I. The Parties Did Not Intend to Apply the Fixed Exchange Rate to the Addendum

109 According to Art. 29 (1) CISG, a contract may be modified by agreement of the parties. Whether a modification is agreed upon is to be determined through Art. 8 CISG [*Schroeter, in: Schlechtriem/Schwenzer, Art. 29, para. 2*], hence, by establishing the intent of the parties or an intent that the other party could not be unaware of.

110 RESPONDENT bears the burden of proof for the interpretation under Art. 8 CISG. The party referring to its intent in terms of Art. 8 (1) CISG has to prove that the other party was aware or could not have been unaware of this intent and has to prove the factual circumstances supporting its interpretation [*Achilles, Art. 8, para. 8; Saenger, in: Ferrari/Kieninger/Mankowski Art. 8, para. 7*]. RESPONDENT claims that it was clear to it, that the Fixed Exchange Rate should also apply to the purchase of the Blades [*Exhibit R 5, p. 31*]. Thus, RESPONDENT has to prove the facts, suggesting that CLAIMANT was aware or could not have been unaware of this intent.

111 However, regarding the negotiations, CLAIMANT could not have been aware of RESPONDENT's intent to modify the Main Agreement with the Addendum. The only reason for adding the Addendum was RESPONDENT's need for fitting clamps [*Request for Arbitration, p. 5, para. 8*]. The Addendum is solely an *"agreement in regard to the clamps"* [*Exhibit R 4, p. 30*], since the Parties only discussed to *"include the purchase of the clamps into the existing contract"* [*Exhibit C 2, p. 57, para 16*]. Also, the subject of the emails only referred to the *"Clamps"* [*Exhibit R 2, p. 28; Exhibit R 4, p. 30*]. Thus, while RESPONDENT claims that it *"insisted on having the exchange rate governing the whole contract*" [*Answer to Request for Arbitration, p. 25, para. 10*], such an intent never became apparent to CLAIMANT. RESPONDENT's CEO himself admits that he *"cannot say whether CLAIMANT's negotiators had the same view"* [*Exhibit R 5, p. 31*]. However, according to Art. 8 (1) CISG, the decisive factor is that the other party knew or could not have been unaware what the intent of the party was.

112 Moreover, a major modification of a contract does not pass by casually [*BGH 27 Nov 2007*]. Mr. Romario states that he only wanted to add the Addendum since it is *"the easiest way to regulate the purchase of the clamps"* [*Exhibit R 2, p. 28*]. The Addendum was attached to the Main Agreement for *"pure convenience"* [*PO 2, p. 57, para. 16*]. Hence, CLAIMANT could not have been aware of RESPONDENT's intent to modify the Main Agreement.

113 The same conclusion must be drawn regarding the sectioning of the Addendum. The first passage of the Addendum governs the object of the added purchase, the 2,000 Clamps, as well as the price calculation on a cost-coverage base. The second passage clarifies that all other

terms shall be identical to the Main Agreement. The third passage then introduces a special deviation for the purchase of the Clamps: namely that the exchange rate shall be fixed [*Exhibit C 2, p. 10*]. This sectioning shows that the Fixed Exchange Rate only refers to the Addendum.

114 This conclusion is emphasised by the wording of the Addendum. The differences in the wording of the second and third passage reveal that the speciality of the Fixed Exchange Rate is only applicable to the Clamps: The second passage refers to the *"main Agreement"* [*Exhibit C 2, p. 11*] written with a capital "A", which is in line with the way the Main Agreement is generally described by the Parties as evidenced by Section 20 and Section 21 of the Main Agreement [*Exhibit C 2, p. 10*]. In contrast, the special provision in passage three refers to the *"agreement"* [*Exhibit C 2, p. 11*] written with a small "a". This difference in wording implies that the two passages do not deal with the same agreement. Hence, CLAIMANT could only assume that the Fixed Exchange Rate should exclusively refer to the purchase of the Clamps.

115 Last, RESPONDENT cannot prove facts supporting its interpretation but rather contradicts itself in its own argumentation. On the one hand, RESPONDENT argues that the Fixed Exchange Rate spells out what had already been the understanding of the Parties when they entered into the Main Agreement, as the Parties always intended to apply the rate at the time of contract conclusion. [*Exhibit R 5, p. 31*]. On the other hand, RESPONDENT then argues that the Fixed Exchange Rate was an outcome of the negotiations of the Addendum [*Exhibit C 7, p. 16*]. This contradicting argumentation reveals, that RESPONDENT also did not intend to apply a Fixed Exchange Rate for the Blades at the time of the conclusion of the agreements. More likely RESPONDENT is now trying to take advantage of CLAIMANT's mistake.

