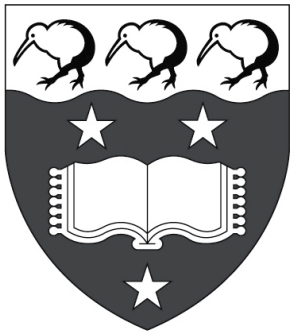
TWENTY-FOURTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Vienna, Austria, 8 April – 13 April 2017

MEMORANDUM FOR CLAIMANT



THE UNIVERSITY OF AUCKLAND

FACULTY OF LAW

On behalf of	Against
Wright Ltd	**SantosD KG**
232 Garrincha Street	77 Avenida O Rei
Oceanside	Cafucopa
Equatoriana	Mediterraneo

HONOR KERRY | JOSH SUYKER | JOVANA NEDELJKOV | MICHAEL SMOL

CONTENTS

TABLE OF ABBREVIATED TERMS

¶ / ¶¶	Paragraph / paragraphs
p. / pp.	Page / pages
s.	Section
art. / arts.	Article / articles
CAM-CCBC	Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
CISG	United Nations Convention for the International Sale of Goods
CLOUT	Case Law on UNCITRAL Texts
FOSFA	Federation of Oils, Seeds and Fats Association
ICC	International Chamber of Commerce
UNIDROIT	International Institute for the Unification of Private Law
UNCITRAL	United Nations Commission on International Trade Law
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention.
US$	United States Dollars
Cl Ex [#]	Claimant's Exhibit [#]
R Ex [#]	Respondent's Exhibit [#]
PO 1	Procedural Order No 1
PO 2	Procedural Order No 2
Request	Claimant's Request for Arbitration
Answer	Respondent's Answer to Statement to Claim
R's Security Request	Respondent's Request for Security for Costs
Cl's Answer	Claimant's Answer to Request for Security for Costs

STATEMENT OF FACTS

CLAIMANT, Wright Ltd, is a manufacturer of fan-blades for jet engines. RESPONDENT, SantosD KG, is a medium sized manufacturer of jet engines. The two Parties entered into a contract on **1 August 2000** under which CLAIMANT was to manufacture a new type of fan-blade, the TRF 192-I, and RESPONDENT was to purchase 2000 blades.

At the time of contracting, CLAIMANT was unable to estimate what the exact development and production costs of the new fan blades would be. However, RESPONDENT insisted on a maximum price under the contract, so that it would be able to offer a price for their engine to Earhart SP, a world-wide aircraft manufacturer. In light of this, the Parties agreed on a risk-sharing price clause. However, notwithstanding the fact that CLAIMANT'S costs were incurred in Equatorianian Denars (EQD), RESPONDENT insisted on a purchase price in USD. Therefore, CLAIMANT'S profit under the contract was to decrease as its costs increased, while CLAIMANT understood RESPONDENT to be bearing the exchange rate risk.

RESPONDENT later became aware that they would also need to purchase clamps from CLAIMANT. Therefore, the Parties agreed to an addendum to the contract which allowed for the sale and purchase of clamps from CLAIMANT to be delivered on a cost-basis. Furthermore, CLAIMANT, at the insistence of RESPONDENT, agreed to a fixed exchange rate in the addendum.

Delivery occurred on **14 January 2015** and the clamps and fan blades were accepted by RESPONDENT. Due to an error in CLAIMANT'S accounting department, the invoice attached to the delivery was wrong. Instead of US$22,723,800 being listed on the invoice, the price listed was US$20,438,560. This was the result of the mistaken application of the fixed exchange rate in the addendum being applied to the entire agreement, rather than just the fan blades. RESPONDENT refused to pay the extra amount required.

Additionally, US$102,192.80 was subtracted from the payment that was made by RESPONDENT to CLAIMANT'S bank account. It was later revealed that this was taken by the Equatoriana National Bank as a 0.5% levy deducted as part of anti-money laundering regulations.

After negotiations broke down on **1 April 2016**, CLAIMANT sent a request for arbitration to the Secretariat of the CAM-CCBC on **31 May 2016**. This was within the time-limit agreed to in the arbitration agreement, which required arbitration within sixty days of failure of negotiation. The CAM-CCBC replied to CLAIMANT, pointing out procedural deficiencies in the application and granting a ten-day extension to comply with the requirements of the CAM-CCBC Rules. After the procedural deficiencies were remedied, the notice was sent to RESPONDENT on **8 June 2016.**

RESPONDENT, in its response of **24 June 2016**, claimed that the arbitration was time-barred, and subsequently applied for security for costs on **6 September 2016**, citing CLAIMANT'S failure to pay an earlier arbitral award against them. CLAIMANT opposed the application for security for costs in their response of **16 September 2016**, providing a valid reason for this lack of payment and giving evidence as to their sound financial position.

As a result of these facts, CLAIMANT has commenced this arbitration seeking the relief set out in the statement of relief at p. 26.

SUMMARY OF ARGUMENTS

I. FIRST ARGUMENT

RESPONDENT should not be granted the order for security for costs against CLAIMANT. RESPONDENT has not made out the necessary elements for the Tribunal to exercise their power to make such an order. Further, even if RESPONDENT had made out these elements, such an order would not be justifiable.

II. SECOND ARGUMENT

The Tribunal should find that CLAIMANT commenced the arbitration within the time limit provided for in the arbitration agreement. The request for arbitration was received by the CAM-CCBC within the time provided for in the contract. The Secretariat then granted an extension of ten days to remedy any procedural defects in the request for arbitration. This is evidenced by the date of commencement used by the CAM-CCBC in their communications. Alternatively, the Tribunal has the power to extend any contractual time limit provided for in the arbitration, and that power should be used in this instance, as policy weighs in the favour of exercising such a power.

III. THIRD ARGUMENT

CLAIMANT asks the Tribunal to order RESPONDENT to pay the full purchase price due under the Development and Sales Agreement. This requires the Tribunal to determine the exchange rate applicable to the Agreement. CLAIMANT submits that the fixed exchange rate in the addendum was never intended to apply to the whole of the Agreement, and that the Tribunal should imply the current exchange rate at the date of payment.

Further, Respondent should pay the levy by the Central Bank on the basis that it is a regulation associated with competing payment. This obligation lies upon the buyer as stated in art. 54 of the CISG.

ARGUMENT ON THE PROCEEDINGS

I. RESPONDENT'S REQUEST TO GRANT AN ORDER REQUIRING CLAIMANT TO PROVIDE SECURITY FOR RESPONDENT'S COSTS IS TO BE REJECTED.

