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MEMORANDUM FOR CLAIMANT

CAM-CCBC ARBITRATION NO. 200/2016/SEC7

WRIGHT Ltd	*v.*	**SANTOSD KG**
CLAIMANT		RESPONDENT
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Oceanside, Equatoriana		Cafucopa, Mediterraneo

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§/§§	paragraph/paragraphs
%	per cent
a fortiori	with stronger reason
Addendum	Addendum of 26 October 2010 (handwritten)
AML	anti-money laundering
ARfA	Answer to Request for Arbitration
ARSC	Answer to Request for Security for Costs
Art./Arts.	article/articles
AUS	Austria
BRA	Brazil
BRL	Brazilian Real
CAM-CCBC	Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
CAM-CCBC Rules	CAM-CCBC Arbitration Rules (2012)
CAN	Canada
CCIG	Geneva Chamber of Commerce, Industry & Services
cf.	confer (see)
CHE	Switzerland

CISG	United Nations Convention on Contracts for the International Sale of Goods
contra proferentem	interpretation against the draftsman
Courier 1	Cover letter from Mr. Fasttrack to Mr. Forbes dated 31 May 2016
Courier 2	Cover letter from Mr. Fasttrack to Mr. Forbes dated 7 June 2016
DSA	Development and Sales Agreement
e.g.	*exempli gratia* (for example)
ed.	edition
EFIU	Equatorianian Financial Investigation Unit
EIS	Engineering International SA
EQD	Equatorianian Denar
essentialia negotii	essential elements of a contract
EU	European Union
Exh. C	CLAIMANT's exhibit
Exh. R	RESPONDENT's exhibit
FATF	Financial Action Task Force
FATF Recommendations	Financial Action Task Force Recommendations
FSRBs	FATF-style regional bodies
Financial Statements	excerpts of CLAIMANT's financial statements

FIU	Financial Intelligence Unit
FN	footnote
FRA	France
GER	Germany
Holding	Wright Holding PLC (CLAIMANT's parent company)
HUN	Hungary
i.e.	*id est* (that is)
ibid.	*ibidem* (in the same place)
ICC	International Chamber of Commerce
ICC Rules	Rules of Arbitration of the ICC (2012)
ICSID	International Center for Settlement of Investment Disputes
in casu	in the case at hand
infra	below
inter alia	among other things
lex arbitri	law of the seat of arbitration
ML/2010C Regulation	ML/2010C Regulation of 1 January 2010 of Equatoriana
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)
mutatis mutandis	with the necessary changes having been made

No.	number
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NZL	New Zealand
CAM-CCBC Order	order of the President of the CAM-CCBC
p./pp.	page/pages
PECL	Principles of European Contract Law (2002)
PO1	Procedural Order No. 1 of 7 October 2016
PO2	Procedural Order No. 2 of 3 November 2016
PoA	Power of Attorney
PoA 1	Power of Attorney of 2 April 2016
PoA 2	Power of Attorney of 5 June 2016
R&D	research and development
ratio legis	reason for the law
Registration Fee	CAM-CCBC registration fee
RfA	Request for Arbitration
RSC	Request for Security for Costs
SIAC	Singapore International Arbitration Centre
supra	above

ToR	Terms of Reference
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (2014)
TTR	Threshold Transaction Reports
UNCITRAL	United Nations Commission on International Trade Law
UN-Model Provisions	UN-Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (2009)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2010)
USA	United States of America
USD	United States Dollar
v.	*versus* (against)

STATEMENT OF FACTS

1 The parties to these arbitration proceedings are Wright Ltd (**"CLAIMANT"**) and SantosD KG (**"RESPONDENT"**), collectively the **"Parties"**.

2 CLAIMANT is a highly specialized manufacturer of fan blades for jet engines, incorporated in Equatoriana. RESPONDENT is a medium sized manufacturer of jet engines, incorporated in Mediterraneo.

3 In **Spring 2010**, the Parties were both subsidiaries of Engineering International SA (**"EIS"**) and entered into negotiations for the joint development of fan blades. CLAIMANT was to improve its most advanced fan blade, which RESPONDENT would incorporate into its engines. During negotiations, RESPONDENT insisted on a maximum price to make a binding offer concerning the sale of its engines to Earhart SP, an international aircraft jet manufacturer. RESPONDENT also insisted on payment in USD despite CLAIMANT's production costs being in EQD.

4 On **27 July 2010**, CLAIMANT was sold to its present parent company, Wright Holding PLC (**"Holding"**).

5 On **1 August 2010**, the Parties entered into a Development and Sales Agreement (**"DSA"**) for 2,000 swept fan blades with a flexible price structure in USD, calculated on the basis of CLAIMANT's production costs. In addition, the DSA provided that all disputes between the Parties were to be settled amicably and in good faith before resorting to arbitration. The Parties had the right to initiate the arbitration proceedings within 60 days after the failure of the negotiations.

6 On **26 October 2010**, the Parties agreed on the additional purchase of 2,000 clamps through a handwritten addendum to the DSA (**"Addendum"**), after RESPONDENT had realized its need to purchase them from CLAIMANT. RESPONDENT had offered to add an addendum instead of a separate contract for pure convenience, *i.e.* simultaneous delivery of the goods. The Addendum contained a fixed exchange rate for the clamps (USD 1 = EQD 2.01), to which CLAIMANT agreed due to the low amount involved.

7 On **14 January 2015**, CLAIMANT delivered the fan blades and clamps along with the two invoices to RESPONDENT, the latter confirmed that the goods were in conformity with the DSA. When establishing the invoice for the fan blades, a confusion about the exchange rate within CLAIMANT's accounting department resulted in an amount short of USD 2,285,240 compared to the agreed price under the DSA.

8 On **15 January 2015**, RESPONDENT used the inaccurate invoice that applied the fixed exchange rate to the price calculation of the fan blades when ordering its bank to make the payment. The same day, CLAIMANT realized the inaccuracy and immediately contacted RESPONDENT to correct the invoice.

Taking advantage of the situation, RESPONDENT did not react for almost a month to CLAIMANT's demand for the outstanding payment.

9 On **29 January 2015**, an even lower amount, *i.e.* short of USD 102,192.80, was credited to CLAIMANT's bank account at the Equatorianian National Bank. Following CLAIMANT's inquiry, it was established that a 0.5% levy had been deducted as a money laundering investigation fee by the Equatorianian Financial Investigation Unit.

10 On **9 February 2015**, CLAIMANT demanded once again the prompt payment of the outstanding purchase price from RESPONDENT, which denied that any amount was due. RESPONDENT insisted on the application of the fixed exchange rate to the payment of the fan blades and refused to bear the bank levy.

11 On **31 May 2016**, after several attempts to negotiate, CLAIMANT initiated the arbitration proceedings at the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (**"CAM-CCBC"**), as agreed under the DSA. Upon reception of the request for arbitration (**"RfA"**), the CAM-CCBC asked CLAIMANT to amend it within 10 days for the sake of good order, which it did on **7 June 2016**.

12 On **6 September 2016**, RESPONDENT sent a request for security for costs basing its factual allegations on a newspaper article.

INTRODUCTION

13 Being active in the aircraft industry is tough: competition is fierce, stakes are high, risks are heavy. RESPONDENT, perfectly aware of these rough conditions, paid a largely insufficient price to CLAIMANT, which does not allow it to survive economically. Barely showing any empathy for its long-term business partner, RESPONDENT did not even attempt to find a compromise. As if this were not enough, RESPONDENT tried to obstruct through dilatory and evasive tactics CLAIMANT's access to justice.

14 With regard to the procedural issues, CLAIMANT's claims are fully admissible contrary to RESPONDENT's allegations **(ISSUE 1)**. In addition, RESPONDENT's request for security for costs should be rejected by the Arbitral Tribunal **(ISSUE 2)**. On the merits, CLAIMANT is entitled to the payment of USD 2,387,432.80 as RESPONDENT failed to fulfill its obligation to pay the full purchase price under the DSA **(ISSUE 3)**. First, the application of the fixed exchange rate to the price calculation of the fan blades resulted in an order for payment short of USD 2,285,240 **(ISSUE 3.I)**. Second, RESPONDENT must bear the bank levy of USD 102,192.80 that was deducted from the purchase price **(ISSUE 3.II)**.

ARGUMENTS

ISSUE 1: CLAIMANT'S CLAIMS ARE FULLY ADMISSIBLE

15 Section 21 of the DSA grants the Parties the right to initiate arbitration within 60 days after the failure of the negotiations and subjects the arbitration to the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Arbitration Rules of 2012 (**"CAM-CCBC Rules"**) [*Exh. C2, p. 11*]. Art. 4.1(b) CAM-CCBC Rules provides that a Power of Attorney (**"PoA"**) should be enclosed in the request for arbitration sent to the CAM-CCBC. In addition, Art. 4.2 CAM-CCBC Rules orders the requesting party to attach proof of payment of the CAM-CCBC registration fee (**"Registration Fee"**).

16 On 1 April 2016, CLAIMANT informed RESPONDENT that it did not consider "*possible to find an amicable solution*" and that it had "*instructed* [its] *lawyer to take the necessary steps to initiate arbitration proceedings*" [*Exh. R3, p. 29*]. CLAIMANT, represented by Mr. Fasttrack, sent a notification to commence the arbitration to the CAM-CCBC on 31 May 2016 [*Courier 1, p. 2*], the 60th day after the failure of the negotiations.

17 RESPONDENT asserts that the proceedings were only initiated when CLAIMANT amended its RfA on 7 June 2016, *i.e.* outside the contractual time limit [*ARfA, p. 25 §§11-14*]. Contrary to RESPONDENT's allegation, CLAIMANT will demonstrate that it initiated the arbitration proceedings within the contractual time limit **(I)** and that, in any case, the time limit does not time-bar CLAIMANT's claims **(II)**.

I. CLAIMANT INITIATED THE ARBITRATION PROCEEDINGS WITHIN THE CONTRACTUAL TIME LIMIT

18 RESPONDENT alleges that the absence of a valid PoA and the partial payment of the Registration Fee hamper the commencement of the proceedings on 31 May 2016 [*ARfA, p. 25 §§11-14*]. Contrary to these allegations, CLAIMANT will establish that the RfA submitted on 31 May 2016 marked the commencement of the arbitration proceedings within the contractual time limit. First, Mr. Fasttrack had adequate representation powers at that time **(A)**. Second, the subsequent payment of the remainder of the Registration Fee did not prevent the initiation of the arbitration proceedings **(B)**.

A. CLAIMANT'S LAWYER HAD ADEQUATE REPRESENTATION POWERS TO INITIATE THE ARBITRATION PROCEEDINGS

19 RESPONDENT wrongly alleges that CLAIMANT had not submitted a PoA and that Mr. Fasttrack lacked proper authority to initiate the arbitration [*ARfA, p. 25 §§12-13*]. In the following, it will be established that the PoA granted by the Holding extended to CLAIMANT **(1)** and that, in any case, CLAIMANT has ratified with retroactive effect all the procedural acts undertaken by Mr. Fasttrack **(2)**.

1. The Power of Attorney submitted on 31 May 2016 extended to CLAIMANT

20 CLAIMANT affirms that the PoA of 2 April 2016 signed by the Holding provided adequate representation to Mr. Fasttrack and encompassed all procedural acts made on its behalf. First, the Holding acted as

CLAIMANT's agent of when it granted this PoA **(a)**. Alternatively, CLAIMANT and the Holding are to be considered as a single economic entity for this procedural act **(b)**.

a. The Holding acted as CLAIMANT's agent of when it granted the Power of Attorney

21 Under the agency relationship theory, a party (commonly called "agent") can, by its conduct, legally affect the legal relations of another party (designated as "principal") with a third party [*Art. 2.2 UNIDROIT Principles; §2.01 Restatement (Third) of Agency; Arts. 3:101-3:304 PECL; Herbots §§239, 261, 365, 427, 474; Bowstead/Reynolds, §§1-001 to 1-034; Chitty/Beale, §§31-001 to 31-008*]. In the present dispute, the PoA is subject to the law of Equatoriana [*PoA 1, p. 18*], which is a verbatim adoption of the UNIDROIT Principles [*PO2, p. 58 §24*]. According to Art. 2.2.2(1) UNIDROIT Principles, the grant of the power of representation can be express or implied. In particular, an implied authority exists when the principal's intention to grant it can be inferred from its conduct or surrounding circumstances [*Art. 2.2.2 UNIDROIT Principles 2010, p.* 77]. An agent is also implicitly granted the authority to act when it is placed in a position that entails such authority [*Vogenauer, Art. 2.2.2 §11*]. Moreover, under Art. 2.2.2(2) UNIDROIT Principles, the scope of authority of the agent is broad and includes all acts necessary to achieve the purpose set by the principal [*Art. 2.2.2 UNIDROIT Principles 2010, pp. 77-78; Vogenauer, Art. 2.2.2 §8*]. In the arbitration context, numerous court decisions and arbitral awards have used the so-called "*principles of agency law*" to bind non-signatories to international arbitration agreements [*Bridas case; Thomson case; ICC Cases No. 9781 (2000) and 10329 (2000); Born, pp. 1418-1419; Hanotiau, pp. 66, 74; Acqua/Lamm, pp. 724-725*].