116 Consequently, the facts do not support RESPONDENT's interpretation. Rather, CLAIMANT could not have been aware of RESPONDENT's intent. As RESPONDENT bears the burden of proof, the Fixed Exchange Rate is not applicable to the purchase of the Blades.

II. In Any Case, Respondent Bears the Risk of the Ambiguity of the Addendum as Respondent Drafted the Exact Wording

117 In any case, RESPONDENT has to bear the risk of the ambiguity of the Addendum, as it drafted the exact wording. The rule of *contra proferentem* states that the party introducing a particular wording into an agreement has to bear the risk of the ambiguity and accept an interpretation in its disfavour [*BGH 28 May 2014; ICC 3 Apr 1987; Schmidt-Kessel, in: Schlechtriem/Schwenzer Art. 8, para. 49; Vogenauer, in*: *Vogenauer Art. 4.6, paras. 2, 9; Sykes,*

V. J. 2004, p. 66]. In order to apply the rule of *contra proferentem,* it is required that one party drafted a term and that at least two different interpretations of this term come into question [*Vogenauer, in: Vogenauer Art. 4.6, para. 4*].

118 RESPONDENT drafted the exact wording of the Addendum [*Exhibit R 2, p. 2; Exhibit C 2, p. 11*]. As demonstrated above, the wording of the Addendum is at best ambiguous. RESPONDENT, as the drafter, bears the risk of this ambiguity. Thus, an interpretation *contra proferentem* leads to the conclusion that the Fixed Exchange Rate only refers to the purchase of the Clamps and not to the Main Agreement.

C. The Invoice Is No Offer to Alter the Main Agreement

119 The invoice does not constitute an offer to modify the Main Agreement in terms of Art. 29 (1) in conjunction with Art. 14 (1) CISG. CLAIMANT sent an incorrect invoice to RESPONDENT due to a mix up in the accounting department [*Exhibit C 4, p. 13*]. However, an invoice is not part of the formation of a contract, but part of the payment based on an already concluded contract [*ZGer Basel-Stadt 3 Dec 1997*]. Thus, according to the understanding of a reasonable person, the incorrect invoice does not constitute an offer to modify the purchase price of the Main Agreement. Also, RESPONDENT itself did not consider the invoice as an offer from CLAIMANT, but as a reflection of the contractual agreement between the Parties [*Exhibit C 7, p. 16*]. Therefore, the invoice does not alter the agreement between the Parties.

CONCLUSION OF THE THIRD ISSUE

120 The Main Agreement requires RESPONDENT to pay the purchase price according to the exchange rate at the time payment is due. A Fixed Exchange Rate would lever out the purpose of the calculation mechanism agreed upon in the Main Agreement. Further, the Addendum does not change the price calculation of the Main Agreement. The Addendum is not a modification of the Main Agreement but solely governs the purchase of the Clamps. Also, the invoice does not constitute a modification of the Main Agreement since it does not constitute a binding offer. Thus, RESPONDENT is obliged to pay the purchase price according to the exchange rate at the time payment is due. Consequently, CLAIMANT is entitled to the outstanding payment of US$ 2,285,240 pursuant to Art. 62 CISG.

ISSUE 4: CLAIMANT IS ENTITLED TO THE OUTSTANDING PAYMENT OF US$ 102,192.80

122 RESPONDENT effected the payment of US$ 20,438,560 to CLAIMANT's account. The transaction was levied with 0,5% by the Equatoriana Central Bank [hereafter: ECB] before the payment had been deposited into CLAIMANT's account. Therefore, only US$ 20,336,367.20 were credited [*Exhibit C 6, p. 15*]. RESPONDENT now refuses to pay the outstanding amount of US$ 102,192.80. RESPONDENT alleges that it does not have to bear the levy since CLAIMANT did not inform RESPONDENT prior to contract conclusion.

123 However, contrary to RESPONDENT's allegations, the levy charged by the ECB has to be borne by RESPONDENT. The levy is considered a *bank charge* and is assigned to RESPONDENT under the Main Agreement (**A**). Even if the Tribunal were to find that the Parties did not reach an agreement concerning the levy, RESPONDENT has to bear it under the CISG (**B**).

