Twenty-Fourth Annual Willem C. Vis International Commercial Arbitration Moot

COLEGIO UNIVERSITARIO DE ESTUDIOS FINANCIEROS

Memorandum for CLAIMANT

On behalf of:

Wright Ltd, 232 Garrincha Street, Oceanside, Equatoriana

Against:

SantosDKG, 77 Avenida O Rei, Cafucopa, Mediterraneo

Jessica Berzal • Claudia García • Luis Ortega

Gutier Rettensteiner • Ana Sanmillán • Jose Usera

LIST OF ABREVATIONS:

ADR	Alternative Dispute Resolution
Agreement	Development and Sales Agreement without the *addendum*
Art./Artt.	Article/s
CAM-CCBC	The Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CISG	United Nation Convention on the International Sales of Goods
CoC	Change of circumstances
DSA	Development and Sales Agreement, including the *addendum*
EQD	Equatorianan Dinar
p.	page
para.	paragraph
RFA	Request for Arbitration
SFC	Security for Costs
UNCITRAL	United Nations Commission on International Trade Law Model Law

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ICSID:

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- ICSID Case Nº. ARB/11/18 , 2012;
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Others:

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1. <u>Introduction</u>

1. The Parties to this Arbitration are:

   - Wright Ltd. ("**CLAIMANT**"), based in Equatoriana, is a high-specialized manufacturer of fan blades for jet engines;
   - Santos D KG ("**RESPONDENT**"), based in Mediterraneo, is a medium size manufacturer of jet engines.

2. The Parties entered into the Development and Sales Agreement ("DSA"), in accordance to which CLAIMANT would sale 2,000 fan blades model TRF 192-I to RESPONDENT, agreeing that the law governing the Agreement would be the UN Convention on the International Sales of Goods ("CISG"). They introduced an arbitration clause, pursuant to which the CAM-CCBC would rule any arbitration proceedings. Months later, they signed an *addendum* for the additional purchase of 2,000 clamps.

3. CLAIMANT met his obligations delivering both the fan blades and the clamps. RESPONDENT paid US$ 20,438,560; a sum calculated by applying an exchange rate (US$ 1 = EQD 2.02) only valid for the *addendum,* which is only applicable to the clamps and not to the fan blades Indeed, according to the Agreement the exchange rate that must be applied for the fan blades is: US$ 1 = EQD 1.79.

4. CLAIMANT requested RESPONDENT to pay the outstanding amount. Because of RESPONDENT's refusal to pay the owed amount, CLAIMANT had no other choice but to present the RFA.

5. RESPONDENT unduly contested CLAIMANT's rights:

6. By challenging the admissibility of the RFA based on the term established at the arbitration clause and the supposed unfulfillment of the requirements to commence arbitration (**Issue 1**);

7. By presenting a groundless application for Security for Costs (**SFC**) relying on CLAIMANT's financial situation, which is more than strong (**Issue 2**);

8. By refusing to pay the remaining US$ 2,285,240 due to CLAIMANT by applying the correct exchange rate (**Issue 3**);

9. By refusing to bear all bank charges according to the DSA, such as the bank levy (**Issue 4**).

10. **Hereafter, CLAIMANT will first recall the main facts underpinning the present dispute, before assessing these four Issues separately. A conclusion and the relief sought will end the present Memorandum of CLAIMANT.**

2. Statement of facts

11. The Parties to this arbitration are:

- Wright Ltd, **CLAIMANT**, is based in Equatoriana; is a high-specialized manufacturer of fan blades for jet engines.
- Santos D KG, **RESPONDENT**, is based in Mediterraneo; is a medium size manufacturer of jet engines.

12. RESPONDENT and CLAIMANT were both subsidiaries of "Engineering International SA". On 27th of July 2010 was signed the SHARE PURCHASE AGREEMENT to sold CLAIMANT to Skymover (now Wright Holder PLC), and one month later RESPONDENT was sold to SpeedRun.

13. **On the 1st of August 2010,** CLAIMANT and RESPONDENT concluded the DSA, in which RESPONDENT ordered 2,000-fan blades TRF 192-I from CLAIMANT for a price per blade of between US$ 9,975 and US$ 13,125. The parties did not agree on any fixed exchange rate.

14. **On the 26th of October 2010,** an *addendum* was added to the DSA in which CLAIMANT agreed to deliver to RESPONDENT 2,000 clamps.

15. **On the 14th of January 2015,** CLAIMANT delivered the fan blades and the clamps to RESPONDENT. On this ocasion, CLAIMANT's accounting department made and obvious mistake, applying the fixed exchange rate agreed upon in the *addendum* to the fan blades. RESPONDENT transferred US$ 20,438,560 instead of US$ 22,723,800, which would have been the result of applying the correct exchange rate.

16. **On the 15th of January 2015,** RESPONDENT's CFO, Mr. Lindbergh, e-mailed CLAIMANT'sCFO, Ms. Beinhorn, explaining that they had transferred the payment of US$ 20,438,560 for the blades and US$ 183,343.28 for the

clamps. Immediately, Ms. Beinhorn replied explaining the accounting mistake, and asked RESPONDENT to pay the additional US$ 2,285,240.

17. **On the 9th of February 2015,** Ms. Beinhorn e-mailed Mr. Lindbergh for the second time, informing they had not received the correct amount of US$ 22,723,800. She also pointed out that RESPONDENT's bank had confirmed that only US$ 20,336,367.20 had been credited into CLAIMANT's account and not US$ 20,438,560 as Mr. Lindbergh had stated. Consequently, she asked RESPONDENT to deposit the outstanding US$ 2,387,430.80 into CLAIMANT's account as soon as possible.

18. **On the 10th of February 2015,** Mr. Lindbergh claimed that they had effected a payment of US$ 20,438,560.00 and had no clue why only US$ 20,336,367.20 had been credited to CLAIMANT.

19. **On the 1st of April 2016**, CLAIMANT regretted that it was not possible to find an amicable solution and thus commenced arbitration proceedings.

20. **On the 31st of May 2016,** CLAIMANT filed a Requesy for Arbitration ("RFA") against RESPONDENT before the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil- Canada ("CAM-CCBC").

21. **On the 1st of June 2016,** the Chamber responded that the RFA had procedural issues in relation to the Power of the Attorney and the registration fee that needed to be remedied.

22. **On the 7th of June 2016,** CLAIMANT paid the outstanding registration fees and submitted a corrected Power of Attorney to the Chamber.

Procedural issues

3. 1st Issue: The claim is admissible

23. RESPONDENT alleged that the RFA presented by CLAIMANT was not submitted within the 60 days as established in the arbitration clause contained in Section 21 of the DSA [CLAIMANT CLAIMANT's Exhibit C2], because CLAIMANT made procedural mistakes regarding the Registration Fee and the

Power of Attorney. Hereafter, CLAIMANT will explain that RESPONDENT allegations to this respect are groundless.

3.1. The claim is admissible under the Art. 4 of the CAM-CCBC

24. The RFA that CLAIMANT presented at the CAM-CCBC against RESPONDENT on 31st May 2016 by was correctly and validly submitted within the 60 days agreed in the arbitration clause contained in Section 21 of the DSA [CLAIMANT's Exhibit C2].

25. CLAIMANT tried to solve the dispute amicably proposing several offers [RFA, para.17, p.6], as CLAIMANT never wanted to initiate the arbitration [RESPONDENT's Exhibit R3]. CLAIMANT declared the negotiations had failed on 1st April 2016 [RESPONDENT's Exhibit R3], but in this e-mail CLAIMANT insisted that he was open to any meaningful negotiations and hoped to avoid any arbitration proceedings against RESPONDENT. Due to the fact that CLAIMANT intended to solve the dispute with a fair amount of commitment, there is evidence of CLAIMANT´s good faith to try to avoid litigation

26. The UNCITRAL Model Law ("UNCITRAL") "*leaves the manner of commencing arbitration to the agreement of the parties as an initial matter. In the great majority of commercial arbitrations, the question will be addressed by arbitral rules selected in the arbitration agreement*" [Holtzmann & Neuhaus]. The arbitral proceedings commence when RESPONDENT receives the RFA unless otherwise agreed by the parties pursuant to Article ("Art.") 21 of the UNCITRAL: "*Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by RESPONDENT*".