22 In the case at hand, CLAIMANT (principal) granted implied authority to the Holding (agent) for the purpose of initiating the arbitration proceedings. This implied authority can be deduced from CLAIMANT's conduct, the Holding's position and the surrounding circumstances. With regard to CLAIMANT's conduct, its management involved the Holding after the present dispute arose [*PO2, pp. 57-58 §22*]. Indeed, all important decisions exceeding the day-to-day business are discussed with the Holding, which can take decisions on CLAIMANT's behalf [*Courier 2, p. 20; PO2, p. 54 §2*]. When it manifested to RESPONDENT its willingness to proceed with arbitration, CLAIMANT also confirmed that Mr. Fasttrack was "[its] *lawyer*" and that he acted on its behalf [*Exh. R3, p. 29*]. With regard to the circumstances, the Holding delivered the PoA on 2 April 2016, the very next day after the failure of the negotiations [*PoA 1, p. 18*]. One could reasonably deduce from the closeness of the dates that CLAIMANT immediately informed the Holding of the need to initiate the arbitration proceedings and to serve the RfA. In addition, Mr. Fasttrack manifestly had access to all the documents of the case with instructions to act, which is strong evidence that the Holding had been given all necessary elements to launch the arbitration proceedings [*Courier 1, p. 2*]. The PoA itself also indicated that Mr. Fasttrack represented the

"*clients*", which included the Holding's subsidiaries [*PoA 1, p. 18*]. In order to achieve the purpose set by CLAIMANT, *i.e.* start the arbitration proceedings, the Holding approached Mr. Fasttrack [*Courier 2, p. 20*] and drafted a written PoA as required by Art. 4.1(b) CAM-CCBC Rules.

23 In conclusion, there is sufficient evidence that CLAIMANT has granted the Holding at least implied authority to engage the arbitration proceedings on its behalf and to adopt all necessary acts for this purpose, in particular to draft a formal PoA. Accordingly, the PoA signed by the Holding provided adequate representation to Mr. Fasttrack on 31 May 2016.

b. Alternatively, CLAIMANT and the Holding acted as a single economic entity under the *alter ego* doctrine

24 Even if the Arbitral Tribunal were to find that the Holding did not act as an agent, CLAIMANT and the Holding are to be considered as a single economic entity for the purpose of initiating the arbitration proceedings. Section 21 of the DSA mentions that "[t]*he arbitration shall be conducted* [...] *in line with international arbitration practice*" [*Exh. C2, p. 11*]. In international arbitration, the *alter ego* doctrine articulates that when a company has substantial control over another, it is possible in certain circumstances to abandon their separate legal forms and treat them as a single entity [*National Dev. case; Carte Blanche case; Born, p. 1430; Hanotiau, p. 126 §98; Gaillard/Savage, p. 283 FN190*]. It relies mainly on considerations of equity and fairness and is therefore independent of the parties' intention [*ICC Cases No. 3879 (1984) and 8385 (1995); Born, p. 1431*].

25 In the case at hand, even though CLAIMANT is an independent legal entity with its own decision-making power, all important decisions exceeding the day-to-day business are discussed with the Holding as it holds 88% of the shares in CLAIMANT [*Courier 2, p. 20; PO2, p. 54 §2*]. Furthermore, the Holding has undertaken all steps to initiate the arbitration proceedings [*cf. supra §22*]. Therefore, RESPONDENT cannot rely on the legal independence of CLAIMANT vis-à-vis the Holding to contest the validity of the PoA of 2 April 2016. In order to achieve justice and equity, the Arbitral Tribunal should lift the corporate veil between the two companies and admit that they formed a single economic entity for the initiation of the proceedings.

26 In conclusion, the PoA signed by the Holding has to be considered as validly granted by CLAIMANT itself under the *alter ego* doctrine. Thus, CLAIMANT's lawyer had adequate representation powers to initiate the arbitration on 31 May 2016.

2. In any event, the submission of the Request for Arbitration has been ratified by CLAIMANT

27 Should the Arbitral Tribunal consider that the PoA of 2 April 2016 did not extend to CLAIMANT, the submission of the RfA was successfully ratified by CLAIMANT. Pursuant to Art. 2.2.9(1) UNIDROIT

Principles, "[a]*n act by an agent that acts without authority* [...] *may be ratified by the principal*" and thus "*produces the same effects as if it had initially been carried out with authority*". Such a ratification requires nothing more than a unilateral manifestation of intent, either express or implied [*Art. 2.2.9 UNIDROIT Principles 2010, p. 90*]. Since this ratification is retroactive, non-authorized acts of the agent are treated as if they had been authorized all along [*Vogenauer, Art. 2.2.9 §13*].

28 On 1 June 2016, the Arbitral Tribunal requested CLAIMANT to amend its RfA and provide for a PoA under its own name. CLAIMANT timely complied with this injunction on 7 June 2016. The new PoA signed by CLAIMANT authorized Mr. Fasttrack to serve documents for all legal proceedings [*PoA 2, p. 21*], which encompassed the RfA in its broad scope. In addition, this PoA expressly stated that it "*approve*[d] *any actions already undertaken by the Lawyer*" [*ibid.*]. This stands as clear proof that CLAIMANT has expressly ratified the acts of its lawyer, in particular the submission of the RfA on 31 May 2016.

29 In conclusion, CLAIMANT authorized Mr. Fasttrack to commence the arbitration proceedings with retroactive effect in accordance with Art. 2.2.9 UNIDROIT Principles. Thus, the submission of the RfA on 31 May 2016 was in compliance with Art. 4.1 CAM-CCBC Rules and perfectly valid.

B. THE SUBSEQUENT PAYMENT OF THE REMAINDER OF THE REGISTRATION FEE DOES NOT PREVENT THE COMMENCEMENT OF THE ARBITRATION PROCEEDINGS

30 RESPONDENT also argues that the outstanding amount of BRL 3,600 for the Registration Fee prevented the arbitration from commencing on 31 May 2016 [*ARfA, p. 25 §§11-12*]. CLAIMANT will demonstrate that the payment of the Registration Fee is not a condition precedent to the commencement of the proceedings. This can be deduced from an interpretation of the relevant provisions of the CAM-CCBC Rules in line with Art. 13.1 CAM-CCBC Rules and from an application by analogy of the ICC practice.

31 Art. 4.1 CAM-CCBC Rules lists the necessary documents to be enclosed with a valid request for arbitration, but neither mentions the Registration Fee nor its proof of payment. On the contrary, the Registration Fee is regulated by Art. 4.2 CAM-CCBC Rules, according to which a proof of payment will be attached to the notice. The rationale of this provision is to discourage "*manifestly inappropriate requests*", such as the start of frivolous proceedings [*Straube/Finkelstein/Casado Filho, pp. 66-67*]. Moreover, the ICC practice is to grant an additional time period, generally 10 days, for a claimant to comply with the payment of the filing fee, if it was not paid at the time of the submission of the notice [*Fry/Greenberg/Mazza, pp. 47-48, §3-121*]. In any event, the procedure is deemed to have started at the date of submission of the request for arbitration [*Art. 4(2) ICC Rules; ICC Cases No. 6784 (1990) and 6673 (1992); Fry/Greenberg/Mazza, p. 48, §§3-123 to 3-124; Bühler/Webster, pp. 68-70 §§4-12 to 4-20; Derains/Schwartz, pp. 43-44*]. Finally, the start of arbitration proceedings has the consequence of setting

aside time limits, which is also recognized by the CAM-CCBC [*Art. 4.1 CAM-CCBC Rules; Straube/Finkelstein/Casado Filho, pp. 65-66; Lew/Mistelis, pp. 506-507; Redfern/Hunter, pp. 178-180*].

32 In the case at hand, CLAIMANT provided a valid RfA on 31 May 2016, even though its lawyer had paid only a portion of the Registration Fee, *i.e.* BRL 400 instead of BRL 4,000 [*CAM-CCBC Order, p. 19*]. On 1 June 2016, the CAM-CCBC granted CLAIMANT a 10-day time period to pay the remainder of the Registration Fee in line with ICC practice [*ibid.*]. As CLAIMANT complied with this order by 7 June 2016 [*Courier 2, p. 20*], the arbitration proceedings are deemed to have started at the date of submission, *i.e.* 31 May 2016. Furthermore, CLAIMANT's prompt payment of the remainder demonstrates the seriousness of its claim and its intention to enter into arbitration. Thus, the rationale of Art. 4.2 CAM-CCBC Rules is met.

33 Should the Arbitral Tribunal disregard the above reasoning, CLAIMANT's right of access to justice would be compromised. Indeed, it would hurt the sentiment of justice if CLAIMANT's considerable claim of USD 2,387,432.80 was barred due to a typing error concerning only BRL 3,600. This excess of formalism would prevent CLAIMANT from exercising its rights, as it cannot proceed before any court due to the existence of the arbitration agreement [*China Merchant case; Tommy CP case; Born/Šcekic, p. 252*].

34 In conclusion, CLAIMANT complied with the injunction of the Arbitral Tribunal in due time. Thus, the subsequent payment of the remainder of the Registration Fee had no impact on the commencement of the arbitration that occurred on 31 May 2016, within the time limit of 60 days provided by Section 21 of the DSA.

II. IN ANY CASE, THE CONTRACTUAL TIME LIMIT DOES NOT TIME-BAR CLAIMANT'S CLAIMS

35 Even if the Arbitral Tribunal were to find that the proceedings did not start within the 60-day time limit, this contractual period does not time-bar CLAIMANT's claims. As CLAIMANT will demonstrate, RESPONDENT wrongly relies on the time limit contained in Section 21 of the DSA. First, RESPONDENT never tried to settle the dispute amicably and in good faith as required by the DSA **(A)**. Second, the time limit expressed a mere willingness to resort to arbitration without delay and did not constitute a procedural requirement binding the Parties and the Arbitral Tribunal **(B)**.

A. THE TIME PERIOD NEVER STARTED RUNNING AS RESPONDENT DID NOT ATTEMPT TO SETTLE THE DISPUTE AMICABLY AND IN GOOD FAITH

36 Multi-tiered dispute resolution clauses establish a series of stages which the parties have to go through before using arbitration as a last resort [*Pryles, p. 159; Berger K., p. 400*]. Given the amicable nature of arbitration, negotiations in good faith can constitute a valid and enforceable pre-arbitration step [*Chapman, pp. 93-96; Garimella/Siddiqui, pp. 162-163; Varady, pp. 5-6*]. The general understanding is that the parties have agreed to resort to the next step of the clause only if the dispute remains unresolved by

the precedent one [*International Research Corp PLC case; Medissimo case; Kayali, p. 554; Carter, p. 446*]. In principle, the party seeking to rely on a contractual clause has itself, in good faith, sought to enforce the pre-arbitration steps [*BG Group PLC case; Born/Šcekic, p. 254*].

37 In the case at hand, Section 21 of the DSA ordered the Parties to negotiate amicably and in good faith, and to resort to arbitration only after the failure of the negotiations [*Exh. C2, p. 11*]. It therefore constituted a multi-tiered dispute resolution clause. After the dispute arose, CLAIMANT waited for meaningful negotiations in order to honor the long-standing partnership of the Parties, overcoming by itself the strain of liquidity caused by RESPONDENT's conduct [*cf. infra §§72-73*]. During the negotiations, CLAIMANT tried to resolve the dispute amicably by making several offers [*RfA, p. 6 §17*]. *Inter alia*, it proposed a reduction of the sales price for the fan blades covered by the DSA in exchange for RESPONDENT's commitment to purchase further fan blades within the next five years [*RfA, p. 6 §17; PO2, p. 58 §23*]. Through this proposal, CLAIMANT simply expected RESPONDENT to fulfill its moral obligation under the DSA, *i.e.* to uphold its "*firm intention to purchase further units in subsequent years*" [*Exh. C2, p. 10*]. RESPONDENT rejected this proposition and stood on its strict and only position to neither make an additional payment nor order further fan blades [*PO2, p. 58 §23*]. In addition, RESPONDENT constantly replied with important delays [*Exh. C5, p. 14; Exh. C7, p. 16; Exh. R3, p. 29*], which shows that it used evasive tactics to avoid fulfilling its contractual obligations. In particular, RESPONDENT never even confirmed or acknowledged the failure of the negotiations [*Exh. R3, p. 29*].

38 In conclusion, as RESPONDENT never tried to resolve the dispute amicably and in good faith, the contractual time limit never started running and did not time-bar CLAIMANT's claims.

B. IN ANY EVENT, THE CONTRACTUAL CLAUSE ONLY EXPRESSED THE PARTIES' INTENT TO PROCEED WITH ARBITRATION WITHOUT DELAY

39 In the case of a time limit set by the arbitration agreement, the tribunal has to determine if the parties' intention was to set a procedural time limit to the right to arbitrate, *i.e.* to limit the tribunal's jurisdiction, or a simple modality without legal effects [*Vekoma case; Kaufmann-Kohler/Rigozzi, p. 150*; *Kreindler/Kautz, pp. 594-595; Leonard/Dharmananda, pp. 304-305; Friedland, pp. 115-116*]. In arbitration practice, this could be deduced from the intent of the parties or the wording of the arbitration clause [*Nafta Products case; F.D. case; United Steel case; Karton, pp. 4-7*].

