



**TWENTY-FOURTH ANNUAL  
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT  
8 TO 13 APRIL 2017**

---

**MEMORANDUM FOR RESPONDENT**



**HOFSTRA UNIVERSITY SCHOOL OF LAW**

**ON BEHALF OF:**

**SantosD KG**  
77 Avenida O Rei  
Cafucopa  
Mediterraneo

**RESPONDENT**

**AGAINST:**

**Wright Ltd**  
232 Garrincha Street  
Oceanside  
Equatoriana

**CLAIMANT**

---

**COUNSELS:**

MATTHEW GOODISON-ORR · ELIZABETH DRISCOLL · TAUSEEF AHMED  
MIKE HASSARD · ANNETTE BEVANS · JOVIA RADIX  
SARAH CAZE · GABRIELA CALAHORRANO · OLIVIER LABOSSIER

---



**TABLE OF CONTENTS**

**INDEX OF ABBREVIATIONS..... iv**

**INDEX OF LEGAL AUTHORITIES..... vii**

**INDEX OF CASES ..... xi**

**INDEX OF ARBITRAL AWARDS ..... xiii**

**LEGAL SOURCES AND MATERIAL ..... xiv**

  

**STATEMENT OF FACTS ..... 1**

**INTRODUCTION ..... 3**

**ARGUMENT ..... 5**

**I. THE TRIBUNAL HAS THE DISCRETION TO ORDER SECURITY FOR COSTS ..... 5**

**A. The Tribunal has the authority to order claimant to provide security for cost ..... 5**

**B. The Tribunal should grant RESPONDENT’S request for security for cost ..... 7**

    1. An application of CLAIMANT’S test warrants the grant of an order for security for costs..... 8

    2. CLAIMANT’S Questionable Financial Position Weighs Heavily In Favor Of An Order Of Security..... 9

    3. Balancing Claimant Possibility Of Harm Against Injustice To Respondent According To Warrants The Granting Of Security..... 11

**C. Policies of International Practice..... 12**

**II. CLAIMANT’S REQUEST FOR ARBITRATION SHOULD BE DISMISSED..... 13**

**A. The Tribunal should defer to the terms of the Parties’ Arbitration Agreement..... 13**

    1. The Parties may choose to set their own limitations ..... 14

    2. The Parties agreed to the limitation period set out in the Arbitration Agreement ..... 15

    3. The limitation stipulated in the Arbitration Agreement is concrete..... 16

**B. CLAIMANT failed to file its Request for Arbitration within the stipulated period..... 17**

    1. CLAIMANT was aware of a failure of negotiation and a failure to arrive at an amicable agreement after CLAIMANT received RESPONDENT’S answer to the initial correspondence ..... 17

    2. CLAIMANT’S right to legal defense was not violated ..... 18

    3. A partly paid registration fee and improper notice documents do not cease the run of the 60-day period ..... 19



<b>C. CLAIMANT failed to file its Request for Arbitration in accordance with the CAM-CCBC Rules.....</b>	<b>20</b>
a) The Power of Attorney for Wright Ltd and full payment of the Registration Fee are necessary to initiate arbitration proceedings.....	20
b) CLAIMANT failed to satisfy the requirement for the Power of Attorney and the Registration Fee .....	21
i. Failure to provide full payment of the Registration Fee is grounds for dismissal .....	21
ii. The Power of Attorney for CLAIMANT’S parent company was insufficient to satisfy the requirement under Art. 4.1(b).....	22
<b>III. RESPONDENT DOES NOT OWE CLAIMANT ANY ADDITIONAL PAYMENT .....</b>	<b>22</b>
<b>A. The fixed exchange rate applies to the entire agreement .....</b>	<b>22</b>
1. The Addendum articulately represents the exchange rate as applying to the entire agreement.....	23
2. A reasonable person with the same understanding and in the same circumstances as CLAIMANT would have understood that the fixed exchange rate mentioned in the Addendum applied to the entire contract.....	24
<b>B. RESPONDENT has the power to assert application of the fixed exchange rate to the entire contract .....</b>	<b>25</b>
1. There are reasonable usages or practices that make the fixed rate clause applicable to the Agreement.....	25
2. RESPONDENT acted in good faith, and was concerned with fixing a maximum price with good intent.....	26
<b>C. Applying the fixed exchange rate clause to the entire Agreement will not inflict undue hardship upon CLAIMANT.....</b>	<b>27</b>
.....	
3. CLAIMANT was appropriately due US\$ 20,438,560.00 .....	27
<b>D. RESPONDENT has fulfilled its duty to make the payment obligations under the Agreement .....</b>	<b>28</b>
1. RESPONDENT deposited the purchase price in full.....	29
2. RESPONDENT was not obligated to pay the levy pursuant to Section 4 of the Agreement .....	30
3. RESPONDENT has fulfilled its duty to make the payment under Art. 54 CISG.....	30
4. CLAIMANT should bear the costs of the levy under Art. 6.1.14 UNIDROIT Principles.....	32
<b>PRAYERS FOR RELIEF.....</b>	<b>33</b>



## INDEX OF ABBREVIATIONS

¶/¶¶	Paragraph/Paragraphs
§/§§	Section/Sections
Arb.	Arbitration
Agreement	The Development and Sales Agreement between Wright Ltd. and Santos D KG, signed on 1 August 2010
Addendum	Addendum to the Development and Sales Agreement between Wright Ltd. and Santos D KG, signed on 1 August 2010, signed on 26 October 2010
App.	Application
Art./Arts.	Article/Articles
Adv. Op.	Advisory Opinion
Beinhorn	Amelia Beinhorn
CAM-CCBC	Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
CAM-CCBC Rules	The Arbitration Rules for the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC	Advisory Council Convention on Contracts for the International Sale of Goods
Co.	Company
Comm.	Commentary
Dec.	December
Earhart	Earhart SP
Ed.	Edition
E.g.	Exempli Gratia; for example
Et al.	Et Alii/Alia, “and others”
Etc.	Et Cetera, “and so on”



Et seq./et seqq.	And the following
EUR	Euro
EQD	Equitorianian Denar
Ex.	Exhibit
Fasttrack	Horace Fasttrack
Feb.	February
Fn.	Footnote
Inc.	Incorporated
Int'l	International
Jaschin	Iliena Jaschin
Jun.	June
Langweiler	Joseph Langweiler
LCIA	London Court of International Arbitration
Ltd.	Limited
Mr.	Mister
Ms.	Miss
No.	Number
Nov.	November
Oct.	October
Op.	Opinion
p./pp.	Page/ Pages
PoA	Power of Attorney
Pres.	President
Proc. Ord.	Procedural Order
Reg. Fee	Registration Fee
Romario	Paul Romario
Sec.	Security
SantosD	SantosD KG



ToR	Terms of Reference
Tribunal	Tribunal in the Instant Case
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar
v.	Versus
Wright	Wright Limited (“CLAIMANT”)
WHP	Wright Holding PLC



## INDEX OF LEGAL AUTHORITIES

- Altaras, David** “Security for Costs” 69(2) *Arbitration: The Journal of the Chartered Institute of Arbitrators* 81 (2003)  
cited as: *Altaras*
- Ballantine, Henry W.** *Separate Entity of Parent and Subsidiary Corporations*, 14 Cal. L. Rev. 1 (1925).  
Cited as: *Separate Entity*
- Boo, Lawrence** *Arbitration*. Singapore Academy of Law Annual Review of Singapore Cases 2008(1), 70-96.]  
Cited as: *Boo*
- Bonell, Michael Joachim** Maskow, in Bianca-Bonell *Commentary on the International Sales Law*, Giuffrè: Milan (1987) 1-20. Reproduced with permission of Dott. A Giuffrè Editore, S.p.A.  
cited as: *Maskow*
- Born, Gary B.** Chapter 4: Interpretation of International Arbitration Agreements in *International Arbitration: Law and Practice (Second Edition)*, 2nd edition (© Kluwer Law International; Kluwer Law International 2015) pp. 91 – 98  
cited as: *Born*
- Colbran, Stephen** *Security for Costs* Longman Professional, Melbourne 1993  
cited as: *Colbran*
- Chartered Institute of Arbitrators** Chartered Institute of Arbitrators, *Application for Security for costs, International Arbitration Practice Guideline*, (2015)  
cited as: *App. For Sec. for Costs*
- David, René** ‘Arbitration in International Trade’, Kluwer Law and Taxation Publishers, 1985.  
cited as: *David*
- Delany, Jim** *Security for Costs* Law Book Co., Sidney 1989  
cited as: *Delany*
- Frederico, Jose Straube, Claudio Finkelstein, Napoleao Casado Filho** *The CAM-CCBC Arbitration Rules 2012: A Commentary*  
cited as: *Commentary*



- FULBRIGHT,** *A Basic Guide to International Arbitration,*  
NORTON ROSE <http://www.nortonrosefulbright.com/files/arbitration-a-guide-to-international-arbitration-26050.pdf>  
Cited as: *A Basic Guide to International Arbitration*
- Holtzmann,** *A Guide to the UNCITRAL Model Law on International Commercial*  
Howard M. *Arbitration: Legislative History and Commentary* Deventer, Kluwer Law and  
**Neuhaus,** *Taxation,* 2015  
Joseph E. cited: *Holtzmann/Neuhaus*
- Karrer, Pierre** “Security for Costs in International Arbitration: Why, When and What if . . .” in  
**A. Desax,** *Law of International Business and Dispute Settlement in the 21st Century,* Liber  
Marcus Amicorum Karl-Heinz Böcksteigel, pp. 339-353 ed. Robert Briner, L. Yves  
Fortier, Klaus Peter Berger, Jans Bredow Köln/Berlin/Bonn/München Carl  
Heymanns Verlag KG, 2001  
cited as: *Karrer/Desax*
- KAUFMANN-** *International Arbitration: Law and Practice in Switzerland,* Oxford University  
**KOHLER,** Press (2014)  
GABRIELLE cited as: *Kaufmann-Kohler and Rigozzi*  
**RIGOZZI,**  
ANTONIO
- KAUFMANN-** *Arbitral Precedent: Dream, Necessity or Excuse?* *Arbitration Int’l Vol 23.3 p. 364*  
**KOHLER,** [http://www.arbitration-](http://www.arbitration-icca.org/media/4/77507134886347/media01231914308713000950001.pdf)  
GABRIELLE [icca.org/media/4/77507134886347/media01231914308713000950001.pdf](http://www.arbitration-icca.org/media/4/77507134886347/media01231914308713000950001.pdf)  
cited as: *Kaufmann-Kohler*
- Lew, Julian** “Conservatory and Interim Measures: A Synopsis” Presentation given in  
London, 18 Sept. 1997, at Conference to Launch the New ICC Rules  
cited as: *Lew*
- Lew, Julian** *Comparative International Commercial Arbitration*  
**D.M. Mistelis,** The Hague/London/New York Kluwer Law International, 2013  
Loukas A. cited as: *Lew/Mistelis/Kröll*  
**Kröll, Stefan**  
M.
- Macey,** *The Three Justifications for Piercing the Corporate Veil,* (Mar. 27, 2014),  
Jonathan [https://corpgov.law.harvard.edu/2014/03/27/the-three-justifications-for-](https://corpgov.law.harvard.edu/2014/03/27/the-three-justifications-for-piercing-the-corporate-veil/)  
R. [piercing-the-corporate-veil/](https://corpgov.law.harvard.edu/2014/03/27/the-three-justifications-for-piercing-the-corporate-veil/).  
Cited as: *Piercing the Corporate Veil*