27. In the present case, there is no agreement as to the commencement of the arbitration. Therefore, this has to be determined in accordance with the procedural rules applicable.

28. In this case the Parties chose the Arbitration Rules of the Centre for Arbitration and Mediation of the CAM-CCBC ("the Rules") as Rules that shall conduct the Arbitration. More in particular, Articles ("Artt") 4.1 and 4.2 of the CAM-CCBC are the governing rules as to the commencement of the Arbitration.

29. CLAIMANT´s RFA presented on the 31st of May 2016 fulfils the requirements to commence an arbitration set forth in Art. 4.1 and 4.2 of the Rules: "*4.1. The party desiring to commence an arbitration will notify the CAM-CCBC, through its President, in person or by registered mail, providing sufficient copies for all the parties, arbitrators and the Secretariat of the CAM-CCBC to receive a copy, enclosing: (a) A document that contains the arbitration agreement, providing for choice of the CAM-CCBC's to administer the proceedings; (b) A power of attorney for any lawyers providing for adequate representation; (c) A summary statement of the matter that will be the subject of the arbitration; (d)The estimated amount in dispute; (e) The full name and details of the parties involved in the arbitration; and (f) A statement of the seat, language, law or rules of law applicable to the arbitration under the contract*" "*4.2. The party will attach proof of payment of the Registration Fee together with the notice, in accordance with Art. 12.5 of the Rules*".

30. The RFA met all these requirements. Importantly, there is nothing in the Rules that could make the Arbitral Tribunal conclude that these requirements are not remediable. In other words, formal mistakes at the moment when the RFA is filed and which are later corrected do not prevent the arbitration proceedings from commencing at the moment of the filing of the RFA. It should be pointed out that the CAM-CCBC never affirms that the RFA had not been validly filed.

31. Therefore, the date of commencement occurs when a party presents the RFA, notifies the CAM-CCBC and fulfils the requirements to commence an arbitration set forth in Art. 4.1 and 4.2 of CAM-CCBC arbitration rules.

3.2. The RFA is admissible under the Art. 12 of the CAM-CCBC

32. CLAIMANT met its obligations under Art. 12.5 of the CAM-CCBC Rules, according to which: "*At the time of presentation of the notice for commencement of arbitration, CLAIMANT must pay to the CAM-CCBC the Registration Fee, in the amount stated in the Table of Expenses, which cannot be set off or reimbursed*".

33. In the present case, the Claim is admissible from the moment CLAIMANT payed the registration fee. That is, the day when it presented the RFA on the 31st May 2016.

34. As already explained, even if the first payment was not the correct, the Rules allow CLAIMANT to rectify it and the RFA is therefore admissible.

35. Consequently, CLAIMANT fulfilled all the requirements set forth in Art. 4.2 of the Rules.

3.3. The RFA is admissible under the Characteristics of the Arbitration

36. In Addition, CLAIMANT presented an amendment to the RFA on the 7th June in order to remedy both procedural mistakes: the registration fees' payment and the Power of Attorney. Within the term of ten days given by the President of the CAM-CCBC, CLAIMANT set right these mistakes, which are not a problem in arbitration, because of the defining Characteristics of commercial arbitration, as explained hereafter.

37. Firstly, "*arbitration is comparatively flexible, as contrasted to most court procedures*" [Born, p. 1].

38. Secondly, "*arbitration tends to be procedurally less formal and rigid than litigation in national courts. The lack of a detailed procedural code may permit party misconduct or create opportunities for an even greater range of procedural disputes between the parties*" [Born, p. 9]

39. Thus, the flexible character of arbitration allows the Parties to correct procedural mistakes easily and swiftly, compared to ordinary court proceedings.

40. Indeed, if the Parties chose Arbitration as the method to solve disputes it is by virtue of the special Characteristics of flexibility and procedural informality that commercial arbitration offers. Otherwise, the parties would have chosen ordinary jurisdiction, as the entire choice of Alternative Dispute Resolution ("ADR") is rendered purposeless.

3.4. Conclusion of the 1st Issue

41. The RFA fulfils all the requirements to commence an Arbitration set forth in Art. 4.1 and 4.2 of the CAM-CCBC Rules.

42. In conclusion, CLAIMANT was allowed to solve the formal mistakes after the 60 days established in the arbitration clause and the claim is therefore admissible.

4. 2nd Issue: The Tribunal should dismiss the request for Security for Costs

43. Hereafter CLAIMANT will explain the reason why the Arbitral Tribunal should dismiss RESPONDEN's request for Security for Costs.

4.1. The Arbitral Tribunal lacks legal basis to grant Security for Costs

44. Security for Cost is such an exceptional measure that it is not even specifically regulated in the legislation applied to the case.

45. Indeed, Art. 8 of the Rules, which regulates the Provisional Measures, does not at any moment mention SFC. It only mentions vaguely the possibility of the Tribunal for granting provisional measures without elaborating any further. Likewise, Artt. 17 and 17A UNCITRAL broadly mentions "*provisional measures*" without addressing specifically SFC.

46. Considering SFC is not a normal interim measure since it could imply a denial of CLAIMANT's access to justice and a violation of the principle of equal treatment between the Parties, it has to be specifically regulated in the *lex arbitrii* or in the applicable arbitration Rules for the Tribunal to grant it. Indeed, SFC is such an exceptional measure lacking a real, uniform consensus among players it international arbitration, that it cannot be considered as belonging to international practice. In other words, an explicit legal basis specific to SFC is necessary.

47. In the present case, neither the *lex arbitrii* nor the Rules provide for a specific provision giving the Arbitral Tribunal the power to order SFC. As there is not a legal basis, one should turn to the DSA to see if the Parties agreed on this matter specifically.

48. In the case at hand, the Parties did not agree at any point in the DSA that the Arbitral Tribunal has the power to grant SFC.

49. As a conclusion, there is not any legal basis for the Tribunal to grant SFC.

4.2. Security for Costs is an interim measure that should only be granted in exceptional circumstances

50. Even if there were a legal basis, SFC is such an exceptional measure that should only be granted under limited circumstances.

51. SFC should only be awarded when it is undeniably necessary to avoid imminent and irreparable harm and it has to be urgent [ICSID Case Nº. ARB/11/18, para. 34].

52. An interim measure is necessary when it is essential "*to avoid harm or prejudice being inflicted upon the applicant*" [ICSID Case Nº. ARB/11/18, para. 35]. Provisional measures in general and SFC in particular are not meant to protect against the potential, uncertain future harms, but they are rather meant to protect the requesting party from "*imminent harm*" [ICSID Case Nº. ARB/11/18, para. 35].

53. It is urgent when the question "*cannot await the outcome of the award on the merits*" [ICSID Case Nº. ARB/08/5 para. 73].

54. The matter in hand is not necessary, as defined by ICSID. SFC in Arbitration is first and foremost an issue about the conflict between one Party's right to have access to justice on the one hand and the other Party's interest to have a reasonable chance of enforcing a future favourable award on costs issued on the other [ICC 15218/2008].

55. SFC should only be granted in the most extreme circumstances, in which a vital interest of the requesting Party stands in danger of irreplaceable damage [ICSID No. ARB/09/17, para. 47]. As it will be elaborated below, the financial situation of CLAIMANT is strong enough to secure the payment of any future costs issued in RESPONDENT's favour, hence, there is not any danger of RESPONDENT's interests not being satisfied, let alone an imminent one.