40 *In casu*, the Parties did not specifically discuss the time limit, but merely copied the standard dispute resolution clause used between all companies belonging to EIS [*PO2, p. 57 §21*]. This shows that they had the primary intention to arbitrate any dispute and did not intend to give legal effects to the contractual time limit. In any case, according to Section 21 of the DSA, "*each party* ***has the right*** *to initiate arbitration proceedings within sixty days*" (emphasis added) [*Exh. C2, p. 11*]. This wording

demonstrates that the clause was intended to grant the Parties additional options rather than to constrain them by a rigid procedural framework. Therefore, the time limit does not confine the Arbitral Tribunal's jurisdiction since its sole purpose was to accelerate the resolution of the dispute.

41 In conclusion, the arbitration clause does not bind the Arbitral Tribunal as it is only a declaration of the Parties' intent to proceed with arbitration without delay. Therefore, the contractual time limit does not time-bar CLAIMANT's claims.

CONCLUSION ON ISSUE 1

42 CLAIMANT's claims are fully admissible since CLAIMANT initiated the arbitration proceedings within the contractual time limit. The first PoA was fully valid as it extended to CLAIMANT and, in any event, the second PoA ratified retroactively the submission of the RfA. In addition, the subsequent payment of the remainder of the Registration Fee did not prevent the commencement of the arbitration proceedings. In any case, the time limit does not time-bar CLAIMANT's claims. Indeed, since RESPONDENT never tried to settle the dispute amicably and in good faith, the time limit never started running. Moreover, the arbitration clause expressed an intention to arbitrate the dispute without delay and was not meant to bar CLAIMANT's claim.

ISSUE 2: THE ARBITRAL TRIBUNAL SHOULD NOT GRANT SECURITY FOR RESPONDENT'S COSTS

43 On 6 September 2016, RESPONDENT submitted a request for security for costs to the Arbitral Tribunal based on a news article questioning CLAIMANT's finances [*RSC, pp. 45-46*]. At the time, the arbitration proceedings were already initiated and the Terms of Reference (**"ToR"**) had been signed [*ToR, p. 43*]. The seat of arbitration being Vindobona, Danubia, the *lex arbitri* is the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 (**"Model Law"**) [*Exh. C2, p. 11; PO1, p. 53*].

44 International arbitration practice generally admits that security for costs constitutes a provisional measure [*Guidelines CIArb, p. 1; ICC Case (August 2012); Weixia, p. 167; Pinsolle, p. 400*], which in the present case would fall under Art. 17(2)(c) Model Law and Art. 8.1 CAM-CCBC Rules [*Working Group Report, p. 10 §48; Kee, pp. 275-276; Tirado/Stein/Singh, p. 166*]. The latter states that "*the Arbitral Tribunal can grant provisional measures*" and enjoys broad discretion as to the requirements that need to be met. The *lex arbitri* can offer some guidance in this regard. Art. 17(1)(a) Model Law provides that there needs to be an irreparable harm for the requesting party if the measure is not ordered and that such harm must substantially outweigh the harm the other party might be faced with if the measure is ordered. For the sake of clarity, it shall be pointed out that the requesting party is nearly always the respondent [*Geisinger/Voser, p. 114; Berger/Kellerhals, p. 557 §1590; cf. Sandrock, p. 17*].

45 In answer to RESPONDENT's request [*RSC, pp. 45-46*], CLAIMANT asserts that the Arbitral Tribunal should not grant security for RESPONDENT's costs on three alternative grounds. First, the Parties have excluded the power of the Arbitral Tribunal to order security for costs **(I)**. Second, RESPONDENT would not suffer any irreparable harm if the measure is not granted **(II)**. Third, the harm RESPONDENT refers to does not outweigh the harm CLAIMANT might be faced with if the measure is granted **(III)**.

I. THE PARTIES HAVE EXCLUDED THE POWER OF THE ARBITRAL TRIBUNAL TO ORDER SECURITY FOR COSTS

46 CLAIMANT submits that the Arbitral Tribunal does not have the power to order security for costs because the Parties have excluded such power in the ToR [*ToR, pp. 41-44*].

47 The parties to an arbitration can freely decide to exclude the arbitral tribunal's power to order security for costs in line with the paramount principle of party autonomy [*Rubins, p. 367; Born, p. 2455; Waincymer, p. 643 §8.3.2; cf. Lynch, pp. 17-18*]. Art. 8.1 CAM-CCBC Rules expressly recognizes this principle with regard to provisional measures as it states "*unless the parties have otherwise agreed*".

48 The CAM-CCBC, just as the ICC, requires the parties to an arbitration to sign terms of reference aiming to provide a procedural framework for the arbitration [*Straube/Finkelstein/Casado Filho, p. 98; Verbist/Schäfer/Imhoos, p. 127; Gaillard/Savage, p. 667 §1233*]. The terms of reference should be considered as a binding and enforceable agreement with regard to the procedural matters on which the parties mutually agreed [*Derains/Schwartz, p. 257; Craig/Park/Paulsson, p. 287 §15.05*]. It shall be pointed out that an arbitral award rendered in violation of the arbitral procedure agreed by the parties, *i.e.* in violation of the terms of reference, might be refused recognition and enforcement under Art. V(1)(d) of the New York Convention. The allocation of the costs incurred during the proceedings can be settled in the terms of reference [*Straube/Finkelstein/Casado Filho, p. 99; ICC Commission Report, p. 22 §50*].

49 In the case at hand, the Parties signed the ToR on 22 August 2016 [*ToR, pp. 43-44*]. Section 12.4 of the ToR expressly provided that "[d]*uring the course of the arbitration proceedings,* ***each party shall bear the fees of its respective attorneys*** *and possibly of technical assistants*" (emphasis added) [*ToR, p. 43*]. This wording clearly indicates the Parties' intent to bear their own legal costs and thus excludes the Arbitral Tribunal's power to decide on cost allocation during the proceedings. Consequently, Section 12.3 of the ToR only recognizes the Arbitral Tribunal's power to allocate costs at the end of the proceedings [*ibid.*]. As the Arbitral Tribunal does not have the power to decide on cost allocation during the proceedings, it is also prevented from ordering security for RESPONDENT's costs.

50 In conclusion, the Parties have excluded the Arbitral Tribunal's power to order security for costs during these arbitration proceedings in the ToR and such an order could lead to the non-recognition and non-enforcement of a final award rendered by the Arbitral Tribunal.

II. EVEN IF THE ARBITRAL TRIBUNAL HAD SUCH POWER, RESPONDENT WOULD NOT SUFFER ANY IRREPARABLE HARM IN THE ABSENCE OF SECURITY FOR COSTS

51 Even if the Arbitral Tribunal were to affirm its power to order security for costs, it should not make such an order as RESPONDENT would not suffer any irreparable harm in the absence of this measure.

52 The power to grant security for costs should be exercised with extreme caution and considerable restraint [*Sandrock, p. 37; Draetta, p. 82; Henderson, p. 64*]. As a result of this restrictive approach, arbitral tribunals are very reluctant to order security for costs [*Ad Hoc Case (November 2002); ICC Cases No. 12853 (2003) and 13620 (2006); ICC Case (April 2009); Libananco case*]. Furthermore, the burden of proof lies on the requesting party that needs to provide credible evidence to justify its request [*ICC Case No. 8786 (1996); Needham, pp. 123-124; Tirado/Stein/Singh, p. 167*].

53 Different factors have been taken into account when evaluating the harm that the requesting party might suffer in the absence of security for costs [*Weixia, p. 189; TPF Task Force, p. 13; Henderson, p. 71*]. So far, no uniform test has been developed [*ICC Case No. 14433 (2008); TPF Task Force, p. 13; Weixia, p. 186*]. However, the claimant's inability to pay due to its financial situation [*ICC Case No. 12542 (2003); Weixia, p. 190; Karrer/Desax, p. 346*], the existence of a fundamental change of circumstances [*ICC Cases No. 12542 (2003) and 13070 (2006); Berger I, p. 10; Veit, p. 116*] and the risk of non-enforcement [*Art. 3(1)(ii) Guidelines CIArb; ICC Case No. 11798 (2002); Born, p. 2496*] constitute the most decisive factors.

54 In view of the above, the Arbitral Tribunal should reject RESPONDENT's request for security for costs for the following reasons: CLAIMANT's financial situation cannot harm RESPONDENT **(A)**, there has not been a fundamental change of circumstances between the arbitration agreement and the inception of the arbitral proceedings **(B)**, and there is no real risk of non-enforcement **(C)**.

A. CLAIMANT'S FINANCIAL SITUATION CANNOT HARM RESPONDENT IN ANY WAY

55 The first decisive factor when ordering security for costs is the claimant's financial situation, *i.e.* its ability to pay the costs of the arbitration proceedings in case of an adverse award [*ICC Case, XY v. Z (1996)*; *ICC Cases No. 13359 (2006) and 14355 (2007); Weixia, p. 190; Karrer/Desax, p. 346*]. Indeed, a claimant's inability to pay could harm a respondent that would be unable to recover its legal costs at the end of the proceedings.

56 RESPONDENT alleges that CLAIMANT might not perform an adverse award on costs based on its non-compliance with a payment order and its attempt to get third-party funding [*RSC, p. 46*]. Contrary to these allegations, CLAIMANT's financial situation cannot harm RESPONDENT for four reasons. First, CLAIMANT holds enough assets to cover its costs **(1)**. Second, its search for third-party funding does not justify an order for security for costs **(2)**. Third, CLAIMANT has continuously disclosed its financial situation to RESPONDENT in accordance with business practices **(3)**. Fourth, RESPONDENT is barred from

relying on CLAIMANT's financial position to base its request, as its conduct caused any lack of liquidity on CLAIMANT's part in the first place **(4)**.

1. CLAIMANT holds enough assets to cover any costs related to the arbitration proceedings

57 In international arbitration practice, the threshold of financial difficulties necessary to even consider granting security for costs is high. Simple economic hardship is insufficient [*Ad Hoc Case (December 1998); ICC Cases No. 12853 (2003) and 13359 (2006); Silver Limited case; Rubins, p. 357; Brawn/Fenn, p. 194*]. Even insolvency is not enough by itself [*Guidelines CIArb, p. 7; ICC Cases No. 6632 (1993) and 14355 (2007); ZCC Case (December 2008); Poudret/Besson, p. 524 §610*]. Many legal commentators and decisions have considered that an additional bad faith element is necessary to justify security for costs, such as a party intentionally causing its insolvency in order to avoid paying for arbitration costs [*Guidelines CIArb, p. 8; ICC Case, XY v. Z (1996); Ad Hoc Case (June 2003); ICC Case No. 12035 (2003); Gaillard/Savage, p. 687 §1256; Reiner, p. 894*]. Furthermore, as trade in an international context involves more risks than national trade, parties to an international contract must bear the risk of their contractual partners having financial difficulties, up to and including bankruptcy [*CCIG Case (September 1997); Ad Hoc Case (June 2003); ICC Cases No. 12542 (2003) and 14355 (2007); Blessing, §46.14; Poudret/Besson, p. 524 §610*]. Arbitral tribunals have confirmed that bankruptcy is not sufficient, unless there is a clear "*lack of assets*" [*Ad Hoc Case (November 2002); Ad Hoc Case (May 2003); Ad Hoc Case (June 2003); ICC Case No. 14993 (2007)*]. Finally, the payment of advance costs evidences a sound financial situation and constitutes an adequate safeguard against frivolous claims [*ICC Case No. 11399 (2001); ZCC Case (December 2008); Lew/Mistelis, p. 600; Craig/Park/Paulsson, p. 469 §26.05*].

58 In the case at hand, RESPONDENT's request is solely based on the newspaper article published by Carioca Business News [*RSC, pp. 45-46; Exh. R6, p. 47*]. However, this article is unreliable and contains an erroneous presentation of the facts. Indeed, the journalist completely mixed up the two investment arbitrations against Xanadu [*PO2, p. 61 §39*], which evidences that no thorough investigation of CLAIMANT's finances was made. On the contrary, CLAIMANT's publicly available audited accounts of 2015 demonstrate its stable financial situation [*PO2, p. 59, Financial Statements*]. Indeed, important tangible and intangible assets are held by CLAIMANT, including about USD 200,000 in cash [*ibid.*]. In addition to holding more than USD 40 million as non-current assets, CLAIMANT owns USD 478,000 in trade and other receivables [*ibid.*], which are current assets easily convertible into cash [*Levitt/Harverd, p. 182*]. The limited liquidities available can be explained by the nature of CLAIMANT's business. Its funds were invested in the recent development of new fan blades [*Exh. C6, p. 15; PO2, p. 58 §27*]. In the aircraft industry, a strain in liquidity during the development of a new product is usual for companies of this size because it requires important investments [*Exh. C6, p. 15; Exh. C9, p. 50*; *cf. Shan/Wang/Xin/Bi,*

p. 37]. Concerning the 2.5 million award that RESPONDENT mentioned [*RSC, p. 46 §§2-3*], CLAIMANT's non-compliance with this award is not related in any way to its ability to pay. Indeed, the creditor of the award owes a large sum to the Holding and this debt is presently being litigated [*ARSC, p. 49*]. Thus, CLAIMANT declared a set-off in the enforcement proceedings of the award [*PO2, p. 59 §30*]. Finally, CLAIMANT's compliance with its obligation to pay advance costs under Art. 12 CAM-CCBC Rules in the present proceedings is an additional indication of its financial capacity [*PO2, p. 60 §32*].

