AMITY LAW SCHOOL, CENTRE II
AMITY UNIVERSITY

Memorandum for RESPONDENT

CAM-CCBC Arbitration Proceeding Nr.200/2016/SEC7

Wright Ltd V. SantosD KG

On behalf of SantosD KG
77 Avenida O Rei
Cafucopa
Mediterraneo

Against Wright Ltd
232 Garrincha Street
Oceanside
Equatoriana

(RESPONDENT) (CLAIMANT)

•SIDDHARTH SHARMA •SHUBHUM KAUSHIK •SUHAS K HOSAMANI •KAJRI ROY

Amity Law School, Centre II •Noida, State of Uttar Pradesh, India
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STATEMENT OF FACTS

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

2. CLAIMANT is a highly specialized manufacturer of fan blades for jet engines, incorporated in Equatorina.

3. RESPONDENT is a medium size manufacturer of jet engines, incorporated in Mediterraneo.

4. On 1st August 2010, the CLAIMANT and the RESPONDENT entered into a development and sales agreement wherein the CLAIMANT is designated as “seller” and the RESPONDENT as the “buyer”. CLAIMANT agrees to produce and deliver at least 2,000 TRF 192-I swept fan blades by 14th January 2015. The price to be paid was decided in US$.

5. On 26th October 2010, a handwritten addendum was added into the contract by the consent of CLAIMANT and RESPONDENT. The addendum defined a contract of sale between the CLAIMANT and the RESPONDENT wherein the CLAIMANT had to produce and deliver 2,000 clamps to attach fan blades to the fan shaft. The price of the clamps was decided to be on a cost coverage base and be paid in US$. The exchange rate of the agreement was fixed to US$1=EQD2.01.

6. On 9th January 2015, an invoice was prepared by Mr. Mario Lee who was working in the accounting department of CLAIMANT.

7. On 15th January 2015 11:23 AM, the RESPONDENT fulfilled its obligation to pay the CLAIMANT in accordance with invoice sent. Mr. Cyril Eindbergh, RESPONDENT’s Chief Financial Officer, emailed Ms. Amelia Beinhorn, CEO of CLAIMANT, that he had effected the required payment of US$ 20,438,560 & US$183,343,28 for the fan blades and the
clamps respectively. it was also communicated by the RESPONDENT that the blades and clamps were received in good order.

8. Also on **15th January 2015 at 12:46PM**, the CLAIMANT immediately after receiving the 11:23AM mail on the same day communicated the fact that there had been an error in the accounting department and the exchange rate of US$1=1.79EQD was to be used and therefore the outstanding amount due was US$22,723,800 for the fan blades instead of US$20,438,560 as initially charged due to the error.

9. On **9th February 2015**, the CLAIMANT communicated to the RESPONDENT that the outstanding price of US$2,285,240 had still not been received. It was also communicated by the CLAIMANT that only US$20,336,367.20 had been received. This increased the total outstanding amount to be claimed by the CLAIMANT to US$2,387,430.80

10. On **10th February**, the RESPONDENT contents the fact that a fixed rate was agreed on the clamps. The RESPONDENT also contents that the fact of not having any knowledge that why US$20,336,367.20 was transferred instead of US$20,438,560. Also, the bank later clarified that US$102,192.80 were deducted as bank charges for investigation which are applicable to any transaction that is above US $ 2million.

11. On **1st April 2016 12:46 PM**, Ms. Amelia Beinhorn, CEO of CLAIMANT, communicates to the RESPONDENT that they shall be initiating against the REPSODENT to obtain thte additional amount demanded by the CLAIMANT.

12. On **31st Mat 2016**, the CLAIMANT sent a request for Arbitration to the CAM-CCBC Arbitral Tribunal. But, such request was accompanied incomplete formalities. Firstly, the power of Attorney presented to the tribunal referred to a wrong name, it mentioned Wright Holding Plc instead of the name of the CLAIMANT which is Wright Ltd. Secondly, the registration fees were not paid in full, instead R$ 4,000 , only R$ 400 were deposited by the CLAIMANT.
13. On **8th June 2016**, the CAM-CCBC Arbitral Tribunal issues notice for the commencement of the arbitral proceedings as the original request for arbitration was supplemented by the CLAIMANT on **7th June 2016**. This tribunal now has to decide on the issues of Security of Costs, Commencement of Arbitral Proceedings & Merits for the RESPONDENT regarding the additional payment demanded.
ARGUMENTS

[1] Does the tribunal have the power and, if so, should it order CLAIMANT to provide security for RESPONDENT'S costs

Arbitral Tribunal has power to render cost pursuant to Article 10.4.1 of CAM-CCBC rules in favour of RESPONDENT[Sor, p.46].