- Marchac,**  
Gregoire Interim Measures in international Commercial Arbitration Under the ICC, AAA, LCIA, and UNCITRAL Rules in: *American Review of International Arbitration*, vol. 10, p. 123 (1999)  
cited as: *Marchac*
- Mustill,** Sir  
Michael  
**J. Boyd,**  
Stewart C. The Law and Practice of Commercial Arbitration in England 2nd Edition  
London/Edinburgh Butterworths, 1989  
cited as: *Mustill/Boyd*
- Osuna-  
Gonzalez,**  
Alejandro Buyer's Enabling Steps to pay the price: Article 54 of the United Nation's Convention on Contracts for the International Sale of Goods. Available at <https://www.uncitral.org/pdf/english/CISG25/Osuna-Gonzalez.pdf>  
cited as: *Osuna- Gonzalez*
- Redfern,** Alan  
**Hunter,**  
Martin Law and Practice of International Commercial Arbitration  
5th Edition, London 2015  
cited as: *Redfern and Hunter*
- Rubins,** Noah In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration, 11 Am. Rev. Int'l Arb. 307  
cited as: *Rubins*
- Sandrock,**  
Otto The Cautio Judicatum Solvi in Arbitration Proceedings or The Duty of an Alien Claimant to Provide Security for the Costs of the Defendant, *Journal of International Arbitration*, (© Kluwer Law International; Kluwer Law International 1997, Volume 14 Issue 2) pp. 17 – 38  
cited as: *Sandrock*
- Schlechtriem,**  
Peter Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods (Germany 1986)  
cited as: *Schlechtriem*
- Shannon,**  
Victoria. Recent Developments in Third-Party Funding, *Journal of International Arbitration*, (© Kluwer Law International; Kluwer Law International 2013, Volume 30 Issue 4) pp. 443 – 452  
cited as: *Shannon*
- Tallon,**  
Denis Published in Galston & Smit ed., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, Matthew Bender (1984), Ch. 7, pages 7-1 to 7-20.  
cited as: *Tallon*
- Tweeddale,**  
Andrew Delay in Commencing an Arbitration. Arbitration. Vol 68. Issue 3. 2002. p. 238.  
cited as: *Tweeddale*



Commencement of Arbitration and Time-Bar Clauses. *Arbitration*. Vol 75.  
Issue 4. 2009. p. 480.  
cited as: *Tweeddale and Tweeddale*

**Uchkunova,**  
Inna

Security for Costs in ICSID, Kluwer Arbitration Blog, February 10, 2015.  
*Available at:* <http://kluwerarbitrationblog.com/2015/02/10/security-for-costs-in-icsid-arbitration/>  
cited as: *Uchkunova*

**Weigand, Dr.**  
Frank-Bernard

*Practitioner's Handbook on International Commercial Arbitration*, 2nd edn (Oxford:  
Oxford University Press 2009)  
cited as: *Weigand*

**Werbicki,**  
Raymond J.

Arbitral Interim Measures: Fact or Fiction? in: *Dispute Resolution Journal*, vol.  
57, p. 62 (Jan. 2003)  
cited as: *Werbicki*



## INDEX OF CASES

### **Australia**

Roberts v Bury Improvement Commissioners (1870) L.R. 5 C.P. 310 at 326; Holme v Guppy (1838) 3 M. &W. 387 at 389; and Ludgate Administration No.1 Ltd v Northern & Shell Media Ltd [2002] EWHC 1023 (Comm).

cited as: *Roberts*

Schockman v. Hogg, QCA 28 (2003), available at: 2003 Westlaw 723261

Cited as: *Schockman v. Hogg*

Warren Mitchell Pty. Ltd. v. Australian Maritime Officers' Union (1993) 12 ACSR 1 (Fed. Court of Australia)

Cited as: *Warren Mitchell v. Austl. Maritime Officers' Union (Austl.)*

### **Canada**

CLOUT Case No. 391; *Corporacion Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al*; Superior Court of Justice (Lax J.), Canada, 22 September 1999

### **Germany**

Germany 20 November 1992 Appellate Court Karlsruhe (*Frozen chicken case*) [translation available]  
[Cite as: <http://cisgw3.law.pace.edu/cases/921120g1.html>]

Serbia

### **Serbia**

Serbia 27 November 2002 Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce (*Mushroom case*) [translation available]

[Cite as: <http://cisgw3.law.pace.edu/cases/021127sb.html>]

### **Spain**

Spain 27 December 2007 Appellate Court Navarra (*Case involving machine for repair of bricks*)  
[translation available]

[Cite as: <http://cisgw3.law.pace.edu/cases/071227s4.html>]

Germany 21 December 2005 Appellate Court Köln (*Trade usage case*) [translation available]

[Cite as: <http://cisgw3.law.pace.edu/cases/051221g1.html>]



## Switzerland

Switzerland 15 June 2010 Kantonsgericht St. Gallen (*StencilMaster case*)

[Cite as: <http://cisgw3.law.pace.edu/cases/100615s1.html>]

## Tunisia

Parties not indicated, Court of Appeal of Tunis, Case No. 25825, 13 March 2012, International Journal of Arab Arbitration, (© International Journal of Arab Arbitration; International Journal of Arab Arbitration 2015, Volume 7 Issue 1) pp. 53 – 73

Cited as: *Tunis Case*

## United Kingdom

Bank Mellat v. Helleniki Techniki S.A.; England; [1984] Queen’s Bench Division. 291, [1983] 3 W.L.R 78

Cited as: Bank Mellat v. Helleniki Techniki SA, England

Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 B.L.R. 111.

cited as: Peak

Sir Lindsay Parkinson & Co. v. Triplan Ltd. (1973) 2 All E.R. 273

Cited as: *Parkinson & Co. v. Triplan Ltd. (UK)*

## United States

Hess v. L.G. Balfour Co., Inc., 822 F.Supp. 84 (D. Conn. 1993).

Cited as: *Hess v. L.G. Balfour*

Mesler v. Bragg Management Co., 39 Cal.3d 290 (Cal. 1985).

Cited as: *Mesler v. Bragg*

Robbins v. B and B Lines, Inc., 830 F.2d 648 (7th Cir. 1987).

Cited as: *Robbins v. B and B Lines, I*



**INDEX OF ARBITRAL AWARDS**

International Chamber of Commerce (ICC)

ICC Case No. 1434 (1975), *reprinted in* Yves Derains, *Chronique de Sentences Arbitrales*, Clunet (1976)

Cited as: *ICC Case No. 1434*

International Centre for Settlement of Investment Disputes (ICSID)

Burimi SRL and Eagle Games SHA v Albania

ICSID Case No. ARB/11/18

Cited as: *Burimi v Albania*

SM Production Corporation v Saint Lucia

ICSID Case No. ARB/12/10

Cited as: *RSM v St. Lucia*

Victor Pey Casado and President Allende Foundation v. Republic of Chile

ICSID Case No. ARB/98/

Cited as: *Pey Casado v. Chile*

Emilio Agustín Maffezini v. The Kingdom of Spain

ICSID Case No. ARB/97/7

Cited as: *Maffezini v. Spain*



## **INDEX OF LEGAL SOURCES**

American Arbitration Association (AAA) International Arbitration Rules (2003)

Delaware General Corporation Law, § 253(a)  
Cited as: *Del. Gen. Corp. L.*

London Court of International Arbitration (LCIA), Arbitration Rules, Art. 25.2

International Chamber of Commerce (ICC), Standard Arbitration Clauses, available at:  
[www.iccwbo.org/court/arbitration/id4114/index.html](http://www.iccwbo.org/court/arbitration/id4114/index.html)

United Nations Convention on the International Sale of Goods, 1980 (CISG)

UNCITRAL Model Law on International Commercial Arbitration, 1985 with 2006 Amendments  
(UNCITRAL)

UNCITRAL Rules on International Commercial Arbitration, 1976 with 2010 Amendments  
(UNCITRAL Arbitration Rules)

UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles)

29 U.S. Code § 1401

Restatement (Second) of Contracts (1981)

Rules of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada  
(CAM-CCBC Rules)



## STATEMENT OF FACTS

The parties to this arbitration are Wright Ltd (hereafter “CLAIMANT”) and SantosD KG (hereafter “RESPONDENT”).

RESPONDENT is an innovative manufacturer based in Mediterraneo. It produces a sophisticated, high-spec jet engine.

CLAIMANT is a company, incorporated in Equatoriana, that manufactures fan blades for jet engines.

- January 2010**                      RESPONDENT is approached by Earhart SP (hereafter “Earhart”), a world renowned aircraft manufacturer, to develop a specialized engine that would reduce noise and fuel consumption for Earhart’s new jet.
- Spring 2010**                      RESPONDENT approaches CLAIMANT to discuss joint development of a new fan blade, which would be based on CLAIMANT’s model, TRF 192.
- 1 May 2010**                      RESPONDENT’s Development Manager, Ms. Fang, and CLAIMANT’s Production Engineer, Ms. Filmas, discuss improving CLAIMANT’s fan blade. Ms. Fang emphasizes the necessity of fixing a price at this stage so RESPONDENT can make an offer to Earhart. The Parties agree to set a price range, and agree to copying the price mechanism that was used in two or their previous agreements, with adjustments in prices and profit margins. The Parties further agree on pricing in US\$, and CLAIMANT agrees to accept conversion risk as CLAIMANT deals in EQD (Equatorianian Denar).
- June 2010**                      CLAIMANT is sold to its present parent company, Wright Holding PLC.
- 1 August 2010**                      The Parties conclude a Development and Sales Contract (hereafter the “Contract”). Under the Contract, RESPONDENT is obligated to purchase at least 2,000 fan blades. In Sec. 4 of the Contract, based on CLAIMANT’s estimation, the minimum price per fan blade is set to US\$ 9,975 and the maximum price is set to US\$ 13,125. An express provision for the exchange rate that will be used is not included. In Sec. 21, the Parties agree to settle all disputes by arbitration (hereafter the “Arbitration Agreement”).
- 22 October 2010**                      RESPONDENT contacts CLAIMANT to purchase clamps that connect the fan blades to the shaft of the fans, suggesting that the Parties simply sign an addendum to their Contract. RESPONDENT suggests language for the Addendum.