56. Neither is the situation urgent. It has not even been urgent to RESPONDENT, taking into consideration that he did not request SFC in its Answer to RFA. It took RESPONDENT 71 days to present the Request for SFC. If it had considered the situation urgent, it would not have waited that long.

57. Therefore, the situation does not meet the necessity and urgency requirements needed to grant SFC.

58. On the other hand, the "*exceptional circumstances*" that would justify granting the SFC are a vague legal concept, and it is let to the appreciation of the Tribunal to decide if they are met in the particular circumstances of each case,

although the international arbitration practice has defined certain circumstances in which the circumstances are indeed "*exceptional*" [Berger & Kellerhals]:

a) The suspension of bankruptcy for the lack of assets or because the defendant owns a temporal o definite certificate of loss. The opening of bankruptcy itself nevertheless is not considered to be sufficient;

b) The existence of empty shell companies, which are only created with the purpose to litigate, with no founds or significantly less funds than the former contractual partner;

c) When the claim is filed after the claimant has removed its entire funds or a big part of them with the suspicion that it has been done with the aim of eluding a future possible liability;

d) In the situation when the claimant moves its residency to a state where awards cannot be enforced with the suspicion that he has done with the only purpose of "*extricate itself from liability for a future award cost if it lost*".

59. As it is evident, none of the circumstances are present in our case.

60. In addition, it is not only necessary to prove that CLAIMANT could not afford the payment required, creating an imminent and urgent harm on RESPONDENT's interests, but it is also necessary to prove that CLAIMANT has behaved itself in a way that evidences that it will not be willing to comply its future award on costs [ICC Nº. 15218/2008].

61. CLAIMANT has been forthcoming about its financial situation and about the result of past arbitration awards, evidencing a good faith as regards its behaviour.

62. CLAIMANT, therefore, has not deliberately taken any steps to deprive RESPONDENT from recovering its costs. In any event, RESPONDENT has the burden of proof but it has failed to proof that the requirements for granting SFC are met in the present case.

63. Over the above, the general impression collected from the cases that dealt with the issue is that the tribunals have to be cautious and even reluctant to order

security of cost, only grating them under some exceptional circumstances [Bezarević Pajić & Lalatović Đorđević].

64. The caution the tribunals have had over the years relies not only on the denial of claimants' access to justice, but also because it implies an analysis of the matter in a by far too early face of the proceeding, with the risk of violating the principle of equal treatment between the Parties. This implies that a measure such as SFC can only be granted in exceptional circumstances, in which the risk for RESPONDENT is obvious and justifies the risk to infringe one of the fundamental principles of arbitration, such as the equal treatment of the Parties.

65. Due to its burdensome consequences for CLAIMANT, this kind of measure is sometimes used as what has been known as *guerrilla tactics*, i.e the only aim of an application for SFC is to create an unnecessary obstacle for CLAIMANT in the procedure rather than securing RESPONDENT's interest in having a reasonable chance of being able to enforce a future award on costs.

66. Since RESPONDENT's application for SFC does not meet the exceptional circumstances requirement, as indicated below, its intention of creating a needless obstacle to CLAIMANT seems evident. Because of this, the Arbitral Tribunal should dismiss its application for SFC.

4.3. CLAIMANT's financial situation is not precarious, nor weak, nor insolvent

67. CLAIMANT is not impecunious nor finds itself in a precarious financial situation. Therefore it will be able to meet an adverse award of costs, should the Arbitral Tribunal order it.

68. CLAIMANT's financial situation did not change materially and unforeseeably, since the conclusion of the arbitration agreement, therefore the request for SFC is groundless.

69. RESPONDENT's doubts about CLAIMANT's current financial situation do not shift the burden of proof as to whether the requirements for SFC are fulfilled.

4.3.1. RESPONDENT must sufficiently prove that CLAIMANT will not be able to bear the arbitration costs due to its current financial situation

70. In relation to CLAIMANT's financial situation, RESPONDENT's doubts and estimates about its solvency do not shift the burden of proof to guarantee SFC.

i. *The mere doubt about a Party's solvency is insufficient for an Arbitral Tribunal to order SFC*

71. First of all, it is necessary that sufficient evidence is admitted by the tribunal to determine that the current financial circumstances of CLAIMANT are such that it will not be able to pay RESPONDENT's costs at the end of the proceeding.

72. The facts submitted by RESPONDENT do not justify the requested order for SFC. The general assumption that CLAIMANT is not intending to comply with the award rendered against it in the arbitration proceedings in January 2016, where CLAIMANT was ordered to pay one of its suppliers US$ 2,500,000, cannot prove on its own, the need for such an order. CLAIMANT has not complied with the award in this proceeding, as the award creditor owes an even larger amount to the parent company Wright Holding PLC for damages as a result of a delivery of non-conforming goods.

73. In international arbitration, it is well known that doubting the financial strength of an entity is not enough for an Arbitral Tribunal to order SFC [ICC 14666/2008 Procedural Order]. Moreover, it is necessary that a material change in circumstances that were commercially unforeseeable, are shown during the arbitration proceedings in order to grant SFC.

74. These facts do not sufficiently prove that CLAIMANT will not be able to bear the arbitration costs due to its current financial situation. The general understanding is that insolvency is not, in itself, the basis of a request for SFC [Savage & Gaillard] [Poudret & Besson,].

ii. *SFC does not condition the final decision on costs.*

75. RESPONDENT is mistaken in interpreting SFC as a guarantee of the final decision on costs. The scope of SFC is rather aimed to protect a party's right of defence against claims, raised by an impecunious party, which may prove are neither admissible nor justified [ICC 13439/2004]. RESPONDENT should not

attempt to thwart SFC's *raison d'être* by presuming that CLAIMANT is impecunious.

76. An important question that an Arbitral Tribunal must always answer, is if CLAIMANT's financial position should affect its right of access to arbitral justice.

iii. *CLAIMANT's good faith behaviour ensures that it is not organizing its own insolvency and has not deliberately provoked it either*

77. RESPONDENT has to establish, on a *prima facie* basis, that CLAIMANT is organizing its own insolvency [Knoepfler] or that it deliberately provoked its insolvency in order to avoid the financial risks related to an arbitral proceeding, or any other fraudulent reason [Poudret & Besson]. None of these efforts can be identified in CLAIMANT's commercial operations. CLAIMANT's conduct is, and always was, in good faith.

78. There are no insolvency and bankruptcy proceedings against CLAIMANT or any attempts made by a third party [Procedural Order Nº 2; p.60, question 31].

79. The profit in 2015 of US$ 657,000 is caused by commercial and economic strains exerted upon CLAIMANT as a result of RESPONDENT's default [Procedural Order No 2; p. 59, question 28].

80. Commercially unforeseeable material CoC have to be considered and interpreted on the basis that, even if CLAIMANT filed for reorganization proceedings, RESPONDENT will have to bear this business risk. Players in international arbitration generally understand that granting an order for SFC under these circumstances would infringe upon the paramount principle of equal treatment of the parties. Only if bad faith is proven, RESPONDENT will be exonerated. In the present case, not only has CLAIMANT not filed for reorganization but also nothing on record shows that CLAIMANT has acted in bad faith. [ICC 12035/2003]

81. Since the beginning of the commercial relationship between the parties, there is no evidence that CLAIMANT's financial situation will not allow for the payment of a possible award of costs.

iv. *Burden of proof lies on the Party seeking SFC*

82. As for the burden of proof, it is important to recall that it lies with the party seeking SFC. In addition, the arbitral practice suggests a test by which the burden of proof is analysed. This test also determines if a piece of evidence is suitable when granting SFC.

83. The test mentioned was first suggested in *Law and Practice of International Commercial Arbitration* by Redfern and Hunter. Attending to the criterion used by these scholars, the Arbitral Tribunal pointed out that respondent has to show convincingly that claimant, if it proves to be a losing party, will almost certainly be unable to meet an award of costs against it [ICC 13359/2006].