[1.1] It is well within the powers of the tribunal to award security of costs.

1. Where the arbitral rules are silent, the tribunal may fill in gaps in those rules using the lex arbitri [Born, 411-13, Rubins, 314-15]; here, the UNCITRAL Model Law. The CISG is the substantive law of the contract [Art. 1 CISG]; it does not apply to procedural issues arising out of the arbitration agreement. Arbitral tribunals and national courts use widely differing criteria in deciding requests for security for costs [see, e.g. Colbran, 233; Delany, 130; Rubins, 369-376], although the most common approach has been to use factor-based discretion [Parkinson & Co. v. Triplan Ltd. (USA); Bank Mellat v. Helliniki Techniki SA (UK), 303; Delany, 2; Lew, generally]. Ultimately, the Tribunal should balance the potential harm to Claimant against the injustice to Respondent if no security is ordered [Altaras, 86].


3. While it is recognized that arbitrators or courts often perceive security for costs as a possible “obstruction of justice” [Rubino-Sammartano at 814; Needham, Arb. vol. 63(3) (1997) 122 at 124, 125], this Tribunal must not show “such a reluctance to order security for costs that this becomes a weapon whereby the impexcious company can use its inability to pay costs as a

4. On the contrary, virtually all major international arbitral tribunals are empowered to decide on the appropriateness of security for costs. [Marchac 129; see SIAC Art. 27.3; Model Law Art.17; ICC Art. 23; AAA Art. 22; LCIA Art. 25.2]. Many national laws also provide for security for costs to be ordered in arbitration [Werbicki 69]. The number of tribunals in international and national arbitration organizations allowing security for costs is also increasing. [Rubins 313-316].

[1.2] Providing security of costs is important as it shall strike an even balance between the position of the CLAIMANT and the RESPONDENT

5. Posting security for costs becomes especially important where strong reasons have been shown, as parties who can “default with impunity in payment of costs” will deprive international business “the assurance of even that institution’s effectiveness” [ICC Arbitration Case No. 6697 of 1992].

6. The practice of awarding the winning party the reasonable expenses of presenting its case is widespread in international arbitration. [Rubins 312]. In this case, the financial press has raised serious concerns about CLAIMANT’s financial position which call into question its ability to pay any award of costs ordered by the Tribunal. CLAIMANT’s financial difficulties apparently include cash flow problems, delinquency in paying creditors, and apparent unsuccessful attempts to secure arbitral awards. If RESPONDENT prevails in this dispute and is awarded costs by the Tribunal, that victory will be hollow if it cannot enforce the award due to CLAIMANT’s lack of funds.

7. The change in the factual situation of the parties since the agreement was entered into and, in light of such change, the fairness of proceeding without the assurance of an order of security should supplant CLAIMANT’s “balancing of the parties’ interests” (C.B. at 70) as the basis for the Tribunal’s determination of the security for costs issue (Karrer/Desax at 33; ICC No. 10032, 9 November 1999; Sandrock at 32). If the Tribunal were to find these factors in
RESPONDENT’s favor, then an order for security for costs would be justified unless CLAIMANT could prove both:

1) that an order of security would deny them the right of access to arbitration for reasons attributable to RESPONDENT and

2) that the making of such an order would be, after considering RESPONDENT’s reasons for its request of security, highly unfair to CLAIMANT. (ICC No. 10032, 9 November 1999; Karrer/Desax at 42)

8. That RESPONDENT entered into a contract with CLAIMANT is in itself indicative of the perceived healthy financial position of CLAIMANT at the time of the contract (Sandrock at 24 et seq.). RESPONDENT has an interest that its fees incurred will be recoverable (Lew/Mistelis/Kröll at 23-52; C.B. at 72). Without an order for security for costs, such recoverability is not certain (see supra at 53-57; Karrer/Desax at 340; Redfern/Hunter at 7-30). It is thus justified for the Tribunal to grant RESPONDENT a procedural order for security for its costs (Sandrock at 24). It is quite possible given the present factual situation that CLAIMANT could frustrate the Tribunal’s award not deliberately but as a result of their increasingly inaccessible funds or by way of the practice of the Equatorian courts.