59 In conclusion, RESPONDENT failed to substantiate its request with any credible evidence of CLAIMANT's inability to pay, but merely relied on a newspaper article and groundless rumors [*RSC, p. 46; Exh. R6, p. 47*]. On the other hand, CLAIMANT's audited accounts, whose credibility and accuracy are beyond doubt, demonstrate CLAIMANT's sound financial situation.

2. The search for third-party funding does not justify an order for security for costs

60 RESPONDENT argues that CLAIMANT's unsuccessful effort to obtain third-party funding justifies an order for security for costs [*RSC, p. 46 §§3-4*]. This argument has to be rejected because third-party funding does not constitute a relevant factor to grant security for costs unless there are extraordinary circumstances.

61 The existence of third-party funding is not taken into account by arbitral tribunals in the assessment of final awards on costs and legal writings support this approach [*Kardassopoulos/Fuchs case; RSM v. Grenada case*; *TPF Task Force, p. 10; Kirtley/Wietrzykowski, p. 22; Perry*]. Thus, it constitutes an equally irrelevant factor at the earlier stage of granting security for costs [*Silver Limited case; Kirtley/Wietrzykowski, p. 22; Darwazeh/Leleu, p. 141; Zuleta, p. 58*].

62 *In casu*, CLAIMANT contacted two third-party funders but both refused to provide funding due to the insufficient value of its present claim [*PO2, p. 59 §29*]. As third-party funding is not to be taken into account, the unsuccessful attempt to obtain such funding should *a fortiori* not be relevant to grant security for costs.

63 Even if third-party funding were to come into play, it would only be in order to assess a claimant's overall financial situation [*Guaracachi case; Kirtley/Wietrzykowski, p. 28; Zuleta, p. 580*]. It is never in itself a sufficient condition for security for costs but has to go along with exceptional circumstances [*ICC Case (August 2012); Silver Limited case; EuroGas case; Brabant/Lapunzina Veronelli/Ellington/Bailey/Bahri, p. 117; Galagan/Zivkovic, p. 179; Kirtley/Wietrzykowski, p. 30*]. Such circumstances may arise when an insolvent claimant relies on a third party to cover its arbitration costs and the third party is not liable to meet a costs award [*ICC Case No. 15218 (2008)*]. This situation is also known as an "*arbitral hit and run*" [*Kalicki; Schwartz, pp. 379-380*]. Incidentally, financially sound companies also resort to third-party funding to

limit their financial risks and better use their funds in other investments [*Silver Limited case; Yeoh, p. 116; Rosenfeld, p. 165; TPF Task Force, p. 17*].

64 RESPONDENT might rely on the well-known *RSM v. Saint Lucia case* in which the following circumstances considered cumulatively led to an order for security for costs. First, RSM had a procedural history of non-compliance with awards and payment orders. Indeed, in a preceding case, RSM did not comply with advance payment and when proceedings were discontinued did not even cover the actual costs incurred by the arbitral tribunal. In another previous ICSID case, RSM did neither reimburse the respondent for cost advances, nor comply with the final award. Second, RSM admittedly did not possess sufficient financial resources. Third, RSM concluded a third-party funding agreement under which there was no guarantee that the third-party would comply with an adverse costs award.

65 In the case at hand, CLAIMANT's situation must be clearly distinguished from the *RSM v. Saint Lucia case*. First, nothing indicates that CLAIMANT has a procedural history of non-compliance with awards. Indeed, CLAIMANT has not complied with only one recent award [*RSC, p. 46 §2*] and this is due to a set-off claim [*cf. supra §58*]. No other evidence indicates that CLAIMANT failed to pay costs related to arbitration proceedings or refused to comply with arbitral awards. Second, CLAIMANT does not currently benefit from third-party funding [*PO2, p. 59 §29*] and still holds enough assets to cover its arbitration costs [*cf. supra §§58-59*]. Thus, none of the cumulative circumstances that led the arbitral tribunal to order security for costs in the *RSM v. Saint Lucia case* appears in the present case.

66 In conclusion, there are no exceptional circumstances and no risk of "*arbitral hit and run*". The simple fact that CLAIMANT unsuccessfully attempted to obtain third-party funding does not justify security for costs.

3. CLAIMANT always disclosed its financial situation transparently and in line with business practices to RESPONDENT

67 According to RESPONDENT, CLAIMANT's business practice is to conceal its true financial situation [*RSC, p. 46 §4*]. RESPONDENT specifically relies on the non-disclosure of a 2010 award against the government of Xanadu and on the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (**"Transparency Rules"**) requiring that awards should be made available to the general public [*ibid.*]. This argument is without merit since the Transparency Rules neither apply directly, as admitted by RESPONDENT, nor by analogy. In addition, CLAIMANT's financial situation has always been disclosed transparently, in line with business practices.

68 First, the Transparency Rules were only adopted on 16 December 2013 by the United Nations General Assembly [*GA Resolution 68/109*]. Under Art. 1(1) of the Transparency Rules, the rules "*shall apply to investor-State arbitration initiated* [...] *pursuant to a treaty providing for the protection of investments or investors* [...] *concluded on or after 1 April 2014*". As a consequence, the Transparency Rules were neither adopted,

nor in force at the time of the award between CLAIMANT and Xanadu on 7 June 2010 and cannot apply directly.

69 Second, despite RESPONDENT's submission that the Transparency Rules evidence a general trend to transparency in arbitration [*RSC, p. 46 §4*], they should not apply by way of analogy in the case at hand. Provisions on transparency fulfill the need to take into account the public interest involved in investor-State arbitrations, such as sustainable development [*GA Resolution 68/109, p. 1; Euler/Gehring/Scherer, p. 9*]. Indeed, investor-State disputes often involve public policy issues that are not limited to the mutual rights and obligations of the parties to the dispute [*Landau/Weeramantry, p. 677*]. Hence, transparency constitutes a tool to safeguard the public interest inherent to investment arbitrations. In our case, RESPONDENT invokes its personal interest to obtain information about CLAIMANT's financial situation to demonstrate the need for transparency. However, the Transparency Rules never mention such a purely private interest as a ground to enhance transparency and thus cannot be applied in such a manner.

70 As the Transparency Rules are manifestly irrelevant *in casu*, the Parties were merely bound to follow the general principle of negotiation in good faith. In this regard, CLAIMANT published annual audited accounts, which allowed its contractual partners to be fully informed about its financial situation. In particular, CLAIMANT's audited accounts of 2009 mentioned the claim against Xanadu valued at USD 15 million [*PO2, p. 59, Financial Statements*]. These accounts became publicly available in April 2010 [*PO2, p. 58 §28*]. Thus, at the time of negotiations for the DSA, RESPONDENT knew or should have known the estimated value of CLAIMANT's claim. The fact that the arbitral tribunal ultimately awarded USD 12 million in favor of CLAIMANT did not substantially modify its financial situation. Contrary to RESPONDENT's allegation [*RSC, p. 46 §4*], the award was not well below CLAIMANT's expectations. Therefore, CLAIMANT could reasonably consider that the difference of USD 3 million was not of such financial importance that it would impact the negotiations of the DSA and that it had to be disclosed to RESPONDENT.

71 In conclusion, RESPONDENT wrongly relies on the Transparency Rules because they do not apply directly and their purpose is not to protect third-parties' private interests. In addition, CLAIMANT's business practice is not to conceal its true financial situation, but to disclose an accurate picture of it through publicly available audited accounts.

4. CLAIMANT's lack of liquidity is due to RESPONDENT's conduct

72 Finally, a respondent cannot rely on the financial situation of a claimant to request security for costs if, in light of all the circumstances, such a situation results from its alleged misconduct [*Guidelines CIArb, p. 10; ICC Cases No. 12542 (2003) and 15218 (2008); Brawn/Fenn, p. 195; cf. Rubins, p. 375*].

73 In the case at hand, RESPONDENT's conduct caused CLAIMANT's strained liquidities. Indeed, CLAIMANT's claim in the present dispute is over USD 2 million. This represents a significant amount for a company in the aircraft industry, which needs important liquidities to continue developing new products [*cf. supra §58*]. The payment ordered by RESPONDENT for the fan blades (USD 20,438,560) [*Exh. C3, p. 12*] did not even cover CLAIMANT's incurred production costs (USD 21,883,800) [*cf. Exh. C5, p. 14: USD 10,941.90 x 2,000*]. CLAIMANT's current strain of liquidities is thus further aggravated by RESPONDENT's violation of the DSA [*cf. infra ISSUE 3*]. In addition, RESPONDENT was aware of CLAIMANT's development of new fan blades and knew that a partial payment of the purchase price would put a strain on CLAIMANT's finances [*Exh. C6, p. 15; PO2, p. 58 §27*]. In conclusion, RESPONDENT's request for security for costs is abusive in light of these circumstances.

B. THERE HAS NOT BEEN A FUNDAMENTAL CHANGE OF CIRCUMSTANCES BETWEEN THE SIGNATURE OF THE ARBITRATION AGREEMENT AND THE COMMENCEMENT OF THE ARBITRATION

74 Besides a claimant's financial situation, the second decisive factor in international arbitral practice is the existence of a fundamental change of circumstances [*ICC Cases No. 12228 (2003), 13070 (2006), 14993 (2007) and 14433 (2008); Tirado/Stein/Singh, p. 167; Draetta, p. 82*]. In this regard, CLAIMANT will demonstrate that no such fundamental change has occurred as its financial situation has not substantially deteriorated since the conclusion of the DSA **(1)**. In any event, RESPONDENT was aware of any change in CLAIMANT's situation before signing the ToR **(2)**.

1. CLAIMANT's financial situation has not suffered a substantial and unforeseeable deterioration since the signature of the DSA

75 There needs to be a substantial and unforeseeable deterioration in a claimant's financial situation between the signature of the arbitration agreement and the commencement of the proceedings [*Guidelines CIArb, pp. 7-8; ICC Cases No. 10032 (1999) and 15951 (2009); Sandrock, p. 30; Yesilirmak, p. 218 §5-85; Karrer/Desax, pp. 345-346*]. Simply holding fewer assets since the conclusion of the arbitration agreement is not sufficient to consider that a substantial deterioration has occurred [*ZCC Case (December 2008); Rubins, p. 358; Henderson, p. 73; TPF Task Force, pp. 13-14; Berger II, pp. 16-17*]. Furthermore, arbitral practice indicates that security for costs should not be granted when the requesting party knew the identity of its contractual partner and should have been aware of its potential financial difficulties [*Guidelines CIArb, pp. 7-8; ICC Cases No. 7047 (1994), 11798 (2002), 12542 (2003) and 15951 (2009)*].

76 CLAIMANT's liquidities have always decreased during a development period and gone back up after a sale [*cf. supra §58*]. The non-compliance with an award due to a set-off claim [*cf. supra §58*] and the search for third-party funding [*cf. supra §§60-66*] do not amount to a substantial and unforeseeable deterioration in CLAIMANT's financial situation. Thus, RESPONDENT has not provided any specific accounting data to support its allegations and mainly relied on isolated events that are common in international business. In

addition, RESPONDENT knew both CLAIMANT's type of business and the strain of liquidity it could be faced with when signing the arbitration agreement. Therefore, RESPONDENT accepted the risk of having arbitration proceedings against a claimant with limited funds.

77 In conclusion, CLAIMANT's financial situation has not suffered a substantial and unforeseeable deterioration between the signature of the DSA and the commencement of the arbitration proceedings.

2. In any case, RESPONDENT was aware of any change in CLAIMANT's situation when signing the Terms of Reference

78 In addition to providing the procedural framework for the arbitration [*cf. supra §48*], terms of reference signed by all parties in an ICC arbitration constitute a further agreement to arbitrate the dispute, which supplements the initial arbitration agreement [*Webster/Bühler, p. 347 §23-2; Gaillard/Savage, p. 672 §1236*]. Under the CAM-CCBC Rules, a similar approach has been adopted and terms of reference reaffirm the parties' consent to arbitration [*Straube/Finkelstein/Casado Filho, pp. 98-99*].

79 A request for security for costs cannot be based upon the existence of a fundamental change of circumstances if the requesting party knew or should have known about it when signing the terms of reference [*Draetta, p. 86*]. In that case, the requesting party should have already included, or at least mentioned, security for costs in the relief sought in the terms of reference [*ibid.*]. International arbitral practice fully supports this restrictive approach by requiring that an application for security for costs should be made as early as possible during the arbitral proceedings [*Guidelines CIArb, p. 10; ICC Cases No. 12732 (2006) and 14433 (2008); Weixia, p. 195; Reid, p. 1426*].

80 In the case at hand, RESPONDENT signed the ToR on 22 August 2016 [*ToR, pp. 43-44*]. At the time, RESPONDENT had full access to CLAIMANT's audited accounts of 2015 published in April 2016 [*PO2, p. 59, Financial Statements*]. In addition, information about the two awards (2010 and 2013) rendered in favor of CLAIMANT against Xanadu became public in the beginning of 2016 [*Exh. R6, p. 47; PO2, p. 61 §39*]. Thus, RESPONDENT knew, or at least should have known, about CLAIMANT's limited liquidities and global financial situation when signing the ToR. If RESPONDENT considered that these facts evidenced a substantial and unforeseeable deterioration of CLAIMANT's financial situation, it should have mentioned security for costs in the ToR. By failing to do so, RESPONDENT reiterated its agreement to arbitrate its dispute with CLAIMANT and to allocate costs only at the end of the proceedings [*cf. supra §49*].

