TWENTY-FOURTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
VIENNA, AUSTRIA – 7 TO 13 APRIL 2017

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF ZURICH

ON BEHALF OF:	AGAINST:
SantosD KG	Wright Ltd
77 Avenida O Rei	232 Garrincha Street
Cafucopa	Oceanside
Mediterraneo	Equatoriana
RESPONDENT	**CLAIMANT**

MERY CANELLA • SIMON GLASL • ANJA KORRADI • MICHAEL LYSAKOWSKI
DORA PERIC • LAURA SCHÄUBLIN • ALEXANDRA SCHNEIDER • FABIAN SCHREDT

TABLE OF CONTENT

INDEX OF ABBREVIATIONS

AC	Advisory Council
Art./Artt.	Article/Articles
AtR	Answer to Request for Arbitration
AtS	Answer to Request for Security for Costs
AUT	Austria
BEL	Belgium
CEO	Chief Executive Officer
cf.	compare
Ch.	Chapter
consid.	consideration
COO	Chief Operating Officer
DOC.	Document
ed.	edition
Ed(s)	editor(s)
et al.	et aliter (and others)
etc.	et cetera (and so forth)
et seq.	et sequens (and the following one)
et seqq.	et sequentes (and the following ones)
EQD	Equatorianian Denars
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
FAQ	frequently asked questions
FIU	Financial Investigation Unit
FRA	France
GER	Germany
Id.	Idem (the same)
i.e.	id est (that is to say)
Int.	international
Ltd.	Limited company
MfC	Memorandum for Claimant
No.	number

NLD	Netherlands
p./pp.	page/pages
para.	paragraph/paragraphs
Plc	Public limited company
PoA	Power of Attorney
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
RfA	Request for Arbitration
RfS	Request for Security for Costs
RUS	Russia
R$	Brazilian reals
SA	Société Anonyme
Sec.	Section
sent.	Sentence
SUI	Switzerland
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
USA	United States of America
US$	United States Dollars
v.	versus
Vol.	Volume

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INDEX OF COURT DECISIONS

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Belgium	
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[GER, 2006]	Higher Regional Court Cologne
	3 April 2006
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[GER, 2007]	Federal Court of Justice of Germany
	27 November 2007
	CISG-online Case No. 1617
	in para. [144]
CISG-online 1820	Laser System Case
[GER, 2008]	Higher Regional Court Jena
	27 August 2008
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CISG-online 2302	Petty District Court Geldern
[GER, 2011]	17 August 2011
	CISG-online Case No. 2302
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[GER, 2014]	Federal Court of Justice of Germany
	28 May 2014
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INDEX OF ARBITRAL AWARDS

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ICC 7565/1994	ICC Case No. 7565 ICC Court Bulletin 1995, Vol. 6, No. 2 *in para.* [69]

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ICC 9984/1999	ICC Case No. 9984 cited in: FIGUERES DYALÁ JIMÉNEZ, Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, ICC Court Bulletin Vol. 14 No. 1 2003, pp. 71-88 *in para.* [63]
ICC 4 July 2008	Procedural Order No. 3 of 4 July 2008 cited in: ASA Bulletin 2010, Vol. 28 X. S.A.R.L., Lebanon v Y. AG, Germany *in para.* [14, 32, 41]

International Centre for Dispute of Investment Dispute

ICSID ARB/12/10	ICSID Case No. ARB/12/10 13 August 2014 RSM Production Corporation v. Saint Lucia *in para.* [14, 35]

Swiss Chambers' Arbitration Institution

HKZ 415 [2001]	HKZ Case No. 415 20 November 2001 Swiss entity v. Dutch entity cited in: ASA Bulletin 2002, Vol. 20 *in para.* [14, 20, 30]

INDEX OF LEGAL ACTS AND RULES

Cited as	Rule/Law/Statute/Principle
ACICA Rules	Rules of the Australian Centre for International Commercial Arbitration
BCA Rules	Rules of Arbitration of Bangladesh Council of Arbitration
CCBC Rules	Rules of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Rules 2012
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
DIAC Rules	Dubai International Arbitration Centre Rules 2007
ICAC Rules	Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation
ISTAC Rules	Rules of the Istanbul Arbitration Centre
JCAA Rules	Rules of the Japan Commercial Arbitration Association
KLCRA Rules	Rules of the Kuala Lumpur Regional Centre for Arbitration
PECL	Principles of European Contract Law
PICC	UNIDROIT Principles of international commercial contracts 2010
Swiss Bankruptcy Act	Federal Statute on Debt Enforcement and Bankruptcy 1889
UML	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
UML 1985	UNCITRAL Model Law on International Commercial Arbitration 1985

STATEMENT OF FACTS

1 The "**Parties**" to this arbitration are Wright Ltd ("**CLAIMANT**") and SantosD KG ("**RESPONDENT**"). CLAIMANT is a manufacturer of fan blades for jet engines incorporated in Equatoriana and RESPONDENT is a jet engine producer based in Mediterraneo.

2 On 1 August 2010, the Parties concluded the Development and Sales Agreement ("**Agreement**") for the new fan blade model TRF 192-I. After CLAIMANT had delivered the fan blades, RESPONDENT paid the purchase price due under Sec. 4.1 of the Agreement. The purchase price was expressed in US$ and calculated based on the production costs for the fan blades to which a profit margin was added. As CLAIMANT incurs its production costs in Equatorianian Denars ("**EQD**"), its costs had to be converted into US$. In the Addendum to the Agreement of 26 October 2010 ("**Addendum**") the Parties fixed the exchange rate to US$ 1 = EQD 2.01 ("**Fixed Exchange Rate**"). In the invoice sent by CLAIMANT on 14 January 2015 the price of the fan blades was calculated by applying the Fixed Exchange Rate. At the time of invoicing the prevailing exchange rate was US$ 1 = EQD 1.79 ("**Present Exchange Rate**").

3 On 15 January 2015, RESPONDENT effected payment for the fan blades to CLAIMANT's bank account at the Equatoriana National Bank ("**National Bank**"). However, pursuant to Equatorianian Regulation ML/2010C the Financial Intelligence Unit ("**FIU**") of the Equatoriana Central Bank ("**Central Bank**") investigated the payment in respect of money laundering and deducted a levy in the amount of US$ 102'192.80. Equatoriana is one of only six countries worldwide with legislation such as Regulation ML/2010C that leads to the deduction of such levies. CLAIMANT did not inform RESPONDENT about Regulation ML/2010C.

4 According to Sec. 21 of the Agreement ("**Arbitration Clause**") arbitration has to be commenced within sixty days after failure of negotiations to settle the dispute amicably ("**Time Limit**"). The negotiations failed on 1 April 2016. On 31 May 2016, the last day of the Time Limit, CLAIMANT filed its Request for Arbitration. However, the Request was incomplete. CLAIMANT only handed in an adequate Request on 7 June 2016 after expiry of the Time Limit.

5 At the end of 2015, CLAIMANT had less than US$ 200'000 in cash. Furthermore, an award of US$ 2'500'000 is currently being enforced against CLAIMANT in a domestic court. On 6 September 2016, after learning about CLAIMANT's dire financial state, RESPONDENT requested the Arbitral Tribunal (**"Tribunal"**) to order CLAIMANT to provide security for costs.

SUMMARY OF ARGUMENTS

Issue A: CLAIMANT should be ordered to provide security for costs

6 Both Art. 8.1 CCBC Rules and Art. 17 UML provide the Tribunal with power to order security for costs. As CLAIMANT is in a dire financial situation, which might deteriorate even further, it is likely that RESPONDENT will be unable to obtain reimbursement of its costs in case of an award rendered in its favour. Since all prerequisites to order security for costs are met, the RESPONDENT's Request for Security for costs should be granted.

Issue B: CLAIMANT's claims are inadmissible

7 The Parties agreed to commence arbitration within sixty days after the failure of the negotiation to settle the dispute amicably. In order to commence arbitration in accordance with the CCBC Rules, CLAIMANT should have issued a PoA for adequate representation and paid the Registration Fee in full within the time limit. However, CLAIMANT failed to do so. He who comes too late will be punished by life – CLAIMANT's claims are belated and hence inadmissible.

Issue C: CLAIMANT is not entitled to additional US$ 2'285'240 for the fan blades

8 RESPONDENT has discharged its payment obligation for the fan blades by effecting payment for the full purchase price owed to CLAIMANT. CLAIMANT trims its sails to the wind when it claims that its invoice for the fan blades only applied the Fixed Exchange Rate by mistake. CLAIMANT's invoice accurately reflected the understanding of the Parties that the Fixed Exchange Rate in the Addendum applies to the sale of the fan blades.

Issue D: CLAIMANT is not entitled to additional US$ 102'192.80 for the deducted levy

9 CLAIMANT can demand additional payment for the levy neither based on the Agreement nor on the CISG. Rather, the levy is foreign to RESPONDENT's payment obligation and is imposed –on CLAIMANT as a tax. In any case, CLAIMANT cannot demand additional payment as it did not inform RESPONDENT about the peculiar Regulation ML/2010C.

A. CLAIMANT should provide security for RESPONDENT's costs

10 RESPONDENT requests the Tribunal to order CLAIMANT to provide security for RESPONDENT's costs in the amount of US$ 200'000 (*RfS, p. 46*). The Tribunal has power to order security for costs [**I**] and the prerequisites for the order are met [**II**].

I. The Tribunal has power to order CLAIMANT to provide security for costs

11 The Tribunal has power to order CLAIMANT to provide security for costs as such measure is encompassed by both Art. 8.1 CCBC Rules [**1**] and Art. 17 UML [**2**]. It is not necessary that the Arbitration Clause expressly provide for the power to order security for costs [**3**]. Further, the Parties did not exclude the power to order security for costs in the ToR [**4**]. Finally, it is immaterial that RESPONDENT requested security only after the ToR were signed [**5**].

1. Art. 8.1 CCBC Rules is a legal basis for ordering security for costs

12 Pursuant to Art. 8.1 CCBC Rules the "*Tribunal can grant provisional measures".* Contrary to CLAIMANT's allegation (*MfC, para. 59*), Art. 8.1 CCBC Rules encompasses security for costs.

13 The CCBC Rules are intended to be in line with the latest practices in arbitration (*HADDAD/COELHO, p. 29*), following "*the patterns of the most modern Arbitration Centers in the world*" (*CAM-CCBC Website, The History of CAM-CCBC, para. 6*). Hence, the term "*provisional measures*" has to be interpreted according to the international understanding of the term. Furthermore, in the Arbitration Clause the Parties agreed to conduct their arbitration in accordance with international arbitration practice (*Exh. C 2, p. 11*).

14 In international arbitration, provisional measures, also referred to as interim measures, aim to protect the parties' rights for the duration of the proceedings (*POUDRET/BESSON, para. 604*). The purpose of security for costs is to protect a party's right to obtain reimbursement of the costs it incurred in the arbitration in case of a favourable costs award (*ICSID ARB/12/10; BÜHLER/STACHER, para. 50; POUDRET/BESSON, para. 604*). Hence, as security for costs aims to protect a party's right it qualifies as a provisional measure (*X. Holding v. Y. Co. Ltd., [2003]; HKZ 415 [2001]; ICSID ARB/12/10; ICC 4 July 2008; POUDRET/BESSON, para. 604; BERGER, p. 9; GU, p. 167; RUBINS, p. 315; BLACKABY et al., para. 5.35; UCHKUNOVA/TEMNIKOV, para. 1; CIARB, p. 2; BERGER/KELLERHALS, para. 1256 et seq.*). Thus, if an arbitral tribunal has power to order provisional measures, this includes security for costs (*BÜHLER/STACHER, para. 51; BERGER/KELLERHALS, para. 1464; BLACKABY et al., para. 5.37; CIARB, p. 2*).

15 CLAIMANT alleges (*MfC, para. 62*) that provisional measures cannot protect rights that are not yet *due*. However, according to the very case on which CLAIMANT bases its allegation, the power to order provisional measures encompasses security for costs (*X. Holding v. Y. Co.*

Ltd., [2003]). Thus, the reasoning of this case cannot be used for arguing against the power to order security for cost. CLAIMANT also bases its view on Art. 271(1) Swiss Bankruptcy Act (*MfC, para. 62*), which constitutes a foreign national statute not applicable in the case at hand. Therefore, Art. 8.1 CCBC Rules vests the Tribunal with power to order security for costs.