9. The equal treatment of parties, as required by Art. 18 UNCITRAL ML, is another core policy of arbitration (Holtzmann/Neuhaus at 550; C.B. at 73). Article 18 is a mandatory provision from which the Tribunal cannot derogate (see supra at 47). An order of security in this arbitration will ensure equal treatment of the parties. Article 18 is not intended to protect a party from its own failures or strategic choices (CLOUT Case No. 391).

10. CLAIMANT has the burden of showing that an order for security of costs would in effect deny them the right of access to arbitration for reasons not attributable to them and that the making of such an order would be highly unfair to CLAIMANT (see supra at 52; ICC No. 10032, 9 November 1999). CLAIMANT has failed to carry this burden. It has previously been established that security for costs equivalent to US$21,078 may be reasonable against a
party even when that party is in bankruptcy proceedings (ZCC Award No. 415, 20 November 2001).

1.3 CLAIMANT’s financial situation raises serious doubts about its ability to cover RESPONDENT’s legal costs.

11. Because the payment of a substantial sum of money is at the root of security for costs orders, the opposing party’s financial health is a major factor to consider when contemplating a security request [Oilex A.G. v. Mitsui & Co. (USA) (ordering security because “plaintiff has no assets or is out of business”); see also Atlanta Shipping Corp. v. Chemical Bank (USA); K/S A/S Havbulk I v. Korea Shipbuilding and Eng’g Corp. (UK); Frontier Int’l Shipping Corp. v. Tavros (Can.)]. Orders for security are the standard method of protecting a party against the other’s potential inability to pay costs [Continental Shelf Case (ICJ); see also Bernstein, 98; Rubins, 310].

12. Claimants who take advantage of the international arbitral system should comply with tribunals’ decisions on costs, win or lose. The system is undermined if Claimant can benefit from it but can escape liability if its claim does not succeed [Kron, 2]. When claimants are defeated in arbitration and default with impunity on costs payments, “international businesspeople are deprived of the assurance of even that institution’s effectiveness. The risks of doing business across borders rise, the cost of capital for the initiation of international ventures rises, and global expansion is checked to some degree” [Rubins, 359; cf. ICC Case No. 6697 (ordering security for costs because arbitrators bear a “responsibility to safeguard the development of international trade, even at the cost of some procedural niceties”)].

13. CLAIMANT’s financial condition is a relevant factor in assessing a request for security for costs by RESPONDENT [Needham, Arb. vol. 63(3) (1997) 122 at 123; Lew, Arb. vol. 63(3) (1997) 166 at 167]. There are two alternative tests to determine whether CLAIMANT is financially able to pay costs if its claim were unsuccessful. On both tests, CLAIMANT’s financial condition strongly supports the order of security. First, security should be ordered
if there is “reason to believe” that CLAIMANT would be unable to pay RESPONDENT’s costs [Needham, Arb. vol. 63(3) (1997) 122 at 123; Regia Autonoma v. Gulf Petroleum (U.K.) at 72; Soo, Int’l A.L.R. (2000) 25 at 29, 30]. Second, under the intermediate Swiss-Germanic approach, security should be ordered if there is deterioration in CLAIMANT’s financial condition between the conclusion of the contract and the arbitration proceedings [Sandrock, J. Int’l. Arb. vol. 14(1) (1997) 17 at 30].

14. Such reports provide “credible testimony” of CLAIMANT’s financial condition [Needham, Arb. vol. 63(3) (1997) 122 at 125]. Furthermore, the reports state that CLAIMANT has been “delinquent” in paying its trade creditors, and has been unsuccessful in seeking additional financing from several banks. These press reports further state that CLAIMANT’s financial problems may have begun.

15. Contrary to CLAIMANT’s assertions, the financial condition of the parties is a legitimate consideration in determining awards of security for costs. In fact, commentators on the 1997 Guidelines drafted by the Chartered Institute of Arbitrators suggest that the financial condition of the claimant might be the most important factor to consider. [Rubins 326; see also Schockman v. Hogg ¶¶ 9-12]. In practice, the ability of a party to fulfill an award of costs against it is a significant consideration in awards for security for costs. [Redfern/Hunter 7-32].

[1.4] There is a very high possibility that the CLAIMANT is not in a position to cover the legal costs

16. Respondent has presented reputable financial press articles reporting that Claimant has a cash flow shortfall and has been delinquent in paying its trade creditors. 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. Strict application of rules of evidence is at odds with the intended informality of arbitration [ICC Case No. 1434, Born, 470; David, 290]. All that is required is “that the material … [be] sufficiently persuasive to permit a rational belief to be formed that, if ordered to do so, the corporation would be
unable to pay the costs of that party upon disposal of the proceedings” [Warren Mitchell v. Austl. Maritime Officers’ Union (Austl.)].