1. CLAIMANT submits that RESPONDENT'S request for an order requiring CLAIMANT to pay security for costs is to be rejected.

2. The Arbitral Tribunal cannot exercise any power it has to order CLAIMANT to provide security for costs **[A]**.

3. Even if the Arbitral Tribunal could exercise its power to order CLAIMANT to provide security for costs, this power should not be exercised, as there is no justifiable basis upon which to do so **[B].**

A. THE ARBITRAL TRIBUNAL CANNOT EXERCISE ANY POWER IT HAS TO ORDER CLAIMANT TO PROVIDE SECURITY FOR RESPONDENT'S COSTS.

1. ***The CAM-CCBC Rules and Arbitral Law grant the Arbitral Tribunal the power to make an order requiring security for costs.***

4. CLAIMANT accepts that the Tribunal has the power to grant provisional measures under the arbitral rules and law applicable to this dispute [*Cl Ex 2; CAM-CCBC Rules, art. 8.1; Arbitral Law, art. 17*]. CLAIMANT acknowledges that an order requiring security for costs is well accepted to be an interim measure contemplated by art. 17(2)(c) of the Arbitral Law [*Greenberg, Kee and Weeramantry,* ¶ *7.211*].

5. CLAIMANT notes that the UNCITRAL Working Group II contemplated amending the original Arbitral Law provisions on interim measures to specifically identify security for costs as coming within the purview of art. 17 [*Report of Working Group II,* ¶ *48*]. No such amendment was ultimately made [*Arbitral Law, art. 17*]. The decision not to amend the Arbitral Law could be interpreted as deliberate and to indicate that art. 17 is not intended to authorise the Arbitral Tribunal to make such orders.

6. CLAIMANT however acknowledges that such an interpretation is strained, particularly given the Working Group's agreement that orders requiring security for costs were likely "encompassed" by the existing wording of art. 17(2)(c) [*Report of Working Group II,* ¶ *48*].

2. ***RESPONDENT has not yet established the conditions necessary for the Arbitral Tribunal to exercise this power.***

7. CLAIMANT submits that art. 17 of the Arbitral law may be construed to grant the Tribunal the power to make an order requiring security for costs, however, the necessary conditions for granting such an interim measure under art. 17A are not satisfied [*Arbitral Law, art. 17A*].

8. RESPONDENT has not identified any harm such as "damage to reputation" or "loss of business opportunities" which it would be unable to be compensate by an award of damages [*Redfern, ¶ 7-28*]. RESPONDENT has only identified the potential loss of US$200,000 in costs associated with the arbitration. Should RESPONDENT incur these costs they could be remedied by damages which CLAIMANT has adequate financial assets to pay [*PO 2, ¶ 28*]. This harm to RESPONDENT would additionally not "substantially outweigh" the harm that would be incurred by the CLAIMANT if the measure was to be granted, as the financial burden would be equal.

9. Second, the Tribunal must be satisfied that RESPONDENT has a "reasonable possibility" of "succeed[ing] on the merits of its claim" and that determining this will not affect the arbitral tribunal's exercise of discretion in its later determinations [*Arbitral Law, art. 17A(1)(b)*]. This has been interpreted to be a test of whether there is a "serious question to be tried" [*UNCITRAL Digest, p. 86; Safe Kids, ¶ 30*]. CLAIMANT submits that it there is no possibility of RESPONDENT succeeding in the dispute as CLAIMANT has a meritorious claim.

10. Therefore, RESPONDENT has not discharged the burden of art. 17A and the arbitral tribunal cannot exercise its power to grant an order requiring CLAIMANT to pay security for costs [*Arbitral law, arts. 17 and 17A*].

B. THE ARBITRAL TRIBUNAL SHOULD NOT ORDER CLAIMANT TO PROVIDE SECURITY FOR RESPONDENT'S COSTS.

11. If, in the alternative, the Tribunal were to find that it was able to exercise the power to grant an order requiring CLAIMANT to pay security for RESPONDENT'S costs, the Tribunal should not grant such an order.

12. The Tribunal must be satisfied that there is clear and proper justification for any exercise of its discretion to grant any interim measure. This is as the exercise of its discretion is taken without full knowledge of the facts, and the Tribunal runs the risk of pre-judging or even rendering irrelevant its final award in the arbitration [*Williams, p. 246*].

13. In light of the seriousness of these implications, the Tribunal does not have sufficient justification to warrant the granting of this interim measure. CLAIMANT'S financial position has not been proven by RESPONDENT to warrant such an order. Further, RESPONDENT'S conduct warrants declining to grant such an order, and such an order would be inconsistent with the Parties' contractual intent**.**

1. ***The CAM-CCBC Rules and Arbitral Law grant the Arbitral Tribunal the power to make an order requiring security for costs.***

a) ***There is no factual basis upon which RESPONDENT doubts CLAIMANT's financial situation.***

14. CLAIMANT rejects RESPONDENT'S submission that CLAIMANT'S financial situation is such that a costs award is unlikely to be enforceable. CLAIMANT'S financial situation has not materially changed since the agreement with RESPONDENT was entered into [*Cl Ex 9*]. CLAIMANT'S initial failure to pay the full registration fee was the result of clerical error and was promptly corrected [*CLAIMANT'S letter of 7/6/16*]. CLAIMANT has otherwise paid all fees payable under the CAM-CCBC Rules and there is no reason for RESPONDENT to believe that it would not pay any final award for costs [*Notice for Commencement of Arbitration Proceeding*].

b) ***RESPONDENT has failed to prove CLAIMANT's impecuniosity.***

15. The evidence relied upon by RESPONDENT is not sufficiently credible to constitute evidence of CLAIMANT'S alleged impecuniosity. Such an allegation must be based on credible evidence [*Gu, p. 189*]. In order to be credible, RESPONDENT must show; first, that the author of such evidence must have "knowledge of the claimant's financial affairs" based on documents such as "annual accounts and statutory returns;" second, that the evidence alone, "give[s] rise to a reason to believe that the claimant will be unable to pay the respondent's costs;" and third, that the evidence must corroborate CLAIMANT'S inability to pay, not a mere likelihood of such an inability [*Needham, pp. 122-9*].