A. The Main Agreement Requires Respondent to Bear the Levy

124 The Main Agreement obligates RESPONDENT to deposit the full purchase price into CLAIMANT's account (**I**). Further, the levy is considered a bank charge and therefore has to be borne by RESPONDENT (**II**).

I. Respondent Is Obliged to Deposit the Purchase Price in Full into Claimant's Account

125 Section 4 of the Main Agreement obligates RESPONDENT to "*deposit the purchase price in full into the seller's account*" [*Exhibit C 2, p. 10, sec. 4, para. 3*]. Therefore, the place of payment is explicitly defined in the contract as the account of CLAIMANT. Due to the principle of party autonomy, stipulated in Art. 6 CISG in connection with Art. 57 (1) CISG, the place of payment determines who bears the risk of loss and delay of payment [*cf. Mohs, in: Schlechtriem/Schwenzer, Art. 57, para. 3, 5, 20*].

126 Due to said clause, anchored in the Main Agreement, RESPONDENT is solely freed of its obligation to pay the purchase price only after the full amount is deposited into CLAIMANT's bank account [*c.f. Brunner, Art. 54, para. 3*]. Hence, all risks before that point are allocated to RESPONDENT. Thus, costs and risks arising from any transaction until the money arrives at the place of payment are to be borne by the debtor [*OLG München 9 Jul 1997; Mohs, in: Schlechtriem/Schwenzer, Art. 57, para. 9; Benicke, in: MüKo -HGB, Art. 57, para. 4; Schlechtriem/Schroeter, para. 521; Piltz, para. 4-124; Lüderitz/Budzikiewicz, in: Soergel,*

Art. 57, para. 6], i.e. RESPONDENT. So far, CLAIMANT has only received US$ 20,336,367.20. Therefore, it is still entitled to the outstanding payment in the amount of US$ 102,192.80.

II. The Levy Is a Bank Charge and Has to Be Borne by Respondent

127 Pursuant to Section 4 of the Main Agreement, incurred "*bank charges*" are to be borne by the buyer [*Exhibit C 2, p. 10, para. 3*]. According to Art. 8 (2) CISG statements made by and other conduct of a party are to be interpreted according to the understanding of a reasonable person of the same kind. A reasonable person in the same circumstances as the Parties would determine the stipulation in Section 4 of the Main Agreement as an allocation of risks, regarding the transfer of money to RESPONDENT.

128 RESPONDENT agreed to Section 4 of the Main Agreement. By doing so, RESPONDENT took on any monetary risk which might arise from the transaction of the purchase price into CLAIMANT's account. Hence, all occurring "*bank charges*" during the transaction lay within RESPONDENT's sphere of risk and thus have to be borne by it. RESPONDENT argues that the levy is not an "*ordinary bank charge*" and therefore does not have to be borne by it [*Answer to Request for Arbitration, p. 26, para. 18*]. However, the respective term does not distinguish between ordinary and extraordinary bank charges. By agreeing to the Main Agreement RESPONDENT obligated itself to bear any bank charges.

129 Consequently, RESPONDENT has to comply with the terms under the Main Agreement and therefore needs to bear the levy.

B. Even If the Main Agreement Did Not Cover the Payment of the Levy, Respondent Would Have to Bear It Under the CISG

130 RESPONDENT has to bear the levy as it is required as part of its obligation to pay the purchase price under Art. 54 CISG (**I**). CLAIMANT did not have to inform RESPONDENT about the levy, prior to contract conclusion (**II**).

I. Respondent Has to Bear the Levy as Part of Its Obligation to Pay under Art. 54 CISG

131 According to Art. 54 CISG, the buyer's obligation to pay the price includes taking any steps and formalities which may be required under any laws and regulations to enable payment to be made. Consequently, incurred costs for the transfer of the payment have to be borne by RESPONDENT.

132 In order to enable payment of the purchase price, these requirements have to be fulfilled on the buyer's own expenses [*Huber, in*: *MüKo - BGB, Art. 54, para. 1, 16; Benicke, in: MüKo - HGB Art. 54, para. 3*]. Consequently, laws and regulations of all other countries that concern payment, especially at the seller's place of business have to be observed by the buyer [*Enderlein/Maskow, Art. 54, para. 5; Enderlein/Maskow/Strohbach, Art. 54, para. 5; Rosch, in: Herberger et al., Art. 54, para. 2; Magnus, in: Staudinger BGB, Art. 54, para. 5; Schnyder/Straub, in: Honsell, Art. 54, para. 33*].