17. The Tribunal is free to draw negative inferences from such conduct [Born, 489; Rubino-Sammartano, (duty to cooperate in good faith in the taking of evidence); cf. Reinsurance Austl. Corp. (Austl.) (where Claimant refused to offer evidence of its financial viability, the court inferred that the evidence would have hurt Claimant’s position); Forsythe Int’l., SA v. Gobbs Oil Co. (USA); Bigge Crane & Rigging Co. v. Docutel Corp. (USA)].

18. Respondent has discharged its evidentiary burden of making a prima facie case that Claimant presents a risk of non-payment. The onus is now on Claimant to satisfy the Tribunal that, taking into account all relevant factors, the discretion to make an order should not be exercised [Idoport v. National Austl. Bank (Austl.)]. Claimant has not demonstrated that it should be exempt from the general rules to which the parties agreed.

19. Since no one can prove whether a hypothetical future event will or will not occur, this would put an impossible burden on Respondent. As there is no reason to believe Claimant’s situation will improve before the end of the proceedings, and in fact may worsen if it loses this arbitration and must pay Respondent’s costs, a showing of urgency is not required [Interim award of 12 December 1996 (Neth.)].

20. The Tribunal should order security because CLAIMANT may be able to avoid paying costs. The Tribunal should order security because CLAIMANT may be able to avoid paying costs. There is reason to order security where there is evidence that CLAIMANT may be able to avoid paying costs [Lew, Arb. vol. 63(3) (1997) 166 at 167] or a future cost award will not be enforceable. [Rubins, Am. Rev. Int. Arb. vol. 11(3) (2000) 314 at 329, 337; Wirth, ASA Bulletin vol. 18(1) (2000) 31, see also Arbitral Decision of 21 December 1998 (ASA)]. CLAIMANT’s assets are in all in Equatoriana. [Procedural Order No. 3, para. 48]. Hence RESPONDENT is likely to seek enforcement of a future cost award in Equatoriana.

[1.5] CLAIMANT also has a reputation of not complying with arbitral awards
21. A security for costs order would circumvent any problems with enforcement that might arise. Despite the fact that Equatoriana is a party to the New York Convention, courts in Equatoriana have not been rigorous in enforcing awards in cases where the company is in financial difficulties. [Letter of Horace Fasttrack, 1 Sept. 2003]. A better solution for enforcement of awards is to remove the responsibility for enforcement from the hands of the national courts altogether. [Craig 23-26]. Guaranteeing enforcement through the tool of ordering security for costs would avoid potential political tension between the home nations of the parties. If Equatoriana failed to enforce an award, Mediterraneo could then refuse to enforce arbitral awards to Equatorianan parties, [see New York Convention art. XIV], increasing tension between the nations. By contrast, when enforcement is secured through security for costs, future contracting parties in both nations can confidently place their trust in the arbitration process (leading to an increase of cross-border dealings that can benefit both nations).

22. There is reason to order security where there is evidence that CLAIMANT may be able to avoid paying costs [Lew, Arb. vol. 63(3) (1997) 166 at 167] or a future cost award will not be enforceable.

[1.6]RESPONDENT has reasonably asked for an order of security of costs acting in good faith.

23. The amount of security requested by Respondent is also reasonable. The allocation of costs is an element of procedure [Gillis Wetter/Priem, 249] and is governed by the rules of the arbitral institution chosen by the parties [Weintraub, 69; Triumph Tankers Ltd. v. Kerr McGee Refining Corp. (SMA); Final Award No. 6962 (ICC); Final Award No. 6248 (ICC)]. Despite the significance of a claim for costs [see Schwartz, 8-23; Gurry, 233], international tribunals have no uniform approach for awarding them [Gotanda, 2].

24. First, RESPONDENT fulfilled its obligations by making advance payment of the administration fees as requested, before requesting for costs. Second, RESPONDENT
submitted the request for security in a timely manner [Needham, Arb. vol. 63(3) (1997) 122 at 125; Regia Autonoma v. Gulf Petroleum (U.K.) at 73], as it did so immediately upon discovery of the relevant financial reports [Problem at 36]. Third, the quantum requested for security is a reasonable estimate to legal costs that would be incurred by the RESPONDENT [Award in Case No. 415 (ASA) where CHF 35,000 (approximately US$29,000) for security for costs was held to be reasonable by the arbitrator applying Zurich Chamber of Commerce Arbitration Rules].