16. RESPONDENT relies solely on a news article for the proposition that CLAIMANT is in a difficult financial position [*R's Security Request, ¶ 3*]. This article does not purport to have been based on any sufficiently credible documents [*R Ex 6*]. Additionally, the contents of the article at best, in a general sense, problematize CLAIMANT'S financial situation [*R Ex 6*]. The article does not make any assertions that alone have the specificity to reasonably "raise serious doubts" about CLAIMANT'S financial situation [*R Ex 6*]. Finally, inferences that CLAIMANT is

in a difficult financial situation may be drawn from the contents of the article. But the article alone cannot be used to corroborate this without other knowledge of CLAIMANT'S financial affairs [*R Ex 6*].

*c) **CLAIMANT's financial position is not of itself a sufficient reason for ordering CLAIMANT to pay security for costs***

17. Even if RESPONDENT'S doubts as to CLAIMANT'S financial situation were proven, the fact of financial difficulties is "certainly not sufficient, in itself, to form the basis of a request for security" [*Fouchard, Gaillard and Goldman,* ¶ *1256*].

18. If the arbitral tribunal must determine whether to grant an order requiring security for costs solely on this basis, it should be rejected.

*2. **CLAIMANT's conduct does not warrant the need for an order requiring security for costs.***

19. CLAIMANT's has acted in good faith throughout the present arbitral proceedings and CLAIMANT's has a meritorious founded on a legitimate cause of action.

*a) **CLAIMANT has acted in good faith throughout the arbitral process.***

20. CLAIMANT has acted in good faith at all times and has not in any way used its opposition to an order requiring security for costs, or, if it were found to exist, CLAIMANT's impecuniosity, as a "weapon" to put "unfair pressure" on RESPONDENT [*Gu, p.191*]. "Evasive or dilatory behaviour" on the part of a Claimant is recognised to indicate that an award for costs may not ultimately be complied with and hence to provide a reason to grant an order for security for costs [*Gu, p. 196*]. Similarly, demonstration of "[m]alicious intent" by a Claimant at any point in the proceedings will provide an arbitral tribunal with appropriate reasoning to make an order [*Pessey,* ¶ *3*]. It has even been required that a Claimant deliberately "manoeuvred…into" the circumstances giving rise to doubts as to its ability to pay any final costs award so as to prevent a respondent from recovering [*Berger,* ¶ *12*]. This is clearly not the case here.

21. An order requiring security for costs is likely to be granted where a Claimant is relying on funding from a third party to pursue an arbitral award [*Pessey,* ¶ *2.1*]. CLAIMANT has no such funding to finance the costs of this arbitral proceeding [*PO 2,* ¶ *29*].

22. CLAIMANT submits that its conduct in relation to another arbitral proceeding should not be considered to have an effect on these proceedings. CLAIMANT's additional arbitral proceedings

are currently being litigated and hence the arbitral award is not to be considered to have become payable [*NYC, art. VI*].

b) ***CLAIMANT's has a meritorious claim founded on a legitimate cause of action.***

23. In determining whether to grant an order requiring security for costs, an arbitral tribunal should consider the merits of a Claimant's case. This is in order to ensure that a Claimant's right to have a legitimate claim heard is not undermined by the need to comply with an order that a claimant cannot or will not comply with [*International Arbitration Practice Guideline*, *art. 2*]. A frivolous case brought by a Claimant would provide a justification for an order requiring security for costs [*Pessey,* ¶ *4*].

24. Here, CLAIMANT has a meritorious claim that the fixed rate in the addendum should not apply to the whole contract and that the fees deducted by the Central Bank should be paid by RESPONDENT [*Request,* ¶¶ *21-23*]. To require CLAIMANT to order security for costs could have the effect of stifling CLAIMANT'S claim. Such an effect has been viewed as a factor to be considered as pointing strongly against ordering security for costs [*Gu, p. 195*].

3. ***RESPONDENT's conduct negates an order for security for costs being granted***

25. Any of CLAIMANT'S alleged funding difficulties have been caused by RESPONDENT'S actions in not paying what is due under the Development and Sales Agreement [*Cl's Answer*]. Where a Claimant's alleged lack of funds has been contributed to by the behaviour of a Respondent, it would be unfair to require a Claimant to pay security for costs [*International Arbitration Practice Guideline, art. 4*].

26. RESPONDENT made its request over a month after the terms of reference had been agreed. RESPONDENT has asserted that it submitted its request at this later date due to inability to know of CLAIMANT'S behaviour or financial position [*R's Security Request,* ¶ *4*]. CLAIMANT submits that its financial statements were publically available and RESPONDENT did not consult these before making an application for an order requiring security for costs [*PO 2,* ¶ *28*]. RESPONDENT is hence unwarranted in seeking to rely on its doubts as to CLAIMANT'S financial situation as a basis for requiring security for costs. Requests for orders requiring security for costs that are presented late in the arbitration proceedings risk "being viewed as attempts to stifle" CLAIMANT'S claim [*Pessey,* ¶ *5*].

4. ***An order requiring security for costs would be inconsistent with the parties' contractual intent***

27. Section 21 of the contract containing the arbitration agreement of CLAIMANT and RESPONDENT demonstrates the Parties' intent that arbitration was to be the means of dispute resolution were a dispute to arise under the contract [*Request, ¶ 19*]. This evidences that both Parties contemplated being required to pay the costs of arbitration and that this possibility would have been accounted for in the contract price [*Rubins, p. 357*]. Both Parties consciously "r[a]n the risk" of such costs becoming payable and having assumed such a commercial risk, it would be inconsistent with the Parties' contractual intent for RESPONDENT'S risk to be transferred to CLAIMANT by requiring CLAIMANT to provide security for costs [*Blessing, ¶4 8.140*].

28. Further, CLAIMANT'S financial position has not changed since the agreement with RESPONDENT was entered into [*C Ex 9*]. CLAIMANT'S financial position was hence known to RESPONDENT, especially given that its audited accounts were publically available in 2010, 2011 and 2016 [*PO 2, ¶ 28*]. The risk that costs could not be recovered in any potential arbitral proceedings should have been part of RESPONDENT'S "expectation and business calculation" [*Pessey, ¶ 2.2*].

29. Contractual intent may only be disregarded where there has been a material change in circumstances that was not contemplated when the agreement was entered into [*Kirtley, p. 20*]. CLAIMANT submits there has been no material change to its financial situation aside from that which could have been reasonably foreseen when the contract was entered into [*Cl Ex 9*]. Even if it were found that CLAIMANT'S financial position had worsened since the agreement was entered into, this is generally to be regarded a "normal commercial risk" [*International Arbitrator Practice Guideline, p. 8*].