81 RESPONDENT might argue that it discovered CLAIMANT's attempt to obtain third-party funding and non-compliance with an award only after the signature of the ToR [*RSC, p. 46 §§2-4*]. However, as argued above [*cf. supra §§57-66*], these events in and of themselves cannot be considered as a fundamental change of circumstances, neither justify security for costs.

82 In conclusion, RESPONDENT cannot rely on the change in CLAIMANT's financial situation as it occurred prior to the signature of the ToR, which constitutes a renewal of the Parties' agreement to arbitrate.

C. IN ADDITION, SECURITY FOR COSTS IS UNNECESSARY BECAUSE THE NEW YORK CONVENTION PERFECTLY ENSURES THE ENFORCEABILITY OF AWARDS

83 The risk of non-enforcement outside the forum of jurisdiction has been taken into account as a third factor [*ICC Case No. 11798 (2002); Ad Hoc Case (May 2003); Born, p. 2496; Altaras, p. 87*]. However, the enforcement of awards is nowadays largely secured by the New York Convention [*Guidelines CIArb, p. 9; CCIG Case (September 1997); ICC Case No. 12393 (2003); Yesilirmak, p. 218; Reid, p. 1426*]. Indeed, when both parties are nationals of contracting States of the New York Convention, no real risk of non-enforcement exists [*Rubins, p. 360*].

84 In the present case, as the Parties are both nationals of contracting States of the New York Convention [*PO2, p. 60 §35*], any award rendered by the Arbitral Tribunal would be perfectly enforceable. In conclusion, both Parties are protected from the risk of non-enforcement of a final award and security for costs is unnecessary.

III. IN ANY CASE, THE HARM RESPONDENT REFERS TO DOES NOT SUBSTANTIALLY OUTWEIGH THE HARM CLAIMANT MIGHT BE FACED WITH IF THE MEASURE IS ORDERED

85 Security for costs is a conflict between a claimant's right to have access to arbitral justice and a respondent's interest to have any future award in its favor enforced and complied with [*Ad Hoc Case (December 1998); ICC Case No. 15218 (2008); Blackaby/Partasides/Redfern/Hunter, p. 316 §5.35; Brawn/Fenn, p. 195*]. An order for security for costs would violate CLAIMANT's fundamental right of access to justice in view of the circumstances **(A)** and such a violation outweighs any potential harm that might result to RESPONDENT **(B)**.

A. AN ORDER FOR SECURITY FOR COSTS WOULD VIOLATE CLAIMANT'S FUNDAMENTAL RIGHT OF ACCESS TO JUSTICE

86 An order for security for costs can render impossible the prosecution of a legitimate claim [*Guidelines CIArb, p. 11; Porzelack case; ZCC Case No. 415 (2001); ICC Case No. 14355 (2007); ZCC Case (December 2008); Weixia, p. 185; Hosang, p. 182*] by unduly interfering with a party's right to be heard as it may lack the financial means to post the required security [*Born, p. 2496; Waincymer, p. 643 §8.3.1*]. In arbitral practice, the reluctance to grant security for costs also results from the fact that such orders might exclude smaller companies from commercial arbitration and make this alternative dispute resolution the field of wealthy multinational companies [*Rubins, p. 373*].

87 Although CLAIMANT's financial situation is sound, the company's size and type of business makes the cash flow fluctuate enormously [*cf. supra §58*]. An order for security of USD 200,000 or more would freeze all the available liquidities in a crucial moment of product development [*Exh. C6, p. 15; Exh. C9, p.*

50; RSC, p. 46; cf. PO2, p. 59, Financial Statements]. This in turn would place CLAIMANT in a position to be forced to either give up its legitimate claim or put its business in jeopardy. In light of all the circumstances, an order for security for costs would prevent CLAIMANT from pursuing a legitimate claim and would violate its right of access to justice.

B. SUCH A VIOLATION OUTWEIGHS ANY FINANCIAL HARM THAT RESPONDENT MIGHT HAVE TO SUFFER

88 The violation of a claimant's right of access to justice has to be weighed against a respondent's potential financial harm [*ICC Case No. 12035 (2003); SIAC Case No. ARB076/2006*]. Before concluding an arbitration agreement, the parties carefully analyze all the factors advocating in favor or against arbitration, such as procedural efficiency, costs and enforceability of awards [*ICC Case No. 11399 (2001)*]. Thus, the commercial risk that the parties accept when concluding such an agreement encompasses the risk of being unable to collect arbitration costs [*ICC Cases No. 11399 (2001) and 14020 (2006); Webster/Bühler, p. 434 §28-38; Henderson, pp. 68-69*].

89 In addition, a claimant's access to justice "*is clearly a right*", whereas a respondent's ability to enforce a costs award is "*not a right, but merely an interest*" [*Schwartz, p. 384*]. Thus, the former must be accorded greater importance when operating a balance of interests [*Schwartz, pp. 384-385*]. Arbitral tribunals support such an approach as they have almost unanimously considered that the violation of the fundamental right of access to justice outweighed the requesting party's financial risks [*ICC Case No. 12035 (2003); ZCC Case (December 2008); Commerce Group case; cf. Draetta, p. 83*].

90 In the present case, RESPONDENT accepted the financial risks related to the arbitration proceedings, such as the incapacity to collect arbitration costs, both when signing the DSA and the ToR. On the contrary, CLAIMANT has never contemplated, and even less accepted, the risk of being denied access to justice.

91 In conclusion, as CLAIMANT's fundamental right of access to justice outweighs RESPONDENT's interests to recover arbitration costs and avoid financial harm, the balance of interests leans clearly in favor of CLAIMANT. The request for security for costs should therefore be denied.

CONCLUSION ON ISSUE 2

92 The Arbitral Tribunal should not grant security for RESPONDENT's costs. Indeed, the Parties have excluded the power of the Arbitral Tribunal to order security for costs in their Terms of Reference. Even if the Arbitral Tribunal had such power, it should not grant an order for security for costs since RESPONDENT would not suffer any irreparable harm in the absence of such an award. In any case, the harm RESPONDENT refers to does not substantially outweigh the harm CLAIMANT might be faced with.

ISSUE 3: CLAIMANT IS ENTITLED TO THE OUTSTANDING PAYMENT OF USD 2,387,432.80 TO RECEIVE THE FULL PURCHASE PRICE UNDER THE DSA

93 The Parties concluded the DSA and the Addendum for the purchase of fan blades and clamps respectively [*Exh. C2, pp. 9-11*]. The Parties agreed in Section 20 of the DSA that their contract was to be governed by the CISG and alternatively by the UNIDROIT Principles [*Exh. C2, p. 10*]. CLAIMANT delivered the goods in conformity with the contractual requirements [*Exh. C3, p. 12*]. However, CLAIMANT never received the full purchase price of USD 22,723,800 for the fan blades [*Exh. C5, p. 14*]. In fact, RESPONDENT ordered its bank to pay for the fan blades on the basis of the wrong exchange rate, which led to an incomplete payment. The final amount credited to CLAIMANT's account was even lower, *i.e.* USD 20,336,367.20, as a bank levy had been charged during the transfer [*Exh. C6, p. 15*].

94 Therefore, CLAIMANT is entitled to the outstanding payment of USD 2,285,240 for the fan blades based on the current exchange rate under the DSA **(I)** and the payment of USD 102,192.80 for the fees deducted by the Equatorianian Financial Investigation Unit **(II)**.

I. CLAIMANT IS ENTITLED TO THE OUTSTANDING PAYMENT OF USD 2,285,240 FOR THE FAN BLADES BASED ON THE CURRENT EXCHANGE RATE UNDER THE DSA

95 Under the DSA, RESPONDENT undertook to purchase a minimum of 2,000 newly developed fan blades, with the firm intention to purchase further units in subsequent years [*Exh. C2, p. 10*]. The price in USD was to be calculated on a cost-plus basis, *i.e.* on the basis of the current production costs in EQD. Under the handwritten Addendum, CLAIMANT had to produce and deliver exactly 2,000 clamps. The price in USD for those was to be calculated on a cost-coverage basis [*Exh. C2, p. 11*]. For terms not regulated in the Addendum, the latter referred to the "*main Agreement*" [*Exh. C2, p. 11*]. The Addendum hence created a clear distinction within the DSA between the main agreement of 1 August 2010 regarding the fan blades (**"main Agreement"**) and the Addendum concerning the clamps.

96 The Addendum applied the fixed exchange rate of USD 1 = EQD 2.01 to the clamps [*Exh. C2, p. 11*]. The main Agreement, however, applied a current exchange rate to the fan blades. The current exchange rate is to be understood as a floating rate to be determined subsequently, in opposition to a fixed exchange rate. In fact, RESPONDENT failed to fully pay the price under the main Agreement by applying the fixed exchange rate to the fan blades, making its payment short of USD 2,285,240 [*Exh. C5, p. 14*].

97 Therefore, CLAIMANT is entitled to request the outstanding payment of the price according to Arts. 62 and 53 CISG. First, the Parties agreed under the main Agreement to apply the current exchange rate for the fan blades **(A)**. Second, the fixed exchange rate agreed in the Addendum is expressly limited to the clamps and does not modify the applicable exchange rate for the fan blades **(B)**. Third, the inaccurate invoice does not amount to a valid offer to modify the main Agreement **(C)**.

A. UNDER THE MAIN AGREEMENT, THE PARTIES AGREED TO APPLY THE CURRENT EXCHANGE RATE (USD 1 = EQD 1.79) TO THE FAN BLADES

98 Although there is no express provision in the main Agreement regarding the applicable exchange rate, the Parties agreed on a current exchange rate for the fan blades. The interpretation of the main Agreement reveals the Parties' understanding to apply the current exchange rate at the time of production (USD 1 = EQD 1.79) **(1)**. In any case, the applicable law chosen by the Parties provides for the current exchange rate at the time of due performance (USD 1 = EQD 1.79) **(2)**.

1. An interpretation of the main Agreement reveals the Parties' understanding to apply the current exchange rate at the time of production (USD 1 = EQD 1.79)

99 The statements and conducts of the Parties as well as provisions in contracts are to be interpreted according to the "*intent where the other party knew or could not have been unaware what that intent was*" under the subjective test of Art. 8(1) CISG [*Honnold/Flechtner*, *§105*]. In the absence of such common intent, the hypothetical understanding of a reasonable third person of the same kind, placed in the same circumstances, is determining under the objective test of Art. 8(2) CISG [*ICC Case No. 7331 (1994); Schlechtriem/Schwenzer I, Art. 8 §20*]. For both the subjective and objective interpretations, regard is to be had to all relevant circumstances including negotiations, established practices between the parties, usages and any subsequent conduct [*Art. 8(3) CISG*].

100 CLAIMANT will demonstrate that the Parties' understanding was to apply the current exchange rate at the time of production for the fan blades (USD 1 = EQD 1.79) [*Exh. C5, p. 14; PO2, p. 56 §12*]. The flexible price mechanism contained in the main Agreement is only economically viable when applying the exchange rate at the time of production **(a)**. In addition, the application of that current exchange rate is also supported by the trade usage of risk-sharing partnerships in the aircraft industry **(b)**. Finally, the previous co-operations between the Parties are irrelevant for the determination of the applicable exchange rate **(c)**.

a. The flexible price mechanism agreed by the Parties is economically viable only if they apply the exchange rate at the time of production

101 Under the main Agreement, the Parties agreed to calculate the purchase price on a cost-plus basis, *i.e.* a flexible price mechanism [*Exh. C2, p. 10*]. It is the result of a two-stage evolution during the negotiation process. First, RESPONDENT insisted on a maximum price, even though the production costs were not yet certain [*Exh. C1, p. 8; RfA, p. 4 §5*]. To counter-balance that demand, the Parties agreed on a flexible price structure based on the production costs within the framework of a price range [*RfA, p. 4 §5; ARfA, p. 24 §7*]. Second, RESPONDENT insisted on pricing in USD, despite the production costs being in EQD [*Exh. C1, p. 8; RfA, p. 4 §5*]. To make that demand feasible, CLAIMANT undoubtedly relied on the current exchange rate at the time of production. It is a natural and logical consequence to the pricing in USD,

which RESPONDENT knew or could not have been unaware of [*Exh. C1, p. 8: "expenses in EQD* ***will*** *have to be converted"* (emphasis added)].

102 Furthermore, in the eyes of a reasonable third person, the purpose of the flexible price mechanism is to correctly reflect the production costs in the price and share the risks in that regard. In order to express the actual production costs in EQD at any given moment in the price in USD, the exchange rate at the time of production needs to be applied. If a fixed exchange were applied to calculate the price, CLAIMANT would bear the risk of disparity between the fixed and the current exchange rate. Indeed, the price in USD will be converted back into EQD at the current exchange rate since CLAIMANT's accounts are held in EQD. Thus, a fixed exchange rate negates the intended effects of the flexible price mechanism to cover CLAIMANT's production costs and is therefore inherently incompatible with the main Agreement. This is evidenced by the fact that the price actually paid by RESPONDENT (USD 20,438,560) on the basis of the fixed exchange rate [*Exh. C3, p. 12*] fails to even cover CLAIMANT's production costs (USD 21,883,800) [*cf. supra §73*].