26. While RESPONDENT is aware that the Tribunal should not go into the merits of the case in considering such interim measures like security for costs [Needham, Arb. vol. 63(3) (1997) 122 at 125, Rubins, Am. Rev. Int. Arb. vol. 11(3) (2000) 314], such a request is not outrageous because RESPONDENT’s case has a reasonably good prospect of success [RESPONDENT Memorandum, para. 118]. Since costs follow events [Rubins, Am. Rev. Int. Arb. vol. 11(3) (2000) 314 at 363; Rubino-Sammartano at 815], RESPONDENT has at least a prima facie case of securing costs.

27. RESPONDENT seeks to preserve it right to payment through an order for security contrary to CLAIMANT’s. RESPONDENT has shown this Tribunal credible evidence and indication of the necessity of an order for security for costs. Therefore, an order for security would ensure that the RESPONDENT’s interest of being reimbursed for its expenses in case of success is protected and preserved [Award in Case No. 415 (ASA)].

2. Are CLAIMANT’s claims admissible or have they been submitted out of time?

28. CLAIMANT had declared the negotiations to be failed on 1st April 2016[RE, 3]. This is not in dispute with the CLAIMANT and the RESPONDENT. The issue in dispute is the fact that the CLAIMANT claims the date of arbitration to be 31st May, 2016, i.e the date of
submission of the incomplete request. RESPONDENT denies such date to be the date of commencement for the mere reason that the power of attorney was not present along with the registration fees. The power of attorney, along with being a rule of the tribunal as a requirement is a mandatory requirement for any party to approach a arbitral tribunal. Whereas the registration fee is a rule of the tribunal. These both were only satisfied on 7th June, 2016. This is 67 days after the negotiations were failed and thus are not in accordance with the time limit of 60 days as specified in the arbitration clause which is 60 days [CE 2, p.10].

[2.1] The terms of the contract had mentioned limitation period of 60 days for the commencement.

29. The parties are free to make their own agreement as to how arbitration is to be started, but in default it will be commenced when one party serves notice on the other requiring them to appoint their arbitrator. [Simon Baughen]

30. The model law, UNICITRAL, recognizes the freedom of parties and arbitrators to tailor their own procedural rules. [Petar Sarcevic]. The time limit may be agreed upon by the parties either in arbitration agreement or in an independent agreement. [Fathi Waly]

31. When arbitration proceedings are commenced by one party and the other party does not consider it bound by an arbitration agreement in the contract, the respondent should object to the jurisdiction of the arbitration tribunal before it contests the merits of the matter. [Yvonne Baatz]. Time limit applies to both court and arbitration proceedings. [Yvonne Baatz, Charles Debattista, Filippo Lorenzon]

32. One disadvantage in putting time limits in the arbitration clause, particularly if the period is very short, is that it may make it more difficult for the parties to find arbitrators willing to undertake to complete an arbitration within the specific period. There is a possibility that it may not be possible in practice for the arbitrators to comply with the time limit, and that one of the parties will not agree to extend it. Our view is therefore that very short, hard time
limits are best avoided. [Wolters Kluwer]. An arbitration agreement may permit a party to refer a dispute to arbitration within a fixed period. [Julian Bailey]

[2.1] The CLAIMANT did not comply with the rules of CAM-CCBC

33. The request for arbitration submitted by the CLAIMANT on 31st May 2016 did not comply with the requirements of Article 4.1 and 4.2 of CAM-CCBC rules [SoR, p.25]. Under the law, the arbitration is deemed to have commenced when the arbitrators accept their nomination, but when the parties have agreed to resort to institutional arbitration, the commencement shall be determined in accordance with institutional rules. [Joaquim T. de Paiva Muniz, Ana Tereza Palhares Basílio]

34. Recently the English High Court in Multiplex Construction v Honeywell Control Systems endorsed the view that time-bar clauses are valid and should be upheld. Jackson J. held that contractual terms requiring a contractor to give prompt notice of delay served a valuable purpose as they enabled matters to be investigated while they were still current. He also regarded such terms as valuable because they sometimes gave the employer the opportunity to withdraw instructions when the financial consequences became apparent. He doubted that Gaymark represented English law [Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd [2007] EWHC 447 (TCC)]

35. Article 4.1 of CAM-CCBC rules states that, the party desiring to commence an arbitration will notify the CAM/CCBC, through its President, in person or by registered mail, providing sufficient copies for all the parties, arbitrators and the Secretariat of the CAM/CCBC to receive a copy, enclosing: (a) A document that contains the arbitration agreement, providing for choice of the CAM/CCBC’s to administer the proceedings; (b) A power of attorney for any lawyers providing for adequate representation; (c) A summary statement of the matter that will be the subject of the arbitration; (d) The estimated amount in dispute; (e) The full name and details of the parties involved in the arbitration; and (f) A statement of the seat, language, law or rules of law applicable to the arbitration under the contract.
36. It is for the CLAIMANT to ensure that his claim is brought within the time limit imposed by the contract or by the applicable law or both[ICC Arbitration No. 4620, Interim award dated April 19, 1984].