2. Art. 17 UML is a legal basis for ordering security for costs

16 According to Art. 17 UML "*the arbitral tribunal may, at the request of a party, grant interim measures"*. This encompasses orders for security for costs.

17 Art. 17 UML is commonly understood to vest an arbitral tribunal with power to order security for costs (*BORN, p. 2434, 2494 et seq.; KEE, p. 275.; REDFERN/O'LEARY, p. 402; CIARB, p. 2, note 7; cf. Working Group 2007, para. 48*). Pursuant to Art. 17(2)(c) UML an arbitral tribunal can order a party to "*[p]rovide a means of preserving assets out of which a subsequent award may be satisfied*". This encompasses ordering a party to provide a security (*Working Group 2003, para. 26; HOLTZMANN et al., p. 167*). Security for costs aims to preserve assets for the satisfaction of a possible costs award (*BORN, p. 2494*). Hence, orders for security for costs can be based on Art. 17(2)(c) UML (*KEE, p. 275; cf. Working Group 2007, para. 48*).

18 CLAIMANT might have argued that security for costs cannot be based on Art. 17(2)(c) UML as such order does not relate to the *subject matter*. However, even Art. 17 UML 1985, which expressly required interim measures to be "*in respect of the subject matter",* encompasses security for costs (*BORN, p. 2433 et seq.; KEE, p. 275*). Indeed, there are some opposing views stating that security for costs does not relate to the "*subject matter*" and thus is not included in Art. 17 UML 1985 (*BORN, p. 2494; HUNTLEY, p. 80*). However, the required link to the "*subject matter*" was removed when the UML was revised in 2006 to expand the tribunal's power (*Working group 2002/3, para. 52; Working Group 2005, para. 25; HOLTZMANN et al., p. 165*).

19 Thus, security for costs must be all the more within the ambit of Art. 17(2)(c) UML.

3. An express authorisation in the Arbitration Clause is not necessary

20 CLAIMANT argues that the Tribunal can only order security for costs if the Parties have expressly foreseen this power in the Arbitration Clause (*MfC, para, 59*). It bases its view on nearly thirty-year-old Swiss doctrine (*cf. MfC, para. 59*). However, the Parties agreed to conduct their arbitration in line with international arbitration practice [*para. 13*]. CLAIMANT's view neither finds support in current international arbitration practice nor in current Swiss doctrine. According to the prevailing opinion the power to order security for costs is inherent in a tribunal's power to order provisional measures [*para. 14*]. Therefore, an express authorisation in the arbitration clause is not necessary for a tribunal to have power to order security

for costs (*HKZ 415 [2001]; BÜHLER/STACHER, para. 51; BERGER/KELLERHALS, para. 1464; YESILIRMAK, para. 5-84; GU, p. 170 et seq.; BLACKABY et al., para. 5.08 et seqq., para. 5.37; BORN p. 2494 et seq.*; *WIRTH, p. 35*).

21 Thus, it is immaterial that the Parties did not expressly empower the Tribunal to order security for costs in the Arbitration Clause.

4. The Parties did not exclude the Tribunal's power in the ToR

22 As a matter of precaution RESPONDENT submits that ordering security for costs does not contradict Sec. 12.4 of the ToR. Pursuant to Sec. 12.4 "*[d]uring the course of the arbitration proceedings, each party shall bear the fees of its respective attorneys and possibly of technical assistants, of its free choice*" (*ToR, p. 43*). No Party may therefore be ordered to *bear*, *i.e.* to actually pay for, the other Party's costs during the course of the proceedings. However, this provision does not stand in the way of ordering a mere *security* for costs. If such security were ordered the Parties would still bear, *i.e.* pay for, their own costs while the proceedings are pending. Thus, ordering security for costs is in line with Sec. 12.4 of the ToR.

5. Requesting security for costs only after signing the ToR does not affect the Tribunal's power

23 CLAIMANT argues that the Tribunal lacks jurisdiction to order security for costs because no new claims may be submitted after the signing of the ToR (*MfC, para. 64 et seqq.*).

24 Indeed, according to Art. 4.21 CCBC Rules "*parties can change, modify or amend the claims [...] until the terms of reference are singed*". However, security for costs can be requested after signing the ToR because provisional measures are not "*claims*" in terms of Art. 4.21 CCBC Rules. Rather, provisional measures aim to temporarily *protect* the claim of a party (*BERGER/KELLERHALS, para. 1245*). Thus, the Request for Security for costs is not a claim but merely an ancillary request intended to protect RESPONDENT's claim to be reimbursed its costs in case of a costs award rendered in its favour.

25 Furthermore, neither Art. 8.1 CCBC Rules nor Art. 17 UML contains a time limitation on when provisional measures have to be requested. In fact, Art. 17(2) UML expressly states that provisional measures can be ordered "*at any time prior to the issuance of the award*".

26 Therefore, RESPONDENT could request security for cost after the signing of the ToR.

II. The prerequisites for ordering security for costs are fulfilled

27 While Art. 8.1 CCBC Rules does not contain prerequisites for ordering provisional measures, Art. 17A(1) UML stipulates three conditions. First, the tribunal evaluates if "*[h]arm not ade-*

quately reparable by an award of damages is likely to result if the measure is not ordered". Second, such harm has to substantially outweigh *"the harm that is likely to result to the party against whom the measure is directed if the measure is granted*". Third, there needs to be "*a reasonable possibility that the requesting party will succeed on the merits of the claim.*"

28 Presently, all three conditions are met. If security for costs is not granted, RESPONDENT is likely to incur harm not adequately reparable by an award of damages [**1**]. This substantially outweighs the harm that might result to CLAIMANT [**2**]. There is a reasonable possibility that RESPONDENT will succeed on the merits of the claim [**3**]. Contrary to CLAIMANT's argument, there are no further requirements that would speak against an order of security for costs [**4**].

1. RESPONDENT is likely to incur harm not adequately reparable

29 RESPONDENT is likely to incur harm not adequately reparable by an award of damages as it is likely that CLAIMANT will not comply with a potential costs award: CLAIMANT's balance sheet of 2015 demonstrates its poor financial state [**a**]. The loan granted to CLAIMANT by its parent company entails the same risk as third party funding [**b**]. CLAIMANT's non-compliance with a previous award of US$ 2.5 million and the circumstances of its non-compliance make it likely that it will not comply with a costs award rendered in the present arbitration either [**c**].

a) CLAIMANT's balance sheet of 2015 displays its poor financial situation

30 A strong indication for security for costs exists when a claimant lacks assets to cover a potential costs award (*BORN, p. 2495; BÜHLER/STACHER, para. 56; BERGER/KELLERHALS, para. 1599; HKZ 415 [2001]; CIARB, p. 6).* Contrary to CLAIMANT's argument (*MfC, para. 74*), its balance sheet of 2015 displays a dire financial state and thus establishes that it is likely that CLAIMANT will be unable to comply with a costs award.

31 Contrary to CLAIMANT's submission (*MfC, para. 88*), the cash and cash equivalents in its balance sheet of 2015 do not suffice to cover RESPONDENT's costs arising from the present arbitration proceedings. As of 31 December 2015, CLAIMANT has US$ 199'950'000 in cash and cash equivalents (*PO2, p. 59*) while RESPONDENT's costs amount to a minimum of US$ 200'000 but will probably be higher (*RfS, p. 46, para. 1*). Hence, CLAIMANT does not have enough liquidity to cover RESPONDENT's costs.

32 Furthermore, CLAIMANT's assets of US$ 42'757'950 (*PO2, p. 59*) are meagre considering its liabilities of US$ 40'532'950 (*Id.*). Also, in a forced sale, it is normally impossible to meet the values of the assets entered in the balance sheet (*ICC 4 July 2008*). Lastly, CLAIMANT has equity of merely US$ 2'225'000. The resulting equity ratio of 5% demonstrates that CLAIMANT is only a stone's throw away from being insolvent.

b) CLAIMANT was unable to obtain third party funding but had to misuse a loan of its parent company in order to finance this arbitration

33 The fact that CLAIMANT was unable to obtain further third party funding and had to misuse a loan of its parent company in order to finance the present arbitration demonstrates its dire financial situation. A strong indication for security for costs exists whenever a party appears to lack assets to satisfy a costs award, but is still pursuing claims in an arbitration with the help of a third party funder (*BORN, p. 2495; DARWAZEH/LELEU, p. 125*).

34 CLAIMANT failed to obtain third party funding (*PO2, p. 59, para. 29*). If a party receiving third party funding presents a strong indication for ordering security for costs, then security for costs is indicated all the more when a party is not even able to obtain such funding.

35 This conclusion is not opposed by the fact that CLAIMANT received a loan from its parent company (*PO2, p. 59, para. 29*) as the loan granted entails the same risk as third party funding. The danger resulting from third party funding is that it might enable an impecunious claimant to pursue arbitration without guaranteeing that the funder will assume responsibility for an unfavourable costs award (*RUBINS, p. 361; ICSID ARB/12/10*). As the loan of the parent company was actually granted for the production of certain fan blades, CLAIMANT was only able to proceed with the present arbitration by misappropriating the loan (*PO2, p. 59, para. 29*). This circumstance makes it very unlikely that CLAIMANT's parent company will finance the negative impacts of CLAIMANT's misuse of the loan, and hence entails the same risk as third party funding.

36 To conclude, CLAIMANT's dire financial situation is illustrated by the fact that it did not obtain third party funding and had to misuse a loan of its parent company. To put it in simple terms, grants alone do not cure but rather illustrate the pauper's financial dependency.

c) CLAIMANT's non-compliance with a previous award demonstrates the likelihood of its non-compliance with future awards

37 The fact that CLAIMANT did not comply with a previous award of US$ 2.5 million demonstrates that it is likely not to comply with a future costs award in the present arbitration.

38 CLAIMANT's financial situation is likely to deteriorate even further as another award of US$ 2.5 million is currently being enforced against it. CLAIMANT, and not its parent company as incorrectly stated by CLAIMANT (*MfC, para. 77*), did not comply with an award of US$ 2.5 million in favour of one of its suppliers (*Exh. R 6, p. 47, para. 1*). CLAIMANT argues that its non-compliance was justified because it will set off the sum with a claim of its parent company that is currently being litigated against the same supplier (*AtS, p. 49*). However, the

supplier is now enforcing the award in a domestic court and has objected to the set-off (*PO2, p. 59, para. 30*). This objection is likely to succeed: Even leaving aside whether the parent company will at all succeed in its litigation, a debt can only be set off where two parties owe *each other* money (*Art. 8.1(1) PICC; PICHONNAZ/GULLIFER, p. 11; SCHERER, p. 451*). As the claim set off by CLAIMANT is not its own, the set-off will not succeed. Hence, it is likely that the supplier's objection to the set-off will be upheld and, thus, CLAIMANT will be forced to pay the award of US$ 2.5 million, which will further deteriorate its financial state.

39 Furthermore, CLAIMANT's non-compliance with the award is reason to order security for costs. Potential difficulties concerning the enforcement of an award (*BORN, p. 2495; GU, p. 192*) and the procedural history and conduct indicating avoidance of an award (*GU, p. 196; RUBINS, p. 374 et seq.*) are reasons to grant security for costs. RESPONDENT has reason to fear that CLAIMANT will not comply with a costs award in the present arbitration because its parent company seems to use CLAIMANT's claims and obligations to pursue its own interests. Consequently, CLAIMANT's previous payment behaviour indicates that it will also default on a costs award rendered against it in the present arbitration.

40 CLAIMANT's non-compliance with an award of US$ 2.5 million indicates that it might again not comply with a potential costs award rendered against it.

2. The harm likely to result to RESPONDENT substantially outweighs the harm that might result to CLAIMANT

41 According to Art. 17A(1)(a) UML the harm likely to result to the party requesting an interim measure if the measure is not ordered has to substantially outweigh the harm that might result to the other party if the measure is ordered. This requires a "*balancing of the interests*" (*BORN, p. 2471 et seq.; GIRSBERGER/VOSER, para. 1087)*. In the case of security for costs, the respondent's interest to have a reasonable chance of being able to enforce a future costs award is to be weighed against the claimant's interest to have access to justice (*ICC 4 July 2008; ICCA-QMUL, p. 12*). Contrary to CLAIMANT's allegation (*MfC, para. 91*), RESPONDENT's interest prevails.