133 In the case at hand Section 5 and Section 12 of the Regulation ML/2010C pose a requirement to enable *any* payment that exceeds the designated US$ 2,000,000 limit [*Exhibit C 8, p. 17*]. Therefore, the payment can only be made after clearance for the transfer is given [*PO 2, p. 56, para. 10*].

134 RESPONDENT's transaction had to be levied in order to enable the payment. Thus, RESPONDENT is obliged to comply with the levy under Art. 54 CISG and therefore has to bear the costs.

II. Claimant Did Not Have to Inform Respondent about the Levy Prior to Contract Conclusion

135 Contrary to RESPONDENT's allegations [*Answer to Request for Arbitration, p. 26, para. 19*], CLAIMANT was not obliged to inform RESPONDENT about the levy prior to the conclusion of the Main Agreement. First, there is no pre-contractual duty to inform under the CISG (**1**). Second, a pre-contractual duty to inform cannot be derived from an analogy to Art. 35 (2) CISG (**2**). Third a pre-contractual duty to inform cannot be derived from the duty to cooperate under the CISG (**3**).

1. A General Duty to Inform Does Not Cause a Pre-Contractual Duty to Inform

136 There is no pre-contractual duty to inform, since all duties to inform are explicitly stated in the CISG. This is due to the fact that legal certainty is one of the main aims of the CISG, since the CISG governs international sales contracts between parties, which are foremost only familiar with their domestic laws [*Bailey, Cornell Int'l L. J. 1999, para. 292*]. The main purpose of regulating the duty to inform in the CISG expressly is that the parties can identify under which conditions they are obliged to fulfil this duty. Only then legal certainty is granted [*Wiegand, in: Bucher, p. 153, para. IB. 1. b); Magnus, Int'l. Trade & Bus. L. Ann. 1997, p. 46*].

137 The CISG contains particular duties to inform, as stipulated in Artt. 19 (2); 21 (1), (2); 26; 32; 39 (1); 46 (2), (3); 47 (2); 48; 49 (2); 63 (2); 64; 65 (2); 67 (2); 71 (3); 72 (2); 79 (4); 88 (1), (2) CISG. Each of these articles regulates specific situations. In order for these particular duties to apply, the requirements of each article have to be met.

138 Therefore, an obligation to provide certain information only exists where it is expressly stipulated. Consequently, there is no pre-contractual duty to inform under the CISG.

2. In the Present Case, a Pre-Contractual Duty to Inform Cannot Be Derived from an Analogy to Art. 35 (2) CISG

139 RESPONDENT alleges that it is not obliged to bear the levy unless CLAIMANT had informed RESPONDENT about it, prior to contract conclusion. To support this allegation, RESPONDENT attempts to draw an analogy to Art. 35 (2) CISG [*Answer to Request for Arbitration, p. 26, para. 19*]. Art. 35 (2) CISG regulates the conformity of goods with the contract. RESPONDENT argues that the contractual conformity of goods includes compliance with public law regulations at the buyer's place of business, of which the buyer has to inform the seller. According to RESPONDENT, this concept also applies to the obligation to pay the price. However, CLAIMANT was not obliged to inform RESPONDENT about the levy.

140 As discussed above [*see para. 139*], legal certainty requires an express stipulation of a specific duty to inform, which cannot be found in Art. 35 (2) CISG (**a**). Even if an analogy to Art. 35 (2) CISG was possible, the present case does not require one (**b**).

a) Legal Certainty Requires an Express Stipulation of the Duty to Inform

141 Art. 35 (2) CISG does not contain an express duty for one party to inform the other party of relevant public law regulations. It would undermine the aim of legal certainty if such a duty was extended to both parties and generally obliged them to inform the other party about public law provisions [*CdA 13 Sep 1995*]. Hence, there is no duty to inform under Art. 35 (2) CISG. Thus, no analogy can be drawn.

b) Even If an Analogy to Art. 35 (2) CISG Was Possible, the Present Case Does Not Require One

142 Even if the Tribunal were to find that Art. 35 (2) CISG contained a duty to inform about public law requirements, no analogy can be drawn in the present case.