84. The result of applying the test, suggested in Redfern and Hunter, in the present case, will determine that CLAIMANT is not impecunious nor finds itself in a precarious financial situation and would therefore be able to meet an award of costs against it.

v. *Even though CLAIMANT's debt/equity ratio has changed over time, the financial situation is not at all weak*

85. It is part of normal commercial risk-bearing practices to concede that credit standing of a business counterpart may change over time. Therefore, compared with litigation, in international commercial arbitration there is less justification generally for granting SFC [ICCA Task Force Report on SFC and Costs, p.14].

86. In the DSA of the 1st of August 2010, both Parties agreed on a risk sharing structure. The DSA stated, that CLAIMANT had to bear the risk that production cost would be actually above the maximum price established. The maximum price was 13,125$ unit-cost per blade [Section 4.1 of the DSA]. The fixing of a cost-plus on which party is able to better hedge the risk. The fact that CLAIMANT agreed on this cost-plus structure, constitutes clear evidence that CLAIMANT's financial situation was not precarious at the time the DSA was drafted. [CLAIMANT's RFA, p. 4, para. 6]; [CLAIMANT's EXHIBIT C2]; [Procedural Order No 2, p. 56, question 13].

vi. *CLAIMANT has a privileged position in Wright Holding PLC that provides for and guarantees its financial strength*

87. 88% of CLAIMANT's shares are owned by Wright Holding PLC. CLAIMANT's management discusses all important decisions which go beyond the day to day business with the parent company. [Procedural Order No 2, p. 54, question 2]

88. Based on this fact, the corporate relationship between CLAIMANT and its parent company reveals a constant and well-managed commercial cooperation and coordination between them. An example of this sturdy connection would be that Wright Holding PLC wanted a general policy decision as how to deal with customer complaints concerning the levy [Procedural Order No 2, p. 57, question 22].

89. Wright Holding PLC provided CLAIMANT with a parent company loan of US$ 3.000.000 in December 2015 to distribute the necessary liquidity for the final stages of production of the TRF-305 fan [Procedural Order No 2, p. 59, question 29]. The actual financial situation is identical to that of 2010 where CLAIMANT had also a strained liquidity situation. Notwithstanding, the injection of liquidity of US$ 1,500,000 was provided by CLAIMANT's parent company in 2010.

90. Consequently, it is clear that Wright Holding PLC cares about CLAIMANT's commercial future. There is a high probability that the parent company keeps providing and ensuring financial capacity, taking into account these important precedents. There is no evidence that a similar loan will not be extended by Wright Holding PLC to CLAIMANT in the future.

91. In the event that the financial situation of CLAIMANT was to deteriorate, this would not be sufficient to grant RESPONDENT SFC [ICC 14661/2008]. Commercial International Arbitration practice establishes that financial weakness by itself is not enough to award SFC [ICC 13359/2006].

4.3.2. The financial situation of CLAIMANT needs to change materially and unforeseeably, since the conclusion of the arbitration agreement, for the request for SFC to be justified

92. CLAIMANT's current financial situation provides the necessary strength and solvency to operate in the international arena with success.

i. *CLAIMANT's current financial situation warrants payment an adverse award of costs*

93. According to the facts presented in CLAIMANT's financial statements for 2015, US$ 4,500,000 constitute intangible assets. Those assets reflected the development work which went into the TRF 305 [Procedural Order No 2, p. 59, question 29].

94. Just CLAIMANT's intangible assets could bear RESPONDENT's estimation of the minimum legal costs of US$ 200,000. Moreover, intangible assets are one of the most valuable class of assets for their ability to aid a company in its growth and potential. Intangible assets can be easily converted into cash and therefore CLAIMANT, if necessary, could rapidly obtain liquidity. [Webster & Jensen]

95. Additionally, enforceability of any cost award against CLAIMANT would not be problematic because Equatoriana and Mediterraneo are parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

ii. *Ignoring CLAIMANT's real financial situation before arbitration proceedings commenced is not reason enough to grant SFC*

96. CLAIMANT'S financial situation was readily available as the audited accounts for the years 2009, 2010 and 2015 were made public on April of the years 2010, 2011 and 2016. RESPONDENT should have gathered information concerning CLAIMANT's financial situation to notice any relevant economic facts; this being the least due diligence. Furthermore, RESPONDENT should have brought them up during negotiations, during the drafting of the DSA or during the Answer to the Request of Arbitration. Therefore, a respondent which knew or ought to have known about a claimant's financial situation, or even it's

strained liquidity situation, when agreeing to arbitrate disputes with that claimant, should not be able to obtain SFC [ICCA Task Force Report on SFC and Costs, p. 13].

4.3.3. Procuring external funding of legal cost does not prove financial difficulties.

97. Large and solvent companies increasingly used third-party funding as a way to offset risk.

98. Importantly, commercial international arbitration players consider that the presence of a funder should not shift the burden of proof as to whether the requirements for SFC are fulfilled. Therefore, an increasingly adopted view recommends that the mere existence of a third-party funding agreement should not automatically and on its own indicate that CLAIMANT is impecunious. [Craig & Park & Paulsson]

99. In fact, there are views that defend that the existence of a third-party funding agreement can actually be an indication that the claim is not frivolous. The international practice of founding agreements reveals that third-party funders conduct their own due diligence and are arguably not willing to fund meritless claims. [ICCA Task Force Report on SFC and Costs, p. 17].

100. Consequently, the simple action of having sought a TPF is not sufficient to grant SFC.

4.4. Conclusion of the 2nd Issue

101. Firstly, there is no legal basis for the Tribunal to grant SFC. Secondly, the circumstances are far from exceptional, in particular, CLAIMANT's financial situation has not materially changed in an unforeseeable way since the arbitration agreement. Thirdly, CLAIMANT is not impecunious nor has organized its own insolvency has not deliberately provoked it either. For these reasons, the Arbitral Tribunal should dismiss RESPONDENT's groundless request for SFC.

Merits

5. 3rd Issue: The exchange rate applicable to the DSA is US$ 1 = EQD 1.79

102. As section 5.1 will prove bellow, the exchange rate stated in the *addendum* is not applicable to the fan blades Agreement. Section 5.2 will demonstrate that the exchange rate which must be applied to the Agreement is the one at the time of payment. Finally, RESPONDENT cannot possibly argue that the hardship clause should apply, as section 5.3 will establish.

5.1. The *addendum* does not change the applicable rate to the agreement regarding the fan blades

103. RESPONDENT insists that the *addendum* fixed an exchange rate for the whole Contract, which is false. The Parties' intention when entering into the *addendum* was not to affect the main Agreement regarding the fan blades model TRF 192-I [RESPONDENT's Exhibit R5]. The facts of the case allow to interpret, pursuant to Art. 8 CISG that the Parties' intentions were to apply the fixed exchange rate only to the *addendum*. The Parties' intentions cannot be interpreted taking into consideration the very different context that existed when Engineering International in November determined the Parties' actions. If the Tribunal found that the Parties' agreement on this particular issue is ambiguous, it should apply the *contra proferentem* rule to the benefit of CLAIMANT.

5.1.1. The parties never intended to govern the whole Agreement by the exchange rate provided by the addendum

104. Parties' intention is to be interpreted pursuant to Art. 8 CISG, which reads:

"For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

In determining the intent of a party or 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 which the parties have established between themselves, usages and any subsequent conduct of the parties".

105. RESPONDENT knew (or, at least, could certainly not have been unaware) that CLAIMANT's intent was not to apply the exchange rate of the *addendum* to the whole Contract (this is, to the price of the fan blades).

106. If the Tribunal found that there is not enough evidence of the above, it is clear that no reasonable person, under the current circumstances, would have understood that the exchange rate in the *addendum* was to apply to the whole Contract.

107. A series of facts prove that the Parties' intent was indubitably not to apply the *addendum'*s exchange rate to the agreement on the fan blades.