103 In conclusion, the price varies in accordance with the production costs incurred in EQD at the moment of production. Therefore, for the sake of coherence and effectiveness, the conversion of said production costs into USD should equally be based on the exchange rate at the time of production.

b. In addition, the trade usage of risk-sharing partnerships in the aircraft industry supports the application of the exchange rate at the time of production (Art. 9(2) CISG)

104 International usages in a particular industry are to be taken into account when interpreting provisions of a contract [*Arts. 8(3) and 9(2) CISG*]. CLAIMANT will first demonstrate that there is a trade usage in the aircraft industry to establish risk-sharing partnerships. The risk distribution in the case at hand weighs heavily on CLAIMANT, thus it presupposes the sharing of the exchange rate risk.

105 Under Art. 9(2) CISG, "[t]*he parties are considered* [...] *to have impliedly made applicable to their contract* [...] *a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned*". The objective element first requires the usage to be widely known in the particular international industry so that there is no considerable fraction of market actors unaware of such usage [*Witz/Salger/Lorenz, Art. 9 §8*]. Second, the usage must be regularly observed, which means that it is followed by the majority of those involved in the particular industry [*CISG-online 380 (AUS 1998); CISG-online 641 (AUS 2000); Staudinger/Magnus, Art. 9 §22*]. Third, the subjective element of the supposed knowledge of the Parties can often be inferred from the objective element [*Schlechtriem/Schwenzer I, Art. 9 §20; Soergel, Art. 9 §5*].

106 In the global aircraft industry, there is a clear tendency to establish risk-sharing partnerships with suppliers in the light of the internationalization and fragmentation of the supply chain [*Danish Technical*

Institute, p. 2; Figueiredo/Silveira/Sbragia, p. 28; Wagner/Baur, p. 7]. The main purpose is to push down the R&D work to specialized lower-tier suppliers and to share major risks related to the development, serial production and the aftermarket activities, which results in a reduction of costs [*Wagner/Baur, p. 1; PwC, p. 3; US Trade Commission Report, §2-8*]. In particular, risk-sharing partnerships are extensively used by the mid-sized aircraft manufacturers Bombardier (CAN) and Embraer (BRA), which dominate the regional aircraft market [*Pritchard, p. 2; Kedy, pp. 6-7*]. Thus, the objective requirements as to the trade usage are met.

107 The Parties to the present case are active in the regional aircraft market, since they both produce parts that are used in mid-sized aircrafts of Earhart SP [*Exh. C2, p. 9; ARfA, p. 24 §5*]. They were therefore clearly aware of the extensive use of risk-sharing partnerships [*RfA, pp. 6-7 §21*], particularly with regard to the fact that they themselves implemented risk-sharing elements into the main Agreement, namely the flexible price mechanism [*cf. supra §§101-103*] and the price range (USD 9,975 - 13,125) [*Exh. C2, p. 10*]. Thus, as the subjective element is also given, there is a trade usage in the international aircraft industry to establish risk-sharing partnerships, which applies to the present contract.

108 To appreciate CLAIMANT's situation, it shall be pointed out that the risk distribution weighs heavily on lower-tier suppliers in the aircraft industry. Indeed, the financial impact of currency fluctuations is substantial and particularly sharp for them [*Bénassy-Quéré/Fontagné/Raff, p. 3; Danish Technology Institute, p. 32*]. Moreover, both protection measures, *i.e.* the purchase of derivative instruments (financial hedging) and the diversification of the business base (operational hedging), constitute a problem for lower-tier suppliers since they demand either large additional costs or a large capacity [*Danish Technology Institute, p. 34; Döhring, p. 16*]. Finally, there is a clear tendency in the aircraft industry to set increasingly high quality requirements to lower-tier suppliers, especially in the engine part market [*Wyman, p. 7; CBI, pp. 10, 14*].

109 In the case at hand, the present risk distribution weighs heavily on CLAIMANT and therefore presupposes the sharing of the exchange rate risk. CLAIMANT is an engine part manufacturer specialized in fan blades, which were to be incorporated in RESPONDENT's engines. Due to CLAIMANT's high degree of specialization and position as a lower-tier supplier, both operational and financial hedging possibilities were very limited. Accordingly, CLAIMANT had not purchased any derivative instruments [*PO2, p. 57 §20*]. Furthermore, CLAIMANT had to meet high quality requirements for the swept fan blades under the main Agreement. The sweep angle of fan blades both contributes to aerodynamic and aeroacoustic advantages, thus enhancing efficiency and noise reduction [*Bamberger/Carolus, pp. 2-3*]. In addition to offering the best fuel efficiency on the fan blade market, CLAIMANT had to improve the already sophisticated model by realizing further noise reduction [*Exh. C2, p. 9*]. Those heavy risks pushed down

to CLAIMANT are best illustrated by the fact that the contractual prospect of RESPONDENT with Earhart SP directly hinged upon a successful improvement of the fan blade by CLAIMANT [*RfA, p. 4 §3; Exh. C2, p. 9*]. Still, CLAIMANT managed to meet all quality standards in conformity with the main Agreement [*Exh. C3, p. 12*]. Moreover, the price range of USD 9,975 to USD 13'125 had been introduced to guarantee RESPONDENT a maximum price in favor of the contractual relationship with Earhart SP. It burdened CLAIMANT with an additional risk since it erased the certainty to cover its production costs usually guaranteed by the flexible price mechanism. On the contrary, the price range did not create additional risks for RESPONDENT since it did not have to handle different currencies. Indeed, RESPONDENT held its accounts in USD [*PO2, pp. 56-57 §14*] and paid the price in USD. To counter-balance those heavy risks borne by CLAIMANT, the exchange rate risk has to be shared by the Parties. Indeed, if a fixed exchange rate were applied, CLAIMANT would additionally be burdened with the whole exchange rate risk when converting the price in USD back into its currency EQD.

110 In light of the above, the main Agreement constitutes a coherent and effective risk-sharing agreement only if the currency risk is shared by means of the exchange rate at the time of production.

c. The previous co-operations between the Parties are irrelevant for the determination of the applicable exchange rate (Art. 9(1) CISG)

111 According to Art. 9(1) CISG, "[t]*he parties are bound* [...] *by any practices which they have established between themselves*". For this provision to apply, such practices established by a course of conduct must have created an expectation that this conduct will be continued [*CISG-online 1093 (AUS 2005); Honnold/Flechtner, §116*]. Therefore, a certain frequency and duration are required [*CISG-online 61 (HUN 1992); CISG-online 157 (FRA 1995); Staudinger/Magnus, Art. 9 §13*], *i.e.* more than a single repetition of a particular conduct [*CISG-online 329 (CHE 1997); CISG-online 440 (USA 1998); Schlechtriem/Schwenzer I, Art. 9 §8; Witz/Salger/Lorenz, Art. 9 §17*]. Even a conduct twice repeated has been deemed insufficient by numerous courts [*CISG-online 346 (CHE 1997); CISG-online 659 (GER 2000); Schlechtriem/Schwenzer I, Art. 9 §8*]. In addition, any practice between the parties can come to an end, especially when their original relationship changes [*Schlechtriem/Schwenzer I, Art. 9 §10; Witz/Salger/Lorenz, Art. 9 §17; Westermann, Art. 9 §13*].

112 Contrary to RESPONDENT's allegation [*ARfA, p. 24 §§8-9*], the previous co-operations are irrelevant to determine the exchange rate as the circumstances have since changed significantly. At the time of their two earlier contracts, the Parties were subsidiaries of EIS. Both times, EIS decided on exchange rates profitable to RESPONDENT, *i.e.* the exchange rate at the time of the conclusion of the contracts, because it was mainly interested in maximizing its aggregate revenue by shifting profits to fiscally advantageous States, such as Mediterraneo [*Exh. C9, p. 50; PO2, pp. 54-55 §5*]. However, CLAIMANT has been sold by EIS on 27 July 2010 [*PO2, p. 54 §1*]. Thus, at the time of conclusion of the main Agreement on 1 August

2010, the Parties no longer belonged to the same parent company, which eliminated the fiscal optimization motives of EIS. Furthermore, as the alleged need to "*de-risk*" RESPONDENT from currency fluctuations only concerned "*contracts with other subsidiaries of* [EIS]" [*Exh. R1, p. 27*], it does not apply to the present contractual relationship due to CLAIMANT's new position. Thus, the circumstances of the previous dealings are fundamentally different from the present case and are of no relevance to determine the applicable exchange rate for the main Agreement.

113 In any case, the previous co-operations between the Parties do not amount to an established practice, since the application of the exchange rate at the time of the contract conclusion has been repeated only once [*PO2, p. 54, §5*].

114 In conclusion, the previous co-operations between the Parties are irrelevant to determine the applicable exchange rate for the main Agreement.

2. In any case, the applicable law chosen by the Parties provides for the current exchange rate at the time of due performance (USD 1 = EQD 1.79)

115 If the Arbitral Tribunal were to consider that the exchange rate cannot be deduced from the main Agreement, the applicable law chosen by the Parties [*cf. supra §93*] provides for the exchange rate at the time of due performance.

116 Art. 53 CISG governs the payment of the price, but does not expressly settle the question of the applicable exchange rate or any other questions related to currency. However, as the determination of the currency is inextricably linked to the purchase price, it has been deemed to be governed by the CISG [*CISG-online 91 (GER 1993); CISG-online 130 (GER 1994); Schwenzer/Fountoulakis/Dimsey, p. 422; Schlechtriem/Schwenzer I, Art. 53 §5; Kröll/Mistelis/Perales Viscasillas, Art. 54 §9-12; Ferrari, p. 228; Kronke/Melis/Kuhn, p. 86 §343; Brunner, Art. 54 § 12*]. This matter is therefore to be settled in conformity with the general principles on which the CISG is based [*Art. 7(2) CISG*]. Thus, the conversion of the currency, *i.e.* the exchange rate, should also fall under the scope of the CISG and be settled in conformity with these general principles.

117 A general principle can arise where a number of provisions relating to similar situations lead to the same legal conclusion and thus express a common *ratio legis* [*Witz/Salger/Lorenz, Art. 7 §30*]. Furthermore, it is generally accepted to use the UNIDROIT Principles as a gap-filling tool, particularly when the parties have chosen it [*ICC Case No. 9117 (1998); Original DVD Recordings case; Kröll/Mistelis/Perales Viscasillas, Art. 7 §61; Brunner, Art. 7 §9; Schlechtriem/Schwenzer II, Art. 7 §62; Bonell, p. 352; Teichert, p. 112*].

118 The CISG takes the perspective that, in the absence of an agreement, each party to a foreign money debt bears the risk of currency fluctuation over the course of the contract and until performance is due [*ICC Case No. 8240 (1995); Heidelberg case; AC Opinion No. 6, §3.7; Brand, p. 86; Vogenauer, Art. 6.1.9 §15*].

This principle is implemented in different situations, namely in the case of repayment after avoidance of the contract and in the case of payment made in the currency of the place of payment. In both cases, the exchange rate at the time of due performance of the contract was applied when no specific exchange rate had been determined by the parties. In cases of repayment involving different currencies, the seller bound to repay the purchase price to the buyer must do so at the exchange rate prevailing when performance was due and not at the date of repayment [*Art. 84 CISG; ICC Case No. 7660 (1994); CISG-online 727 (CHE 2002)*]. Moreover, Art. 6.1.9(3) UNIDROIT Principles adopts the same perspective by providing that the "[p]*ayment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due*" [*ICC Case No. 8240 (1995)*; *cf. also Art. 7:108(2) PECL*].

119 In the present case, the date of due performance was the delivery of the fan blades on 14 January 2015 under the main Agreement [*RfA, p. 5 §9; Exh. C3, p. 12*]. Thus, CLAIMANT and RESPONDENT each had to carry the risk of the currency fluctuation until this date under the applicable law. At that time, the exchange rate was USD 1 = 1.79 EQD [*PO2, p. 56 §12*]. If a fixed exchange rate were applied, it would completely shift the currency fluctuation risk to CLAIMANT and be incompatible with the general principle of the CISG.

120 In conclusion, the exchange rate at the time of due performance should be applied to the conversion of the purchase price into USD in accordance with the applicable law.

B. THE ADDENDUM SETS A FIXED EXCHANGE RATE (USD 1 = EQD 2.01) FOR THE CLAMPS AND DOES NOT MODIFY THE APPLICABLE EXCHANGE RATE FOR THE FAN BLADES

121 The Parties introduced the sale of the clamps with the Addendum to which a fixed exchange rate was to be applied [*Exh. C2, p. 11*]. However, RESPONDENT wrongfully argues that the fixed exchange rate extended to the fan blades [*ARfA, p. 25 §10; Exh. C7, p. 16*]. Pursuant to Art. 29(1) CISG, any contract can in principle be modified by the mere agreement of the parties, including the contract's *essentialia negotii* [*Schlechtriem/Schwenzer I, Art. 29 §9*]. Since the meaning of the contractual clause is disputed by the Parties, CLAIMANT will show that the interpretation of the Addendum under Art. 8(2) CISG confines the fixed exchange rate to the clamps **(1)**. In any case, the Addendum has to be interpreted *contra proferentem* **(2)**.