- 26 October 2010** The Parties sign the Addendum, which sets the price to US\$ and provides an exchange rate for the agreement of US\$ 1 = EQD 2.01.
- 14 January 2015** RESPONDENT receives and accepts delivery of fan blades and clamps.
- 15 January 2015** RESPONDENT pays the separate amounts listed, as per the Addendum, in the invoice for both the fan blades (US\$ 20,438,560) and the clamps (US\$ 183,343.28). RESPONDENT provides CLAIMANT with prompt confirmation of the payment. CLAIMANT replies, stating that CLAIMANT's accountant made a mistake. CLAIMANT demands RESPONDENT provide additional monies (US\$ 2,285,240) to remedy CLAIMANT's error.
- 9 February 2015** CLAIMANT reaches out to RESPONDENT, again demanding that RESPONDENT pay to remedy CLAIMANT's mistake. CLAIMANT also states that only US\$ 20,336,367.20 was deposited into its account, a difference of US\$ 102,192.80 from what RESPONDENT had deposited.
- 10 February 2015** RESPONDENT states it does not know why the full amount was not deposited, noting that RESPONDENT's bank confirmed a full transfer. RESPONDENT informs CLAIMANT that the original invoice that CLAIMANT provided was correct because the Addendum set a fixed exchange rate of US\$ 1 = EQD 2.01, which applies to the entire Contract. RESPONDENT notes that CLAIMANT had agreed to accept any currency exchange risk.
- Feb 2015 – Jan 2016** CLAIMANT learns that the Financial Investigation Unit subtracted a 0.5% levy on the funds deposited by RESPONDENT for routine investigations.
- 2 January 2016** Horace Fasttrack is given Power of Attorney of Wright Holding PLC.
- 1 March 2016** CLAIMANT notes its regrets that an agreement could not be reached, and states that its attorney will be initiating arbitration proceedings.
- 31 May 2016** CLAIMANT fails to initiate arbitration proceedings because CLAIMANT's attorney does not have authority and the registration fee was not paid in full.
- 5 June 2016** Power of Attorney of Wright Ltd is completed for Horace Fasttrack.
- 8 July 2016** The Parties agree to the appointed arbitrators (hereafter "the Tribunal").
- 7 October 2016** The Tribunal issues Procedural Order No 1.





## INTRODUCTION

1. The Arbitral Tribunal has the discretionary power to order the CLAIMANT to provide security for costs both under the CAM-CCBC Rules and under the UNCITRAL Model Law. Moreover, the CLAIMANT fails the very test for granting security for costs it claims to be widely applied in international practice. An order to provide security for costs is both imminent and urgent to prevent RESPONDENT's harm of not recovering its arbitration costs if it prevails in these proceedings. Therefore, in the present case, the Tribunal should exercise this power and order the CLAIMANT to provide security for the costs of RESPONDENT's proceedings.
2. CLAIMANT'S Request for Arbitration should be dismissed as it was submitted outside of the stipulated period. The parties may choose to set their own limitations. Procedural autonomy is the foundation of the arbitral process. Guarantees of party autonomy are an essential element of international arbitration proceedings. The parties expressly agreed to the limitation period set out in the Arb. Agreement. This limitation period is concrete in light of this express agreement as well public policy; RESPONDENT should not be punished for CLAIMANT'S failure to initiate proceedings on time. Thus, the time limitation is enforceable and applicable in this case. A statute of limitations defense is enforceable in court as well as arbitration. This is because arbitration is designed to resolve disputes in accordance with will of the parties.
3. CLAIMANT has inaccurately claimed that their request for arbitration was filed inside of the stipulated 60-day period. CLAIMANT incorrectly filed required paper work to the tribunal to initiate arbitration, thus allowing the stipulated time period to continue to run. After having knowledge of a failure to negotiate CLAIMANT failed to commence arbitration. Additionally, the CLAIMANT'S argument that "parties could not reduce limitation period of application for arbitration to sixty days without violation of right for legal defense" is inaccurate.
4. CLAIMANT failed to satisfy the requirements for initiation arbitration in accordance with the CAM-CCBC Rules. The procedural rules are in place to assure the integrity of arbitration proceedings; therefore, strict adherence is required. Here, CLAIMANT was notified that it failed to obtain the proper power of attorney, as well as provide a complete proof of payment of the Reg. Fee; accordingly, the proceedings should not commence any further.
5. The fixed exchange rate applies to the whole agreement because the addendum articulately represents the exchange rate as applying to the whole agreement. A reasonable person with



the same understanding and in the same circumstances as CLAIMANT would have understood that the fixed exchange rate mentioned in the addendum applied to the whole contract. RESPONDENT has the power to assert application of the fixed exchange rate to the entire contract. First, there are reasonable usages or practices that make the fixed rate clause applicable to the Agreement. Second, RESPONDENT acted in good faith, and was concerned with fixing a maximum price with good intent. Furthermore, applying the fixed exchange rate clause to the entire agreement will not inflict undue hardship upon CLAIMANT. Therefore, \$20,438,560.00 is the appropriate full amount CLAIMANT was due to receive, and they have been paid this amount by RESPONDENT in a timely manner.

6. The respondent fulfilled all of its payment obligations under the agreement because he made the payment in full, into the Equatoriana Central bank, provided notice of payment and made the payment into two separate amounts. Respondent made the payment in full as requested by the Claimant in the first invoice and Respondent should not bear the bank fees because it is not an ordinary bank fee for the transfer of money but it comes from a very specific governmental regulation for a money laundering investigation. Even under CISG article 54, for Respondent to comply with this specific governmental regulation, Respondent would have required Claimant to inform him of this specific regulation. Claimant had the duty to inform because the regulation takes place in Claimant's place of business under the UNIDROIT principles 6.1.14. Since Claimant did not inform respondent, then Claimant should bear the bank fees.



## **ARGUMENT**

### **I. THE TRIBUNAL HAS THE DISCRETION TO ORDER SECURITY FOR COSTS**

1. The Arbitral Tribunal has the discretionary power to order the CLAIMANT to provide security for costs both under the CAM-CCBC Rules and under the UNCITRAL Model Law. Moreover, the CLAIMANT fails the very test for granting security for costs it claims to be widely applied in international practice. An order to provide security for costs is both imminent and urgent to prevent RESPONDENT's harm of not recovering its arbitration costs if it prevails in these proceedings. Therefore, in the present case, the Tribunal should exercise this power and order the CLAIMANT to provide security for the costs of RESPONDENT's proceedings.

#### **A. THE TRIBUNAL HAS THE AUTHORITY TO ORDER CLAIMANT TO PROVIDE SECURITY FOR COSTS**

2. Pursuant to Art. 8.1 of the CAM-CCBC Rules, “[u]nless the parties have otherwise agreed, the Arbitral Tribunal can grant provisional measures, both injunctive and anticipatory, that can, at the discretion of the Arbitral Tribunal, be subject to the provision of guarantees by the requesting party.” Here, the Tribunal is granted wide discretion on the allocation of interim measures. The CLAIMANT concedes to this interpretation of Art. 8.1. [*Cl. Mem.*, ¶.11]. An order for security for costs is an interim/provisional measure, thus therefore within the power of the Tribunal to grant and does not require express agreement or provision in the Terms of Reference to further expound this power.[*Rubbins pp. 315*]. Contrary to CLAIMANT's argument, however, the agreement between the CLAIMANT and RESPONDENT being silent on interim measures does not rid the tribunal of that power. As the language in article 8.1 plainly indicates, the Tribunal has the discretion to grant provisional measures if the parties did not agree otherwise.
3. Commentary on Art. 8 of the CAM-CCBC Rules lays out that while no express agreement or provision is necessary there are two conditions that must be met for all interim measures being considered by the Tribunal. First, the object of the litigation must be at risk of perishing before a final decision on the merits can be rendered. Second, the existence of an ‘appearance of good law’ must be found. It is necessary to persuade the arbitral tribunal that the requesting party (here, RESPONDENT) has a reasonable claim on the merits, as derived from the arguments and



evidence produced at the moment the interim measure is requested. [*See Commentary, pp. 143 – 147*].

4. Under Art. 7.8 of the CAM-CCBC Rules, this Tribunal will adopt the necessary and convenient measures for the appropriate conduct of the proceedings, observing the right to fully defend oneself and the right to dispute the allegations of the other party, as well as the equal treatment of the parties. Art. 7.8 CAM-CCBC grants the Tribunal the power to interpret and apply Art. 8.1 CAM-CCBC Rules., which in this instance is Tribunal’s discretion on the matter of awarding security for costs. [*LCLA Art. 25.2; § 38.3; Rubins p. 320*].
5. Art. 7.8 of the CAM-CCBC Rules grants this arbitral tribunal procedural powers to keep the order of the proceedings. These powers are granted by (1) providing for the remedies that the arbitrators can adopt and (2) establishing the purposes that this tribunal must advance by exercising such powers. Per the language of the provision, this tribunal may “... adopt the necessary and convenient measures for the appropriate conduct of the proceedings” in order to uphold the “... right to fully defend oneself and the right to dispute the allegations of the other party, as well as the equal treatment of the parties.” Thus, this is an essential provision to allow this arbitral tribunal to sanction the parties as they find necessary to conduct a fair proceeding.
6. Moreover, where the CAM-CCBC rules are silent, the Tribunal may fill in gaps in those rules using the *lex arbitri* [*Born, pp. 411-13, Rubins, pp. 314-15*]; here, the UNCITRAL Model Law as amended in 2006. The CAM-CCBC rules are silent as to security for costs specifically, the Tribunal nevertheless has the discretion to grant such an order as an interim measure under the UNCITRAL Model Law. Under 17(1) UNCITRAL, “[u]nless the parties agreed, the Tribunal may, at the request of a party, grant interim measures.” Under (17)(2) UNCITRAL, “an interim measure is any temporary measure, whether in the form of an award or any other form, by which, at any time prior to the issuance of the award, by which the dispute is finally decided, the arbitral Tribunal orders a party to maintain the status quo, prevent action that cause imminent harm or prejudice to the arbitral proceedings, provide the means of preserving assets out of which a subsequent award may be satisfied, and preserve evidence that may be relevant and material to the resolution of the dispute. [*See 17(E)(1) UNCITRAL; 17(2) UNCITRAL*].
7. The order granting security for costs requested by RESPONDENT corresponds to the definition of a provisional measure under (17)(2) UNCITRAL: it is a temporary order from the Tribunal which would be granted prior to the issuance of the final award to, in the present proceedings, prevent any action that could cause imminent harm to the RESPONDENT, and to provide the



means of preserving assets out of which a subsequent arbitral award may be satisfied. In fact, if the Tribunal awards costs to the RESPONDENT at the end of these proceedings, it is likely that CLAIMANT will not be able to comply with said award due to its precarious financial situation. Moreover, contrary to CLAIMANT's contentions, even if RESPONDENT has already paid the arbitration costs, it will nevertheless suffer future irreparable harm if it cannot recover such costs, because RESPONDENT paid for these costs to challenge CLAIMANT's meritless claims. [*Cl. Mem.*, ¶.14]

8. CLAIMANT is correct in arguing that a provisional order for arbitration proceedings should be decided according to the *lex arbitri* or the institutional rules imposed by the parties, here the CAM-CCBC rules. [*Cl. Mem.*, ¶.11]. However, erroneously contends that the *lex arbitri* prevails over institutional rules. [*Cl. Mem.*, ¶.11]. First, the CLAIMANT provides no support for this contention. Second, as stated above, *lex arbitri* supports the providing of provisional measures. Third, the Tribunal will only turn to the *lex arbitri* if the chosen institutional expressly prohibit the relief requested [*Born*, pp. 411-19, *Rubins*, pp. 314-15]. Here, the CAM-CCBC Rules are silent on an explicit provision granting security for costs but they nevertheless afford the Tribunal the discretion to grant provisional measures, and security for costs, by its nature, is a provisional measure as it is granted prior to the final arbitral award.
9. Moreover, contrary to the contentions of the CLAIMANT, the language of Art. 17 of the UNCITRAL does not depend on the subject matter of the arbitration. [*Cl. Mem.*, ¶.8, 9]. Similar to Art. 8.1 of the CAM-CCBC Rules, this provision of the UNCITRAL grants discretion to the Tribunal to order an interim measure with no mention as to the relevance of the subject matter of the proceedings. As will be established below, the application of the UNCITRAL would be justified in these proceedings to preserve assets out of which a subsequent award may be satisfied, in case the RESPONDENT prevails, and the Tribunal orders CLAIMANT to reimburse RESPONDENT's costs in these proceedings.