108. First, in the Parties' relations, every time they referred to the whole Contract, they used the word Agreement with a capital "A".

109. This can be seen on the following excerpts [CLAIMANT's Exhibit C2]:

- "*The BUYER undertakes to purchase a minimum of at least 2,000 fan blades under this Agreement, expressing at the same time the firm intention to purchase further units in subsequent years*" [Section 2 of the DSA].
- "*This Agreement is governed by the UN Convention on the International Sale of Goods ("CISG")*" [Section 20 of the DSA]
- "*All disputes arising out of or in connection with this Agreement shall be settled amicably and in good faith between the parties*" [Section 21 of the DSA].

110. RESPONDENT follows the same pattern on his answer to RFA: "*the whole Agreement, which is specified - or agreed between the Parties - in the Addendum to the* ***Agreement****...*" [Answer to RFA, p.20, para.17]. Therefore, RESPONDENT did not intend to apply the exchange rate stated on the *addendum* to the whole Contract.

111. Most importantly, the same happens in the *addendum* itself, which refers to the *addendum* as "agreement" and to the DSA as "*main Agreement*":

Addendum of 26 October 2010 (handwritten)
The Buyer may request the Seller to produce and deliver 2,000 clamps to attach the fan blades to the fan shaft. The Price for the clamps shall be on a cost coverage base and be paid in US$.

Other terms as per main Agreement.

The exchange rate for the agreement is fixed to US$ 1= EQD 2.01.

112. It is RESPONDENT who drafted the *addendum* [RESPONDENT's Exhibit R2], and it is RESPONDENT who used the same terms which had been used on the rest of the Contract. The award in Case 7110 states that: "(f)*inally, it is also a generally accepted practice by international arbitral tribunals, predicated upon elementary notions of coherence and rationality, to assume that the same words or expressions shall have the same meaning throughout the documents containing them…*". When it comes to the exchange rate, the word agreement without capital letters is used. Hence, it can only be considered that it applies only to the *addendum* (which is obviously an "agreement") and not to the whole Agreement (which is a very specific Agreement). If RESPONDENT's intention was to apply the exchange rate provided on the *addendum* to the whole Contract, he would have undoubtedly written "The exchange rate for the agreement **and the Main Agreement** is fixed to US$ 1 = EQD 2.1".

113. Furthermore, RESPONDENT's CEO (Paul Romario), as can be seen on his witness statement [RESPONDENT's Exhibit R5], uses the term "*main Agreement*" for the contract regarding the fan blades. Therefore he distinguishes between two different notions: the "Agreement" and the "agreement". When Mr. Romario alludes to the *Agreement* he is referring to the DSA. It would be contradictory that on the *addendum*, a written agreement that needs to be as clear and straightforward as possible, RESPONDENT uses different words for the same concept (the Agreement). Hence, by using the capital letter "*A*" ("*Agreement*") the *addendum* makes reference to a term that applies to the whole Agreement and, when the *addendum* makes reference to the "agreement", with a small "*a*", it is referring to itself.

114. Second, on the e-mail sent by RESPONDENT regarding the *addendum,* no reference was made to the applicable exchange rate for the whole contract, as it had never been the case before. This issue was not even dealt with when the principles for the cooperation were agreed on [CLAIMANT's Exhibit C1)]. Even if, according to RESPONDENT, the applicable exchange rate is a "*major issue*" and regulating it in the Agreement would be of the upmost importance. Nevertheless, the fact is that no mention of the exchange rate was made before signing the Agreement and that no exchange rate clause was included in previous projects: "*the parties copied the price mechanism of the earlier contracts*", [RESPONDENT's statement of facts, para. 8]. It can be inferred that the parties did not intend to discuss the exchange rate during the drafting the Agreement. This is in line with CLAIMANT's CFO, Iliena Jaschin's witness statement [CLAIMANT's Exhibit C9], where she said that the exchange rate, in both previous projects, was not discussed until the moment of payment.

115. Third, regarding CLAIMANT's intention, it is utterly clear that there was no intention of adding an exchange rate clause to the whole Contract, because, as Ms. Jaschin stated, this issue was to be discussed at the time of payment. When CLAIMANT pointed out its mistake in applying the exchange rate one hour and twenty-three minutes after receiving RESPONDENT's e-mail stating that the payment had been made. It is impossible in that short period of time to elaborate a plan aiming to take advantage of the exchange rate, as RESPONDENT's CEO implied: "*the lack of clarity always entails the risk of opportunistic behaviour*" [RESPONDENT's Exhibit R5]. CLAIMANT immediately corrected the mistake. Therefore, CLAIMANT's intention was never to submit the whole contract to the exchange rate on the *addendum*, but – as it will be proven below- to apply the one existing at the moment of payment.

116. Last, but not least, the summary notes on the 1 May 2010 meeting held by the Parties [CLAIMANT's Exhibit C1] proves that RESPONDENT's intent was never to apply a fixed exchange rate to the price of the fan blades. In that meeting, "*SantosD insisted on pricing in US$"* but reassured CLAIMANT that its "*expenses will have to be converted but no major risk involved".* Also, Mr. Romario does not refer to the exchange rate (notwithstanding the *addendum*)

nor to the convenience of including one to be applied to the fan blades in his e-mail sent to Mrs. Beinhorn (the 22nd October 2010) suggesting the linking of the *addendum* [RESPONDENT's Exhibit R2]. In fact, the only reason for linking the *addendum* to the main Agreement was a practical one, as stated on the aforementioned e-mail [RESPONDENT's Exhibit R2]: "*we think the easiest way to regulate the purchase of the clamps is to sign an addendum to our DSA*". In addition, in order to novate the main Agreement, the novated obligation must be incompatible with the one it novates [Albaladejo]. In consequence, there is no incompatibility in applying an exchange rate for the clamps and another one for the fan blades.

5.1.2. CLAIMANT must no longer obey the orders given by Engineering International during November 2009

117. In November 2009 Engineering International wanted to sell RESPONDENT. To make the sale feasible, RESPONDENT needed to be de-risked. Engineering International ordered its companies to bare all currency risks in their operations with RESPONDENT. The reason for this was to make RESPONDENT "*more attractive to potential buyers*" [Answer to RFA, p. 24, para. 9].

118. The facts that are relevant to infer the Parties' intent regarding the issue of the exchange rate applicable to the price of the fan blades are not the ones that existed when Engineering International order to de-risk RESPONDENT. In February 2010, before RESPONDENT contacted CLAIMANT, an offer was made to Engineering International to buy CLAIMANT. The offer made by the buyer met Engineering International's expectations Therefore, since February 2010, CLAIMANT knew that it would be sold. CLAIMANT entered the negotiations with RESPONDENT knowing it would no longer be a part of the same group as RESPONDENT; hence Engineering International's order to de-risk RESPONDENT was no longer in force. CLAIMANT was not bound to agree on an exchange rate in favour of RESPONDENT.

5.1.3. If the arbitrors consider that the terms in the **addendum** *are not as clear as CLAIMANT does, a* **contra proferentem** *interpretation must benefit CLAIMANT*

119. Even if it is CLAIMANT's position that the *addendum* unambiguously establishes an exchange rate which only applies to the clamps, if the Tribunal were to consider that the *addendum is* ambiguous in this point, as RESPONDENT drafted the *addendum*, a *contra proferentem* interpretation should be applied by the Tribunal.

120. Art. 4.6 of the UNIDROIT Principles states: "*If contract terms supplied by one party are unclear, an interpretation against that party is preferred*". Hence, as the *addendum* is unclear, it should be interpreted against RESPONDENT, who drafted it.