143 The German Supreme Court identified a duty to inform in the '*Mussels Case'* [*BGH 8 Mar 1995*]. In this case, a Swiss seller had delivered mussels from New Zealand to a German buyer. These mussels contained an increased cadmium level. The German Supreme Court ruled that the buyer could not expect conformity of the goods with all public law regulations prevailing in its country unless the buyer informed the seller about them. However, this case is not comparable to the case at hand. Whether a duty to inform exists or not has to be decided in respect of the circumstances of the specific case [*Schwenzer, in: Schlechtriem/Schwenzer, Art. 35, para. 18*].

144 It is true that, in comparison to Meditarraneo, there had been extensive press coverage about the ML/2010C Regulation in Equatoriana [*PO 2, p. 55, para. 7*]. However, this does not change the fact that RESPONDENT could have easily informed itself, since RESPONDENT had a strong interest in executing the Main Agreement. This was due to the fact that it wanted to use it as a binding reference and marketing tool to a third party [*Exhibit R 5, p. 31*].

145 Further, in the *'Mussels Case',* the mussels were declared non-resalable, since their cadmium content exceeded the advised level of cadmium for meat, which was required by the German Federal Health Department. However, this advised cadmium level only served as a benchmark which was not even coherent in all German federal states [*LG Darmstadt 22 Dec 1992*]. In contrast to that, the ML/2010C Regulation is based on a UN-Model Provision against Money Laundering. A similar provision is in force in several countries worldwide [*PO 2, p. 55, para. 7*]. Therefore, RESPONDENT could have easily informed itself.

146 Further, exceeding this benchmark resulted in an impediment to the sale. In contrast, outstanding payments can be settled by a following transaction. This makes the difference between obligations regarding goods and money evident.

147 Moreover, Art. 35 (2) CISG leaves space for the parties' discretion. Thus, extensive regulations regarding payment can be found in Chapter III of the CISG. Art. 54 CISG obliged RESPONDENT to comply with all relevant laws and regulations. Hence, there is no regulatory gap that would justify an analogy.

148 Lastly, regulations concerning payments are more accessible than regulations concerning goods. The variety and possible complexity of goods make it indispensable to extensively regulate a duty to inform under the terms of the CISG. Consequently, no analogy can be drawn to the present case. Therefore, RESPONDENT was not in need to be informed about the levy.

3. A Pre-Contractual Duty to Inform Cannot Be Derived from the Duty to Cooperate

149 The duty to cooperate is a general principle which requires each party to assist the other party in order to enable the performance of the contract [*Ferrari, in: Schlechtreim/Schwenzer (ger), Art. 7 Rn. 54*]. Hence, the duty to cooperate is restricted to performance and does not encompass a duty to inform prior to the contract conclusion.

150 Further, no pre-contractual duty can be derived from the principle of good faith. This is because, Art. 7 (1) CISG, which governs the principle of good faith, does not govern the parties behaviour [*Gerechtshof Arnhem 18 Jul 2006; US Ct App 11 Jun 2003; Witz in: Bucher, p. 149*]. Therefore, Art. 7 (1) CISG limits the principle of good faith to the interpretation of the Convention. This is evidenced by the wording and the legislative history makes this evident. [*HKH 21 Jun 1996; ICC 23 Jan 1997; Winship, 43 Consumer Fin. L.Q. Rep. 1989, para. III; Winship, Nw. J. Int'l L. & Bus.1988, para. IV.*]. Consequently, there is no general duty to cooperate prior to contract conclusion.

CONCLUSION OF THE FOURTH ISSUE

151 The Parties agreed in the Main Agreement that bank charges have to be borne by RESPONDENT. The levy is a bank charge and therefore had to be taken on by RESPONDENT. Even if the Tribunal were to come to a different conclusion, RESPONDENT has to bear the costs according to Art. 54 CISG. Last, there is no duty to inform RESPONDENT prior to the conclusion of the contract. Hence, CLAIMANT is entitled to the outstanding payment of US$ 102,192.80.

REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of CLAIMANT. For the reasons stated in this Memorandum, Counsel respectfully requests this Tribunal to declare that:

It did not have the power to order CLAIMANT to provide security for costs for RESPONDENT's cost and even if it should not do so [**Issue 1**].

CLAIMANT's claims are admissible [**Issue 2**].

CLAIMANT is entitled to the outstanding payment from RESPONDENT in the amount of US$ 2,285,240 for the Blades based on the present exchange rate [**Issue 3**].

CLAIMANT is entitled to the outstanding payment from RESPONDENT in the amount of US$ 102,192.80 for the levy deducted by the ECB [**Issue 4**].

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

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