C. CONCLUSION

30. The Tribunal should not uphold RESPONDENT'S request and order CLAIMANT to pay security for costs because the conditions required for the Tribunal to use their power to do so, do not exist. Further, there is no justification for this order. Accordingly, CLAIMANT requests that the Tribunal deny RESPONDENT'S request for the grant of an order requiring CLAIMANT to pay security for costs.

II. CLAIMANT'S CLAIMS ARE ADMISSIBLE AND WERE NOT SUBMITTED OUT OF TIME

31. The Tribunal should find that CLAIMANT commenced the arbitration within the time limit agreed to in the arbitration agreement.

32. Commencement of the arbitration occurs at the date when the request for arbitration is received, so the arbitration was commenced within the time limit **[A]**.

33. The Secretariat gave an extension to CLAIMANT to allow for any procedural flaws to be remedied **[B]**.

34. In the alternative, the Tribunal should extend the contractual time limit between the parties to allow the proceeding to continue **[C]**.

35. Alternatively, the Tribunal has the power to extend the contractual time limit **[D].**

36. That power should be exercised by the Tribunal, because policy reasons weigh in favour of such a decision being made **[E].**

A. COMMENCEMENT OF THE ARBITRATION OCCURS AT THE DATE WHEN THE REQUEST FOR ARBITRATION IS RECEIVED, SO THO ARBITRATION WAS COMMENCED WITHIN THE TIME LIMIT.

37. The Arbitration Agreement required arbitration proceedings to be initiated within 60 days [*Cl Ex 2*]. The initiation of proceedings can be distinguished from formal commencement of the arbitration.

38. A plain meaning interpretation of this phrase would suggest that the action of requesting arbitration with the CAM-CCBC, or perhaps even instructing a solicitor to take such an action would suffice the requirements of the contract. The purpose of the agreement was to ensure that the possibility of arbitration was not hanging over the parties for a long amount of time after any disagreement reached an impasse. If the interpretation outlined above is adopted, then the purpose of the clause is still retained, whilst allowing the parties in this case to have their cases on the merits heard by the Tribunal. The actions of CLAIMANT did not create a risk of uncertainty for the parties.

39. Alternatively, even if the Tribunal rejects the approach outlined above, a notice for commencement of arbitration is sufficient for the arbitration proceedings to be commenced. The CAM-CCBC Rules do not definitively state when arbitration is commenced. The

agreement is not only bound by the CAM-CCBC rules, but also international arbitration practice [*Cl Ex 2*]. The ICC Rules suggest that the date of receipt of the request for arbitration is the relevant date. [*ICC Rules, art. 4(2)*].

40. The Tribunal, as a matter of policy, should be the sole judge of whether any contractual time limit has been followed. Such a position is explicitly stated in other similar rules [*FOSFA Rules, s. 2(b)*].

B. THE SECRETARIAT GAVE AN EXTENSION TO ALLOW FOR ANY PROCEDURAL FLAWS TO BE REMEDIED.

41. The Tribunal has wide ranging powers for the interpretation and application of the CAM-CCBC Rules [*CAM-CCBC Rules, s. 7.8 and 13.1*]. The Tribunal's 10-day extension is one such order under the CAM-CCBC rules. The orders made by the Tribunal should be treated as being binding on the parties, invalidating arguments that rely on the Tribunal's orders being legally mistaken. The action of the Secretariat is one such action that might be taken as a convenient measure for the appropriate conduct of the proceedings [*CAM-CCBC Rules, art. 7.8*].

42. The order made by the Tribunal should not be considered as changing the starting date of the arbitration proceedings. Instead, it was an extension that was granted subsequent to the start date. This approach is recognised in other arbitral laws [*ICC Rules, art. 4(4)*]. Again, the agreement is governed by "international arbitration practice" as well as the CAM-CCBC Rules, so analogy must be drawn to other arbitral institution's rules.

43. At the time when the arbitration request was made, there was no indication from the Secretariat that the arbitration was late due to the procedural faults in the notice. The arbitration was clearly on-foot.

C. SUBSEQUENT COMMUNICATION FROM THE SECRETARIAT IN ORGANISING THE ARBITRATION REFERRED TO THE DATE OF THE REQUEST FOR ARBITRATION AS THE DATE OF COMMENCEMENT FOR ARBITRATION.

44. All subsequent communication from the Secretariat refers to 31 May 2016 as the date for the commencement of the arbitration. While the Tribunal may find that this is not binding one way or another, it is suggestive of the date that the Tribunal thought the arbitral proceedings were commenced. The Secretariat are in the best position to determine the application of the CAM-CCBC Rules.

D. THE TRIBUNAL HAS THE POWER TO EXTEND THE TIME LIMIT CLAIMANT IS GIVEN UNDER THE AGREEMENT TO INITIATE ARBITRATION PROCEEDINGS.

45. International authority suggests that the application of any applicable time limit is a matter for the Tribunal, rather than national courts [*Howsam*].

46. The Tribunal can be granted the power to make extensions to contractual time limits [*Lew, Mistelis and Kroll*, ¶ *20-19*]. The CAM-CCBC Rules do not include express provision for the extension of time-limits, but the Tribunal should find that this is not prohibitive in making such an extension. There are two reasons for this.

47. First, that the Tribunal can make an extension in a contractual time limit is because the rules provided by an arbitral institution are not are not exhaustive. The issue of a time-limit is procedural rather than substantive. Born states that it is commonly accepted that institutional arbitral rules provide a framework for arbitration, but do not make clear every procedural rule or possible action that can be taken by the Tribunal [*Born 2014, pp. 2144-2154*]. Academic writing and case law on the same point has shown Arbitrators as willing to use their discretion to permit late claims [*Reed Smith LLP*].

48. The second reason is that the Agreement states that "international arbitration practice" is to be part of the Arbitral law adopted in this proceeding. In ICC Arbitration, the Court of Arbitration can extend contractual time limits [*ICC Rules, art. 24.2*]. In England, the Arbitration Act 1996 allows for the extension of contractual time-limits [*Arbitration Act 1996, s. 12(1)*]. The FOSFA Rules of Arbitration and Appeal allow for extension of contractual time limits [*FOSFA Rules, r. 2(b)*]. While the standard for such an extension will necessarily be high in order to protect the bargain of the parties, the possibility of an extension remains [*Harbour & General Works*].