42 Harm is likely to result to RESPONDENT since it is likely that it will not be able to recover its costs of at least US$ 200'000 in case of a costs award rendered in its favour [*para. 29 et seqq.*]. CLAIMANT, however, does not face such harm. Its access to justice is not put in jeopardy by providing security for costs. CLAIMANT's chairman has given a personal undertaking that CLAIMANT would provide security if so ordered by the Tribunal (*PO1, p. 52, para. 3*). Hence, if CLAIMANT would be unable to provide the security, its chairman would step in.

Therefore, CLAIMANT's access to justice is, in any case, not barred.

43 CLAIMANT argues that ordering security violates the principle of equal treatment (*MfC, para. 90*). However, in the present case this principle implies the opposite: If CLAIMANT were to win on the merits, RESPONDENT would comply with a costs award. By requesting security for costs, RESPONDENT only wants to ensure that it has the same prospect and, thus, is treated equally.

44 Therefore, as CLAIMANT does not face any considerable harm, the harm likely to result to RESPONDENT substantially outweighs the harm that might result to CLAIMANT.

3. There is a reasonable possibility that RESPONDENT will succeed on the merits of the claim

45 According to Art. 17A(1)(b) UML the determination of the possibility of success on the merits shall not affect the tribunal's discretion in making any subsequent determination. Hence, the tribunal's assessment is limited to the determination of the seriousness of the party's case (*Working Group 2002/10, para. 43; BORN, p. 2478 et seq.*). As will be demonstrated in Parts B, C, and D, there is a more than reasonable possibility that RESPONDENT will succeed on the merits of the claim.

4. No further requirements speak against an order of security for costs

46 CLAIMANT argues that security for costs can only be ordered if, first, the claimant's financial state unexpectedly deteriorated since contract conclusion (*MfC, para. 79*), second, if the respondent did not cause the claimant's financial state (*MfC, para. 86 et seqq.*), and third, if the request is urgent (*MfC, para. 89*). However, under Art. 17A UML these criteria are irrelevant. None of them can be deduced from the wording and the requirement of "*urgency*" was even consciously excluded by the drafters of the UML (*Working Group 2002/10*, *para. 41*).

47 Even if the Tribunal were to take the aforementioned requirements into account, they would be met. CLAIMANT's financial state has deteriorated unexpectedly since contract conclusion [**a**]. RESPONDENT did not cause CLAIMANT's financial state [**b**]. The request is urgent [**c**].

a) CLAIMANT's financial state has deteriorated unexpectedly since contract conclusion

48 CLAIMANT's financial state has indeed deteriorated unexpectedly since contract conclusion.

49 There were no indications that CLAIMANT was in a bad financial situation when the Agreement was concluded on 1 August 2010. According to the balance sheets of 2009 and 2010, CLAIMANT had sufficient liquidity: At the end of 2009, it had US$ 875'000 and at the end of 2010, it even had US$ 10'856'000 in cash and cash equivalents (*PO2, p. 59*). At the end of 2015, however, CLAIMANT only had US$ 199'950 left (*Id.*).

50 Moreover, the deterioration of CLAIMANT's financial state was unforeseeable for RESPONDENT and, thus, not a risk RESPONDENT accepted by entering into the Agreement. When concluding the Agreement, RESPONDENT could even reasonably expect a substantial improvement of US$ 100 million in CLAIMANT's financial state. Based on an announcement of CLAIMANT's CEO on 9 November 2009, RESPONDENT could rightfully expect that CLAIMANT would receive an award of at least US$ 100 million (*PO2, para. 34, p. 60*). CLAIMANT reinforced RESPONDENT's belief during the negotiations of the Agreement (*Id.*). CLAIMANT only receiving US$ 12 million (*PO2, p. 58, para. 28*) was therefore unforeseeable to RESPONDENT.

51 Apart from that, a further deterioration due to the enforcement of the award of US$ 2.5 million against CLAIMANT is likely [*para. 38*]. RESPONDENT only learned about the award on 5 September 2016 (*Exh. R 6, p. 47)*, *i.e.* six years after the conclusion of the Agreement. To conclude, CLAIMANT's financial situation has deteriorated unexpectedly since contract conclusion and may deteriorate even further.

b) RESPONDENT did not cause CLAIMANT's dire financial situation

52 Contrary to CLAIMANT's submission (*MfC, para. 87*), CLAIMANT's dire financial state cannot be blamed on RESPONDENT. According to doctrine cited by CLAIMANT (*MfC, para. 87*), security for costs should be reconsidered if the respondent caused the claimant's poor financial state by its obstructive behaviour or "*unsavoury*" activities. However, RESPONDENT did not behave obstructively, it has a clean record. It swiftly paid the amount stated in CLAIMANT's invoice (*cf. Exh. C 3, p. 12*) and fulfilled its obligations under the Agreement [*Parts C and D*].

c) The Request for Security for costs is urgent

53 The Request for Security for costs is urgent because RESPONDENT is likely to suffer harm not adequately reparable [*see para. 29 et seqq.*].

54 Furthermore, contrary to CLAIMANT's allegation (*MfC, para. 89*), RESPONDENT issued the Request for Security for costs as soon as possible. On 5 September 2016 (*Exh. R 6, p. 47*), RESPONDENT learned of CLAIMANT's financial difficulties *i.e.* the fact that CLAIMANT has not complied with an award of US$ 2.5 million and that in another arbitration it only received US$ 12 million instead of US$ 100 million. Only one day after, RESPONDENT made its Request for Security for costs (*RfS, p. 45*).

55 **Conclusion**: The Tribunal should order CLAIMANT to provide security for RESPONDENT's costs. The Tribunal has power to order such security based on Art. 8.1 CCBC Rules and Art. 17 UML. All prerequisites for ordering security for costs are met.

B. CLAIMANT's claims are to be rejected as inadmissible

56 CLAIMANT's claims are inadmissible as they have been submitted out of time. The Arbitration Clause states: *"If no agreement can be reached each party has the right to initiate arbitration proceedings within sixty days after the failure of the negotiation*" (*Exh. C 2, p. 10 et seq.*).

57 CLAIMANT had to initiate arbitration within the Time Limit [**I**]. CLAIMANT failed to timely initiate arbitration in compliance with Artt. 4.1, 4.2 CCBC Rules [**II**]. Arbitration was not timely initiated by merely informing RESPONDENT about the initiation of the claim, either [**III**]. Further, the amendment of the Request does not render the claims admissible [**IV**].

I. CLAIMANT had to initiate arbitration within the Time Limit

58 CLAIMANT alleges that it is uncertain when the negotiation failed (*MfC, para. 39*) and that the Time Limit is not mandatory (*MfC, para. 34*). However, the Time Limit was triggered by CLAIMANT's e-mail of 1 April 2016, which establishes the failure of the negotiation [**1**]. Further, the Time Limit is mandatory [**2**]. Finally, the Time Limit does not violate the PICC [**3**].

1. The negotiation failed on 1 April 2016 and triggered the Time Limit

59 CLAIMANT's e-mail of 1 April 2016 marks the failure of the negotiation and, thus, triggered the Time Limit, which, thus, expired 60 days later on 31 May 2016.

60 The "*failure of the negotiation*" according to the Arbitration Clause can only be understood as the moment in time when it is clear to at least one party that the dispute cannot be settled amicably. It is the right of each party to unilaterally end and refuse to continue the negotiation *(MCCARTHY, para. 10; BERGER, Escalation Clauses, p. 11*). In *Vekoma v. Maran Coal* the arbitration clause stipulated that each party had the right to initiate arbitration within thirty days "*after it was agreed that the difference or dispute cannot be resolved by negotiation*" (*Vekoma BV v. Maran Coal, [SUI, 1995], consid. 3(c)*). In line with the above principle, the court deemed a unilateral statement of one party that it was not possible to settle the dispute amicably as sufficient to establish the date of failure of the negotiation, even without acceptance of the other party (*Vekoma BV v. Maran Coal, [SUI, 1995], consid. 3(c)*).

61 In the present case, on 31 March 2016, a meeting between the Parties revealed the fundamental discrepancies between them (*Exh. R 3, p. 29; PO2, p. 58, para. 23*). Consequently, CLAIMANT informed RESPONDENT in its e-mail of 1 April 2016 that it had instructed its lawyer to initiate arbitration proceedings since "*the outcome of yesterday's meeting shows, that it is presently not possible to find an amicable solution*" (*Exh. R 3, p. 29*). Hence, CLAIMANT unilaterally terminated the negotiation which, thus, failed on 1 April 2016.

2. Compliance with the Time Limit is a mandatory requirement

62 CLAIMANT alleges that "*the negotiation tire under the escalation arbitration clause"* is not mandatory and hence the Time Limit is not to be taken into account (*MfC, para. 33 et seqq.*). However, compliance with the Time Limit is mandatory in order to validly initiate arbitration.

63 First, the mandatory character of the Time Limit is expressed by the wording of the clause. As acknowledged by CLAIMANT (*MfC, para. 33, 39*), the Arbitration Clause is an escalation clause, *i.e.* a clause in which parties agree that they will try to resolve the dispute with alternative dispute resolution mechanisms such as bilateral negotiations before commencing arbitration (*KAYALI, p. 552; JOLLES, p. 329; BERGER, Escalation Clauses, p. 1*). Contractual time limits that provide for a specific time period within which arbitration must be commenced also form part of escalation clauses (*BORN/ŠĆEKIĆ, p. 229 et seq.*). An escalation clause is mandatory if its wording expresses obligations with terms such as "*shall*" or "*if*" (*ICC 9984/1999; KAYALI, p. 572; BERGER, Escalation Clauses, p. 5; FIGUERES, p. 72).* Presently, sentence 1 and 2 of the Arbitration Clause make clear that *"disputes […] **shall** be settled amicably […]. **If** no agreement can be reached each party has the right to initiate arbitration proceedings within sixty days after the failure of the negotiation*" (*Exh. C 2, p. 10 et seq., emphasis added*). Thus, the Arbitration Clause contains clear wording reflecting that the Time Limit is mandatory.

64 Second, even if the Tribunal were to conclude that the *negotiation tire* was not mandatory, the *Time Limit* would still be mandatory. The Time Limit is triggered when one party declares that it is impossible to settle amicably [*para. 60*]. Even without having negotiated before, either Party could have stated that it is not possible to settle, thus triggering the Time Limit. Hence, the Time Limit can be triggered irrespective of whether negotiations between the Parties have taken place or not. This distinction between Time Limit and negotiation tire is supported by the fact that the requirement that disputes "*shall be settled amicably*" and the Time Limit are stipulated in two separate sentences in the Arbitration Clause (*Exh. C 2, p. 11 et seq., Sec. 21, sent. 1 and 2*). Thus, the Time Limit applies irrespective of the negotiation tire.

65 Third, the Time Limit only achieves its purpose if it is mandatory. Parties stipulate time limits within which arbitration must be commenced to ensure prompt and timely resolution of a dispute (*LEW et al., para. 20-10*). The purpose is to provide legal certainty by ensuring that after expiration of a certain time no claims will arise from a certain event (*Id.; GALLOWAY et al., para. 4; MUSTILL/BOYD, p. 201*). If the Time Limit were not mandatory and CLAIMANT could still bring the claims after its expiration, the Time Limit would be pointless. Thus, in order to ensure legal certainty, the Time Limit has to be mandatory.

66 Fourth, the cases cited by CLAIMANT (*MfC, para. 35 et seqq.*) are not comparable to the present case: None concerns the mandatory character of time limits but only the enforceability of negotiation tires. As negotiation tires and time limits are two separate issues [*para. 64*], the cases are not pertinent for determining the mandatory character of time limits.

67 Consequently, the Time Limit is mandatory and must be respected.

3. The Time Limit does not violate the PICC

68 The Time Limit does not violate the minimum limitation period of one year pursuant to Art. 10.3(2)(a) PICC and is therefore valid.