121. The party who introduces a term individually negotiated (or a standard term) should make sure that it is sufficiently transparent, reassuring that the other party knows what are its rights and obligations. "*The contra proferentem rule is mainly based upon the concept of deterrence. The party who introduces a clause into the contract can and should ensure its transparency and, respectively, avoid the uncertainty associated with ambiguous terms. This uncertainty is detrimental, since the other party is not sufficiently aware of the scope of his rights and duties when concluding the contract […] The contra proferentem rule aims to achieve that the other party's 'well-earned' legal position is only restricted to an extent that is made perfectly clear in the contract*" [Canaris & Grigoleit].

122. The *contra proferentem* rule entails that the supplier of the unclear term or clause must bear the risk of said lack of clarity. The obscurer the term, the more justified the *contra proferentem* interpretation becomes. Arbitral tribunals apply it whenever they face the ambiguity of a clause or term. As stated in ICC Case 7110: "*It is a general principle of interpretation widely accepted by national legal systems and by the practice of international arbitral tribunals, including ICC arbitral tribunals, that in case of doubt or ambiguity, contractual provisions, terms or clauses should be interpreted against the drafting party (contra proferentem)*". Also, scholars like Bonell recognize the universal application of such a rule: "*It is a well known principle that if there is any doubt*

as to the meaning and scope of terms included in general conditions, such ambiguity will be construed against the party seeking to rely on these terms" [Bonell].

123. Vogenauer and Kleinheisterkamp consider that two requirements must be met to apply the rule of interpretation *contra proferentem* [Vogenauer & Kleinheisterkamp].

- Irremediable ambiguity: the term at issue can have at least two different meanings.
- Contract terms must be supplied by the other party: the term or clause can be a standard term or an individually negotiated term, and it is of no relevance whether the supplier is the obligator or the obligee. In order to interpret the ambiguous term against one party, that party must have introduced it in the agreement.

124. If the Tribunal found that the *addendum* lacks clearness, it should be interpreted to the detriment of RESPONDENT as it is RESPONDENT who drafted it.

125. First, RESPONDENT individually drafted the terms of the *addendum* and insisted on adhering them directly to the main Agreement as an *addendum*. This was not denied by RESPONDENT's statement of facts, and is proved by an e-mail sent by Mr. Paul Romario, RESPONDENT's CEO [RESPONDENT's Exhibit R2].

126. Mr. Romario, on his witness statement, recognizes that he did not know if CLAIMANT had the same point of view regarding the *addendum*. He affirms that CLAIMANT should have pointed this out: "*For me it was clear that the exchange rate would apply also to the fan blades. I cannot say whether CLAIMANT's negotiators had the same view. If not, they should have said so…*" [RESPONDENT's Exhibit R5]. According to his own statement, it was only clear for Mr. Romario ("*for me it was clear*"), and not to CLAIMANT's negotiators, that the exchange rate would apply to the fan blades. It was not certain for him that they understood the *addendum* in the same way he did. Hence, he seems to admit that this point was somewhat ambiguous and that he did nothing to avoid this ambiguity, thus increasing the likelihood of

misinterpretation of the *addendum*. Therefore, only RESPONDENT, as the draftsman of the *addendum*, must bear the burden its eventual lack of clarity.

5.2. The exchange rate that should be applied to the contract is the one at the time of payment

127. Since the *addendum* must not be applied to the fan blades Agreement, the adequate exchange rate, for the said agreement, must be US$ 1 = EQD 1.79; this is, the exchange rate existing in Equatoriana at the moment of payment.

128. When the Agreement regulates the price [section 4 of the DSA] there is no mention to the applicable exchange rate. Nevertheless, a reference to when the price is due is made in section 4 of the Agreement:

> "*The price is due upon delivery of the fan blades and payment should be confirmed by the BUYER as soon as possible*".

129. Thus, the Contract regulates payment as follows:

- There is a formula to calculate the price;
- The price is due after the fans are delivered;
- The parties made no reference to the exchange rate.

130. The only mention in the Agreement as to when the payment should be confirmed is section 4, which establishes that this must take place upon delivery of the fan blades. The confirmation of the price includes the determination of the applicable rate, which must therefore be made upon delivery of the blades. There is no mention in the Agreement as to a confirmation on the time of the signing of the Agreement or at any other time. The payment is due once the fan blades are delivered, and the exchange rate upon delivery was: US$ 1 = EQD 1.79.

131. Art. 6.1.10 of the UNIDROIT Principles also provide some guidance which is useful to the current situation. It states that "w*here a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made*".

132. Applying Art. 6.1.10 of the UNIDROIT Principles seems advisable, considering that CISG and the UNIDROIT Principles provide no regulation

regarding the lack of an express exchange rate in a contract, and that there is no international practice in the aircraft market regarding exchange rate [Procedural Order Nº 2, p. 56, question 13].

133. The similarities between the current situation and Art. 6.1.10 rely on the following:

- There is a monetary obligation;
- A particular feature of said obligation (the exchange rate, instead of the currency) is undetermined;

134. Consequently, considering that no exchange rate was fixed for the clamps agreement (an exchange rate was only regarding the fan blades), the Parties must apply the exchange rate applicable when payment is due. Thus, the applicable exchange rate is US$ 1 = EQD 1.79.

5.3. Hardship must not be applied in the present case

135. RESPONDENT might try to argue that the hardship provision in the DSA must apply. This provision reads:

136. "*Should the production cost per fan blade exceed US$ 13,125 due to the extraordinary unforeseeable circumstances and result in unbearable hardship for the Seller the Parties will enter into good faith negotiations to determine a price which is finally acceptable to both parties*." [CLAIMANT'S EXHIBIT C2]

137. If this were the case, the Arbitral Tribunal must not uphold this argument.

138. The principle of Hardship is based on the core principle of civil law and International Law, i.e. *Pacta Sunt Servanda* which means that *"Agreements must be kept*." Art. 1.3 of the Unidroit Principles are in application thereof: *"A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles*".

139. According to this principle, clauses in private contracts are law between the parties and as they are legally binding, non-performance of those terms constitutes a contractual breach.

140. *"However, this bona fide principle of Pacta Sunt Servanda is subject to one restriction." This restriction is commonly known as the rebus sic santibus clause, a legal doctrine allowing for clauses in a contract to become inapplicable because of a fundamental CoC. It is essentially an "escape clause" that makes an exception to the general rule of Pacta Sunt Servanda."* [Fucci].

141. The hardship clause, in the context of long-term international contracts, fulfils the same function as the *rebus sic stantibus* clause, which is the Latin aphorism used for the treatment of excessive onerosity in Ancient Roman Law.

142. Both scholars and case law have recognised Hardship as a circumstance that affects the compliance of obligations. Hardship is regulated in the UNIDROIT principles, under Artt. 6.2.1 and 6.2.2, mentioned below.

- Art. 6.2.1: "*Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.*"
- Art. 6.2.2: "*There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and*

  The events occur or become known to the disadvantaged party after the conclusion of the contract;

  The events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

  The events are beyond the control of the disadvantaged party; and

  The risk of the events was not assumed by the disadvantaged party."

143. Hardship indicates a situation which is unforeseeable, unavoidable or unknown at the time of the conclusion of the contract, and alters the economic balance of the contract significantly, making its performance particularly onerous for the other party. This situation has not been reached in the case at hand.

144. Therefore, the principal function of this clause is to allow for a renegotiation of the contract.

145. Since the general principle is that a change in circumstances does not affect the obligation to perform [Art. 6.2.1], it follows that hardship may not be invoked unless the alteration of the equilibrium of the contract is fundamental. It is clear that an alteration of the equilibrium of the contract will, of course, depend on the circumstances. Excessive onerousness entails that the balance between the parties has disappeared. Arbitration courts have considered an increase of 30% of the value of the performance as a non-fundamental alteration of the contract's equilibrium. [Nouva Fucinati S.p.A v. Fondmetall Int'l A.B]

146. In this case RESPONDENT knew about the devaluation and appreciation of the EQD. EQD as exchange rates have been fluctuating since 2007. [Procedural Order No 2, p. 56, question 12]

147. Even if CoC occurs after the conclusion of the contract, as it is said in sub-para. (b) of Art. 6.2.2, is it clear that such circumstances cannot cause hardship if they could reasonably have been taken into account by the disadvantaged party.