E. THE TRIBUNAL SHOULD EXERCISE THAT POWER IN THIS INSTANCE, AS POLICY REASONS LIE IN FAVOUR OF SUCH AN EXTENSION BEING GRANTED

49. If the test that is adopted is similar to that taken by the English Court of Appeal in *Harbour & General Works,* then the Tribunal should pass an extension. In that case, referring to the application of s. 12 of the UK Arbitration Act 1996 it was held:

> "The sub-section is concerned with party autonomy. Its aim seems to me to be to allow the Court to consider an extension in relation to circumstances where the

> parties would not reasonably have contemplated them as being ones where the time bar would apply, or to put it the other way round, the section is concerned not to allow the Court to interfere with a contractual bargain unless the circumstances are such that if they had been drawn to the attention of the parties when they agreed the provision, the parties would at the very least have contemplated that the time bar might not apply;—it then being for the Court finally to rule as to whether justice requires an extension of time to be given." [*Harbour & General Works, ¶ 81*].

50. Applying that test to the facts at hand, the parties should have contemplated that where the request for arbitration is sent in within the time limit, but there is a procedural defect, that the time limit would not apply. On the second arm of the test, whether justice requires that an extension of time be given, policy reasons lie in favour of the granting of an extension.

51. Regardless of whether the test outlined above is adopted, the extension should be granted by the Tribunal. The Tribunal should exercise its discretion to extend the contractual time limit. CLAIMANT has taken all reasonable steps to initiate proceedings within the given time limit.

52. There is no risk of commercial uncertainty resulting from an extension of the time limit. Giving an extension allows for the parties to settle their dispute in good-faith through arbitration, rather than requiring litigation through the national court system which is likely to require discovery and cross-examination of witnesses, as well as a long and costly delay in the proceedings. The arbitration agreement in this instance would likely be construed to be a time-bar only to arbitration, not to action in a national court.

53. The value of the claim is relatively large, and given the cyclical nature of CLAIMANT'S business, the importance of obtaining the certainty of the award and the cash flows that result from a decision either way are essential. A strict adherence to the incorrect view that the initiation of arbitration proceedings was unduly delayed is unduly harsh to CLAIMANT given the relatively minor implications of allowing the claim to be heard on the merits. RESPONDENT always submitted to the possibility of arbitration. The only impact on them is the small delay that occurred as a result of procedural deficiencies.

54. The parties agreed to the arbitration clause as a way of settling any disputes with certainty and a relatively low cost. Such an agreement comes with the necessary obligations of good faith that the parties assume when agreeing to such an obligation [*Born 2014, p. 1254*].

D. CONCLUSION

55. The Tribunal should find that the arbitration was commenced within the time limit required. Alternatively, the Tribunal has the power to, and should exercise the power to, extend the contractual time limit.

ARGUMENT ON THE MERITS

III. CLAIMANT IS ENTITLED TO ADDITIONAL PAYMENTS FROM RESPONDENT FOR BOTH THE FAN BLADES AND THE FEES DEDUCTED BY THE CENTRAL BANK.

56. CLAIMANT submits that it is entitled to the outstanding payment of US$2,285,240 **due** under the purchase price of the contract. The RESPONDENT has alleged that it has fulfilled its obligations, as the purchase price is determined with regard to the exchange rate in the addendum. CLAIMANT contests this, and has the three following arguments.

    a. The exchange rate was never expressly regulated in the Development and Sales Agreement **[A].**

    b. The fixed exchange rate in the Addendum should not apply to the Development and Sales Agreement **[B].**

    c. The Tribunal should imply the current exchange rate into the Agreement **[C].**

57. CLAIMANT further submits that RESPONDENT is liable to pay the US$102,192.80 fees deducted by the Equatorianian Central Bank. It makes three arguments in support of this:

    a. The CISG requires the buyer to pay for any regulatory costs associated with the price **[D].**

    b. The CISG principles regarding the non-conformity of goods are not applicable to the current situation **[E]**.

    c. RESPONDENT cannot excuse its performance under other provisions of the CISG **[F].**

A. THE EXCHANGE RATE WAS NEVER EXPRESSLY REGULATED BY THE DEVELOPMENT AND SALES AGREEMENT

58. In the Development and Sales Agreement concluded between CLAIMANT and RESPONDENT, there is no mention of the exchange rate that is to be applied to determine the price of the TRF 192-I fan blades in US$ [*Cl Ex 2*].

59. Further, the Parties did not discuss or negotiate an applicable exchange rate at the time of the contract's conclusion [*PO 2, ¶ 15*].

60. Therefore, the Tribunal needs to address the gap in the Parties' agreement in order to determine whether RESPONDENT has breached its obligation under art. 53 of the CISG to pay the full purchase price due under the contract.

B. THE FIXED EXCHANGE RATE IN THE ADDENDUM SHOULD NOT BE USED TO CALCULATE THE PURCHASE PRICE OF THE CONTRACT

61. The addendum of 26 October 2010 was added to the contract to set out the subsequent arrangement between the Parties. This arrangement involved CLAIMANT providing RESPONDENT with 2,000 clamps to be used for the development of the JE 76/TL 14b engine [*Cl Ex 2*]. The addendum noted that "[t]he exchange rate for the agreement is fixed to US$ 1=EQD 2.01". CLAIMANT submits that this exchange rate was only intended to apply to the price for the clamps, and not the contract as a whole.

62. As noted previously, an exchange rate was never explicitly incorporated into the original Development and Sales Agreement. Therefore, RESPONDENT, in contending that the addendum's exchange rate applies to the whole of the contract, is arguing that the Parties modified the contract by a subsequent agreement.

63. The Parties never intended to modify the exchange rate applicable to the contract through the inclusion of the addendum.

1. The Tribunal should look to art. 8 of the CISG, and arts. 4.1 and 4.3 of the UNIDROIT Principles when interpreting the Addendum.

64. The Parties agreed, in s. 20 of the contract, that the substantive law governing the contract is the CISG. The Parties further noted that that any issues not dealt with by the CISG would be regulated by the UNIDROIT Principles [*Cl Ex 2, s. 20*].

65. Therefore, the Tribunal should have regard to art. 8 of the CISG, the Convention's operative interpretation provision. Art. 8 of the CISG deals with the interpretation of statements, or other conduct by a party. It is generally accepted, however, that it also regulates the interpretation of contracts [*Schmidt-Kessel (Art. 8)*, *p. 113*].

66. If the Tribunal does not accept that art. 8 of the CISG is applicable to the interpretation of contracts, then recourse should be made to art. 4.1 of the UNIDROIT Principles. Article 4.1 of the Principles explicitly applies to the interpretation of contracts.

67. The tests under both art. 8 of the CISG, and art. 4.1 of the UNIDROIT Principles, are similar. First, the tribunal must look to the parties' common intention. If this cannot be ascertained,

the tribunal must look to the meaning or understanding that a reasonable person of the same kind as the parties would give to the contract in the same circumstances [*Art. 8(2) CISG; art. 4.1(2) UNIDROIT Principles*].