69 First, the Time Limit is of procedural and not of substantive character and thus not governed by the PICC. The PICC regard limitation periods as a matter of substantive law (*WINGTEN, Art. 10.9, para. 1)* whereas case law and doctrine treat tires set forth in escalation clauses as a procedural matter (*e.g. Decision by the Federal Court of Justice [GER, 1998]; Decision by Paris Court of Appeals [FRA, 2004]; Decision by Zurich Court of Appeals [SUI, 2001]; Decision by Thurgau Court of Appeals [SUI, 2001]*; *JOLLES, p. 336; KAYALI, p. 560 et seqq.*). Accordingly, in the ICC Award 7565, the tribunal held that the time limit within which arbitration had to be initiated was of procedural character (*ICC 7565/1994; cf. Vekoma BV v. Maran Coal, [SUI, 1995], consid. 2(a)*). Since the Time Limit is part of an escalation clause [*para. 63*] and thus of procedural nature it is not governed by the PICC.

70 Second and in any event, the Time Limit does not fall under Art. 10.3(2)(a) PICC as it does not shorten the general limitation period under the PICC. Pursuant to Art. 10.3(2)(a) PICC the general limitation period cannot be shortened to below one year. According to Art. 10.2 PICC this period starts on „*the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised*". "*Facts*" in terms of this provision are facts on which the right is based, *e.g.* formation of a contract, delivery of goods or non-performance (*BONELL, PICC, Art. 10.2, p. 515*). The purpose of a minimum limitation period is to give an obligee a reasonable chance to pursue its rights after it finds out about them (*Id.; UNIDROIT 2003 DOC. 91, p. 3*). One year should provide enough time to gather evidence, seek legal advice, and try to resolve the dispute amicably – in short: to provide time for the obligee to find out if arbitration is necessary. However, the Time Limit in the Arbitration Clause does not affect this time period since it only starts after all these considerations have been made. It only commences when the Parties consider arbitration as the only possibility to solve their dispute. The failure of the negotiation might be a prerequisite for initiating arbitration, but it does not correspond with the moment the obligee finds out about the facts on

which it bases its right under Art. 10(2) PICC. Presently, this moment was on 9 February 2015 at the latest when CLAIMANT found out about the allegedly missing purchase price (*cf. Exh. C 6, p. 15*). Hence, the Time Limit is not subject to the limitations of Art. 10.3(2)(a) PICC.

71 Lastly, even if Art. 10.3(2)(a) PICC were applicable, the Time Limit would still be valid. Where it is not possible to foresee if a contractual time limit will comply with Art. 10.3 PICC, it should be given effect within the limits of Art. 10.3 PICC in order to respect the freedom of contract (*WINTGEN, Art. 103, para. 14*). Presently, the limitation period of Art. 10.2 PICC was triggered on 9 February 2015 at the latest [*para. 70*]. Hence, the one-year period ended on 10 February 2016. As the Time Limit only expired on 31 May 2016 [*para. 59*] the minimum limitation period of Art. 10.3(2)(a) PICC is respected and the Time Limit is, thus, valid.

II. CLAIMANT did not comply with Artt. 4.1, 4.2 CCBC Rules in time

72 CLAIMANT had to comply with Artt. 4.1, 4.2 CCBC Rules to initiate arbitration in time. However, CLAIMANT's Request for Arbitration of 31 May 2016 did not meet this standard.

73 The Arbitration Clause does not define how arbitration is initiated in order to respect the Time Limit. However, the Parties chose the CCBC Rules to govern their arbitration which set forth the requirements for commencing arbitration in Artt. 4.1, 4.2. The fact that the wording of the Arbitration Clause is to "*initiate*" and not "*commence*" as used in Art. 4 CCBC Rules does not imply that the Parties intended to deviate from the CCBC Rules. On the contrary, "*to initiate*" and "*to commence*" are used interchangeably by the CAM-CCBC: In order to "*initiate arbitration proceedings*", the commencement requirements pursuant to Art. 4 CCBC Rules have to be complied with (*CAM-CCBC Website, FAQ 1*). Thus, CLAIMANT had to initiate arbitration in compliance with Artt. 4.1, 4.2 CCBC Rules.

74 To commence arbitration under the CCBC Rules, a notice has to be filed to the President of the CAM-CCBC with the documents listed in Art. 4.1 CCBC Rules. *Inter alia* a "*power of attorney for any lawyer providing for adequate representation*" must be submitted pursuant to Art. 4(1)(b) CCBC Rules. Additionally, pursuant to Art. 4.2 CCBC Rules proof of payment of the Registration Fee has to be supplied "*with the notice, in accordance with Art. 12.5 CCBC Rules"*. Art. 12.5 CCBC Rules states that "*at the time of the presentation of the notice for commencement of arbitration, the claimant must pay [...] the Registration Fee*".

75 However, CLAIMANT did neither provide an adequate PoA pursuant to Art. 4(1)(b) CCBC Rules [**1**] nor pay the entire Registration Fee pursuant to Art. 4.2 CCBC Rules [**2**].

1. The PoA dated 2 April 2016 does not comply with Art. 4.1(b) CCBC Rules

76 Contrary to CLAIMANT's allegation (*MfC, para. 22 et seqq.*), the PoA dated 2 April 2016 attached to the Request for Arbitration does not comply with Art. 4.1(b) CCBC Rules.

77 First, the submitted PoA does not provide for CLAIMANT's adequate representation as it was not issued *on behalf of* CLAIMANT but "*in the matter of Wright Holding Plc*" (*PoA 1, p. 18*), *i.e.* CLAIMANT's parent company (*Mr Fasttrack to CAM-CCBC, p. 20*).

78 Second, the PoA was not issued *by* CLAIMANT but by its parent company (*Id.*), which did not have power to issue a PoA on behalf of CLAIMANT. A PoA issued by a parent company does not expand to its separately incorporated subsidiaries (*LEEDS, para. 10*). As distinct companies, they must issue their own PoA (*Id.*). Presently, while CLAIMANT and its parent company belong to the same group, they are still independent legal entities (*PO2, p. 54, para. 2*). Hence, CLAIMANT's parent company lacked power to issue the PoA on behalf of CLAIMANT.

79 Third, the "*group of companies doctrine*" invoked by CLAIMANT (*MfC, para. 22 et seqq.*) does not apply to a PoA. Under very specific circumstances, this doctrine might extend arbitration agreements to non-signatories (*ICC 4131/1982; FERRARIO, p. 650; GIRSBERGER/VOSER, para. 302; BLACKABY et al., para. 2.43 et seqq.*). This principle cannot be applied to a PoA which is a legal document by which one person constitutes another as its attorney (*GARNER, p. 1380*). Hence, the group of companies doctrine is not applicable.

80 Fourth and contrary to CLAIMANT's allegation (*MfC, para. 15 et seqq.*), the submission of a PoA is mandatory to commence arbitration under the CCBC Rules. Even though other arbitration rules may not require the submission of a written PoA for commencing arbitration, the Parties opted for the CCBC Rules, which explicitly ask for such a document in Art. 4.1(b). The necessity of a "*power-of-attorney document*" to commence arbitration is even emphasized on the homepage of the CAM-CCBC (*CAM-CCBC Website, FAQ 1*).

81 Fifth and contrary to CLAIMANT's allegation (*MfC, para. 20*), it is irrelevant that authority as such can be granted without written document under the PICC. Art. 4.1(b) CCBC Rules requires a written PoA and takes precedence over the provisions of the PICC as it forms part of the Party's agreement and is *lex specialis* regarding commencement of arbitration. In any event, CLAIMANT did not provide any evidence that authority was granted informally.

82 To conclude, CLAIMANT's Request did not comply with Art. 4.1(b) CCBC Rules as no adequate PoA was attached.

2. CLAIMANT did not pay the Registration Fee as per Art. 4.2 CCBC Rules

83 CLAIMANT did not pay the entire Registration Fee on 31 May 2016 and thus did not commence arbitration proceedings in accordance with Art. 4.2 CCBC Rules.

84 According to Artt. 4.2, 12.5 CCBC Rules, the Registration Fee has to be paid at the latest when the request for arbitration is issued, as proof of payment has to be attached to the notice of arbitration. When CLAIMANT filed its Request on 31 May 2016 the Registration Fee was only partially paid: R$ 3'600 of the required R$ 4'000, *i.e.* 90% of the Fee were missing (*Order of the President, p. 19*). Thus, CLAIMANT did not comply with Art. 4.2 CCBC Rules.

85 CLAIMANT seems to allege that in international arbitration practice payment of the Registration Fee is not necessary to commence arbitration (*MfC, para. 27*). However, international arbitration practice is not relevant since the CCBC Rules clearly require payment of the Registration Fee to commence arbitration. In any case, in international arbitration practice, the arbitration does not commence if a claimant fails to pay the registration fee (*cf. Artt. 4.4, 4.6 DIAC Rules; Artt. 6.1(b)(iii), 6.2 BCA Rules; Art. 14(5) JCAA Rules; Art. 5.2 ACICA Rules; Art. 2(2) KLRCA Rules; Art. 7(6) ISTAC Rules; Artt. 8(1), 14(1) ICAC Rules*).

86 To conclude, CLAIMANT's only partial payment does not comply with Art. 4.2 CCBC Rules.

III. Alternatively, CLAIMANT did not initiate arbitration in time by informing RESPONDENT about the claims

87 CLAIMANT alleges that in order to initiate arbitration in accordance with the Arbitration Clause, a complete request for arbitration is not necessary. CLAIMANT argues that it is sufficient that RESPONDENT is provided "*with legal certainty of how to behave and sufficient information to identify the nature of the claim and the counter-party*" (*MfC, para. 15*). Even if the Tribunal were to follow CLAIMANT's own understanding of "*initiation of arbitration proceedings*", CLAIMANT did not initiate the proceedings in time.

88 RESPONDENT could be certain about the existence and the nature of the arbitral claim only once it finally received CLAIMANT's Request for Arbitration. In the same vein, Art. 21 UML – which would apply if the CCBC Rules did not regulate the commencement – provides that arbitral proceedings "*commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.*" It does not suffice that the respondent merely indicates its intention to later maybe initiate arbitration proceedings (*BORN, p. 2213*).

89 In its e-mail of 1 April 2016, CLAIMANT merely indicated that it had instructed its lawyer to prepare proceedings (*Exh. R 3, p. 29*). RESPONDENT only received the Request for Arbitration

on 8 June 2016 (*Notice for Commencement, p. 22; cf. Order of the President, p. 19, para.* 3), when the Time Limit had already expired. To conclude, CLAIMANT did not initiate arbitration proceedings in time by informing RESPONDENT about the initiation of the claims, either.

IV. The amendment of the Request does not render the claims admissible

90 The President of the CAM-CCBC demanded an amendment of the Request as it did not comply with Artt. 4.1(b), 4.2 CCBC Rules. Despite CLAIMANT's amendment on 7 June 2016 (*PoA 2, p. 21; Mr Fasttrack to CAM-CCBC, p. 20*), the claims are not admissible.

91 First, CLAIMANT's statement that the CCBC Rules "***expressly*** *provide that [a] RfA filed without all elements could be amended keeping the date of the initial RfA as date of commencement of the arbitration*" (*MfC, para. 48, emphasis added*) is mere assertion. Such a provision does not exist in the CCBC Rules.

92 Second and contrary to CLAIMANT's allegation (*MfC, para. 51 et seq.*), the order of the CAM-CCBC's President requesting amendment did not extend the Time Limit. The President only analyses whether the formal requirements under Artt. 4.1, 4.2 CCBC Rules are met (*cf. Order of the President, p. 19)*. Apart from that, he does not examine the submitted documents which would be necessary to calculate the Time Limit. The only exception concerns the examination of objections regarding "*existence, validity or effectiveness of the arbitration agreement*" according to Art. 4.5 CCBC Rules. In the case at hand, however, this is not disputed. Consequently, the President did not verify whether the Time Limit had been met. Thus, by requesting amendment of CLAIMANT's Request the President did not extend the Time Limit.

93 Third and contrary to CLAIMANT's allegation (*MfC, para. 51 et seq.*), the President does not have power to extend the Time Limit based on Art. 6.4 CCBC Rules. First, Art. 6.4 CCBC Rules only grants power to extend time periods to the "*Arbitral Tribunal"* but not to the President of the CAM-CCBC. Second, it only concerns *"time periods provided in these Rules"*. The Time Limit, however, is not set forth in the CCBC Rules but in the Agreement. Hence, Art. 6.4 CCBC Rules neither empowers the President nor the Tribunal to extend the Time Limit agreed upon by the Parties.