37. The CLAIMANT, thus showed utter disregard of the arbitral tribunal by not complying with the requirements set forth in Article 4.1. The power of Attorney referred to Wright Holding Plc instead of Wright Ltd [CAM-CCBC order, p. 21]. The question arises that even if a request is submitted in time, it must be at least be submitted by the CLAIMANT or its authorized representative. But in this case, the authorized representative, Mr. Horase Fasttrack was not authorized to submit the request on behalf of the CLAIMANT for the sole reason that the CLAIMANT's name was not there in the power of Attorney. Thus, the CLAIMANT never approached CAM-CCBC Tribunal on 31st May 2016. The secondary issue is that the registration fees was paid in the amount of R$ 400 instead of R$ 4000 which is not in accordance with the rules of CAM-CCBC rules. Therefore, this brings a question the creditability for the request of Arbitration. Such a request must be formal, well-drafted and must be in accordance with the rules of arbitral tribunal. But, such a request was not made by the CLAIMANT and therefore must not be rendered as a valid request for arbitration. Request for arbitration must contain information concerning the issues in dispute, identity of the parties and their consent for the arbitration [Lucy Reed, Jan Paulsson, Nigel Blackaby]. The requirements of article 4 where only fulfilled on 7th June 2016[OP, p.22] and this must be recognized as the date wherein the arbitration commenced.

[2.2] An incomplete request must not be considered as a ground for commencement of arbitral proceedings

38. The commencement of the arbitration is the first formal step that a claimant must take and in many regards is the most important. The claimant who serves a defective notice of commencement may find that the notice has no effect and, if the limitation period has
subsequently expired, has no remedy. [Andrew Tweeddale]. The date of the notice will, in the first place, be relevant to ensure that any time limits within the arbitration clause have been complied with. [Thomas Telford]

39. Indeed, in the early years of ICC arbitration, the request not only served the function of initiating the arbitration proceedings, but also often represented the Claimant’s only written submission in relation to its claim, thus permitting the swift resolution of dispute following the constitution of the arbitral tribunal. [Yves Derains, Eric A. Schwartz]. An arbitration agreement also gives rise to substantive rights and obligations. [Lars Heuman, Sigvard Jarvin]

40. The advantage of incorporating in one’s agreement a specific deadline for rendering the award is that it encourages the arbitral tribunal to swiftly conclude the proceedings before its time expires. [Michael McIlwrath, John Savage].

41. The claimant sent her ET1 form, along with the ET fee and an application for remission, 4 days before the deadline. The form was rejected because of an incorrect ACAS certification number and sent back to her to the wrong address such that she only received the rejection after the deadline had passed. She immediately lodged the form again at the ET in person, having corrected the ACAS certification number. She could not remember whether the ACAS number was corrected on the ET1 or the remission application. The Judge inferred from her evidence and the material before him that she had not fully entered the ACAS conciliation number she had been given on her application form, and that the Employment Tribunal had been obliged by Rule 10(1)(c)(i) of the Employment Tribunal Rules to reject it. The claimant appealed. The EAT dismissed the appeal [UKEAT/0439/14/DM]. Article 4.2. The party will attach proof of payment of the Registration Fee together with the notice, in accordance with article 12.5 of the Rules.

42. Article 4.3. The Secretariat of the CAM/CCBC will send a copy of the notice and respective documents that support it to the other party, requesting that, within fifteen (15) days, it describe in brief any matter that may be the subject of its claim and the respective amount, as
well as comments regarding the seat of arbitration, language, law or rules of law applicable to the arbitration under the contract. The date on which a request is received by the secretariat shall for all purposes, be deemed to be the date of commencement of the arbitral proceedings [*The Hague Convention, 1907*].