68. In determining the common intention of the parties, or the understanding of a reasonable person, the tribunal must have regard to a variety of factors. Similar factors are noted under both art. 8(3) of the CISG, and art 4.3 of the UNIDROIT Principles. Regard must be had to the negotiations between the parties, any practices which the parties have established between themselves, usages, subsequent conduct of the parties, and the nature and purpose of the contract [*Art. 8(3) CISG; art. 4.3 UNIDROIT Principles*].

a) **The common intention of the parties is not ascertainable from the evidence provided.**

69. RESPONDENT contends that it has always insisted that the addendum's fixed exchange rate should be applicable to the Development and Sales Agreement as a whole [*Answer, ¶ 10*]. However, there is no evidence that this intention was communicated to CLAIMANT, or that CLAIMANT should have been aware that this was RESPONDENT'S intention [*R Ex 2*]. Therefore, this is not a "common" intention as understood under art. 8 of the CISG, or art. 4.3 of the UNIDROIT Principles.

70. Further, the terms of the addendum itself are unclear, and do not reflect the Parties' common intention. In describing the Parties' arrangement, the addendum states that other terms of this arrangement (apart from the price of the clamps) shall be set out as per the "main Agreement" [*Cl Ex 2*]. However, when mentioning the fixed exchange rate, the Addendum states that the "exchange rate for the agreement is fixed to US$1=EQD 2.01" [*Cl Ex 2*]. It is unclear whether the further reference to "the agreement" applies to the addendum, or to the whole of the Development and Sales Agreement.

71. Therefore, the Tribunal should turn to the understanding a reasonable third party would give to the addendum in the same circumstances.

b) **A reasonable third party in the same circumstances would confine the application of the fixed exchange rate to the addendum.**

72. A fixed exchange rate is incompatible with the nature and purpose of the main Agreement, and the risk-sharing practices the Parties incorporated into it.

73. The price calculation formula in s. 4 of the Development and Sales Agreement was agreed upon to fulfil various objectives. One of these objectives was to ensure that CLAIMANT would recover its costs and make some profit if it kept the costs of the TRF 192-1 blades under the maximum price [*Request,* ¶ *21*]. In order to meet this objective, CLAIMANT'S costs needed to be reimbursed as they occurred [*Request,* ¶ *22*]. CLAIMANT would never have agreed to be burdened with the full exchange rate risk [*Request,* ¶ *22*].

74. The terms of the contract itself emphasise the importance of the price being inclusive of CLAIMANT'S costs. S. 4 states that "the purchase price is calculated on a cost-plus basis" [*Cl Ex 2, s. 4*].

75. Further, negotiations between the Parties confirm that RESPONDENT was aware of this objective. In the summary notes of the Parties' preliminary meeting on 1 May 2010, before the contract was entered into, the Parties agreed on basic principles for their co-operation [*Cl Ex 1*]. This included the objective for the price to be determined on a "cost-plus" basis.

76. A reasonable party would also infer that that the addendum was added to the contract for reasons of efficiency, rather than to modify the contract. In Paul Romario's email on 22 October 2010, he noted that the "easiest way" to regulate the purchase of the clamps was to sign the addendum, and not to enter into a separate contract [*R Ex 2*]. It is reasonable to conclude, in light of this, that the addendum was added to the contract in order to utilise the terms of the main contract, so that the parties would not have to draft a separate agreement for the purchase of the clamps. This makes sense in light of the terms of the addendum, where its terms are to be set out "as per the main Agreement". Such efficiency should not be mistaken as intent to modify the Agreement through the addendum.

77. CLAIMANT submits that no reasonable third party could have inferred that CLAIMANT intended the fixed exchange rate to apply through the sending of their mistaken invoice. CLAIMANT has maintained that this invoice was a mistake, and immediately clarified this upon RESPONDENT'S payment of the incomplete purchase price [*Cl Ex 5*].

c) In the alternative, the Addendum should be interpreted *contra proferentum* in favour of CLAIMANT.

78. If the Tribunal considers that it is unclear whether the addendum's exchange rate applies to the main contract, CLAIMANT submits that the *contra proferentum* rule should be applied in its favour.

79. Art. 4.6 of the UNIDROIT Principles states that if contract terms supplied by one party are unclear, an interpretation against that party is preferred. This is more commonly referred to as the *contra proferentum* rule. The terms of the addendum were supplied by RESPONDENT. In light of this, if the Tribunal finds that it is unclear to which agreement the fixed exchange rate applies to, this ambiguity should be resolved in favour of CLAIMANT.

80. Under the application of the *contra proferentum* rule, the fixed exchange rate would be contained to the addendum.

C. THE TRIBUNAL SHOULD IMPLY THE CURRENT EXCHANGE RATE INTO THE AGREEMENT

81. If the Tribunal finds that the exchange rate in the addendum is not applicable to the contract, then there is no defined rate for working out the purchase price of the blades.

82. CLAIMANT submits that in such circumstances, the Tribunal should imply a term into the contract stipulating that the exchange rate to be applied is the current rate at the date of payment.

1. ***The Tribunal has the power, under the CISG and the UNIDROIT Principles, to imply a term under the contract.***

83. CLAIMANT submits that the Tribunal has the power to supply omitted terms from contracts under art. 8 of the CISG. The Parties' intentions must remain the borders of such supplementation, but recent commentary argues that implication of terms can occur under art. 8 [*Schmidt-Kessel (Art. 8), p. 122*]. Schmidt-Kessel argues that such implication of terms is especially appropriate if the Parties' intentions will otherwise remain fruitless [*Schmidt-Kessel (Art. 8), p. 122*].

84. In the alternative, if the Tribunal considers it does not have this power under the CISG, the CLAIMANT submits that such a power exists under the UNIDROIT Principles. Art. 5.1.2 of the UNIDROIT Principles states that the contractual obligations of the parties may be express or implied. Further, art. 4.8 of the UNDROIT Principles provides a defined method for supplying an omitted term in a contract.

85. Under art. 4.8 of the UNIDROIT Principles, the Tribunal can supply an omitted term if such a term is important for the determination of the Parties' rights and duties [*Art. 4.8(1) UNIDROIT Principles*]. Without an applicable exchange rate, the obligation on RESPONDENT, as the buyer, to pay the "purchase price" is unclear. As a result, it is unclear whether

RESPONDENT has breached their payment obligations under art. 53, and whether CLAIMANT has a right to specific performance under art. 62.