94 Fourth, Art. 2.6(i) CCBC Rules does not empower the President to extend the Time Limit, either. This provision vests the President with power to extend time periods that do not fall under the Tribunal's authority. However, contractual time limits are not encompassed by "*time periods*" in terms of Art. 2.6(i) CCBC Rules. "*[T]ime periods*" only refers to administrative time periods within the CCBC Rules since the CAM-CCBC's task under Art. 2.2 CCBC Rules is to "*administer arbitration*". Encompassed is *e.g.* the time period

within which arbitrators have to fill out the "*Conflict of Interest and Availability Questionnaire*" under Art. 4.6 or the period in which the parties must comment on the Questionnaire under Art. 4.7 CCBC Rules. Thus, the President is not empowered to extend the contractual Time Limit.

95 Consequently, CLAIMANT's amendment of 7 June 2016 does not render the claims admissible.

96 **Conclusion**: CLAIMANT's claims are inadmissible since they have not been submitted in time. CLAIMANT did neither commence arbitration within the Time Limit by complying with Artt. 4.1, 4.2 CCBC Rules nor by informing RESPONDENT about the initiation of the claim. Further, the amendment of 7 June 2016 does not cure the defective Request.

C. CLAIMANT is not entitled to additional payment of US$ 2'285'240 as the price of the fan blades is based on the Fixed Exchange Rate

97 RESPONDENT has discharged its payment obligation in accordance with Art. 53 CISG by effecting payment for the fan blades in the amount requested in CLAIMANT's invoice of 14 January 2015. CLAIMANT's invoice correctly applied the Fixed Exchange Rate of US$ 1 = EQD 2.01 stipulated in the Addendum to the Agreement. CLAIMANT erroneously submits that the price for the fan blades has to be calculated based on the Present Exchange Rate of US$ 1 = EQD 1.79 prevailing at the time of invoicing and claims the price difference of US$ 2'285'240.

98 However, CLAIMANT is not entitled to additional payment as the Fixed Exchange Rate in the Addendum applies to the sale of the fan blades [**I**]. None of CLAIMANT's arguments for the application of the Present Exchange Rate is compelling [**II**]. Even if the Tribunal were to conclude that the Fixed Exchange Rate of the Addendum does not apply to the entire Agreement, the latter has been modified by the invoice so that the Fixed Exchange Rate applies [**III**].

I. The Fixed Exchange Rate in the Addendum applies to the Agreement

99 The interpretation of the Addendum shows that the Fixed Exchange Rate provided therein applies to the entire Agreement, and thus also to the price calculation of the fan blades.

100 Pursuant to Art. 8(2) CISG contracts have to be interpreted according to the understanding a reasonable person of the same kind as the other party would have had in the same circumstances (*SCHMIDT-KESSEL, Art. 8, para. 3*). According to Art. 8(3) CISG in determining the understanding a reasonable person would have had due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices, usages, and any subsequent conduct of the parties.

101 Contrary to CLAIMANT's submission (*MfC, para. 119 et seqq.*), a reasonable person in terms of Art. 8(2) CISG would have understood the Fixed Exchange Rate to apply to the sale of the fan blades. The wording of the Addendum is clear [**1**]. The Fixed Exchange Rate applies because the Addendum modified the Agreement [**2**]. The application of the Fixed Exchange Rate is reasonable in view of the transaction volume of the sale of the fan blades [**3**]. CLAIMANT's subsequent conduct confirms the Fixed Exchange Rate [**4**]. Finally, the Fixed Exchange Rate corresponds with the Parties' established practice [**5].**

1. The wording of the Addendum shows that the Fixed Exchange Rate applies

102 The starting point of interpretation is the wording of the contract (*SCHMIDT-KESSEL, Art. 8, para. 13; SCHWENZER/HACHEM/KEE, para. 26.16*). Special weight is to be given to the usual meaning of the terms used by the parties (*SCHMIDT-KESSEL, Art. 8, para. 41*).

103 The Addendum states that "*[o]ther terms as per main **A**greement*" apply to the sale of the clamps and that "*[t]he exchange rate for the **a**greement is fixed to US$ 1 = EQD 2.01*" (*Exh. C 2, p. 11, emphasis added*). Contrary to CLAIMANT's assertion (*MfC, para. 109*), the term "***a**greement*" encompasses the Addendum as well as the Agreement. Thus, the Fixed Exchange Rate applies to the purchase of the clamps and the fan blades.

104 The Parties have consistently used the term "*Addendum*" when referring to the Addendum (*cf. RfA, p. 5, para. 8, 14; Exh. C 4, p. 13; Exh. C 5, p. 14; Exh. C 7, p. 16; AtR, p. 25, para. 10, 17; Exh. R 2, p. 28*) and "***A**greement*" with a capital "*A*" when referring to the Development and Sales Agreement (*cf. RfA, p. 6, para. 17; Exh. C 2, p. 10, Sec. 2.3, 20; Exh. C 4, p. 13; Exh. C 5, p. 14; Exh. C 7, p. 16; AtR, p. 25, para. 10, 16 et seq.; Exh. R 2, p. 28; Exh. R 5, p. 31; Mr Fasttrack to Tribunal, p. 49; Exh. C 9, p. 50*). As the Parties have given the terms "***A**greement*" and "*Addendum*" a consistent, distinct, and deliberate meaning, the scope of application of the term "***a**greement*" as used in the Addendum cannot be limited to either the "***A**greement*" or the "*Addendum*". Therefore, "***a**greement*" has to be understood in a broad sense including both the sale of the clamps and the fan blades.

2. The Fixed Exchange Rate applies because the Addendum modified the Agreement

105 In the Agreement the Parties had forgotten to include a provision on the applicable exchange rate (*Exh. R 5, p. 31; AtR, p. 25, para. 10*). RESPONDENT therefore proposed to conclude the Addendum and insisted on the Fixed Exchange Rate in order to clarify the Agreement (*Id.*). Contrary to CLAIMANT's assertion (*MfC, para. 102 et seqq.*), the Addendum is not a separate contract. Rather, considering the strong connection between the clamps and the fan blades a

reasonable person in terms of Art. 8(2) CISG must have understood that the Addendum modified the Agreement. Thus, the Fixed Exchange also applies to the sale of the fan blades.

106 Pursuant to Art. 29(1) CISG a contract may be modified by the mere agreement of the parties. By modifying a contract, parties amend pre-existing contractual terms (*SCHLECHTRIEM, p. 422; CISG-online 128, [USA, 1994]*). Contract modifications do not lead to a separate contract (*BERGSTEN, p. 51; DATE-BAH, Art. 29, para. 1.3*).

107 RESPONDENT informed CLAIMANT that "*the easiest way to regulate the purchase of the clamps is to sign an addendum to [the] […] Agreement and not to enter into a separate contract*" (*Exh. R 2, p. 28*). CLAIMANT accepted RESPONDENT's suggestion "*to link the agreement in regard to the clamps to the contract in regard to the TRF 192-I fan blades*" and explicitly "*agree[d] to the fixed exchange rate*" in its e-mail of 24 October 2010 (*Exh. R 4, p. 30*). On 26 October 2010, the Parties included the Addendum into the Agreement and thus modified it.

108 Contrary to CLAIMANT's submission (*MfC, para. 104 et seqq.*), there is no requirement that the subject matter of a main contract and its modification have to be the same. CLAIMANT argues that the Addendum does not modify the Agreement as they do not concern the same subject matter (*Id.*). However, such a prerequisite exists neither under Art. 29(1) CISG nor according to the case law or legal writing cited by CLAIMANT (*cf. MfC, para. 105*). Instead, according to Art. 29(1) CISG the principle of freedom of contract applies to contract modifications without stint. Therefore, the Addendum is a modification of the Agreement.

109 Even if there were a requirement of identity of subject matter between main contract and its modification, it would be fulfilled. There is a strong connection between the subject matter of the Addendum and the Agreement as both pursue the same objective, *i.e.* the development and production of a new fan blade to be incorporated into RESPONDENT's new jet engine (*Exh. C 2, preamble 5 et seq.*). The delivery of suitable clamps is essential for this goal as it enables RESPONDENT to attach the fan blades to the shaft of the fans (*RfA, p. 4 et seq., para. 8*). CLAIMANT itself considered linking the Agreement to the Addendum as "*sensible*" (*Exh. R 4, p. 30*). Thus, a reasonable person in terms of Art. 8(2) CISG must have understood that the Addendum modified the Agreement. Hence, in view of the interrelation between the Agreement and Addendum, the Fixed Exchange Rate extends to the Agreement.

3. Applying the Fixed Exchange Rate is reasonable in view of the transaction volume of the sale of the fan blades

110 Considering the vastly different transaction volumes of the sale of the fan blades and the sale of the clamps, a reasonable person in terms of Art. 8(2) CISG must have understood the Fixed

Exchange Rate to apply to both sales.

111 CLAIMANT acknowledges that the clamps sale is economically insignificant compared to the fan blades (*Exh. C 9, p. 50, para. 5*). Indeed, the purchase price for the 2'000 clamps amounts to only US$ 183'343.28 (*Exh. C 3, p. 12*), compared to the minimum price of US$ 19'950'000 for the fan blades (*Exh. C 2, p. 10, Sec. 4.1*). Thus, the transaction volume of the fan blades is at least 108 times bigger than the one of the clamps. As the Fixed Exchange Rate undisputedly applies to the commercially insignificant sale of the clamps, a reasonable person in terms of Art. 8(2) CISG would have understood that the Fixed Exchange Rate also has to apply to the sale of the fan blades whose transaction volume is at least 108 times bigger.

112 This is all the more the case as CLAIMANT's COO and negotiator of the Addendum had been informed by e-mail of 10 November 2009 about the de-risking strategy adopted for RESPONDENT by its parent company at the time (*PO2, p. 57, para. 18*). Part of this de-risking strategy was the stipulation of fixed exchange rates in all of RESPONDENT's contracts (*Exh. R 1, p. 27*). Contrary to CLAIMANT's argument (*MfC, para. 122*), the de-risking of RESPONDENT was still a concern at the time of the Addendum's conclusion as RESPONDENT still belonged to Engineering International when the Agreement was signed (*PO2, p. 54, para. 1*).

113 Consequently, a reasonable person in terms of Art. 8(2) CISG must have understood the Fixed Exchange Rate to apply to both the sale of the clamps and the sale of the fan blades.

4. CLAIMANT's subsequent conduct confirms that the Fixed Exchange Rate applies

114 The application of the Fixed Exchange Rate to the fan blades is confirmed by CLAIMANT's subsequent conduct in terms of Art. 8(3) CISG. Subsequent conduct can manifest itself in "*declarations, notices and actions*" (*CISG-online 1376, [AUT, 2005]*), *e.g.* by sending an invoice (*UNCITRAL Digest 2012, Art. 8, para. 24; CISG-online 1456, [RUS, 2005]*).

115 CLAIMANT's invoice of 14 January 2015 affirmed the application of the Fixed Exchange Rate. It shows that CLAIMANT accurately applied the Fixed Exchange Rate to convert its production costs from EQD into US$ (*PO2, p. 57, para. 19*). Consequently, CLAIMANT subsequently confirmed the Parties' understanding of applying the Fixed Exchange to the sale of the fan blades in its invoice.

5. Applying the Fixed Exchange Rate corresponds with the Parties' practice

116 Contrary to CLAIMANT's contentions (*MfC, para. 149 et seqq.*), the Parties have established a binding practice in terms of Art. 9(1) CISG between themselves to apply the exchange rate prevailing at the time of contract formation [**a**] by which they are still bound [**b**].

a) The practice consists in applying the exchange rate prevailing at contract formation

117 Pursuant to Art. 9(1) CISG the parties are bound by any practices which they have established between themselves. In order to establish a practice, a certain conduct of a certain duration (*BONELL, Art. 9, para. 2.1.1; VISCASILLAS, para. 145; BOUT, Ch. II, B; SUN, p. 84; ESSER, p. 450; GRAFFI, p. 108; CISG-online 329, [SUI, 1997]; CISG-online 1093, [AUT, 2005]*) has to exist between two parties (*BOUT, Ch. II, B; SUN, p. 84; ESSER, p. 450*).