1. The Addendum expressly limits the fixed exchange rate to the clamps

122 The interpretation of a contractual provision is to be assessed according to Art. 8 CISG [*cf. supra §99*]. In the case at hand, the Parties did not communicate their intent as to the extent of the fixed exchange rate contained in the Addendum [*Exh. C2, p. 11; PO2, p. 57 §17*]. Hence, there was no common intent and neither party could have known or been aware of the other's intention under Art. 8(1) CISG.

123 Taking into account the negotiations of the Addendum **(a)**, its wording **(b)**, its nature **(c)** and the numerous opportunities RESPONDENT had to fix an exchange rate for the fan blades **(d)**, a reasonable third person under Art. 8(2) CISG would interpret the Addendum as to be limited to the clamps.

a. In their negotiations, the Parties merely addressed the need to regulate the sale of the newly added clamps

124 At the time the main Agreement was concluded, RESPONDENT did not intend to purchase clamps from CLAIMANT. In fact, RESPONDENT expressed its willingness to do so almost three months later, when it became clear that the clamps it intended to purchase from another producer were not suitable [*RfA, pp. 4-5 §8; Exh. C2, p. 11*]. Thus, contrary to RESPONDENT's allegation [*ARfA, p. 25 §10; Exh. C7, p. 16*], the Addendum did not serve the purpose of fixing an exchange rate applicable to the complete contract, but served solely the purpose of regulating the purchase of the clamps. Furthermore, RESPONDENT's email proposal to add a handwritten Addendum to the main Agreement contained the sole subject of "*Clamps*" and the proposition to merely "*regulate the purchase of the clamps*" without modifying the existing provisions in the main Agreement [*Exh. R2, p. 28*]. Finally, RESPONDENT recommended to include the purchase of the clamps into the existing contract for pure convenience, assuring the simultaneous delivery of the fan blades and clamps [*PO2, p. 57 §16*].

b. The different wording used for the main Agreement and the Addendum confines the fixed exchange rate clause to the clamps

125 The Parties agreed in the Addendum that "[t]*he exchange rate for the agreement is fixed to US$ 1 = EQD 2.01*" [*Exh. C2, p. 11*]. The use of the term "*agreement*" instead of "*main Agreement*" reveals the Parties' intent to limit the fixed exchange rate to the clamps since they did not use these different terms interchangeably. Indeed, the exchange rate was fixed for the "*agreement*", *i.e.* the Addendum itself, whereas the other terms were to be governed by the "*main Agreement*" signed on 1 August 2010 [*Exh. C2, p. 11*]. Mr. Romario, RESPONDENT's CEO, also used the words "*main agreement*" in his witness statement to refer to the first part of the DSA, *i.e.* the main Agreement [*Ex. R5, p. 31*]. Hence, RESPONDENT's subsequent conduct further emphasized the Parties' intent to distinguish the two terms. Moreover, the capitalized "*main Agreement*" has a legal significance, since capitalized terms are generally defined beforehand in the contract [*Marchand, p. 99*]. Indeed, the main Agreement refers to itself as the "*Agreement*" [*Exh. C2, pp. 10-11*].

c. The long-term nature of the main Agreement clearly diverges from the short-term vision of the Addendum, manifesting the need for different exchange rates

126 The nature of the main Agreement and the Addendum differs significantly. Under the main Agreement, the Parties agreed on the joint development of fan blades and on a specific method to calculate the

purchase price. Under the Addendum, the Parties agreed on a one-time sale of clamps and on a simple cost coverage base.

127 The significant impact of the new sophisticated swept fan blades on fuel efficiency and noise emission required a long-term development and cooperation between the Parties, usual in the aircraft industry [*Wyman, p. 7; US Trade Commission Report, §2-9*]. This was underlined in the preamble of the main Agreement, where RESPONDENT "[was] *planning to purchase within the next 5 years more than 600 further TRF 192-I fan blades"* [*Exh. C2, p. 9*]. Since the main Agreement concerning the fan blades was marked by a long-term vision, the Parties deemed it necessary to share the risks related to the preliminary research and development performed by CLAIMANT [*cf. supra §§102, 107*].

128 On the other hand, the sale of the clamps under the Addendum was made in a short-term mindset. In opposition to the fan blades, the clamps were of lesser technical importance and neither required extensive R&D nor risk-sharing measures. Since the sale of 2,000 clamps constituted a one-time transaction with no long-term development or cooperation aspects and involved a much lower amount, it was acceptable for CLAIMANT to agree on a fixed exchange rate [*Exh. C9, p. 50; RfA, p. 7 §22*].

129 Finally, the different nature of the main Agreement and the Addendum is evidenced by the fact that CLAIMANT issued two different invoices, one for each good, due to the different price calculation methods [*RfA, p. 5 §9; Exh. C4, p. 13*]. Consequently, the exchange rate applicable to the fan blades needs to be distinguished from the one applicable to the clamps.

d. RESPONDENT failed at numerous occasions to extend the fixed exchange rate to the fan blades despite its perfect awareness of the currency fluctuation risks

130 Finally, if it were essential for RESPONDENT to fix an exchange rate for the fan blades, it would have explicitly mentioned this in the numerous communications it had with CLAIMANT, in particular in the negotiations of the main Agreement or of the Addendum [*Exh. C1, p. 8; Exh. R2, p. 28; PO2, p. 57 §§15-16*]. Instead, Mr. Romario, who negotiated both agreements on behalf of RESPONDENT [*Exh. R5, p. 31*], never mentioned to CLAIMANT his concern to modify the existing provisions of the main Agreement [*Exh. R2, p. 28; PO2, p. 57 §16*]. This is all the more surprising as he was very much aware that the choice of the exchange rate would have a strong influence on which party would bear the currency risk [*Exh. R5, p. 31*]. He also recognized that an inexplicit clause "*entails the risk of opportunistic behavior*" [*ibid.*].

131 In conclusion, a reasonable third person would understand that the fixed exchange rate contained in the Addendum applies solely to the purchase of the clamps and does not modify the applicable exchange rate for the fan blades.

2. In any event, the Addendum has to be interpreted *contra proferentem*

132 If the Arbitral Tribunal were to consider the fixed exchange rate clause of the Addendum to be unclear, it has to be interpreted *contra proferentem*. The international principle *contra proferentem*, according to which the party supplying the term should bear the risk of possible ambiguity, applies under the CISG and is furthermore confirmed by Art. 4.6 UNIDROIT Principles [*CISG-online 1658 (GER 2008); CISG-online 2513 (GER 2014); Schlechtriem/Schwenzer I, Art. 8 §49; Honnold/Flechtner, §107.1; Schwenzer/Hachem/Kee, §26.61*; *Felemegas, p. 51*].

133 RESPONDENT drafted the clause of the Addendum and suggested it by email [*Exh. R2, p. 28*]. It should therefore bear the risk of its possible ambiguity and the term "*the agreement*" should be interpreted as being a reference to the mere Addendum. Therefore, the fixed exchange rate agreed for "*the agreement*" only applies to the clamps and does not modify the applicable exchange rate for the fan blades.

C. THE INACCURATE INVOICE OF 14 JANUARY 2015 DOES NOT AMOUNT TO A VALID OFFER TO MODIFY THE MAIN AGREEMENT

134 Due to a confusion in CLAIMANT's accounting department, an invoice with an inaccurate exchange rate for the price calculation of the fan blades was sent to RESPONDENT on 14 January 2015 [*Exh. C3, p. 12*]. However, this does not amount to a valid offer to modify the applicable exchange rate for the fan blades under the main Agreement.

135 The modification of an agreement according to Art. 29 CISG requires a valid offer and acceptance, the existence of which is to be interpreted in accordance with Art. 8 CISG [*CISG-online 21 (GER 1990); Schlechtriem/Schroeter, §298; cf. supra §99*]. Where a proposal remains ambiguous despite an interpretation in light of Art. 8 CISG, no offer exists [*Art. 14 CISG; Kröll/Mistelis/Perales Viscasillas, Art. 14 §2; Schlechtriem/Schwenzer I, Art. 14 §26*]. A sent declaration, whose main purpose is not to modify the contract, would hardly ever be considered as an offer [*CISG-online 1511 (BEL 2004); CISG-online 2216 (GER 2010); Enderlein/Maskow, Art. 29 §1.2; Schmidt-Kessel/Meyer, p. 177-179; Schlechtriem/Schwenzer I, Art. 29 §10; Honsell, Art. 29 §10*]. In particular, an invoice containing newly integrated terms sent at the moment of delivery of the goods does not constitute an offer to modify the contract and cannot be accepted by payment [*CISG-online 1511 (BEL 2004); Herber/Bracker/Piltz/Magnus, pp. 114-115*].

136 On 14 January 2015, an inaccurate invoice applying the fixed exchange rate to the fan blades was sent by CLAIMANT [*cf. Exh. C3, p. 12; RfA, p. 5 §10*]. It had been prepared by CLAIMANT's employee Mario Lee, who was not responsible for the financial side of the DSA at that time [*Exh. C4, p. 13; RfA, p. 5 §10*]. RESPONDENT manifestly tried to take advantage of the inaccuracy by immediately paying the lower amount [*Exh. C3, p. 12*]. CLAIMANT rectified the invoice one hour after it became aware of the confusion and immediately sent the correct invoice to RESPONDENT [*Exh. C5, p. 14*]. Accordingly, the principal

aim of CLAIMANT's first invoice was to detail the method used for price calculation and obtain the payment of the full purchase price, but certainly not to modify the main Agreement. RESPONDENT neither reacted nor objected to the application of the current exchange rate as provided in the rectified invoice, which shows that the sales price demanded was justified and not excessive. Indeed, it was only one month later, when CLAIMANT sent a reminder, that RESPONDENT expressly refused to pay the outstanding amount and argued that the fixed exchange rate was to be applied to the price calculation of the fan blades as well [*Exh. C7, p. 16*].

137 In light of all these circumstances, RESPONDENT was fully aware that CLAIMANT's inaccurate invoice did not constitute an offer to modify the contract. As there was no offer on CLAIMANT's side, RESPONDENT could not tacitly accept it by paying the amount. Even if RESPONDENT could not recognize CLAIMANT's absence of intent to modify the contract, a reasonable third person in the same circumstances would never have understood the invoice as an offer to modify the applicable exchange rate.

138 In conclusion, the confusion in CLAIMANT's accounting department does not modify the exchange rate applicable to the fan blades under the main Agreement, since the inaccurate invoice of 14 January 2015 cannot be considered as a valid offer to modify the contract.

II. CLAIMANT IS ENTITLED TO THE PAYMENT OF USD 102,192.80 FROM RESPONDENT FOR THE FEES DEDUCTED BY THE EQUATORIANIAN FINANCIAL INVESTIGATION UNIT

139 In mid-January 2015, RESPONDENT ordered its bank to effect the payment of the purchase price to CLAIMANT's account in Equatoriana [*Exh. C3, p. 12*]. Besides the fact that the payment was partial due to the application of a wrong exchange rate [*cf. supra ISSUE 3.I*], the credited amount was even lower, *i.e.* USD 20,336,367.20 instead of USD 20,438,560 [*Exh. C6, p. 15; Exh. C7, p. 16*]. Following CLAIMANT's inquiry to its commercial bank, it was established that the Equatorianian Financial Investigation Unit (**"EFIU"**) investigated the transferred sum for money laundering and subtracted a 0.5% bank levy, *i.e.* USD 102,192.80, under the ML/2010C Regulation. Hence, CLAIMANT demands payment of the deducted bank fees from RESPONDENT. The DSA unambiguously stipulated that RESPONDENT must deposit the full purchase price into the CLAIMANT's account **(A)**. In any case, the applicable law provides that RESPONDENT must bear the bank levy **(B)**.

A. UNDER THE DSA, RESPONDENT MUST ENSURE THAT THE TRANSFERRED PURCHASE PRICE IS CREDITED IN FULL TO CLAIMANT'S BANK ACCOUNT

140 RESPONDENT must bear the deducted bank charges of USD 102,192.80. According to Section 4 of the DSA, "[t]he *BUYER will deposit the purchase price in full into the SELLER's account at the Equatorianian National Bank* [...]. *The bank charges for the transfer of the amount are to be borne by the BUYER*" [*Exh. C2, p. 10*]. Therefore, the buyer must make sure that the amount put at the seller's disposal corresponds to the full purchase price [*Paper Production Lines case; Schlechtriem/Schwenzer I, Art. 53 §22*].

141 In its statement, RESPONDENT makes reference to two previous transactions, in which CLAIMANT bore the 0.5% bank levy deducted by the EFIU [*ARfA, p. 26 §19*]. However, these instances must be distinguished from the case at hand as those contracts with CLAIMANT's customers did not contain any express provision concerning the bank charges [*PO2, pp. 55-56 §§8-9*]. Moreover, as the first agreement was concluded before the entry into force of the ML/2010C Regulation, CLAIMANT did not request payment of the subtracted fees [*PO2, p. 55 §8*]. As to the second contract, CLAIMANT waived its right to demand the payment of the subtracted levy due to the largely favorable contractual terms and the importance of its customer [*PO2, p. 56 §9*].

142 In conclusion, RESPONDENT must bear the bank levy subtracted under the ML/2010C Regulation and deposit the remainder of the price, *i.e.* USD 102,192.80, into CLAIMANT's bank account.