**[2.3]** **CLAIMANT cannot take the defense of supporting laws and case laws regarding time limit.**

43. A distinction should be drawn between a contractually imposed time limit for the commencement of arbitration proceedings and a time limitation imposed by law. Where there is a time limit already agreed by both the parties as part of the contract, it prevails over the time limitation imposed by law since breach of the contract will otherwise be the consequences. [*Grant Hanessian, Lawrence W. Newman*]

44. The courts cannot extend time, where a clause extinguishes a claim; for example, where the clause states that by not serving the claim in a prescribed time the potential defendant is discharged from any liability under that claim. Therefore in [*Babanaft International Co SA v Avant Petroleum Inc*] a time-bar operated where no claim in writing supported by documents was received within 90 days of a prescribed event. [*British Gas Trading Ltd v Amerada Hess Ltd*] Donaldson L.J. noted that such a clause might be “a source of injustice or even oppression” but “as the law stands, that will be the position”.

**[3.] Is CLAIMANT entitled to the additional payments from RESPONDENT in the amount of US $ 2,285,240.00 for the blades based on the present exchange rate (US$ 1 = EQD 1.79) and US$ 102,192.80 for the fees deducted by the central bank?**

45. CLAIMANT in pursuant of RESPONDENT’s request had agreed to two things, first the agreement in regard to clamps and second, the fixed exchange rate [*RE 4, p.30*]. The CLAIMANT’s case is that the agreement was for the exchange rate only to be used for the clamps and not for the whole agreement. The CLAIMANT is creating a wrong impression regarding the exchange rate. The Second issue is the bank charges regarding the investigation which cannot be regarded as bank charges in the ordinary course as they are the
charges for the investigation for money laundering and not bank charges as they would be in its ordinary course.

[3.1] CLAIMANT is not entitled to additional payments of US$2,285,240.00 for the blades based on the present exchange rate

[3.1.1] The CLAIMANT is creating a wrong impression regarding the interpretation of the addendum

46. A contract addendum is an agreed-upon addition signed by all parties to the original contract. It details the specific terms, clauses, sections and definitions to be changed in the original contract but otherwise leaves it in full force and effect. Contract addendums are tricky to write, because contract law is very clear that all parties must abide by the contract as it stands. The goal when writing a contract addendum is to only change the parts that all parties want to change while not creating any loopholes or unintended consequences in the agreement as it stands in writing. [Black's Law Dictionary] It was in the knowledge of CLAIMANT’s CEO that the RESPONDENT had to be “de-risked” [RE 1, p.27]. RESPONDENT had thus insisted for an addendum to be added to the contract which would have an exchange rate of US$1=EQD2.01 for the agreement [RE 2, p.28].

47. Mr. Paul Romario, CEO of SantosD KG agreed that it was a policy of RESPONDENT to include fixed exchange rate in its contracts [RE 5, p.31]. The last two engines (TRF 163-I; TRF 150-II) had not used the price clause with reference to exchange rates as the CLAIMANT and RESPONDENT belonged to the same group of companies. But later on due to separation, the fixed exchange rate was to be used in order to “de-risk” and thus the last sentence of addendum was clearly stated by Mr. Paul Romario [RE 5, p.31] and thus, RESPONDENT insisted for an addendum to be added to the contract which would have an exchange rate of US$1=EQD2.01 for the agreement [RE 2, p.28].

48. When one speaks of the intention of the parties to the contract one speaks objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if
placed in the situation of the parties. [Chan Leng Sun] Such an intention was evident the CLAIMANT by the conduct of the RESPONDENT which it had observed.

[3.1.2] The exchange rate decided by the addendum is binding on the CLAIMANT

49. Exchange rates between individual currencies are subject to daily fluctuations which can sometimes vary quite dramatically. As a result, the question in which currency the damages are to be awarded, is highly relevant. In a particular instance, various countries or tribunals may have jurisdiction in a matter and the court or tribunal should not summarily be awarded in the local currency of the court or tribunal, which may have no further contact with the whole transaction.

50. The CISG contains no provision on this issue. The point of departure should, however, be that in terms of the principle of freedom of contract underlying the CISG, any contractual arrangement that the parties have agreed upon, should take precedence. Therefore, if the agreement specifically states that damages on breach of contract is payable in US dollars, the court awarding damages should do so in dollars.

51. However, in this case the court is faced with the difficulty that the damages suffered were actually suffered in Euros and not dollars. It will therefore have to determine the dollar amount with reference to the Euro amount. The question then becomes one of deciding which date to use as the date of conversion from Euros to dollars. Is it at the time of the breach, or the actual time the damages were suffered, or the date of judgment, or the date of payment?