118 First, the Parties have established a practice of applying the exchange rate at the time of contract formation in two previous transactions. Contrary to CLAIMANT's submission (*MfC, para. 149*), two prior contracts can fulfil the requirement of frequency (*CISG-online 321, [NLD, 1996]*). Moreover, in the case *Calzaturificio Claudia v. Olivieri Footwear*, the court held that even "*one transaction is enough to establish a course of dealing*" (*CISG-online 440, [USA, 1998]*). Presently, the first contract between the Parties was formed on 4 March 2003, while the second was concluded on 3 January 2005 (*PO2, p. 54, para. 5*). Both contracts contained a price formula like the one in Sec. 4.1 of the Agreement: The formulas contained different thresholds and profit margins and the purchase price was determined in US$ (*Id.; cf. RfA, p. 7, para. 21*). Additionally, the purpose of both contracts was the joint development of a fan blade (*Exh. C 1, p. 8; cf. AtR, p. 24, para. 7 et seq.; PO2, p. 54, para. 5*). Lastly, the Parties did not define the applicable conversion rate in both previous contracts (*Exh. R 5, p. 31*) and ended up using the exchange rate prevailing at the time of contract conclusion (*PO2, p. 54, para. 5*). Therefore, the two previous contracts constitute a certain conduct of a certain duration between the Parties and establish a practice.

119 Second and contrary to RESPONDENT's argument (*MfC, para. 150*), the practice has been established between CLAIMANT and RESPONDENT and not between the Parties and their former parent company. Though it may be true that it was the former parent company which defined the exchange rate under the prior contracts (*PO2, p. 54, para. 5*), this only affected the Parties' rights and obligations and thus only their contractual relationship. On the contrary, the former parent company has not been a party to either of the two previous contracts. Thus, the practice has been established between the Parties themselves.

b) The Parties are bound by the practice they have established between themselves

120 Established practices in terms of Art. 9(1) CISG are binding as the parties can trust in the continuation of a certain conduct (*HONNOLD/FLECHTNER, Art. 9, para. 116; BOUT, Ch. II, B; SUN, p. 84*). A practice ceases to be binding only when the circumstances have changed considerably or if one party notifies the other that it no longer wants to be bound by the practice

(*HONNOLD/FLECHTNER, Art. 9, para. 116; WITZ, Art. 9, para. 17*).

121 Contrary to CLAIMANT's contention (*MfC, para. 150*), the fact that the Parties are no longer subsidiaries of the same parent company does not lead to the termination of their practice.

122 CLAIMANT was sold on 27 July 2010 by its former parent company, *i.e.* five days before the Agreement's formation (*PO2, p. 54, para. 1*). Thus, CLAIMANT knew that the Parties would no longer belong to the same parent company when the Agreement would be performed. Nevertheless, in the Agreement the Parties settled on a price formula "*largely identical*" to the one in their prior two contracts (*PO2, p. 54, para. 5*). Particularly, like the previous price formula the price formula in the Agreement is denominated in US$ and based on a "*cost-plus*" structure consisting of production costs and profit margins (*Id.*). The fact that the Parties were no longer part of the same corporate group when entering into the Agreement did not lead them to consider it necessary to modify their price formula. Absent any agreement to the contrary, a reasonable person could therefore rightfully expect the implementation of a price formula so glaringly similar to the one used in the previous two contracts to mean that the Parties agreed to apply it in the same way as they had done previously. Hence, a reasonable person could expect that the Parties would continue their practice of applying the exchange rate of contract conclusion even if they no longer belong to the same corporate group. Therefore, pursuant to Art. 9(1) CISG, the Parties are still bound by their established practice to apply the exchange rate at the time of contract formation. Consequently, as the purchase price under the previous two contracts was calculated irrespective of currency depreciation occurring after contract conclusion, the Fixed Exchange Rate has to apply because it guarantees that potential currency depreciation until performance of the Agreement will not affect the purchase price.

II. CLAIMANT's arguments against the application of the Fixed Exchange Rate are not compelling

123 Contrary to CLAIMANT's allegation, the application of the Fixed Exchange Rate does not lead to an unbalanced risk allocation between the Parties [**1**]. Additionally, the Fixed Exchange Rate does not negate the purpose of the Agreement [**2**]. Furthermore, the Present Exchange Rate does not apply based on Art. 6.1.9 PICC [**3**] or the *contra proferentem* principle [**4**].

1. Applying the Fixed Exchange Rate does not lead to an unbalanced risk allocation

124 CLAIMANT argues that the application of the Fixed Exchange Rate would result in an unbalanced risk allocation as it would cause CLAIMANT to assume the exchange rate risk in addition to the risk stemming from the maximum price in Sec. 4.1 of the Agreement (*MfC, para. 119*).

However, the application of the Fixed Exchange Rate does not lead to an unbalanced risk allocation between the Parties.

125 First, the risk imposed on CLAIMANT by the stipulation of the maximum price is balanced by the stipulation of the minimum price. CLAIMANT omits that the Parties not only agreed on a maximum price, but also on a minimum price, which RESPONDENT had to pay irrespective of CLAIMANT's production costs (*Exh. C 2, p. 10, Sec. 4.1*). Thus, the risk borne by CLAIMANT by agreeing on a maximum price is counterbalanced by the definition of a minimum price.

126 Second, the application of the Fixed Exchange Rate to the price formula of Sec. 4.1 of the Agreement does not lead to an unbalanced distribution of risk between the Parties. As the Parties decided to use a price structure in the Agreement that was largely identical to the one already used in their previous two contracts (*PO2, p. 54, para. 5*), they replaced the older prices, threshold values, and profit margins with the ones eventually agreed upon under the Agreement (*AtR, p. 24, para. 8*). As CLAIMANT readily admits, these negotiations about the exact specifications of the price formula were carried out on the basis of the prevailing exchange rate of around US$ 1 = EQD 2 (*RfA, p. 4, para. 7*). CLAIMANT itself was of the opinion that the "*[e]xchange rate should be around 2–1 [as it] ha[d] been very stable over the last years*" (*Exh. C 1, p. 8*). Therefore, the Present Exchange Rate would distort the Parties' risk allocation as the determination of the minimum price and maximum price was based on the Fixed Exchange Rate. Only the application of the Fixed Exchange Rate ensures that the balanced risk allocation between the Parties is maintained.

2. Applying the Fixed Exchange Rate does not negate the purpose of the Agreement

127 When interpreting a contract under the CISG, its purpose has to be taken into account (*BUTLER, p. 60; SCHMIDT-KESSEL, Art. 8, para. 29; ZELLER, p. 320; ICC 8240/1995*).

128 CLAIMANT argues that the application of the Fixed Exchange Rate negates the Agreement's purpose of covering CLAIMANT's production costs (*MfC, para. 126 et seqq.*).

129 However, there is no provision in the Agreement nor any communication between the Parties indicating that it is the purpose of the Agreement to cover CLAIMANT's expenses. On the contrary, the purpose of the Agreement is the joint development and production of a new fan blade to be incorporated into RESPONDENT's new jet engine (*Exh. C 2, p. 9, preamble 3, 5 et seqq.; RfA, p. 4, para. 3; AtR, p. 24, para. 6*).

130 When entering into the Agreement, CLAIMANT knew that the conversion of its production costs from EQD into US$ would pose the risk of exchange rate fluctuations (*Exh. C 1, p. 8*). If

it truly had been the purpose of the Agreement to cover CLAIMANT's production costs, a reasonable person in CLAIMANT's position would have insisted on an express provision in the Agreement that would ensure the fulfilment of this purpose. As CLAIMANT omitted to do so, it cannot retroactively allege that the purpose of the Agreement was the coverage of its production costs, now that the exchange rate has developed to its detriment.

131 Thus, applying the Fixed Exchange Rate does not frustrate the purpose of the Agreement.

3. The Present Exchange Rate does not apply based on Art. 6.1.9(3) PICC

132 Contrary to CLAIMANT's submission (*MfC, para. 141 et seqq.*), the Present Exchange Rate does not apply based on Art. 6.1.9(3) PICC. Pursuant to Art. 6.1.9(1) PICC, the obligor can be allowed to pay the monetary obligation in the currency of the place for payment even if the price is expressed in a different currency. In that case, Art. 6.1.9(3) PICC requires the payment to be made in application of the exchange rate prevailing when payment is due.

133 However, in the present case the monetary obligation under the Agreement has to be paid in US$ and not in the currency of the place of payment, *i.e.* EQD (*Exh. C 2, p. 10, Sec. 4.1; Exh. C 3, p. 12, PO2, p. 57, para. 19*). Therefore, CLAIMANT cannot invoke Artt. 6.1.9(1), 6.1.9(3) PICC as they do not apply.

4. The *contra proferentem* principle is not applicable

134 CLAIMANT submits that the Present Exchange Rate applies because the Tribunal has to interpret the Fixed Exchange Rate clause against RESPONDENT (*MfC, para. 134 et seqq.*).

135 According to the *contra proferentem* rule doubts concerning the wording of a contract are to be resolved against the drafter (*CISG-online 2513, [GER, 2014], para. 21; HONNOLD/FLECHTNER, Art. 8, para. 107.1; ZUPPI, Art. 8, para. 24*). However, the *contra proferentem* rule only applies if a provision remains ambiguous even after interpretation pursuant to Art. 8 CISG (*CISG-online 225, [GER, 1996]; SCHROETER, in: IHR, p. 179*).

136 Presently, the Fixed Exchange Rate clause is not unclear or ambiguous in regard to its sphere of application [*para. 104*]. Consequently, the *contra proferentem* rule is not applicable and does not lead to the application of the Present Exchange Rate to the sale of the fan blades.

III. Alternatively, the invoice constitutes a modification of the Agreement so that the Fixed Exchange Rate applies

137 Even if the Tribunal were to conclude that the Parties initially agreed on the Present Exchange Rate, the Fixed Exchange Rate still applies based on the invoice for the fan blades of 14 January 2015. In that case the invoice would not be subsequent conduct confirming the

Parties' original intent [*cf. para. 114 et seq.*]. Instead, CLAIMANT's invoicing and RESPONDENT's respective payment would constitute a modification of the Agreement in terms of Art. 29 CISG to apply the Fixed Exchange Rate [**1**] by which CLAIMANT would be bound [**2**].

1. The invoice and its payment would constitute a modification of the Agreement

138 Pursuant to Art. 29(1) CISG a contract may be modified by the mere agreement of the parties. The modification can be made in the same contract or in a different instrument that complements it, *e.g.* an invoice (*CISG-online 1820, [GER, 2008]; SCHROETER, Art. 14, para. 2*). The provisions on offer and acceptance (Artt. 14–24 CISG) as well as the general rules on interpretation of the contract (Art. 8 CISG) apply to the modification of a contract (*VISCASILLAS, in: J.L. & Com., p. 171 et seq.*). Presently, CLAIMANT's invoice applying the Fixed Exchange Rate and RESPONDENT's issuance of payment modified the Agreement.

139 First, the invoice of 14 January 2015 is sufficiently definite as required by Art. 14(1) CISG as it indicates the goods and expressly determines the price. CLAIMANT's invoice sets out the production costs per fan blade in EQD, the Fixed Exchange Rate for the conversion into US$, the price formula of the Agreement, and the final price (*PO2, p. 57, para. 19*).

140 Second, the invoice indicates CLAIMANT's intention to be bound in case of acceptance as required by Art. 14(1) CISG. When determining the offeror's intention to be bound only the understanding a reasonable person of the same kind as the offeree would have had as per Art. 8(2) CISG is relevant (*KÖTZ, p. 27; GIANNINI, para. 1.1*). The offeror has to be treated according to the legal appearance it has created (*CISG-online 336, [SUI, 1997], consid. 5*). CLAIMANT submits that the application of the Fixed Exchange Rate in the invoice was due to an accounting mistake and thus does not reflect its true intentions (*MfC, para. 99*). However, a reasonable person in the same circumstances as RESPONDENT had no reason to assume that CLAIMANT applied the Fixed Exchange Rate mistakenly. Considering the Fixed Exchange Rate expressly stipulated in the Addendum [*para. 102 et seqq.*] and the Parties' practice of applying the exchange rate of contract conclusion [*para. 116 et seqq.*], a reasonable person in RESPONDENT's shoes could rightfully expect that CLAIMANT intended to be bound by the Fixed Exchange Rate used in its invoice in terms of Art. 14(1) CISG.