## **B. THE TRIBUNAL SHOULD GRANT RESPONDENT'S REQUEST FOR SECURITY FOR COSTS.**

10. While the CAM-CCBC Rules do not discuss in any certainty what is required to prove "exceptional circumstances", the Tribunal in *RSM v St. Lucia* set out factors for showing an "exceptional circumstance" exists. In *RSM v St. Lucia*, Saint Lucia asserted that the Tribunal had the power to order security for costs under Art. 47 of the ICSID Convention and ICSID



Arbitration Rule 39. [*RSM v St. Lucia*]. Based on the Tribunal's decision in *RSM v St. Lucia* decision, the following factors are necessary to prove 'exceptional circumstances' exist: "(i) necessity of the measure to protect a certain right, and (ii) urgency which leaves no room for waiting until the final award. [*RSM v St. Lucia*].

11. It is more certain than not that the Tribunal has the power to order interim measures including security for costs under the CAM-CBBC Rules or the UNCITRAL Model Law. In the present proceedings, the Tribunal should exercise that power to grant RESPONDENT's request for security for costs because (1.) An application of the test warrants such result, (2.) CLAIMANT's financial situation is precarious, and, (3.) Balancing CLAIMANT possibility of harm against injustice to RESPONDENT according to warrants the granting of security [*Cl. Mem.*, ¶15].

**1) An Application Of Claimant's Test Warrants The Grant Of An Order For Security For Costs.**

12. RESPONDENT's request for security for costs should be granted, as RESPONDENT has shown there is a genuine risk of non-collection. CLAIMANT sets out a four-part test for RESPONDENT to show "extraordinary circumstances of the case presented," considering urgency and imminence of harm, ability of CLAIMANT to pay, CLAIMANT's noncompliance with other arbitral awards, and RESPONDENT's prospects of success on the merits. [*Cl. Mem.*, ¶. 15, 22]. CLAIMANT offers no support of this test in international practice. However even in weighing these unfounded factors the deservedness of providing RESPONDENT security on costs becomes apparent.
13. A long and established set of cases have allowed for Security for Costs as an interim measure under the following regime of factors: "(1) existence of *prima facie* jurisdiction; (2) the right to be protected is at least plausible; (3) and relates to the dispute; (4) the measure is necessary and (5) urgent." [*Uchkunova*, p. 2]. In sum, as long as a showing of urgency and necessity can be made by RESPONDENT then the requesting party will have met its minimum threshold requirement. [*Maffezini v. Spain; Pey Casado v. Chile; Libananco v. Turkey; RSM Production Corporation et al. v. Granada; Burimi S.R.L. v. Albania*].
14. In order to show urgency RESPONDENT must show that he will suffer serious injury unless provisional relief is granted. [*Cl. Mem.* ¶16]. In the case at hand there is the strong possibility that RESPONDENT will be unable to recoup any monies spent on this litigation if the Security on



costs is not granted. This issue must be dealt with prior to the commencement of arbitration so as to not leave RESPONDENT with an unenforceable judgment.

15. RESPONDENT must be awarded security for costs since “there are reasons to believe that the enforcement of an adverse award would be unenforceable or frustrated. For instance, if the State where most of Claimant’s assets are located is not a party to the same enforcement conventions or treaties as the other party. [RSM, ¶. 5.21]. Here, simply being a member of the New York Convention cannot be enough to reassure the Tribunal.
16. CLAIMANT seeks to rely on its countries inclusion in the New York Convention to ensure enforceability of the arbitral award. However past practice of CLAIMANT shows that despite this Convention they will go to extraordinary measure to avoid payment. In the referenced case where CLAIMANT is in nonpayment, they have brought the matter to state courts despite the finality of the tribunals ruling [*Cl. Mem.*, ¶. 19]. Instead of paying the money determined to be owed by the tribunal the CLAIMANT is currently waiting on litigating a separate issue of damages related to their parent company in state court in hopes of offsetting the amount of security currently sought. [*Claimant’s Objection to the Request for Security for Costs, Proc. Ord.*, p. 49]. There is no reason to believe that CLAIMANT will treat an award from this tribunal any differently.

**2) Claimant’s Questionable Financial Position Weighs Heavily In Favor Of An Order Of Security.**

17. RESPONDENT requested that CLAIMANT provide security for costs when it discovered that CLAIMANT’s financial situation had deteriorated. Interim measure such as security for costs may be ordered by means of CLAIMANT’s lack of assets, impecunious or even insolvency. [*Karrerr/Desax*, p.346, ¶.34]. Although CLAIMANT asserts that it is not insolvent, it admits that it has a lack of funding and very limited assets. In fact, CLAIMANT only has USD 199,550 cash at its disposal. [*Proc. Ord.*, p. 49; p. 59]. CLAIMANT is currently seeking \$2.3 million from RESPONDENT, this is eleven times their current cash disposal. Furthermore, CLAIMANT admits that without this award, paying the full registration fees for the arbitration, along with a freezing of its assets would make it impossible for it to continue business. [*Cl. Mem.*, ¶. 26]. In other words, the amount of cash the CLAIMANT has at its disposal it can only pay for its own arbitral costs and run its plant. Considering their lack of current lack of liquidity and the possibility of their losing this current suit it is very likely that CLAIMANT will not have any means to comply with an award ordering it to pay





RESPONDENT's costs. Moreover, CLAIMANT does not have the support of any third party funders for the present arbitration proceedings, which means that they are funding these proceedings with their already limited funds, and that if the Tribunal awards costs to the RESPONDENT, CLAIMANT will not likely be able to comply with such award. [*Proc. Ord., Ex R6, p. 47; Proc. Ord., p. 59*].

18. Looking closely at some of the facts akin to those in this case, specifically those regarding a third-party investor, Tribunals such as those in the RSM case held that “[*t*]he third party funding exacerbates the concern engendered by RSM's conduct in the Annulment Proceeding and the Treaty Proceeding. It places an unfunded RSM and the third party funder(s) in the inequitable position of benefiting from any award in their favor yet avoiding responsibility for a contrary award.” (RSM, ¶. 76).
19. Furthermore, according to the Chartered Institute for Arbitrators, if the circumstances show that the deterioration of the party's financial situation or the lack of available assets was caused by something other than an accepted business risk, which is when the cost of a certain risk is accepted, arbitrators may consider that an order for security for costs is justified. [*App. For Sec. for Costs, p. 8*]. Here, as shown on RESPONDENT's R. 6, the CLAIMANT's lack of liquidity results from the closure of one of its plants in Xanadu, a drop in its share prices, and possibly the litigation of a previous arbitral award. All of which is stated on CLAIMANT's response to the request for security for costs. As such, CLAIMANT's precarious financial situation is not caused by an accepted business risk. Therefore, an order for security for costs is justified in these proceedings.
20. CLAIMANT argues that if the Tribunal grants RESPONDENT security for its legal costs, this would go against the “expressed will of the parties” principle, which as a cornerstone of arbitration is intended to discourage one-sided proceedings. [*Cl. Mem., ¶¶. 10-11*]. CLAIMANT's argument makes little sense. RESPONDENT has not counterclaimed, so only CLAIMANT could be making a frivolous claim. If RESPONDENT wins and CLAIMANT cannot pay any costs awarded, RESPONDENT would lose the entire amount of its legal costs. Security for costs is thus the most appropriate way to preserve the advantages of the costs following the event rule and to protect RESPONDENT against a frivolous claim.
21. Lastly, CLAIMANT has an outstanding arbitral award for USD 12 million which it will have to pay if it does not prevail in its litigation for that award. These facts raise doubt as to CLAIMANT's ability to comply with an unfavorable award in these proceedings, and therefore also justify granting RESPONDENT's request for security for costs.





### 3) Balancing Claimant Possibility Of Harm Against Injustice To Respondent According To Warrants The Granting Of Security.

22. International practice has experienced no lack of inconsistency when tasked with deciding requests for security for costs. [*Rubins*, pp. 369-376]. While the factor-based approach has become the more commonly applied standard. [*Parkinson & Co. v. Triplan Ltd. UK*]; *Bank Mellat v. Helliniki Techniki SA (UK)*, 303; *Delany*, 2; *Lew*, generally]. Nonetheless, this Tribunal should take great care in balancing the significance of such an order against the injustice to RESPONDENT if no security is ordered [*App. For Sec. for Costs*, p. 2].
23. CLAIMANT's financial difficulties apparently include cash flow problems, delinquency in paying prior arbitration obligations. [*Proc. Ord., Ex R6*, p. 47]. The practice of awarding the winning party the reasonable attorney's fees and expenses resulting from and derived entirely from the arbitration of the instant case has become far-reaching in international arbitration. [*Rubins*, p. 312]. In this case, the Carioca Business News Journal art. dated 5 Sept. 2016 embossed serious concerns about CLAIMANT's financial condition and subsequent liquidity. [*Proc. Ord., Ex R6*, p. 47]. The news article revealed that the CLAIMANT has failed to comply with a previous arbitral award in the amount of \$2,500,000, had been turned down by third party funders in the current arbitration proceedings, and that it closed down its local subsidiary in Xanadu due to an alleged non-compliance with local regulations. Thus, the Tribunal must call into question CLAIMANT's ability to pay any award of costs ordered by the Tribunal. If the Tribunal grants RESPONDENT's order for security for costs, legal costs, if awarded, will be unenforceable if it cannot act upon the Tribunal's final award due to CLAIMANT's already proven statements of inconsistent access to sufficient funds. Or better explained in CLAIMANT's own words, "[t]he mere fact that CLAIMANT experience some shortage of liquidity...". [*Cl. Mem.*, ¶¶. 18, 26].
24. The financial condition of the CLAIMANT might be the most important factor to consider. [*Rubins* 326]. Paradoxically to CLAIMANT's pronouncements, the financial condition of the parties is a legitimate consideration in determining awards of security for costs. [*Rubins* 315]. For instance, "[c]laimant considers such a request absolutely baseless as no criteria for granting interim measure is satisfied." [*Cl. Mem.*, ¶. 5]. In international practice, evaluation of a party's financial condition has proven a significant consideration in making such awards for security for costs. [*Rubins* 326].
25. CLAIMANT offers no evidence to beyond unverified explanations citing "...shortage in liquidity..." for any issues in paying an award of security for costs. [*Cl. Mem.*, ¶¶. 18, 26]. Given



that several media sources have raised the issue of CLAIMANT's financial problems, the burden must fall on CLAIMANT to show that it is sufficiently solvent.