86. Therefore, the exchange rate is an omitted term which is important to the determination of the Parties' rights and obligations and should be supplied under art. 4.8 of the UNIDROIT Principles.

2. ***The Tribunal should imply the current exchange rate into the contract***

87. In determining whether to imply a term, the Tribunal should have regard to the factors laid out in art. 4.8 of the UNIDROIT Principles. Art. 4.8(2) specifies the following mandatory considerations; the intention of the parties, the nature and purpose of the contract, good faith and fair dealing, and reasonableness.

88. This approach under art. 4.8 is consistent with art. 8 of the CISG, and the principles of good faith and reasonableness that underpin the Convention.

89. The intention of both the Parties was to agree on a price-fixing mechanism in the contract that would best share risk between them [*Request,* ¶ *6*]. CLAIMANT already took on the risk that it may not receive any profit under the contract if the cost of the blades exceeded US$13,125. Therefore, if the risk between the contract was to be "shared", the corresponding risk borne by RESPONDENT should be the potential fluctuation of the exchange rate at the date of payment.

90. Implying the current exchange rate into the contract would be in keeping with the nature and purpose of the contract. This exchange rate would better reflect the objectives of the price mechanism in the contract – for CLAIMANT'S costs to be reimbursed as they occurred. The current exchange rate is also that prevailing during CLAIMANT'S production time, therefore CLAIMANT'S costs would be compensated in full [*PO 2,* ¶ *12*].

91. Applying the current exchange rate is also consistent with the principles of good faith and reasonableness. It is not reasonable to assume that CLAIMANT would bear all risks under the contract in regards to both the cost of the blades to produce, and the exchange rate risk. It is reasonable, and in keeping with the notion of good faith, however, to assume that the Parties meant to share the burden of the fluctuating price mechanism between them.

3. ***The parties are not bound by their previous practices in past contracts***

92. RESPONDENT has contended that in the past contracts RESPONDENT had with CLAIMANT, the Parties ended up using the exchange rate at the date of contracting. CLAIMANT submits,

however, that this does not establish a previous practice which forces the Tribunal to apply the same exchange rate to the current contract.

93. Art. 9 of the CISG states that Parties are bound by any usage to which they have agreed, and by any practices they have established between themselves. A certain frequency and duration of such practice is necessary for it to qualify under art. 9 [*Schmidt-Kessel (Art. 9), p. 145*]. CLAIMANT submits, however, that the past conduct of the Parties does not bind them.

94. First, the price mechanism provisions in the previous contracts are sufficiently distinct from the current contract. Therefore, they do not constitute a "practice" that the Parties have established between themselves. Under previous contracts, the price clauses did not contain a minimum or a maximum price. This is unlike s. 4 of the current contract, where CLAIMANT bears the risk of the cost of the blades being above US$13,325. In such circumstances, it is understandable that CLAIMANT would therefore have to bear the exchange rate risk.

95. Further, the two previous instances where similar provisions were used in past contracts with RESPONDENT is insufficient to meet the "frequency and duration" of such practice necessary for the Parties to be bound under art. 9. Often, a circumstance repeated twice between the parties has been deemed insufficient to bind contracting parties [*Schmidt-Kessel (Art. 9), p. 145, fn 45; White Urea Case*].

96. Moreover, the course of conduct did not create a justified expectation that the Parties would proceed correspondingly in the future [*Morrisey, p. 88*]. The contracts were entered into at a time when both Parties were subsidiaries of Engineering International SA [*Request,* ¶ *2*] . It was Engineering International SA which instructed the parties to adopt, in both previous contracts, an exchange rate which was profitable for RESPONDENT. It cannot be argued, therefore, that these past contracts created a justified expectation that the parties would adopt a similar exchange rate when they were no longer owned by the same company, or instructed as to the content of their contracts by an parent company.

97. Therefore, the exchange rate utilised in previous contracts is irrelevant for the determining the contractual intent of the parties.

D. THE CISG REQUIRES THE BUYER TO PAY FOR ANY REGULATORY COSTS ASSOCIATED WITH THE PRICE

1. The RESPONDENT is obliged to pay the levy under Art. 54 of the CISG

98. Art. 54 of the CISG provides that the buyer's obligation to pay the contract's purchase price includes the cost of complying with legal or regulatory formalities that enable payment to be made. This provision encompasses all formalities, including those found in the seller's country [*Schwenzer, p. 620; Gabriel, p. 274, at fn. 5*].

99. A buyer's performance is to be assessed by reference to the result of their efforts. It is not sufficient for them to satisfy the pre-conditions for payment if the measures implemented prove are not successful [*UNCITRAL Digest,* p. 264]. As such, RESPONDENT'S behaviour is to be measured by the end result of the transaction–the sum that CLAIMANT received.

100. The payment of the levy was a legal formality that was necessary to enable full payment. The levy is unavoidable, as every transaction exceeding US$2 million in value is investigated by the Equatoriana Central Bank [*Cl Ex 8*]. If the levy is not incorporated into RESPONDENT'S payment to CLAIMANT, it results in the seller receiving a sum less than the amount listed in the contract.

101. Therefore, the levy is part of the price that RESPONDENT is obliged to pay under art. 54 of the CISG. No part of the contractual arrangement rebuts this conclusion.

*2. **RESPONDENT should be held to the standard of a party fulfilling a commercial formality***

102. The formalities payable under art. 54 will either be commercial or administrative in nature [*UNCITRAL Digest 2012¸ p. 64*]. As a buyer has different degrees of control over these formalities, Alejandro Osuna-Gonzalez suggests that they each impose a slightly different burden [*Gonzalez, pp. 303, 305*].

103. Commercial formalities are those which serve commercial ends, and are determined by the contracting parties. They can include establishment of security, acceptance of a bill of exchange, or obtaining a guarantee [*UNCITRAL Digest 2012*]. The buyer is clearly in control of these steps, meaning they should bear the whole responsibility for their outcome.

104. Administrative formalities are those mandated by statutes or regulations that are not directly part of the contract. They can include requesting permission to transfer funds abroad or purchase foreign currency [*Gonzlaez, p. 304*]. As a buyer cannot control the outcome of these requests, Gonzalez proposes a slightly reduced burden for the buyer, requiring a "reasonable effort to pursue compliance with the legal requirements full heartedly" [*Gonzalez, p. 305*].