141 Third, RESPONDENT accepted CLAIMANT's offer to modify the Agreement by effecting payment of the invoice. Pursuant to Artt. 23, 18(2) CISG a contract is concluded when an acceptance of an offer becomes effective, *i.e.* when the indication of assent reaches the offeror. A buyer's acceptance of goods or the payment of an invoice are indications of assent and

thus an acceptance of an offer in terms of Art. 18(1) CISG (*CISG-online 1820, [GER, 2008]; CISG-online 1106, [BEL, 2005]; CISG-online 1376, [AUT, 2005]*; *BUTLER, §3.07; SCHROETER, Art. 18, para. 13*). Presently, RESPONDENT's e-mail of 15 January 2015 confirmed delivery of the fan blades and informed CLAIMANT that it had effected payment for the invoice (*Exh. C 3, p. 12*). RESPONDENT thereby accepted CLAIMANT's offer to modify the Agreement in terms of Art. 18(1) CISG. In accordance with Artt. 23, 18(2) CISG the modification was concluded when CLAIMANT received RESPONDENT's e-mail of 15 January 2015.

2. CLAIMANT would be bound by the modification

142 CLAIMANT might argue that it has revoked its offer to modify the Agreement under Art. 16 CISG and claim avoidance of the modification based on error in expression in terms of Art. 8(1) CISG or Art. 3.2.2(1)(a) PICC. However, these arguments would be untenable.

143 First, CLAIMANT could not revoke its offer to modify the Agreement. Pursuant to Art. 16(1) CISG the right to revoke an offer ends when the contract is concluded. CLAIMANT notified RESPONDENT about the alleged accounting mistake which lead to the application of the Fixed Exchange Rate in the invoice on 15 January 2015 at 12:46 pm (*Exh. C 5, p. 14*). At that point, however, the modification of the Agreement had already been concluded by RESPONDENT's e-mail of 15 January 2015 at 11:23 am [*para. 141*]. Consequently, CLAIMANT could not revoke its offer under Art. 16(1) CISG.

144 Second, CLAIMANT cannot avoid the modification based on an error in expression. In accordance with Art. 8(1) CISG the offeree only bears the risk that the offer has not been expressed correctly if it was aware or could not have been unaware of the real intent of the offeror (*CISG-online 1617, [GER, 2007]; SCHWENZER/HACHEM, Art. 4, para. 36; SCHMIDT-KESSEL, Art. 8, para. 6; SCHLECHTRIEM/SCHROETER, para. 170*). If that is not the case, the risk of an error in expression has to be borne by the offeror (*SCHWENZER/HACHEM, in: Am. J. Comp. L., p. 473*). Subsidiarily, pursuant to Art. 3.2.2(1)(a) PICC a party may only avoid the contract for mistake if the other party knew or ought to have known of the mistake. As demonstrated above [*para. 140*], RESPONDENT ought not to have known of CLAIMANT's alleged accounting mistake. Therefore, CLAIMANT cannot avoid the modification based on a mistake in expression. Consequently, CLAIMANT is bound by the modification.

145 **Conclusion:** CLAIMANT is not entitled to additional payment of US$ 2'285'240 for the fan blades because the Fixed Exchange Rate governs the Agreement. In addition, none of CLAIMANT's arguments against the Fixed Exchange Rate is compelling. In the alternative, CLAIMANT's invoice has modified the Agreement so that the Fixed Exchange Rate applies.

D. CLAIMANT is not entitled to the additional payment of US$ 102’192.80 for the levy deducted by the FIU of the Central Bank

146 The day after RESPONDENT had received the fan blades from CLAIMANT, it effected payment for the purchase price of US$ 20’438’560 to CLAIMANT’s bank account at the National Bank (*Exh. C 3, p. 12; Exh. C 8, p. 17*). Pursuant to the Equatorianian public law Regulation ML/2010C, the FIU of the Central Bank investigates every payment exceeding US$ 2 million in respect of money laundering and deducts a levy of 0.5% from the payment (*Exh. C 8, p. 17; PO2, p. 55, para. 7*). Thus, the FIU investigated the payment directed to CLAIMANT and deducted a levy of US$ 102,192.80 (*Exh. C 8, p. 17*). Although RESPONDENT has paid the purchase price, CLAIMANT demands additional payment for the deducted levy (*MfC, para. 54 et seqq.*). However, RESPONDENT is neither obliged to bear the levy under the Agreement [**I**] nor under Artt. 54, 57 CISG [**II**].

I. RESPONDENT does not have to bear the levy under the Agreement

147 In Sec. 4.3 of the Agreement the Parties stipulated that “*the bank charges for the transfer of the amount are to be borne by the BUYER*” (*Exh. C 2, p. 10*). In doing so, the Parties contractually determined bank charges to be the only additional costs that RESPONDENT would have to bear for the payment. CLAIMANT argues that the deducted levy qualifies as a “*bank charge for the transfer of the amount*” in terms of Sec. 4.3 of the Agreement (*MfC, para. 158*). However, the levy does not have the characteristics of a “*bank charge*” paid “*for the transfer of the amount*” [**1**]. Even if the Tribunal were to find that it is unclear whether the levy falls under Sec. 4.3 of the Agreement, the provision would have to be interpreted according to the principle of *contra proferentem* and hence against CLAIMANT’s understanding [**2**].

1. The levy is not a “*bank charge for the transfer of the amount*”

148 The interpretation of Sec. 4.3 of the Agreement shows that the levy is not a “*bank charge for the transfer of the amount*”.

149 A reasonable person in terms of Art. 8(2) CISG would have understood the term “*bank charge for the transfer of the amount*” to encompass the costs charged by a bank for the services it carries out for its client, *e.g.* for opening a bank account or carrying out a money transfer. Accordingly, the dictionary cited by CLAIMANT (*cf. MfC, para. 156*) defines a bank charge as “*[t]he amount charged to a customer by a bank, usually for a specific transaction*” (*Oxford Dictionary, “bank charge”, p. 34*; *cf. also: Cambridge Dictionary*). Thus, according to the common understanding a bank charge has three characteristics: First, it is charged by a bank, second, it concerns the contractual relationship of a bank and its clients, and third, it is

charged for the costs of the bank's service to the client, *i.e.* "*for the transfer of the amount*". The levy charged by the FIU fulfils none of these criteria.

150 First, contrary to CLAIMANT's allegation (*MfC, para. 158*), the levy was not charged by a bank, *i.e.* the Central Bank, but rather by the FIU (*Exh. C 8, p. 17*). The FIU was established by Regulation ML/2010C to combat money laundering in Equatoriana (*PO2, p. 55, para. 7; p. 56, para. 10*). Although the FIU formally is a subdivision of the Central Bank (*Id.*) it does not provide banking services. Financial investigation units hold regulatory functions and can be established as a subdivision of any regulatory agency (*GLEASON/GOTTSELIG, p. 10; ALHOSANI, p. 96*). Remarkably, if the FIU had been established by the Minstry of Finance or the Ministry of Justice, there would have been no debate whether the FIU is a bank and the levy a bank charge. Form follows function: The FIU holds the function of an agency and not the functions of a bank, hence it should be treated as an agency and not as a bank. Consequently, the levy does not fulfil the first criterion of a bank charge as it was not charged by a bank.

151 Second, neither RESPONDENT nor CLAIMANT is in a contractual relationship with the FIU or even the Central Bank. Rather, the FIU charged the levy independent of any contractual relationship. Therefore, the levy does not fulfil the second criterion of a bank charge as it does not concern the contractual relationship of a bank and its client.

152 Third, the levy was not charged by a bank for the costs of its service, *i.e.* "*for the transfer of the amount*" in terms of Sec. 4.3 of the Agreement. The service required from RESPONDENT's bank was to transfer the payment to CLAIMANT's bank account at the National Bank (*cf. Exh. C 3, p. 12*). Hence, these are the bank charges RESPONDENT would have been obliged to bear "*for the transfer of the amount*" pursuant to Sec. 4.3 of the Agreement. However, the levy was charged for the FIU's money laundering investigation pursuant to Regulation ML/2010C (*Exh. C 8, p. 17*). This is not a bank service carried out for RESPONDENT. Although the levy was deducted *during* the course of payment transfer as submitted by CLAIMANT (*MfC, para. 158*), it was not charged as a cost "*for the transfer of the amount*" as required by Sec. 4.3 of the Agreement.

153 Therefore, the levy does not fulfil the third criterion of a bank charge as it was not charged for the service of a bank to its client, *i.e.* "*for the transfer of the amount*".

154 Consequently, RESPONDENT does not have to bear the levy under Sec. 4.3 of the Agreement.

2. Sec. 4.3 of the Agreement has to be understood *contra proferentem* and hence against CLAIMANT's understanding

155 Even if the Tribunal were to find that it is unclear whether the levy is a "*bank charge for the transfer of the amount*", the provision would have to be interpreted according to the principle of *contra proferentem* and hence against CLAIMANT's broad understanding.

156 According to the principle of *contra proferentem* the party that included a certain term into a contract bears the risk of the term's ambiguous wording. Thus, in case of doubt, the term has to be interpreted against the understanding of the proposing party (*CIETAC 7 January 2000, para. 5; CISG-online 2513, [GER, 2014], consid. 21; cf. CISG AC Opinion No. 13, Rule 9*).

157 In the present case, CLAIMANT is the proposing party as it has suggested the inclusion of Sec. 4.3 into the Agreement (*PO2, p. 55, para. 6*). CLAIMANT might argue that it was RESPONDENT who had drafted the provision under a previous party agreement. However, the *contra proferentem* principle has to apply irrespective of who drafted the provision initially because it was CLAIMANT who included it into the present Agreement. Hence, under the present Agreement, CLAIMANT is considered the proposing party of the provision. Therefore, the provision "*bank charge for the transfer of the amount*" in Sec. 4.3 of the Agreement has to be interpreted against CLAIMANT's broad understanding. Thus, the meaning of "*bank charge*" is restricted to an ordinary bank charge and does not encompass additional costs like the levy. Further, "*for the transfer of the amount*" can only mean costs that were charged for the transfer and not any costs arising during transfer. If CLAIMANT had wanted the provision to encompass the levy, it should have adjusted Sec. 4.3 of the Agreement accordingly.

158 Consequently, Sec. 4.3 of the Agreement has to be interpreted against CLAIMANT's broad understanding so that it does not encompass the levy. Thus, RESPONDENT does not have to bear the levy under Sec. 4.3 of the Agreement.

II. RESPONDENT does not have to bear the levy under Artt. 54, 57 CISG

159 CLAIMANT submits that under Art. 54 CISG RESPONDENT had to comply with Regulation ML/2010C to enable full payment to be made (*MfC, para. 168*). It further argues that the levy is a cost of payment that RESPONDENT has to bear pursuant to Artt. 54, 57 CISG (*MfC, para. 168, 183*). However, Regulation ML/2010C is not a "*law and regulation*" in terms of Art. 54 CISG [**1**]. Moreover, the levy is not a cost of payment in terms of Artt. 54, 57 CISG but rather a tax imposed on CLAIMANT [**2**]. Even if Artt. 54, 57 CISG would encompass the levy, CLAIMANT would not be entitled to additional payment as it did not fulfil its duty under Artt. 54, 57 CISG to inform RESPONDENT about Regulation ML/2010C [**3**].

1. Regulation ML/2010C is not a "*law and regulation*" in terms of Art. 54 CISG

160 Art. 54 CISG stipulates that the buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made. CLAIMANT submits that RESPONDENT did not enable payment to be made as it did not comply with the administrative requirements of Regulation ML/2010C (*MfC, para. 168 et seq.*). However, Regulation ML/2010C is not a "*law and regulation*" in terms of Art. 54 CISG. It does not stipulate any "*steps*" RESPONDENT could have taken or any "*formalities*" it could have complied with as required by Art. 54 CISG.

161 The "*steps*" and "*formalities*" referred to in Art. 54 CISG concern actions preliminary to payment that the buyer has to take to enable payment of the price (*UNCITRAL Digest 2012, Art. 54, para. 1; SECRETARIAT'S COMMENTARY, Art. 54; FERRARI/TORSELLO, p. 223; MANKOWSKI, Art. 54, para. 3*). Such steps or formalities required under laws and regulations may include applying for official authorisation to remit the currency abroad (*SECRETARIAT'S COMMENTARY, Art. 54; MASKOW, Art. 54, para. 2.6; FERRARI/TORSELLO*, *p. 224; SEVÓN, p. 333; OSUNA-GONZÁLEZ, para. II. B.; MOHS, Art. 54, para. 2*), registering the contract with a government office or with a bank or procuring the necessary foreign exchange (*SECRETARIAT'S COMMENTARY, Art. 54*).