26. RESPONDENT has presented reputable financial journal arts. reporting CLAIMANT's has liquidity issues and extensive cash asset shortfalls. Furthermore, CLAIMANT has been delinquent in paying prior arbitration obligations [*Proc. Ord., Ex R6, p. 47*]. These articles are appropriate and sufficient evidence to support the belief that there is a substantial risk that CLAIMANT will not be able to meet an order of costs against it.
27. The credibility of the newspapers cited by RESPONDENT is unchallenged by CLAIMANT [*Proc. Ord., p. 61, ¶39*]. CLAIMANT further argues that CLAIMANT "demonstrated his financial capacity by paying all arbitration fee's in full amount and therefore established the willingness and capacity to make payments" . [*Cl. Mem., ¶. 23*]. If the Tribunal accepts this evidence as reliable, then it will no doubt accept RESPONDENT's reliance on financial news and other periodicals as reliable.
28. A Tribunal balancing the potential for harm to the CLAIMANT with injustice toward RESPONDENT would see through a careful consideration of CLAIMANT's financial situation and the strong possibility of RESPONDENT being left with an unenforceable judgment that the scales weigh heavily towards providing RESPONDENT security for costs.

### **C. POLICIES OF INTERNATIONAL PRACTICE**

29. One of precepts to the preference parties select international commercial arbitration is to make the prevailing party in arbitration whole. [*Rubins, p. 312*]. If this Tribunal were to ultimately find for RESPONDENT in the present arbitration, RESPONDENT would be entitled to reasonable legal fees and costs under Art. 10.4.1 CAM-CCBC Rules. It is quite possible given the present factual situation that CLAIMANT could frustrate the Tribunal's final award perhaps not deliberately but rather because of their increasingly unstable liquidity or inaccessible funds or by way of the practice of the Equatorianian courts.
30. Art. 18 UNCITRAL lays out a classic cornerstone of arbitration which is the equal treatment of the parties. [*Cl. Mem. ¶¶ 28-29*]. Art. 17 and 18 UNCITRAL are mandatory provisions from which the Tribunal cannot derogate [*Cl. Mem. ¶. 18*]. Art.18 UNCITRAL is not intended to protect a party from its own failures or strategic choices [*CLOUT Case No. 39*]. CLAIMANT agreed to arbitration under the CAM-CCBC Rules and was aware of Art. 8.1 CAM-CCBC Rules when it chose to bring the claim against RESPONDENT. Now, it cannot use the force of Art. 18 UNCITRAL to escape a justified request for security. [*Cl. Mem. ¶. 18, 26*]. Accordingly, to guarantee equal treatment, this Tribunal must protect RESPONDENT from frivolous claims and



ensure an award will be available post suit. Only awarding RESPONDENT an order of security on their costs can do this.

31. Withal CLAIMANT attestations to the contrary, security for costs is not considered “baseless...or a disruptive tactic.” [*Cl. Mem.*, ¶.19]. To that end, virtually all major international arbitral tribunals are empowered to decide on the appropriateness of security for costs. [*Marchac*, p. 129; *Art.17(E) UNCITRAL*; *Art. 23(1) ICC*; *Art. 24 AAA*; *Art. 25.2 LCIA*]. Many national laws also provide for security for costs to be ordered in arbitration [*Werbicki*, p. 69]. The number of tribunals in international and national arbitration organizations allowing security for costs is also increasing. [*Rubins*, pp. 313-316]. This trend of widespread power to order security for costs suggests that this is an appropriate practice in international arbitration.
32. The London Court of International Arbitration (LCIA) presents a more consistent paradigm for the CAM-CCBC Rules to follow. Likewise, Arts. 9.4.1 and 10 CAM-CCBC Rules follow the language of the LCIA in empowering the Tribunal to order security for costs, the Tribunal would be well-advised to follow the LCIA’s practice by issuing such an order in this case. [*See Commentary*, pp. 159 fn. 9, 171 fn. 4].
33. In accordance with this international practice the most accepted factors in security tests favor RESPONDENT as the prevailing party for the foregoing reasons: (1) RESPONDENT is procedurally entitled to an award for costs under the CAM-CCBC Rules; (2) The evidence effectively merits adequate concern that CLAIMANT may not have sufficient funds to pay RESPONDENT’s costs; (3) RESPONDENT did not contractually or otherwise agree to bear the risks of CLAIMANT’s financial insolvency; (4) Finally, RESPONDENT has not engaged in evasive or bad faith behavior during these proceedings. [*See Arts. 7..8, 8.1. 8.4 CAM-CCBC Rules*].

## **II. CLAIMANT’S REQUEST FOR ARBITRATION SHOULD BE DISMISSED**

### **A. The Tribunal should defer to the terms of the Parties’ Arbitration Agreement. The Parties may choose to set their own limitations**

34. CLAIMANT contends that parties cannot reduce the limitation period to sixty days. However, this simply is not the case because procedural autonomy for parties is at the crux of the arbitral process. [*Born*, ¶1-2, p. 1528]. Born explains that the guarantee of party autonomy is an essential element of international arbitration proceedings. *Id.*



35. CLAIMANT states that a complex legal framework of international arbitration rules supersedes the contract chosen by the parties. [*Claimant's brief* ¶ 35., pg. 26]. However, this simply is not the case. The basis for this argument is the opinion of case 1185 of the ICC which states that the Principles of European Contract Law, UNIDROIT, and UNICTRAL Model Law provide general guidelines of international arbitration [*Kaufmann-Kohler and Rigozzi*, p. 336-337]. First, Kaufmann-Kohler herself notes in chapter 6.50 of her treatise, *International Arbitration: Law and Practice in Switzerland*, that in the hierarchy of rules governing arbitral proceedings, party-agreed specific rules have priority over arbitration rules [*Kaufmann-Kohler and Rigozzi*, p. 280 ¶3-4].
36. Thus, CLAIMANT incorrectly cites their main source of authority for this argument. Second, the treatise that CLAIMANT cites to is specific to the law and practice of arbitration in Switzerland, which has its own unique national jurisprudence and case precedent. [*Id.*] Third, Kaufmann-Kohler notes in another academic work that, “arbitrators have . . . broad discretion in determining and applying the law that governs” any particular case [*Kaufmann-Kohler*, p. 364 ¶2]. This means that arbitrators are not bound to follow those rules cited by CLAIMANT, but actually have broad discretion when applying rules based on the facts of each case. In this case, party autonomy supersedes because of the express limitation period in the Arb. Agreement.

1) **The Parties agreed to the limitation period set out in the Arbitration Agreement**

37. The Arb. Agreement sets out a clear limitation period for parties to begin arbitral proceedings following negotiation failure. The agreement was signed and endorsed by both parties, further evidencing mutual agreement. Parties cannot simply opt-out out of limitation periods to assert a claim. The issue fundamentally comes down to party autonomy as the superseding interest in arbitral proceedings.
38. Arbitral tribunals are bound to the will of the parties. Both parties made a statute of limitation to initiate proceedings express and contractually bound. As a matter of public policy the tribunal should not obviate this agreement. To do so would undermine foundational principles of party autonomy in international commercial arbitration. Additionally, RESPONDENT should not be punished for CLAIMANT's failure to initiate proceedings on time. This further debilitates the importance of procedural expediency and responsibility in arbitration.



39. CLAIMANT contends that allowing parties to choose their own limitations violates their right to be heard [*Claimant's brief*, p. 26, ¶ 35]. CLAIMANT cites to the NYC Rules of Arbitration, UNCITRAL, and U.N. docs to refer to principles of fairness in arbitration and right to be heard. CLAIMANT is right in stating that parties have a right to be heard in arbitration proceedings. However, this is not responsive to the matter at hand. This refers to the right to be heard on the merits. CLAIMANT has sixty days following negotiation failure to begin the proceeding, during which both CLAIMANT and RESPONDENT are afforded their full right to be heard before the tribunal. These provisions assume that proceedings have already initiated, and certain procedural limitations are preventing one party from fully presenting their case. These provisions do not permit parties to blatantly obviate express statute of limitation provisions to which both parties expressly agreed.

**2) The limitation stipulated in the Arbitration Agreement is concrete.**

40. The sixty-day period is concrete in light of the wording of the contract. This is because on an international level, arbitration agreements are interpreted as fairly as possible. [§914, *Austrian Code of Civil Law*; *Koller*, ¶3/239, 3/240 *et seq.*; see *OGH case (2004)*; *OGH case (2008)*].
41. Based on the history of this case, the parties attempted to resolve their dispute amicably and were unable to do so in a reasonable fashion. The sixty-day period following negotiation failure establishes a strict time limit for initiate arbitral proceedings. To have either party wait for the sixty-day time period to elapse would undermine the purpose of arbitration proceedings in the first place: to have a fast, efficient resolution of the dispute.
42. Arbitration has the benefit of neutrality, centralized dispute resolution, enforceability of awards, commercial competence and expertise, finality of decision-making, party autonomy and procedural flexibility, cost and speed, and confidentiality, but only if both parties meet the requirements to engage in those proceedings [*Born*, ¶1, p. 67]. Here, CLAIMANT clearly missed the sixty-day time limit deadline and thus forfeited its right to initiate arbitration. To stipulate the entire initiation of proceedings on a concrete time period is consistent with the primary policy of including an arbitration clause in the DSA: a flexible procedure to resolve disputes according to the *express* agreement of both parties. In this case we have a clear contractual limitation to bringing the arbitration proceeding, which has the effect of barring claimant's right to bring a claim or even extinguishing it. [*Tweeddale*, p. 238].



### 3) The time limitation in the arbitration agreement is enforceable and applicable (T)

43. A statute of limitations defense is enforceable in court as well as arbitration. This is because of the fundamental similarity of court and arbitral processes: dispute resolution. First, the purpose of arbitration is to resolve disputes in accordance with the agreement of both parties. Second, arbitrators are restricted to strict rules of procedure and evidence taking. Since there is express intent of a sixty-day time limit within which to initiate proceedings following negotiation failure, then there is a presumption that statute of limitations defense is enforceable in arbitration. It is because of arbitration's structural flexibility to meet the will of both parties intent that the tribunal is bound to this time limitation. [*Miller and Danysb*, p. 26].
44. In *Alghussein Establishment v Eton College* the House of Lords held that a party may not benefit from its own breach of contract. [*Alghussein*, p. 4; *Roberts* p. 326] This called the "prevention principle" and was applied to construction contracts in *Peak Construction(Liverpool) Ltd v McKinney Foundations Ltd*, which held that:
- “[A]n Employer cannot hold the Contractor to the contractual completion date, if the Employer has by its act or omission prevented the Contractor from completing by that date. Instead, time becomes at large and the obligation to complete by the contract date is replaced by an implied obligation to complete within a reasonable time.” [*Peak*, p. 122]
45. There has been a trend in enforcing statute of limitations or time bars in arbitration agreements. [*Tweeddale and Tweeddale*, p. 480]. The primary purpose of private agreements is that they are enforced according to their terms. This is essential when a dispute arises where the parties want to determine the particular meaning of a certain phrase. In this case, it involves the sixty-day limitation and whether or not it is enforceable. The Arb. Agreement specifies a time within which to begin proceedings and outside that it is barred; this is an agreement that the Tribunal is bound to enforce. Therefore, in light of this clear and express agreement, the Tribunal should attempt to construe parties' intentions towards not permitting arbitration [*Mitsubishi v. Soler (US 1985)*].