148. Based on other case law, the case at hand offers no possibility to invoke a hardship clause. First, in a case involving two Lithuanian companies, the defendant made 20% of the payment, but refused to pay the total price. When Plaintiff sued, defendant invoke hardship on the ground that the value of the share decrease. The Lithuanian Supreme Court decided in favour of Plaintiff concluding that norms that determine hardship to perform did not apply to monetary obligations, which may be required in any case. [Supreme Court of Lithuania, nº 3K-3-612, of 19-05-2013] Second, in another lawsuit, the court pointed out that the appreciation of the Brasilian reais again the US dollars was foreseeable at the time of the conclusion of the agreements, which is similar to the present situation. [Tribunal de Contas de União, nº TC 007.103 / 2007-7 , of 17-12-2011] Third, the *Cour d'appel* of Québec, determined that hardship did exist. The Court reached this decision because not only was the contract a long term one (40 years) but there was a "*fundamental alteration*" of the equilibrium of the contract. More importantly, the "*unpredictability of the event causing hardship*" was crucial to determine the existence of the "*teorie de l'imprevision*" (doctrine of hardship) [*Cour d'appel,* Province de Québec, District of Montreal, case number 500-09-024690-141 dated on 1-08-2016]

149. The fluctuation could have reasonably been foreseen, as there was a constant devaluation of the exchange rate due to well-known political turmoil, so the risk of the fluctuations of exchange rate was know by both parties at the time of the contract.

150. To conclude what we had seen through, the hardship cannot apply in this case.

6. 4th Issue: The Bank Levy must be paid by RESPONDENT

151. The question here is whether the bank levy should be borne either by RESPONDENT, the buyer or by CLAIMANT, the seller.

152. Firstly, as section 6.1 will prove below, the parties designed the DSA to allocate all payment to the buyer; the use of the term *bank charges* being nothing more than a useful description to encompass all costs that this particular form of payment. Secondly, section 6.2 shall demonstrate that article 54 CISG also compels RESPONDENT to bear the levy, along with a wealth of precedents and scholars. Finally, section 6.3 will refute all of RESPONDENT's arguments to avoid paying the levy.

6.1. The intention of the parties was to stipulate that any and all bank charges were to be borne by the buyer, RESPONDENT

153. On the 15th of January 2015, Mr Lindbergh emailed Ms Beinhorn to confirm that RESPONDENT had effected payment for the fan blades and clamps respectively. On the 29th of January 2015, US$ 20,336,367.20 was credited to the CLAIMANT's account at the Equatoriana National Bank. On the 9th of February 2015 Ms Beinhorn notified Mr Lindbergh by email that CLAIMANT demanded the outstanding payment of US$ 2,387,432.80 by the 4th of March 2015. In his reply of 10 February 2015 Mr Lindbergh denied that any additional purchase price payment was due, stating that RESPONDENT was not aware of any reason why US$ 102,192.80 had been deducted from the US$ 20,438,560 it had transferred.

154. The bank levy established under section 5 of Regulation ML/2010C constitutes a "*bank charge"* under the contract's language. Section 4.3 of The DSA [CLAIMANT's CLAIMANT'S EXHIBIT C2] states that "*the bank charges for the transfer of the amount are to be borne by the BUYER.*" The term "*charge*"

in this context would undoubtedly include any type of banking commission that relates to the expenses or the costs of the wire transfer between financial institutions from different states, in this case Ecuatoriana and Mediterraneo. Moreover, it would evidently include any type of additional charge imposed by any of the banks it is the state that imposes it that took part in the commercial relationship between the parties.

155. There were no other bank charges known to the Parties at the time of signature of the DSA [section 4 of the DSA]. The Parties did not deem necessary to add other clauses referring specifically to "*bank fees*", "*bank taxes*" "*bank duties*", "*tariffs*", etc. as the concept of bank charge was comprehensive enough. There were no other predictable financial costs that would reasonably be incurred by the transfer. Hence, when introducing this term, the parties had no fixed target in mind, but rather intended for the buyer, CLAIMANT, to receive the entire payment owed for the blades.

156. The purpose of the provision set out in section 4.3 was to allow CLAIMANT to receive the whole price. This clause sought to avoid the possibility that any sort of cost incurred by the actions taken by RESPONDENT to secure payment would hinder in any way the payment of the full price, let alone thwart payment entirely. As the means of payment was an international wire transfer the language of the contract precisely refers to banking charges; this is, any and all costs that a transfer may foreseeably be subject to. The use of the broadly interpretable term "*bank charges*" in the context of a wire transfer must be read as to include any and all possible costs incurred by the transferal of funds.

6.2. Under article 54 CISG, the bank levy must be borne by the buyer, RESPONDENT.

157. Article 54 CISG states 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*." A classical interpretation of this provision would include each and every preliminary step to fulfil the obligation of payment. Indeed, the UNCITRAL Digest is clear in pointing out that "*preparatory actions required by applicable laws or regulations might involve, for example, an administrative authorisation*

needed for the transfer of funds to enable payment to be made" [Digest]. This concept of preparatory measures is also mentioned in the Secretariat Commentary, which states that "*as part of the buyer's obligation to pay the price, he must take the steps and comply with the formalities which may be required by the contract and by any relevant laws and regulations to enable payment to be made*" [Secretariat Commentary].

158. The levy at issue is clearly comparable to the examples given by both the Digest and the Commentary due to the fact that the transfer is subject to administrative scrutiny and authorization. Consequently, the levy constitutes, under the wording of Article 54, a "*step*" to allow for full payment of the fan blades.

159. The Secretariat's Commentary along with the vast majority of commentators, scholars and courts agree that "*unless the contract specifically placed one of these obligations on the seller, it is the buyer who must take these steps*." In similar terms, the Digest concludes that "*unless otherwise provided for in the contract, article 54 imposes these obligations on the buyer, who must thus bear the costs thereof.*" As there is no question that the DSA [CLAIMANT'S EXHIBIT C2] is unambiguous in placing the burden on the buyer, this fact is not challenged by RESPONDENT.

160. Particularly eloquent is Professor Henry Deeb Gabriel who also adds that "*absent a contrary agreement, the buyer must bear the costs for measures necessary to enable him to pay the price*" and concludes explaining that art. 54 "*specifies that the buyer's obligation to pay the contract price extends beyond the abstraction of owing the money. The obligation also includes whatever steps and costs that are necessary to ensure that the payment is actually made*." Thus, as Prof. Gabriel explains, many cases have pointed out that "*any costs associated to effect payment are rightfully borne by the buyer*." He illustrates this with an example in the form of a footnote: "*If a government charged a tariff on the export of money, the buyer would be responsible for that extra cost (absent contrary agreement) as part of the payment of the price*."

161. As many commentators have recognized, article 54 gives rise to "*particular difficulties with regard to administrative measures imposed by applicable laws or regulations in order that payment can be effected*" [Digest]. This is the crux

of the question debated in this issue. One analysis of article 54 makes a distinction between measures of a commercial nature [DiMatteo, Maskow, Osuna, Tallon,] "*in respect of which the buyer assumes a commitment to achieve the result stated in the contract*" [Digest], and administrative measures, "*with regard to which the buyer takes on only an obligation to employ its best efforts without being answerable for the outcome*" [Digest]

162. However, the same digest and other scholars [Lookofsky, Gabriel] suggest that "*a possible argument against this distinction is that, under article 54, the buyer is automatically responsible if a prerequisite to payment, whatever its nature, is not satisfied." [Digest] According to Professor Jean-Pierre Plantard, "these formalities are part of the principal obligation to effect payment; therefore, if a buyer fails to comply with any of these enabling steps he would be in breach of his contractual obligation to pay*." [Plantard]

163. Following either theory, RESPONDENT must bear the cost of the levy. Even if there is a legally relevant distinction between commercial and administrative measures and the levy is defined as being part of the second category, RESPONDENT has not fulfilled its obligations as he has neither employed "*its best efforts*" [Digest] nor taken "*all the appropriate measures to persuade the relevant Governmental authorities*" [Secretariat Commentary]. Despite the fact that the buyer is not responsible for the outcome of administrative measures, there must exist proof of "*good faith effort to satisfy the requirements of the contract*" [DiMatteo].