105. Though the payment of the levy was required by Equatorianian law, it should be assessed as a commercial requirement for the purposes of art. 54. The distinction between administrative and commercial formalities is made on the basis of control over the outcome – where more control results a greater expectation.

106. In the present case, RESPONDENT'S failure to account for the levy was not due to discretionary forces outside its control. They were capable of paying for the levy in the same way that they might acquire security or a guarantee. As such, RESPONDENT should be held to the standard of a party performing a commercial formality. Their inability to provide the full purchase price as required by the contract is in breach of art. 54.

3. ***CLAIMANT was not obliged to co-operate with RESPONDENT regarding the payment of the levy***

107. Case law under the CISG has determined that a seller should be obliged to co-operate with a buyer when a payment covered by art. 54 concerns regulations in the seller's country [*Propane case*]. This obligation is partially based on the general duty of good faith in art. 7(2) CISG.

108. This obligation is not relevant in the present case. CLAIMANT'S negotiators did not act in bad faith by failing to disclose the existence of the levy, as they were not aware of its existence themselves [*PO 2, ¶ 8*].

4. ***The contra proferentem rule does not apply to the contract***

109. Codified in art. 4.6 of the UNIDROIT Principles, the *contra proferentem* rule provides that an ambiguous contractual provision should be interpreted against its drafter. The rule places the burden on the drafter of a contract to "communicate clearly to a reasonable person in the same position as the other party" [*Honnold*, ¶ *107.1*]. In addition to encouraging effective drafting, art. 4.6 also prevents unscrupulous parties from taking advantage of intentionally ambiguous contractual provisions.

110. In this case, the bank charges provision was drafted for an earlier contract by RESPONDENT, but suggested by CLAIMANT. As both parties played a role in the provision's inclusion in the contract, neither can truly be said to be the drafter.

111. Therefore, the *contra proferentem* rule does not apply.

E. THE CISG PRINCIPLES REGARDING THE NON-CONFORMITY OF GOODS ARE NOT APPLICABLE TO THE CURRENT SITUATION

112. Art. 35 of the CISG requires goods to conform with the requirements of the contract. Conformity has not been found to extend to meeting special public law requirements in the destination state unless circumstances exist to the contrary [*Mussels case*, ¶ *1(ccc); Henschel p. 171*].

113. These circumstances require that the seller either knew or ought to have known of the special regulations [*Mussels case*, ¶ *1(ccc)*]. A seller may be assumed to know of regulations in the buyer's country where they have a branch in that country, have an existing business connection with the buyer, have often exported to that country, or have previously promoted their products in that country [*Mussels case*, ¶ *1(ccc)*]. No analogous situation exists in the present facts, as RESPONDENT was new to business in Equatoriana.

114. Maley states that where no circumstances to the contrary exist, the special regulations lie outside the seller's "sphere of influence". Instead they should be the responsibility of the buyer to ensure conformity [*Maley*, *p. 96*].

115. RESPONDENT contends that this principle is applicable to the current situation. The levy is unique to CLAIMANT'S country, supposedly entailing a shift in the onus of compliance to CLAIMANT.

116. This analogy is flawed. A law governing the sale of certain products is qualitatively different to the levy. The former is specific to a certain market, and may require intimate specialist knowledge to understand. As a result, it would be inefficient for sellers to research the destination market. By comparison, the levy is an uncomplicated regulation that applies to a potentially broad class of transactions (those over US$2 million in value). It would not be inefficient for RESPONDENT to have identified, particularly as its existence has an impact on the profitability of the transaction.

117. As a result, art. 35 of the CISG is not relevant to the current case.

F. RESPONDENT'S CANNOT EXCUSE ITS PERFORMANCE UNDER OTHER PROVISIONS OF THE CISG

1. RESPONDENT's failure was not caused by an impediment beyond its control

118. Art. 79 relieves a party of liability for non-performance where that non-performance was due to an impediment beyond their control that could not have reasonably been known of at the time of contracting.

119. Previous cases have required significant impediments before applying art. 79. They have used standards including that the contract has become impossible to perform, or that the situation amounts to one equivalent to the national legal doctrine of *force majeure* [*CLOUT case 277*; *Chinese Goods case*, ¶ *1[12]*]. Common to all of these is that the impediment compromises the very core of the contract.

120. In the present case, the levy only represents 0.5% of the value of the contract. It falls short of the standard set in previous cases, and it is not an unreasonable cost for RESPONDENT to bear.

121. Furthermore, RESPONDENT'S failure to pay was not due to an impediment beyond their control. They were perfectly capable of performing due diligence on Equatorianian financial law, or making enquiries with CLAIMANT. Additionally, there was no impediment to RESPONDENT actually making the payment.

*2. **RESPONDENT's failure was not caused by an impediment beyond its control***

122. Art. 80 of the CISG states that a party cannot rely on another party's failure to perform, to the extent that the failure was caused by the first party's act or omission. This article requires that the first party had a duty to act or co-operate in a certain way [*Kröll*, *p. 1101*].

123. If CLAIMANT was under a duty, the omission does not meet the causation standards under art. 80. The basic requirement is that CLAIMANT'S omission caused RESPONDENT to be unable to perform [*Schäfer*, *p. 246*]. In this case, RESPONDENT did not perform sufficient due diligence, nor consult with CLAIMANT regarding any similar regulatory matters. As such, it was RESPONDENT'S omission that caused the failure to pay the levy.

124. Therefore, art. 80 CISG does not apply to the facts.

G. CONCLUSION

125. Under art. 61 CISG a seller may exercise various rights where a buyer fails to perform one of their obligations. Art. 62 CISG allows the seller to require the buyer to pay the price of an obligation. As such, CLAIMANT seeks that the Tribunal declare RESPONDENT must pay the remaining US$102,192.80 as owed under the contract.

126. CLAIMANT also asks the Tribunal to order RESPONDENT to pay the full purchase price due under the Development and Sales Agreement, an outstanding amount of US$2,285,240. This can be determined by applying the current exchange rate at the time payment. The fixed exchange in the addendum was never intended to apply to the Agreement.

REQUEST FOR RELIEF

For the above reasons, CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal should not order CLAIMANT to provide security for RESPONDENT'S costs.
2. CLAIMANT'S claims are admissible and have not been submitted out of time.
3. RESPONDENT must pay CLAIMANT the additional US$2,285,240 for the fan blades due under the Development and Sales Agreement.
4. RESPONDENT must pay CLAIMANT the US$102,192.80 for the fees deducted by the Central Bank.

Counsel for CLAIMANT respectfully requests the Tribunal to order RESPONDENT to pay the arbitration costs.

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