**B. CLAIMANT failed to file its Request for Arbitration within the stipulated period**

46. The arbitration clause in the development and sales agreement (DSA) provides a time period within which either party was to commence arbitration proceedings. RESPONDENT contends that the CLAIMANT filed the request for arbitration outside of the stipulated period of sixty days. In addition, CLAIMANT improperly filled all required paper work to the tribunal to initiate arbitration within the stipulated time period, which would nullify their attempt to commence an arbitration and allow the sixty-day period to continue to run.

The arbitration clause in the DSA reads as follows:

“All disputes arising out of or in connection with this Agreement shall be settled amicably and in good faith between the parties. If no agreement can be reached each party has the right to initiate arbitration proceedings ***within sixty days after the failure of the negotiation*** to have the dispute decided by an arbitrator.

**1) CLAIMANT was aware of a failure to negotiate and arrive at an amicable agreement after the CLAIMANT received RESPONDENT’S response to their initial correspondence.**

47. CLAIMANT claims to have become aware of a supposed accounting error after a contracted shipment was sent to the RESPONDENT. RESPONDENT was contacted in writing on 15 January 2015 by Amelia Beinhorn, asking for additional funds to remedy the CLAIMANT’S supposed miscalculation. CLAIMANT did not receive a response from RESPONDENT with regards to any additional money and was paid in accordance with the contract, although there is a dispute as to the amount that was actually paid. CLAIMANT attempted to resolve this matter again through written correspondence dated 9 February 2015. The February 9<sup>th</sup> correspondence stated “We have not received the outstanding purchase price of US\$ 2,285,240 from you ... Therefore, we ask that the outstanding US\$ 2,387,432.80 is deposited into our bank account by 4 March 2015.” The RESPONDENT sent a letter to the CLAIMANT on 10 February 2015 stating the following:

“In regard to the purchase price for the swept fan blades TRF 192-I, your original invoice correctly reflected our contractual agreement. In the addendum to the contract we agreed on a fixed exchange rate of US\$ 1 = EQ 2.01. When we negotiated the addendum the agreement on the fixed exchange rate pertained not only the clamps but the whole contract.”

48. It is clear from the wording of the Respondent’s 10 February 2015 letter that the Respondent had no intention of providing the Claimant with any additional money. 1 April 2015, Claimant





sent a “final notice” to the Respondent. By this time, Claimant was aware that there would be no further negotiation due to the wording of the 10 February 2015 correspondence. Miriam Webster define failure as the “omission of occurrence or performance; specifically: a failing to perform a duty or expected action”. Claimant expected that after receiving the January 15 letter that Respondent would have sent the balance asked for or at the very least attempted to negotiate a new price. When the Respondent did not take “expected action” there was a clear failure to negotiate and there was no amicable agreement to be reached, starting the clock on the sixty- day period.

**2) Claimant’s right to legal defence was not violated.**

49. For the CLAIMANT to claim that “parties could not reduce limitation period of application for arbitration to sixty days without violation of right for legal defence;” is clearly inaccurate. The claimant negotiated and agreed to the terms of the DSA, upon doing so agreeing to a sixty-day limitation. The DSA and the clauses wherein were a contract and both parties were obligated by the clauses of said agreement. Chief Justice Chan Sek Keong of the Singapore Court of Appeals asserted “failure by plaintiff to commence arbitration within the stipulated time period... meant that he had lost his right to arbitrate” [Boo]. The Constitution of the Republic of Bulgaria gives a basic definition of the right to legal defense, “everyone shall have the right to legal defence whenever his rights or legitimate interest are violated or endangered. CLAIMANT entered into this contract with the knowledge that if the contract was breached there would be sixty days, subsequent to the failure of negotiations, to commence an arbitration. CLAIMANT cannot now claim that terms, agreed upon were in anyway a violation of their rights. As was stated by Justice Keong, the CLAIMANT has forfeited their right to arbitrate this matter.
50. “Procedural rule(s) regarding the right of defense, which mainly aims to ensure the respect of the principles of adversarial proceedings and equality of parties” [Tunis Case]. Claimant agreed to the sixty-day period with in the DSA, in addition the clause was fair because it applied to both parties. Either party that wished to commence arbitration was contractually obligated to do so within sixty days of a failure to negotiate. In the *Hall Street* decision, the United States Supreme Court decided that during an arbitration the parties should be bound by the wording of their original agreement on its face [Hall Street]. The law in many jurisdictions agrees that the wording of an arbitration agreement should be weighed heavily. In the instant case CLAIMANT should be bound to the sixty-day period that he originally agreed to.





**3) A partly paid registration fee and improper documents do not cease the run of the 60-day period.**

51. Under Art. 4.1 CAM-CCBC, CLAIMANT is to provide the CAM-CCBC with certain materials, when attempting to commence arbitration. The CAM-CCBC states the following:

The party desiring to commence an arbitration will notify the CAM/CCBC, through its President, in person or by registered mail, providing sufficient copies ... 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;

The commencement of an arbitration would subsequently stop the clock on the sixty-day period. In a response to amendments made to Brazilian Arbitration Law in 2014 it has been argued, “arbitration is considered instituted once all arbitrators have accepted their appointment, Nevertheless, once the arbitration is instituted, the date the request for arbitration determines the time in which the statute of limitation is interrupted.” [*Tauil & Chequer*]

52. In order for the response of the CLAIMANT to be complete and toll the sixty day period stipulated in the agreement the CLAIMANT would be required to present the tribunal with the appropriate and necessary paper work. At the time of their original arbitration request CLAIMANT failed to file the appropriate paperwork thus never actually commencing an arbitration. A “limitation period in respect of a claim submitted to arbitration shall cease to run when any party commences arbitral proceedings in the manner provided for in the arbitration agreement.” The time period continued to run until all paper was properly submitted once again placing them outside of the stipulated sixty-day period.

**C. CLAIMANT failed to file its Request for Arbitration in accordance with the CAM-CCBC Rules**

53. Under Art. 4.1 CAM-CCBC, CLAIMANT must provide the CAM-CCBC with certain materials if it wishes to commence arbitration. Among those materials are: “A power of attorney for any lawyers providing for adequate representation”. [CAM-CCBC 4.1(b).] In addition to a power of attorney, CLAIMANT was required to provide proof of payment of the Reg. Fee. [CAM-CCBC 4.2.] Here, the Tribunal requested that CLAIMANT produce additional materials, indicating that CLAIMANT failed to provide the required power of attorney and proof of payment of the registration. [Order of the President of the CAM-CCBC, p. 19]. Courts have held that a failure



to follow an institution's rules for initiating arbitration results in a failure to initiate arbitral proceedings. [*Robbins v. B and B Lines, Inc.* at 651; *See* 29 U.S.C. § 1401].

**1) The Power of Attorney for Wright Ltd and full payment of the Registration Fee are necessary to initiate arbitration proceedings**

54. The Parties agreed to the Rules of this institution without any changes to the submission requirements of a power of attorney and proof of payment of the Reg. Fee. The CAM-CCBC Rules set out specific procedures that must be followed to ensure that arbitration is conducted properly. [*A Basic Guide to International Arbitration*, pp. 8-9].
55. Strict adherence to the Rules provides both Parties with an additional layer of protection, and enables any award granted by the Tribunal to be more easily recognized and enforced. [IBID.]. Arbitral awards may go unrecognized where basic procedures were not followed at any stage of the proceedings, including initiation. Any award issued by this Tribunal is at risk of being overturned based on lack of compliance at the commencement stage; therefore, strict adherence must be practiced when initiating proceedings. [*See* IBID.]. Because of the importance placed on procedure, the fact that the Rules specifically state that a power of attorney and proof of payment of the Reg. Fee are required for a party to properly initiate arbitration proceedings indicates that they are necessary.

**2) CLAIMANT failed to satisfy the requirements for the Power of Attorney and the Registration Fee**

56. The President of the CAM-CCBC responded to CLAIMANT's Request for Arbitration with an Order that required CLAIMANT to amend its Request and "provide evidence that *all* the requirements of Article 4.1 have been complied with". [Order of the President of the CAM-CCBC, p. 19, emphasis added.] CLAIMANT proceeded to obtain a second Power of Attorney of Horace Fasttrack for Wright Ltd. [Power of Attorney, 5 June 2016, p. 21.] and provide the Tribunal with additional funds to satisfy the Reg. Fee. [Letter to the President of the CAM-CCBC, 7 June 2016, p. 20.] Because the Reg. Fee had not been fully paid, the previously supplied proof of payment was insufficient. CLAIMANT's Letter to the President demonstrates that the initial Power of Attorney and proof of payment of the Reg. Fee provided by CLAIMANT failed to satisfy the requirements to initiate arbitration under the Rules.



**i. Failure to provide full payment of the Registration Fee is grounds for dismissal**

57. CLAIMANT's proof of payment of the Registration Fee did not indicate that the Registration Fee was paid in full. As noted in CLAIMANT's Letter to the President of the CAM-CCBC, CLAIMANT made an accounting error which prevented it from paying the full amount of the Reg. Fee. CLAIMANT argues that the Reg. Fee is an administrative expense that must be paid within thirty (30) days of its Request for Arbitration; however, this argument is misplaced. The Rules indicate that proof of payment of the Reg. Fee must be provided alongside the notice of the Request for Arbitration. [CAM-CCBC 4.2].
58. Proof of payment of the Reg. Fee is required to confirm that the Reg. Fee was, in fact, paid in full. [See *Robbins v. B and B Lines, Inc.* at 651]. The Reg. Fee is essential to arbitration proceedings, which is why it is required at the beginning of arbitration. The Reg. Fee is used, in part, to compensate the Tribunal for its work in the administration of proceedings. [Commentary, p. 67.] Additionally, the Reg. Fee is used to compensate the institution for processing the case. [IBID. at 192.] By not paying the full Reg. Fee by the time the Request for Arbitration was made, CLAIMANT failed to provide the Tribunal with the funds necessary to properly administer and process the claim. CLAIMANT's failure also ignores the Tribunal's desire to prevent arbitration of frivolous claims. [IBID. at 67]
59. Although CLAIMANT was given the opportunity to remedy this deficiency, it did so outside of the 60-day limitation. [Letter to the President of the CAM-CCBC, 7 June 2016, p. 20]. Courts have held that a failure to pay required registration fees may render the initiation of arbitration untimely. [*Robbins v. B and B Lines, Inc.* at 651]. Because of the importance of the Reg. Fee and the role it plays in the arbitration proceedings, CLAIMANT's failure to provide full payment is grounds for dismissal.

**ii. The Power of Attorney for CLAIMANT's parent company was insufficient to satisfy the requirement under Art. 4.1(b)**

60. One of the most prominent aspects of company law is the separation between entities. Although parent companies may wholly own their subsidiaries, it has long been understood that each company is considered a separate entity, independent of one another. [See DEL. GEN. CORP. L.; *Mesler v. Bragg* at 299; *Separate Entity* at 12-13]. As independent entities, each company is responsible for its own management and liabilities; however, this may be subject to how the companies specifically operate. [*Piercing the Corporate Veil*]. Some jurisdictions have tests to



determine whether the two entities are more mingled, as opposed to being independent companies. Courts may look to several factors, such as intermingled funds, observation of corporate formalities, the adequacy of the subsidiary's finances, and whether the subsidiary is acting solely for the interest of the parent, to determine whether a parent and its subsidiary have the same identity. [*Hess v. L.G. Balfour* at 87].