B. IN ANY EVENT, RESPONDENT MUST BEAR THE BANK LEVY IN ACCORDANCE WITH THE APPLICABLE LAW

143 CLAIMANT will establish that the applicable law [*cf. supra §93*] provides that RESPONDENT must bear the bank charges. Indeed, the analogous application of Art. 35(2) CISG suggested by RESPONDENT is groundless **(1)**. In addition, the payment of the bank levy constitutes a cost associated with RESPONDENT's obligation to pay the price under Art. 54 CISG, further supported by the UNIDROIT Principles **(2)**.

1. The analogy made by RESPONDENT in regard to Art. 35(2) CISG about public law regulations should not be followed by the Arbitral Tribunal

144 In the absence of an express agreement between the parties on the specific terms related to quality, function and packaging of goods, Art. 35(2) CISG contains implied terms setting the standards to be met by the seller's goods [*Ostendorf, p. 14 §39; Henschel, p. 204; Flechtner, p. 6*]. However, this provision does not fix the standards as to the conformity of goods with public law requirements. The *Mussels case* [*CISG-online 144 (GER 1995)*] established the general principle in this regard. The court stated that the seller cannot be held liable for the non-conformity of the goods with public law requirements in the buyer's country, unless one of the following three conditions is realized: (i) the same standards exist in the buyer's and in the seller's countries; (ii) the buyer has informed the seller about its country's standards; (iii) the relevant provisions are known or should be known to the seller due to particular circumstances. With regard to the last condition, the *Paprika case* [*CISG-online 279 (GER 1995)*] specified that such circumstances exist notably if the seller has a branch in the buyer's country, has a longstanding business relationship with the buyer or has often exported the goods to that country. Although the *Mussels case* principle has been recognized internationally [*CISG-online 157 (FRA 1995); CISG-online 387 (USA 1999); CISG-online 625 (USA 2002); CISG-online 654 (GER 2002); CISG-online 715 (CHE 2002); CISG-online 999*

(GER 2005); CISG-online 2113 (NZL 2010); Flechtner, pp. 7-28; Kennedy, pp. 330-331; Saidov, pp. 542-544], it does not extend to the seller's liability in regard to the payment obligation.

145 RESPONDENT alleges that the *Mussels case* principle should apply by analogy to the obligation to pay the purchase price. In the following, CLAIMANT will demonstrate that the above exposed principle relates exclusively to the seller's obligation to deliver goods in conformity with the public law regulations at the buyer's place of business **(a)**. In any case, RESPONDENT should have known about the anti-money laundering (**"AML"**) regulation **(b)**.

a. Art. 35(2) CISG applies exclusively to the seller's (CLAIMANT's) obligation as to the conformity of the goods

146 The CISG is drafted in a systematic manner [*Gillette/Walt, pp. 8-9*]. On the one hand, the seller's obligations are determined by its Chapter II and relate exclusively to the goods, *i.e.* their conformity and their delivery at the right place and at the right time [*cf. Arts. 30-44 CISG; Henschel, p. 23, Maley, p. 83*]. On the other hand, the buyer's obligations are governed by its Chapter III and include the acceptance of delivery and payment of the purchase price [*cf. Arts. 53-60 CISG; Schlechtriem/Butler, p. 156 §209*]. Finally, the CISG contains common provisions applicable to both parties' obligations [*cf. Chapter V CISG*].

147 Art. 35(2) CISG appears in Chapter II and the duties deriving from this provision relate to the goods. The payment obligation, governed by Arts. 53 and 54 CISG, includes all steps to be taken to comply with laws and regulations. RESPONDENT argues that the seller has a duty to inform the buyer about public law requirements affecting monetary obligations at the seller's place of business [*ARfA, p. 26 §19*]. Given the fundamental differences between the obligation to make payment and the one to deliver goods in conformity with public law requirements, "[t]*he same consideration*[s]" do not apply to the obligation to pay the price, contrary to RESPONDENT's allegation [*ARfA, p. 26 §19*]. On the one hand, the relevant public law standards as to the conformity of goods largely differ from one country to another, resulting in numerous regulatory trade barriers. To mention just a few examples: Canada, unlike the USA, limits the size of fruit and vegetable product cans; the USA prohibit the sale of cars with gradual effects headlights, whereas it is authorized in the EU; and contrary to a lax approach in regard to genetically modified organisms in the USA, the EU obliges producers to prove their safety and to label them accordingly [*Lester/Barbee, pp. 853-856*]. On the other hand, the standards concerning monetary obligations are mainly the same worldwide, *e.g.* all national AML regulations are implemented on the basis of the Financial Action Task Force Recommendations (**"FATF Recommendations"**). In the light of these differences, one must recognize that it is much more difficult to comply with the public law requirements concerning the conformity of goods than with monetary requirements. Thus, if it is reasonable to expect the buyer to assist the seller in the fulfillment of its obligation to comply with public law requirements, it is excessive to expect the seller to do so in regard to monetary

requirements. Ultimately, the analogous application of the *Mussels case* principle is supported neither by court decisions nor by scholars.

148 In conclusion, Art. 35(2) CISG applies exclusively to CLAIMANT'S obligation to deliver the goods. Thus, the Arbitral Tribunal should not follow RESPONDENT's analogy in regard to the *Mussels case* principle.

b. In any event, RESPONDENT should have known about the anti-money laundering regulation of Equatoriana

149 Should the Arbitral Tribunal admit the analogy made by RESPONDENT, it should refuse its application to the case at hand as RESPONDENT should have known about the Equatorianian AML regulation, *i.e.* the third exception to the *Mussels case* principle. Therefore, CLAIMANT was under no obligation to inform RESPONDENT about public law requirements affecting monetary obligations in its country.

150 In order to address the worldwide problem of money laundering, the AML system was created at both national and international levels through the establishment of inter-governmental bodies FATF and FSRBs [*Proctor, p. 147 §7.06; Lombardini I, p. 11 §34; Lombardini II, p. 1010 §7; Alhosani, pp. 66-69; Damais, p. 77*]. Their members, over 190 countries, have committed to comply with the FATF Recommendations [*ibid.*]. Each country undertook the commitment to adopt a national AML policy [*FATF Recommendations 24-35, Alhosani, p. 74*] and establish specialized Financial Intelligence Units (**"FIU"**) to deal with money laundering cases [*FATF Recommendation 29; Muller I, p. 7 §8.2; Muller II, pp. 86-87 §§3-4*]. In line with the FATF Recommendations, countries have adopted Threshold Transaction Reports (**"TTR"**), generally around USD 10,000, which trigger investigations of transactions by the FIU [*Moscow, p. 122; Carroll/McIsaac, p. 132*]. Usually, the FIU's resources come from the state budget but may as well stem from different contributions and levies [*IMF Handbook, p. 8*].

151 *In casu*, the Equatorianian government implemented its AML legislation on the basis of the UN-Model Provisions [*PO2, p. 55 §7*], which do not preclude States from adopting a cost allocation system charging private parties with FIU investigation fees. In December 2009, the Equatorianian press extensively covered the adoption of the ML/2010C Regulation and the fact that CLAIMANT's country would be one of six States where bank charges for the FIU investigations would be borne by private parties [*PO2, p. 55 §7*]. Although RESPONDENT's country, *i.e.* Mediterraneo, does not charge private parties for FIU's services, RESPONDENT should have known about the Equatorianian AML regulation. Indeed, at the end of 2009, Mediterraneo's press reported that the Equatorianian government adopted measures against money laundering [*PO2, p. 55 §7*]. RESPONDENT, which relied on the press like Carioca Business News in order to request security for costs [*cf. RSC, p. 46 §§2-3*], should have given more importance to Mediterraneo's press when it reported about the actions against money laundering in Equatoriana. In fact, RESPONDENT should have looked into the Equatorianian legislation and would have immediately

noticed the distinctive feature of the EFIU's funding. In addition, given the importance of the transferred amount, *i.e.* over USD 20 million, and the very low limits of TTR triggering the FIU investigations worldwide, RESPONDENT could not have simply assumed that its transaction would not be investigated. The consequences of RESPONDENT's negligence should not be borne by CLAIMANT.

152 In conclusion, as RESPONDENT should have known about the ML/2010C Regulation in Equatoriana, the Arbitral Tribunal should deny the existence of CLAIMANT's obligation to inform RESPONDENT about the AML legislation.

2. The payment of the bank levy is part of the buyer's (RESPONDENT's) obligation to pay the price under Art. 54 CISG

153 RESPONDENT has to bear the bank charge pursuant to Art. 54 CISG. This provision defines the buyer's fundamental obligation to pay the price as comprising any steps and costs that are necessary to ensure that payment is made [*Deeb, p. 274; Schwenzer/Fountoulakis/Dimsey, p. 424; Ferrari/Torsello, p. 224*]. Moreover, it places on the buyer a duty to comply "*with such formalities as may be required under the contract or any laws and regulations*" [*Art. 54 CISG*]. In other words, the buyer is required to comply with any foreign laws and regulations, including those of the seller's country, to the extent that they enable the payment [*Bianca/Bonell, Art. 54 §2.7; Schlechtriem/Schwenzer I, Art. 54 §4; Ferrari/Torsello, p. 224*].

154 Unless agreed otherwise, any costs associated with the payment obligation are rightfully borne by the buyer [*Brunner, Art. 54 §15*; *Deeb, p. 274*], in particular those resulting from governmental charges on "*the export of money*" [*Deeb, p. 274, FN5*]. For instance, the buyer cannot deduct the costs due to the payment by cheque from the purchase price [*CISG-online 186 (GER 1996)*]. Moreover, in the case of payment by bank transfer, the buyer has a duty to bear the risk and the costs necessary to complete its monetary obligation until the amount is credited to the seller's account [*CISG-online 282 (GER 1997)*]. Finally, a new Central Bank regulation at the buyer's place, albeit entered into force after the time of conclusion of the contract, must be respected in order to perform the payment obligation [*Cement case*].

155 In addition, the UNIDROIT Principles, which can serve as a complement to Art. 54 CISG [*Osuna-Gonsález, p. 317; Bonell, p. 352; Teichert, p. 112*], adopt the same solution. Under Art. 6.1.11 UNIDROIT Principles, each party bears the costs that allow to fully complete its performance, unless otherwise agreed [*Art. 6.1.11 UNIDROIT Principles 2010, p. 197*, *Vogenauer, Art. 6.1.11 §§1-2*]. Hence, if the seller paid the costs imposed by a specific public regulation, the buyer must reimburse them to the seller since it should bear such costs [*Art. 6.1.11 UNIDROIT Principles 2010, p. 197*]. Finally, a mere order given by the buyer to its bank to debit a certain amount is not sufficient since its debt is discharged only once the amount is credited to the seller's bank account [*Osuna-Gonsález, p. 319*].

156 In the case at hand, the ML/2010C Regulation, in force since 1 January 2010, affected all incoming transfers in Equatoriana [*PO2, p. 55 §7*]. The amounts exceeding USD 2 million were systematically examined by the EFIU as per Section 5 of the ML/2010C Regulation and charged with a 0.5% bank levy for the EFIU investigations [*Exh. C8, p. 17*; *PO2, p. 56 §10*]. Finally, after the clearance for transfer, the amounts were credited to the relevant bank accounts [*PO2, p. 55 §8*]. This said, the 0.5% bank levy charged on the purchase price of the fan blades must be considered a necessary cost to enable the payment. Even though this charge is imposed by the Equatorianian AML legislation, RESPONDENT is still obligated to comply with it in order to discharge its payment obligation.

157 In conclusion, RESPONDENT has to pay the additional amount of USD 102,192.80, *i.e.* the 0.5% bank levy, as costs associated to the transfer of the purchase price.

CONCLUSION ON ISSUE 3

158 CLAIMANT is entitled to the outstanding payment of USD 2,285,240 for the fan blades based on the current exchange rate. Under the main Agreement, the current exchange rate is to be applied for the fan blades, since both the Parties' agreement and the applicable law provide for it. The Addendum merely sets a fixed exchange rate for the clamps and does not modify the applicable exchange rate for the fan blades. The inaccurate invoice does not amount to an offer to modify the applicable exchange rate.

159 CLAIMANT is entitled to the payment of USD 102,192.80. Under the DSA, RESPONDENT must deposit the full purchase price into CLAIMANT's bank account and therefore bear the bank levy deducted from the purchase price. Even without such an agreement, RESPONDENT is under an obligation to bear this charge according to the applicable law.

PRAYER FOR RELIEF

In light of the above, CLAIMANT respectfully requests the Arbitral Tribunal to find that:

1) CLAIMANT's claims are fully admissible;
2) RESPONDENT's request for security for costs should be rejected;
3) RESPONDENT should pay CLAIMANT the outstanding amount of USD 2,285,240 for the payment of the fan blades;
4) RESPONDENT should pay CLAIMANT the bank levy of USD 102,192.80.

CLAIMANT reserves the right to amend its prayer for relief as may be required.

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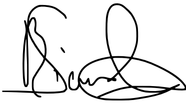
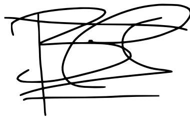
CERTIFICATE

We hereby certify that this Memorandum was written only by the persons whose names are listed below and who signed this certificate:

Geneva, 8 December 2016,

BIANCHI Simon	IBRAHIMI Besnik	MOSTIPAN Svitlana
		
MUSTAFAZADA Nigar	PEKU Jasmina	SCHWIZGEBEL Joël