162 Regulation ML/2010C does not set out such preliminary actions. Rather, it strictly determines that every payment to Equatoriana is routed via the Central Bank and is investigated in respect of money laundering if it exceeds US$ 2 million (*PO2, p. 56, para. 10; Exh. C 8, p. 17*). Contrary to the preparatory steps required under Art. 54 CISG, RESPONDENT could not influence or prevent the money laundering investigation conducted under Regulation ML/2010C. It would have been a different situation if RESPONDENT could have registered the Agreement with the FIU to provide evidence that the purchase price payment does not constitute money laundering. However, the money laundering investigation under Regulation ML/2010C and hence the deduction of the levy was completely out of RESPONDENT's sphere of influence.

163 Consequently, there are no "*steps*" RESPONDENT could have taken and no "*formalities*" it could have complied with under Regulation ML/2010C to enable full payment to be made. Hence, Regulation ML/2010C is not a "*law and regulation*" in terms of Art. 54 CISG.

2. The levy is not a cost of payment RESPONDENT has to bear under Artt. 54, 57 CISG

164 Further, contrary to CLAIMANT's submission (*MfC, para. 183*), the levy is not a cost of

payment in terms of Artt. 54, 57 CISG but rather an Equatorianian tax that CLAIMANT has to bear [**a**]. Even if the levy were not a tax, RESPONDENT still would not have to bear the levy under Artt. 54, 57 CISG as CLAIMANT omitted to account for it in the purchase price [**b**].

a) The levy is not a cost of payment but an Equatorianian tax

165 The levy is not a cost of payment in terms of Artt. 54, 57 CISG but rather an Equatorianian tax that CLAIMANT has to bear.

166 Under Art. 54 CISG the buyer has to bear costs that result from taking steps or complying with formalities that enable payment to be made (*UNCITRAL Digest 2012, Art. 54, para. 3; FERRARI/TORSELLO, p. 223; BUTLER/HARINDRANATH, Art. 54, para. 3; FOUNTOULAKIS, Art. 54, para. 5*). Further, based on Art. 57 CISG the buyer has to bear the costs of the transfer of the payment (*MANKOWSKI, Art. 57, para. 21*). CLAIMANT itself states that costs of payment are "*commissions or charges due to banks under the contractual means of payment*" (*MfC, para. 176*). Hence, the costs encompassed by Artt. 54, 57 CISG are the costs of the process that enables the payment to be made, *i.e.* the costs of the transfer of the payment. In order to pay the purchase price RESPONDENT had to transmit the payment via bank transfer to CLAIMANT's bank account. This transfer enabled the payment to be made. Consequently, the costs charged for this transfer are the costs RESPONDENT would have been obliged to bear under Artt. 54, 57 CISG.

167 By contrast, the levy was charged for the money laundering investigation conducted by the FIU (*Exh. C 8, p. 17*). According to Regulation ML/2010C every payment to Equatoriana that exeeds US$ 2 million has to be investigated in respect of money laundering (*PO2, p. 56, para. 10*). The levy charged for this investigation constitutes an Equatorianian tax imposed on CLAIMANT. A tax encompasses "*all governmental impositions on the person […] and includes duties, imposts, and excises*" (*GARNER, p. 1685*). The levy was charged by the FIU, a subdivision of the Central Bank, which is a state entity (*PO2, p. 55, para. 7*). Hence, it was charged by the Equatorianian government. The objective of the levy is to ensure the enforcement of Regulation ML/2010C which aims to reduce money laundering in Equatoriana (*Id.*). The levy is not imposed on foreign parties but only on citizens and companies in Equatoriana that receive payments exceeding US$ 2 million as they are the ones responsible for improving Equatoriana's reputation regarding money laundering crime (*Id.*). As CLAIMANT is incorporated in Equatoriana (*RfA, p. 3, para. 1*) the levy is a tax imposed on CLAIMANT.

168 Hence, the levy is an Equatorianian tax imposed on CLAIMANT and not a cost of payment that RESPONDENT would have to bear in terms of Artt. 54, 57 CISG.

169 The conclusion that RESPONDENT does not have to bear the levy under Artt. 54, 57 CISG because it is a tax imposed on CLAIMANT is further corroborated by two previous cases under the CISG. The courts held that the addressee of a tax cannot impose the costs of the tax on the other party (*CISG-online 1218, [GER, 2006], para. 27 et seqq.; CISG-online 2302, [GER, 2011], consid. I.2.c)*). In the present case, the same reasoning has to be applied. Because the levy is a tax imposed on CLAIMANT, it cannot shift the burden and impose the costs of the tax on RESPONDENT. Also, the fact that CLAIMANT bore the levy for previous payments directed to it by other customers (*PO2, p. 55, para. 8; PO2, p. 56, para. 9*) shows that CLAIMANT itself is aware that it has to bear the levy.

170 Consequently, RESPONDENT does not have to bear the levy because it is not a cost of payment in terms of Artt. 54, 57 CISG but rather an Equatorianian tax imposed on CLAIMANT.

b) Alternatively, RESPONDENT does not have to bear the levy because CLAIMANT omitted to account for it in the purchase price

171 Even if the levy were not a tax, RESPONDENT would not have to bear it under Artt. 54, 57 CISG. As CLAIMANT omitted to account for the levy in the purchase price calculation it cannot demand RESPONDENT to bear the levy after it has been deducted. Hence, CLAIMANT is not entitled to additional payment for the levy under Artt. 54, 57 CISG.

172 The buyer can expect the purchase price to include all expenses of the seller and thus that the purchase price constitutes the complete price (*STAUDINGER/MAGNUS, Art. 53, para. 6*; *MANKOWSKI, Art. 53, para. 6*). Hence, the seller cannot later demand further payment for taxes, levies, administrative fees *etc*. in addition to the purchase price contractually stipulated (*FOUNTOULAKIS, Art. 53, para. 9; STAUDINGER/MAGNUS, Art. 53, para. 6*).

173 In the invoice for the fan blades CLAIMANT did not take the levy into account. As RESPONDENT could expect CLAIMANT to include *all* its expenses into the purchase price, it could reasonably conclude that further expenses would not arise in the future. Thus, when RESPONDENT paid the purchase price of US$ 20'438'560 for the fan blades it could rightfully expect that it had paid the complete price and thus had discharged its payment obligation under Artt. 54, 57 CISG. Therefore, CLAIMANT cannot demand additional payment for the levy.

174 Consequently, RESPONDENT does not have to bear the levy under Artt. 54, 57 CISG.

3. In any event, CLAIMANT did not inform RESPONDENT about Regulation ML/2010C

175 Even if the Tribunal were to conclude that the levy is a cost of payment in terms of Artt. 54, 57 CISG that RESPONDENT would have to bear, CLAIMANT cannot demand additional

payment because it omitted to inform RESPONDENT about Regulation ML/2010C. CLAIMANT's duty to inform RESPONDENT about Regulation ML/2010C is based on Artt. 54, 57 CISG [**a**] and is further supported by the "*New Zealand mussels*" case [**b**].

a) CLAIMANT had a duty to inform based on Artt. 54, 57 CISG

176 CLAIMANT had a duty to inform RESPONDENT about Regulation ML/2010C under Artt. 54, 57 CISG. Although CLAIMANT correctly submits that the buyer generally has to know the laws and regulations in the seller's country (*MfC, para. 167, 175*), this does not apply to peculiar public laws in the seller's country. The duty to cooperate requires parties to protect the interests of the counterparty and to enable the performance of the counterparty's obligation (*STAUDINGER/MAGNUS, Art. 7, para. 47; FERRARI, Art. 7, para. 54*). Under Art. 54 CISG the seller has to cooperate with the buyer and inform it about the applicable foreign exchange regulations in its country (*MOHS, Art. 54, para. 4; BUTLER/HARINDRANATH, Art. 54, para. 5; HUBER, Art. 54, para. 3*). Thus, where peculiar formalities exist in the seller's country, the seller has to inform the buyer about them (*MASKOW, Art. 54, para. 2.7*).

177 Regulation ML/2010C is very peculiar. It is not common that private parties have to pay the costs of money laundering investigations as such costs are normally paid out of the general state budget (*PO2, p. 55, para. 7*). RESPONDENT neither had knowledge of Regulation ML/2010C nor does it know of any comparable regulations in other countries (*PO2, p. 55, para. 8; AtR, p. 26, para. 18*). In fact, Equatoriana is one of only six countries worldwide where private parties have to pay a levy for such investigations (*PO2, p. 55, para. 7*). Therefore, RESPONDENT could not have been expected to know about the levy. By contrast, CLAIMANT was aware of Regulation ML/2010C as the levy had already been deducted from customer payments directed to CLAIMANT in two different cases before RESPONDENT effected payment in January 2015 (*PO2, p. 55, para. 8 et seq.*). As the previous customers of CLAIMANT did not know about Regulation ML/2010C CLAIMANT could not have reasonably expected RESPONDENT to know about it either. Rather, CLAIMANT must have known that RESPONDENT would depend on its information. Therefore, CLAIMANT was under a duty to inform RESPONDENT about Regulation ML/2010C. As CLAIMANT did not fulfil its duty under Artt. 54, 57 CISG, it cannot demand additional payment for the levy.

b) CLAIMANT had a duty to inform based on the "New Zealand mussels" case

178 CLAIMANT's duty to inform RESPONDENT about Regulation ML/2010C finds further support in the "*New Zealand mussels*" case (*CISG-online 144, [GER, 1995]*). The German Federal Court of Justice held that under Artt. 35(2)(a) and (b) CISG a seller does not have to know

specific public law provisions in the buyer's country that affect the conformity of the goods. A foreign seller cannot be required to know not easily determinable public law provisions in the buyer's country. Thus, the buyer cannot reasonably rely on a seller's knowledge of such provisions. Rather, as the buyer is in a better position to know the public laws in its own country, it is incumbent upon the buyer to inform the seller about such public laws (*CISG-online 144, [GER, 1995] consid. II, bb) bbb)*).

179 The reasoning of the "*New Zealand mussels*" case also applies in regard to CLAIMANT's duty to inform RESPONDENT about Regulation ML/2010C. The question whether one party has to know public laws in the other party's country arises under Artt. 35(2)(a) and (b) CISG as well as under Artt. 54, 57 CISG: Public law provisions in the buyer's country affect the seller's obligation to deliver goods under Artt. 35(2)(a) and (b) CISG in the same way as public law provisions in the seller's country affect the buyer's obligation to pay the price under Artt. 54, 57 CISG. Therefore, just as the German Federal Court of Justice held that the buyer is in a better position to know the public laws in its own country, the seller must also be considered to be in a better position to know the public laws in its country. Consequently, the seller must be under a duty to inform under Artt. 54, 57 CISG just as the buyer is under a duty to inform pursuant to Artt. 35(2)(a) and (b) CISG.

180 To conclude, CLAIMANT was under a duty to inform RESPONDENT about Regulation ML/2010C based on Artt. 54, 57 CISG and the "*New Zealand mussels*" case. As CLAIMANT did not fulfil its duty to inform, it is not entitled to additional payment for the levy.

181 **Conclusion**: CLAIMANT is not entitled to additional payment in the amount of US$ 102,192.80 for the deducted levy. RESPONDENT neither has to bear the levy under Sec. 4.3 of the Agreement nor under Artt. 54, 57 CISG.

REQUESTS FOR RELIEF

In light of the submissions above, counsel for RESPONDENT respectfully requests the Tribunal:

(1) to order CLAIMANT to provide security for costs

(2) to dismiss the claims as belated

(3) to reject all claims for payment raised by CLAIMANT

(4) to order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration

Respectfully submitted on 26 January 2017 by

/s/ MERY CANELLA	/s/ SIMON GLASL	/s/ ANJA KORRADI	/s/ MICHAEL LYSAKOWSKI
/s/ DORA PERIC	/s/ ALEXANDRA SCHNEIDER	/s/ FABIAN SCHREDT	/s/ LAURA SCHÄUBLIN

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