61. In this case, there is no evidence to indicate that the companies should be viewed as a single entity. In fact, Wright Ltd would seem to operate completely independent of its parent company, indicating that they are separate entities and should be treated as such. Wright Holding PLC played no part in the negotiations between CLAIMANT and RESPONDENT, nor do any of the documents indicate that CLAIMANT was required to obtain authorization from its parent. [AGREEMENT, pp. 9, 11 (indicating that Wright Holding PLC had no role in the agreement because it was not mentioned nor did any of its officers sign the Agreement)]. Furthermore, because CLAIMANT has an interest in the development of fan blades and clamps, and the manufacturing of such products is one of its main sources of income, the Tribunal should find that CLAIMANT entered the agreement for its own benefit, not for the sole benefit of the parent company. [*See* REQUEST FOR ARB., pp. 3-4]. Because the two companies are separate entities, the power of attorney of the parent company cannot be attributable to Wright Ltd; therefore, it was insufficient to satisfy the notification requirement under Art. 4.1(b).

### **III. RESPONDENT DOES NOT OWE CLAIMANT ANY ADDITIONAL PAYMENT**

#### **A. The fixed exchange rate applies to the entire agreement**

62. On 26 October 2010 the PARTIES signed an addendum to the original Sales and Development Agreement [*Ex.C2*]. The addendum provides that the “exchange rate for the agreement is fixed to US\$ 1 = EQD 2.01”. It is RESPONDENT’S submission that this clause apply to the entire Sales and Development Agreement because **[a]** it accurately represents the intentions of the parties, and clearly articulates the exchange rate as applying to the whole agreement; and **[b]** a reasonable person with the same understanding and in the same circumstances as CLAIMANT would have understood that the fixed exchange rate mentioned in the addendum applied to the whole contract.



**1) The Addendum articulately represents the exchange rate as applying to the entire agreement**

63. Commentary on interpreting the fixed rate clause explains that the TRIBUNAL shall look at the intention of the parties or at a reasonable meaning of the clause if the intention is unclear. [*CISG Art.8(1), 8(2); UNIDROIT, Art. 4.1(1), 4.2(1)*]. TRIBUNAL is required to look at all of the circumstances [UNIDROIT, Art 4.3], but primarily the text. [*Calnan, 2.01*].
64. Senior management employees from both CLAIMANT and RESPONDENT negotiated the addendum to the Sales and Development Agreement in an effort to articulate a whole and accurate representation of the agreement that the two companies had reached verbally. There was an articulate, and reasonably justified negotiation effort on behalf of both parties to guarantee that any unexpected change in the exchange rate would not adversely affect either party.
65. Immediately prior to the clause in the addendum mentioning the exchange rate is the clause “Other terms as per main Agreement:” [*Ex. C2*]. This clause clearly applies the following exchange rate to the “main agreement”. A contract for the sale of clamps is not the “main agreement” that these two senior management employees had agreed on. Rather, the main agreement identified in the addendum was the Development and Sales agreement.
66. The UNIDROIT Principles note “parties do not use words to no purpose”. [*UNIDROIT, Art. 4.5,comm.*]. In this case, the drafters of the addendum specifically chose to strengthen the word “Agreement” in the clause immediately preceding the exchange rate clause in an effort to associate the word with the whole Development and Sales Agreement, and to disassociate it from the rather minor agreement of the sale of clamps. Capitalization of a letter can denote a whole new meaning to a word. Should CLAIMANT have intended the addendum to apply only to the additional purchase of clamps, surely they wouldn’t have used a capital “A”.

**2) A reasonable person with the same understanding and in the same circumstances as CLAIMANT would have understood that the fixed exchange rate mentioned in the Addendum applied to the entire contract**

67. Introduction Art. 8(3) of the CISG requires that 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. [*CISG Art.8(3)*].



68. A reasonable person with the same understanding and in the same position as CLAIMANT would have understood that the fixed exchange rate mentioned in the addendum applied to the whole contract. This tribunal must interpret the reasonableness of such an assumption based on objective standards. [*StencilMaster case*] In the case at hand, not only was the language clearly articulated by the parties to apply the fixed exchange rate to the whole Development and Sales Agreement, but there was a deliberated negotiation effort by PARTIES, to guarantee fair commercial circumstances. RESPONDENT cannot be held liable for an unexpected change in CLAIMANTS home currency as a reasonable person under the same circumstances would not have foreseen this additional cost. [*Mushrooms case*]. These are factors that are not only supported by international statutes and case law, but also would be understood by any reasonable person with the same understanding as the PARTIES.
69. During the negotiation for the price of the fan blades, the parties agreed on a price formula that fulfilled three objectives. First, it ensured that RESPONDENT – in the absence of unforeseen extraordinary circumstances – would not have to pay more than US\$ 13,125 per blade. Second, it anticipated that below that price CLAIMANT would at least cover its costs and hopefully make some profit. Third, it contained an incentive for CLAIMANT to keep the costs as low as possible, as its profit would increase with the decreasing of the costs. The parties had already used a comparable provision during their earlier co-operations when both were still subsidiaries of Engineering International SA. Furthermore, RESPONDENT had articulated an interest in continuing this commercial relationship for the foreseeable future.
70. While RESPONDENT may have hoped that there was a commercial situation in which CLAIMANT would be able to profit, there is no legal basis in law or precedent that hold a buyer liable for the losses incurred on behalf of a seller due to a change in the applicable exchange rate. CLAIMANT failed to articulate a statute or precedent that lays this responsibility upon RESPONDENT, and any reasonable person can understand that it would be far too unfair and unduly burdensome to expect the RESPONDENT to pay CLAIMANT for the loss it incurred as a result of the change in the Equatorianan Denar.



**B. RESPONDENT has the power to assert application of the fixed exchange rate to the entire contract**

71. RESPONDENT has the power to assert application of the fixed rate to the entire contract as it was agreed to in the addendum to the Sales and Development Agreement. Not only (i) are there reasonable usages or practices that make the fixed rate clause applicable to the agreement, but (ii) RESPONDENT acted in good faith, and was concerned with fixing a maximum price with good intent, both of which CLAIMANT were aware.

**1) There are reasonable usages or practices that make the fixed rate clause applicable to the Agreement**

72. CLAIMANT'S counsel notes that it is a well-accepted rule that parties are bound by the usages agreed and practices established between them [*CISG Art. 9, UNIDROIT, Art.1.9*]. For the practice to be established there must be some duration and frequency in the dealings between the parties, just two or three previous contacts do not suffice [*Duisburg, paras. 114,115; Zv. A*] In this case CLAIMANT contends that there were only two previous dealings between the parties. However, the very existence of each party is conditional upon cooperation with the other. CLAIMANT and RESPONDENT were formerly subsidiaries of Engineering International SA and based in Oceania [*Statement of Facts Para 2*].

73. Following the sale of CLAIMANT to CLAIMANT'S present parent company CLAIMANT and RESPONDENT agreed to mutually develop a new fan blade for RESPONDENT'S high-spec engine. [*id para 3*] The depth and degrees of cooperation and affiliation between CLAIMANT and RESPONDENT are much more entrenched than CLAIMANT'S counsel suggests the relationship to be. The practices established by the parties allow this tribunal to adopt the fixed exchange rate in this case. [*Frozen Chickens case*]. The TRF-192 was to be developed jointly under the technical leadership of CLAIMANT. This was not a single sale or trade agreement, but an entrenched, collaborative effort that meets the requirements of Article 9, and supports RESPONDENT'S contention that it possesses the ability to enforce the fixed exchange rate agreed upon in the addendum to the Development and Sales Agreement.

74. Furthermore, the CISG is clear on the point that "parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly





observed by, parties to contracts of the type involved in the particular trade concerned” [*CISG Art 9.2*]. In this case, as presented in the preceding subsection, the parties “otherwise agreed” to the fixed exchange rate through the addendum. This agreement to fix an exchange market, particularly in a time of turmoil within the currency market, is a common practice in international trade, and should be observed by CLAIMANT.

**2) RESPONDENT acted in good faith, and was concerned with fixing a maximum price with good intent**

75. Article 7 of the CISG stipulates that any decision arising out of this conflict must promote the observance of good faith in international trade. [*CISG Art 7(1); UNIDROIT, Art.1.7,cmt 1*]. Application of the good faith standard centers on the “principle that a contract should have the content that the parties might, with reasonable confidence, hoped they would have”. [*Case involving machine for repair of bricks*]. Accordingly, it is against the principle of good faith in international trade to decide change an outcome that both parties reasonably expected to achieve. In this case RESPONDENT intentionally structured the addendum to fix a maximum price on the contract, and the CLAIMANT entered into this agreement with the knowledge of this concern.
76. From the outset, RESPONDENT had been concerned with fixing a maximum price to be paid for it to be able to offer itself a price for the jet engine to Earhart SP. [*id para 5*] RESPONDENT proposed a flexible price structure in order to ensure that, as far as possible, both parties would generate a profit and that RESPONDENT could at that point offer the engine at a largely fixed price to Earhart.
77. RESPONDENT sought a fixed exchange rate for the same reason. Because REPSONDENT was dealing with Earhart in American dollars, it needed to guarantee that the costs of the fan blades would be capped at a certain price.
78. RESPONDENT communicated these concerns with CLAIMANT and otherwise acted in good faith and fair dealing as defined by the CISG [*CISG Art 7(1); UNIDROIT, Art.1.7,cmt 1*].
79. Senior employees at CLAIMANT’s organization were aware that RESPONDENT possessed these concerns, and they could have managed their portfolio with American reserves, should they have been concerned that a fixed exchange rate would hurt them. Despite this knowledge, CLAIMANT took the risk of incurring production costs in EQD.





80. While there was a clear intention to facilitate a situation in which both parties could profit, it was not explicitly part of the Agreement. Therefore RESPONDENT cannot be held accountable for the losses incurred on behalf of CLAIMANT due to an unexpected change in the currency market. Despite these intentions, it was not specifically written into the contract that both parties were expected to profit, and it is against the principle of good faith to impose an obligation in regard to a clause that is not disclosed to the contractual partner. [*Trade usage case*].

**C. Applying the fixed exchange rate clause to the entire Agreement will not inflict undue hardship upon CLAIMANT**

81. Application of the fixed exchange rate of US\$1 = EQD2.01 to the Agreement results in a fair situation that was reasonably foreseeable.
82. Article 6.2.2 of the UNIDROIT Principles defines hardship according to four requirements. First, events occur or become known to the disadvantaged party after the completion of the contract. Secondly, the disadvantaged party could not reasonably have taken the events into account at the time of the conclusion of the contract. Third the events are beyond the control of the disadvantaged party. And fourth, the disadvantaged party did not assume the risk of the events. [*UNIDROIT Art. 6.2.2*].
83. While the loss incurred by CLAIMANT as a result of the change in the currency market was beyond the control of CLAIMANT, the other three requirements to meet the definition of hardship are not met.
84. First of all, the change in value of the EQD compared to the USD occurred before the conclusion of the contract. The currency market fluctuated while the contract was still under performance by both parties.
85. Secondly, fluctuations occur often in international markets, such events could have reasonably been taken into account by the disadvantaged party, prior to the conclusion of the contract.
86. Finally, CLAIMANT assumed this risk when CLAIMANT decided to bear its costs in EQD rather than USD. CLAIMANT had ample opportunity to contract production costs in USD but made the conscientious decision to work with EQD.
87. International currency markets are complex, and no party should be expected to foresee the imminent rise or decline of a trading partners home currency. If anyone is to held accountable for such a calculation it would clearly be CLAIMANT, for they are based in Equatoriana and are the most familiar with the Equatorianan currency market. [*Houston case para 27*].