164. In this case, RESPONDENT did not take a single step even to investigate what had happened to the amount subtracted to the transfer. The buyer's "*own lack of action*" will not serve as "*an excuse for failure*" to comply with preparatory measures [DiMatteo]. This was confirmed by a decision by the ICC Russian Tribunal in which a Russian buyer could not excuse failure to obtain letter of credit because of an absence of funds. [Trib. of Int'l Commercial Arbitration at the Chamber of Commerce & Indus., 123/192]. "*The buyer must make his best reasonable effort to pursue compliance with the legal requirements full heartedly, with a view to actually obtaining the desired result*" [Osuna]. There is a common understanding that the buyer must take reasonable steps to comply

with administrative measures in order to ensure that payment is made. Even if the result is out of reach, a buyer must always act to ensure that buyer is payed.

165. RESPONDENT has argued lack of knowledge about the bank levy. However, this defence is no longer valid since Mr. Lindberg, on his e-mail of 10 February 2015 stated that RESPONDENT did "*not have any idea why only US$ 20,336,367.20 was credited to Wright's account*" [CLAIMANT's EXHIBIT C7]. From this instance RESPONDENT knew about the imbalance between the transferred and the credited amounts and from that moment onwards RESPONDENT had an obligation, as buyer, to take all necessary steps to ensure payment or, at least to employ its best efforts to do so. RESPONDENT will surely try to argue that it should have been CLAIMANT's duty to insist and inform about the levy and its consequence. However, Arbitral Courts have concluded that Art. 54 does not require the seller to demand compliance with contractual formalities from the buyer [ICC 7197/1992]. As it has been previously explained, the mentioned levy constitutes a bank charge under the DSA and consequently, CLAIMANT did not need to demand payment of the levy to make this obligation binding for RESPONDENT.

166. Traditionally, Courts interpreting Art. 54 CISG have understood that its purpose is to serve as a broad scope to include all those steps involved in performing the payment obligation. For example, a particular ruling found that notifying letters of credit fell within the broad definition of paying the price [ICC 7585/1992]. CLOUT Case No. 301 [Court of Arbitration of the International Chamber of Commerce, Case No. 7585, 1992].

6.3. An analogy between Article 35 (2) CISG and this bank levy is not acceptable under orthodox rules of legal interpretation as there are specific CISG articles that extensively cover the matter.

167. RESPONDENT wrongly argues that "*the present situation is comparable to the [...] seller's obligation to deliver goods that public law regulations at the buyer's place potentially affecting the conformity of the goods*" This line of reasoning by analogy is easily dismissed as there is a flagrant error in legal interpretation when founding this argument on Art. 35 (2) CISG. The case in question deals generally with the unfulfilled obligation of the buyer, to which

CISG devotes a whole chapter (Chapter III) and specifically with payment of the price, an obligation governed by Artt. 54 to 59 CISG that constitutes one of the two main duties the buyer must consummate as deemed by the Convention [Art. 53 CISG]. No argument by analogy between the seller's and the buyer's obligations is permissible when a specific regulation controls those of the latter.

6.4. Under the UNIDROIT Principles, which supplement CISG, the bank levy must be borne by the buyer, RESPONDENT

168. Even if the matter had not been settled by Art.54 CISG —which it has— the UNIDROIT Principles do not contradict CISG. Quite the contrary. Art. 6.1.11 of the UNIDROIT Principles states that "*(e)ach party shall bear the costs of performance of its obligations*". This plainly affirms that the bank levy, a performance cost incurred by the wire transfer, must be borne by RESPONDENT, the party that had to perform this payment obligation.

6.5. None of the arguments brought forward by RESPONDENT, in the Answer to Request for Arbitration, to avoid paying the bank levy can be upheld by the Tribunal

6.5.1. ML/2010C is not an extraordinary or uncommon regulation and is in no regard specific to particular transfers.

169. RESPONDENT argues that this bank levy, instituted under Section 12 Regulation ML/2010C of Equatorianan legislation, "*is not part of the ordinary bank charges for payments but based on a very specific public law regulation.*" [Paragraph 18, Answer to RFA]. This is, at best, an inaccurate legal analysis as the mentioned bank levy is in no way specific to particular transfers or other overseas financial operations. All payments into Equatorianan banks, regardless of origin, amount or currency are subject to ML/2010C and all payments entering Equatorianan banks that exceed US$ 2 million fall under scrutiny of the Financial Intelligence Unit, which makes its own enquiries and eventually gives clearance to the transfer minus the 0,5% levy.

170. Moreover, ML/2010C is not an anomaly in financial regulation as it based on the UN-Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime.

6.5.2. None of the previous two commercial relationships, where CLAIMANT bore the cost of the bank levy, are similar to this contract.

171. RESPONDENT correctly states that on two previous occasions, the bank levy was borne by CLAIMANT [Answer to RFA], the first one being a payment of May 2010 by JetPropulse from Ruritania, and the second one concerning a payment by JumboFly. Both of these cases differ greatly from the one at hand. An important distinction must be made between the DSA and the past two contracts as none of these contained any rule as to which party had to bear the bank charges. Also, a distinction must be made between clients in the previous contracts and RESPONDENT.

172. JumboFly is CLAIMANT's largest customer and this prior payment of US$ 5,300,000 concerned an emergency purchase by JumboFly concluded on very favorable terms for CLAIMANT which made a profit of 8% under said contract. In light of the importance of the customer and of the profit margin obtained in the sale, CLAIMANT decided not to claim the levy deducted from the transfer.

173. In the second instance, JetPropulse was not only a long-standing customer but had signed the contract in January 2009 (a year before ML/2010C came into full force and effect); reasons that made CLAIMANT decide not to ask for the payment of the levy.

174. In the present case, CLAIMANT has not only been deprived of US$ 2,387,432.80 that are rightfully owed to him but also RESPONDENT is in no way similar to the other aforementioned customers, making this commercial relationship a seriously injurious one and in no way analogous to those mentioned herein.

6.6. Conclusion of the 4th Issue

175. As previously demonstrated, the DSA is especially clear in burdening the buyer, in this case, RESPONDENT, with the costs incurred by the transfer. If this were not enough, Art. 54 CISG has also been interpreted as to oblige the buyer to take all necessary steps to "*enable payment to be made*" and this bank levy is no exception. RESPONDENT has no choice but to bear and pay the costs of the bank levy.

7. Relief sought

176. For the reasons given above, the CLAIMANT respectfully requests the Arbitral Tribunal to:

1. Declare the Claim admissible;
2. Dismiss RESPONDENT's request for Security for Costs;
3. Declare that the exchange rate applicable to the sale of the fan blades is US$ 1= EQD 1.79;
4. Therefore, order RESPONDENT to pay CLAIMANT the outstanding amount of US$ 2.285.240 plus the legal interest that the Tribunal may consider fit;
5. Declare that the hardship clause is not applicable;
6. Order RESPONDENT to bear and consequently pay the bank levy amounting to US$ 102,192.80 plus the legal interest that the Tribunal may consider fit;
7. Order RESPONDENT to bear the costs of the arbitration, including CLAIMANT's legal costs.

Signed:

Jessica Berzal

Claudia García

Luis Ortega

Gutier Rettensteiner

Ana Sanmillán

Jose Usera

Madrid, December 8th, 2016.