**3) CLAIMANT was appropriately due US\$ 20,438,560.00**

88. When the fixed exchange rate is applied, CLAIMANT is due \$20,438,560.00 for the fan blades. Upon receiving the fan blades and thus performance of the contract, RESPONDENT promptly paid CLAIMANT the following day in full. [Ex: C3]. Upon completion the contract was completed. The language of the contract was clear, the intent of the parties was understood and all parties acted in good faith upon the completion of this contract. It would be against the notions of justice, and contrary to the norms of international trade for this TRIBUNAL to grant CLAIMANT any more than they have already received.

**D. RESPONDENT has fulfilled its duty to make the payment obligations under the agreement**

89. Respondent has taken the necessary steps to fulfill its payment obligations. As per the agreement, respondent: (1) paid the price due upon delivery of the fan blades; (2) confirmed the payment as soon as possible; (3) deposited the purchase price in full; (4) and into the seller's account at the Equatoriana National Bank. (PO2 Claimant's exhibit C2, section 4). Respondent fulfilled all of these obligations. The letter from the Equatoriana Central bank confirms that the payment was made, as it states; "[w]e can confirm that SantosD KG effected the payment of US\$ 20,438,560 to your account." (Claimant's exhibit C8). The e-mail corroborates that the Respondent paid the entire purchase price, confirmed the payment as soon as possible, and that it was deposited into the Claimant's bank account. It states; "On the basis of the invoices received we have affected the following two payments to Wright's bank account...at Equatoriana National Bank [on the amount of] US\$ 20,438,560 for the fan blades [and] US\$ 183,343.28 for the clamps. As requested two separate payments have been made." (Claimant's exhibit C3). As such, Respondent fulfilled its payment obligations under the agreement.

**1) RESPONDENT deposited the purchase price in full**

90. CLAIMANT When entering into the contract the parties did not immediately agree on the price of the goods. [Claimant's Exhibit C2, section 4, Paragraph 1]. In fact, the summary notes state; "Fang insists that maximum price (subject to adjustment only in extraordinary unforeseeable circumstances) has to be fixed... To make determination of maximum price possible flexible price structure as for the purchase of the joint improved fans TRF 163-I and TRF 150-II must be agreed on a 'cost + basis' with risk sharing elements..." [Claimant Exhibit 1, ¶3]. As such, the purchase



price is calculated on a “cost-plus basis” as per the Agreement [Claimant’s Exhibit C2, section 4, ¶1]. Claimant argues that the full amount was not deposited because the Respondent agreed to pay a minimum price of 20,438,560 for the fan blades but only US\$ 20,336,367.20 was credited due to the 05% bank levy charged pursuant to the Equatoriana MLC Regulations [See Russian University of Justice brief, paragraph 115]. The full amount of \$20,438,560 was paid to Claimant’s account [Claimant’s exhibit C3]. However, the 0.5% bank levy should not be factored into the production costs of the fan blades because it is not a cost related to production, it is a cost that was incurred after production ended, and the profit margin in the contract can only relate to the costs of production [Claimant’s Exhibit C2, section 4]. Therefore, the 0.5% levy imposed by the bank is not and should not be accounted into the price of the goods.

91. The agreement does not set a minimum amount of US\$ 20,438,560 to be paid for the fan blades. [See Agreement Section 4]. In fact, the minimum amount set is of \$9,975 per blade [Claimant’s Exhibit C2 Section 4 ¶ 1] which multiplied by 2,000 units totals 19,95,000. The Respondent made the solicited payment on the amount of \$20,438,560 for the fan blades, which is over the minimal purchase price made in the agreement. 4 [See Claimant Exhibit C3]. As such, the Respondent fulfilled his obligation to pay the price of the goods as per the agreement when making the payment of the fan blades and the clamps in separate amounts.

**2) RESPONDENT was not obligated to pay the levy pursuant to Section 4 of the Agreement**

92. Section 4 of the agreement states that; “*The bank charges for the transfer of the amount are to be borne by the BUYER.*” [PO2 Claimant’s exhibit C2, section 4 ¶3]. However, the bank levy of 0.5% is not an ordinary bank fee, rather it is a very specific fee implemented by the bank in order to comply with governmental money laundering regulations that ensure amounts above the limit of US 2 million (or its EQD equivalent) be examined under the ML/2010C regulation. [PO2 page 56 ¶2]. Furthermore, because the Respondent was not aware of such regulation at the time of the agreement, the respondent could not have agreed to bearing the bank fees for a money laundering investigation. [PO2 page 55].

**3) RESPONDENT has fulfilled its duty to make the payment under Art. 54 CISG**

93. CISG Article 54 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.” While respondent did have to comply with governmental regulations, respondent was not aware of such regulations and was unlikely to have become aware of such regulation. As such Claimant should have informed the Respondent of such regulation because; (1) it is a regulation that was not in effect during the parties’ prior dealings or at the time of the drafting of the agreement [PO2 page 55 ¶2]; (2) the regulation was not customary in other parts of the world, especially in Mediterraneo [PO2 page 55 ¶2]; (3) Claimant was aware of the regulation or should have been aware of the regulation [PO2 page 55 ¶3]; and (4) Claimant should have informed the Respondent of the regulation under the good faith principle [CISG Article 7].

94. Tallon states that CISG Article 54 is linked to the good faith principles [ CISG article 7]. [Tallon, Page 7-7] He states that in some instances the compliance required in article 54 is dependent only on the buyer’s due diligence, while in others it needs the cooperation of other parties. [Tallon, page 7-6.]. In this case, Respondent needed the cooperation of Claimant’s conveyance of this information in order to comply with the formalities imposed by the Equatoriana Central Bank because the NL/2010C regulation because this regulation came into force on 1January 2010 as part of a package by the Equatoriana government [PO2 page 56 ¶ 2], which is prior the parties made the agreement on 1 August 2010 [Claimant’s Exhibit C2].
95. Even if Claimant did not know of this regulation or its extent, Claimant could and should have known of it because the Equatoriana newspapers reported this governmental regulation while pointing out that Equatoriana would be one of the six countries worldwide where private parties would have to pay a fee for such type of investigations and clearances [PO2 page 55 ¶2]. Claimant became aware of this regulation through its dealings with JetPropulse, in June 2010 [PO2 page 55¶ 3]. In that instance, the bank levy was applied to a payment made by JetPropulse, and Claimant decided not to claim an additional amount from JetPropulse [PO2 page 55¶ 3]. Similarly, Claimant bore the bank levy from the same money laundering investigation regulation when conducting business with JumboFly. [PO2 page 55]. Neither contracts between the Claimant and JetPropulse or Claimant and Jumbofly contained any clause as to who should bear the costs of the bank charges. [PO2 pages 55-56].
96. Article 54 requires the buyer to comply formalities in accordance with the rules of the country from which payment is to be made. [Maskow, section 2, ¶ 2.7]. Typically, this does not pose any difficulties because payment is generally made in the buyer’s place of business [Maskow, section 2, ¶ 2.7]. However, when payment takes place in the country where the seller has its place of



business, this can pose problems because there may be formalities for the receipts of payment which cannot be observed by the buyer. [Maskow, section 2, ¶ 2.7]. Maslow states that “[t]he Convention cannot be interpreted in such a way as to impose upon a party obligations impossible to fulfil, these formalities should be imposed upon the only party in a position to fulfil them -- the seller. This gains importance in international economic operations which prescribe special ways of payment or special accounts not generally known.” [ *Id.*] In these cases, the seller should be deemed obliged to indicate such peculiarities to the buyer and so that the buyer could comply with all the formalities connected with making the payment. [Maskow, section 2, ¶ 2.7]

97. In this case, the place of payment is the same place of business as of the seller. Respondent was unlikely to inquire as to this particular bank levy because this particular ML/2010C regulation was covered by foreign press only to the extent that the Equatorianian government took actions against money laundering without providing further details [PO2 page 55]; no comparable levy exists in Mediterraneo [PO2 page 55 ¶ 3]; and Respondent’s negotiators did not know about the content of ML/2010C because Claimant is the only supplier from Mediterraneo [PO2 page 56¶ 2]. As such, the seller should have informed the Claimant of the Equatoriana Central Bank’s money laundering investigation levy.

**4) CLAIMANT should bear the costs of the levy under Art. 6.1.14 UNIDROIT Principles**

98. Because international contracts depend so heavily on international fund transfers, having a uniform international rule to apply would be beneficial to all parties and the UNIDROIT principles seem to provide such a supplemental rule. [UNIDROIT Principles] UNIDROIT principles Article 6.1.14 state that; “ (a) if only one party has its place of business of that state, that party shall take the measures necessary to obtain the permission”. [UNIDROIT Principles]. When there is a public requirement permission, it must be disclosed by the party upon whom rests the burden of obtaining a public permission when such permission is required under rules which are not generally accessible, as such under the good faith principles, it requires the party who’s place of business is the same as location that requires the governmental permission to inform the other party of such requirement. [*Id.*] Furthermore, “ failure to do so may lead a court to disregard the permission requirement altogether or to conclude that the party failed to communicate the existence of the requirement implicitly guaranteed that it would be obtained” [*Id.*] The party that bears the burden to take measures to obtain public permission is the party



with place of business in the state requiring public permission. [*Id*] As such, in this case Claimant is the party with the duty to inform the Respondent and with the burden to pay the bank fees. Since Claimant 's place of business is the same as the location that asks for the governmental permission, meaning the country in which payment was to be effected, the burden lied on the Claimant. And claimant could have instructed Respondent to make several wires under \$2.

99. Claimant argues that its “negotiators” had no knowledge of the levy and because the negotiators are third parties [*Claim. Mem. Par. 153*] Claimant is free from a duty to inform. However, there is no fact showing that these negotiators are actually third- parties. Simply because the negotiators did not have knowledge of the regulation [PO2 page 55], does not bar Claimant from providing Respondent of this information as per UNIDROIT principles 6.1.14.

### **PRAYER FOR RELIEF**

Counsel, on behalf of RESPONDENT respectfully request the Tribunal:

- 1) Grant RESPONDENT’S request for security cost related to this arbitration.
- 2) Deny the CLAIMANT’S request for arbitration.
- 3) Find that the RESPONDENT has fulfilled its duty to make payment of \$20,438,560.00 under the Agreement.

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

Respectfully submitted,

Hofstra, 26 January 2017

---

MATTHEW GOODISON-ORR · ELIZABETH DRISCOLL · TAUSEEF AHMED

MIKE HASSARD · ANNETTE BEVANS · JOVIA RADIX

SARAH CAZE · GABRIELA CALAHORRANO · OLIVIER LABOSSIER

---