52. Schlechtriem is of the opinion that in terms of the principle of the concrete calculation of damages, the damages should be awarded in the currency in which the party entitled to damages suffered the damages. [Prof Sieg Eiselen]

53. Socialist trade specialists also acknowledge a role for trade usage in regulating international sales agreements. Trade usage and custom are often used by Socialist arbitral panels, both to
interpret contracts and to fill in gaps. Before applying the usage, Socialist arbitrators generally require that it (1) be proved by reference to trade literature or experts; be universally recognized in the trade; (3) be the sole usage on point; and (4) be clear and concrete. The final requirement was reflected in the concern of several Socialist states that binding usage under the CISG be limited to international, not domestic, usage. [Stephen Bainbridge]

54. The Convention has taken into account international practice and modern legal systems, both of which accord significance to the rule of usages. "Where the contract is silent, current practices and usages may apply." Usages of trade constitute the core of the lex mercatoria. In regard to the way of determining the intent of the parties, the Convention specifies in Art. 8(3): "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." [Aleksandar Goldstajn]

55. The dictionary definition of an addendum is “a thing to be added; an addition” Webster’s Encyclopedic Unabridged Dictionary of English Language. (Gramecy Books, New York, 1989) [Mark Kalin, Robert S. Weygant, Harold J. Rosen]

56. The addendum acts as an addition to individual contracts, which may be of any type. [Alan Twort, Gordon Rees] As per the terms specified in the sales and development agreement, the CLAIMANT is only entitled to US$20,438,650 [CE 2, p.10]. The calculation of the said amount is based on the following,

Cost per fan blade incurred by the CLAIMANT = US$9,744.28 (Based on exchange rate of 1US$ = 1.79 EQD).

Total amount to be paid by the RESPONDENT per fan blade as per sales and development agreement = US$9,975 [CE 2, p.10].

Total amount to be paid by the RESPONDENT for all fan blades = 2,000 X US$9,744.28 + 475 = 2,000 X US$10,219.28 = US$20,438,560
Now, for the Clamps,

Price for Clamps = US$ 183,343.28 [CE 3, p.12].

Therefore, total price to be paid by the RESPONDENT is US$20,438,560 for blades and US$ 183,343.28 for the clamps. This is also confirmed by the invoice sent by the CLAIMANT dated 15.01.2015 [CE 3, p. 12].

57. A contract addendum is an agreed-upon addition signed by all parties to the original contract. It details the specific terms, clauses, sections and definitions to be changed in the original contract but otherwise leaves it in full force and effect. Contract addendums are tricky to write, because contract law is very clear that all parties must abide by the contract as it stands. The goal when writing a contract addendum is to only change the parts that all parties want to change while not creating any loopholes or unintended consequences in the agreement as it stands in writing. [Black’s Law Dictionary]

[3.1.3] The RESPONDENT has fulfilled its contractual obligations in lieu of Article 54 of CISG

58. Article 54 is frequently cited by the courts. Although the provision is concerned solely with actions preparatory to payment of the price, many decisions nevertheless cite article 54 in cases of non-payment of the price by the buyer where the dispute did not specifically relate to steps or formalities required to enable payment to be made. In those cases, article 54 was referred to by the courts either in conjunction with article 53 or in isolation. [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry. 28th Sep 2004]

59. Article 54 has a double effect. First, unless otherwise provided for in the contract, article 54 imposes these obligations on the buyer, who must thus bear the costs thereof. Secondly, the steps for which the buyer is responsible under article 54 are obligations whose violation permits the seller to resort to the remedies specified in articles 61 et seq.; they do not merely relate to "conduct in preparing to perform or in performing the contract", as stated in article
71(1). Thus, failure to perform those steps constitutes a breach and not merely an anticipatory breach of contract. [*Landgericht Duisburg, 17th April 1996*]

60. Article 54 says nothing about the currency of payment. Most often the parties indicate the currency when fixing the price. As several court decisions have stated, such an agreement is binding on the parties pursuant to article 6. [*Tribunal cantonal Valais, 27th April 2007*]

61. The principal obligations of the buyer are to pay the price and take delivery of the goods "as required by the contract and this Convention". From this phrase, as well as from article 6 of the Convention, it follows that, where the contract provides for performance of the contract that departs from the rules of the Convention, the parties' agreement prevails. [*Pessa Luciano v. W.H.S. Saddlers International, 10th Jan 2006*]

**[3.1.4] There is no liability arising on part of the RESPONDENT as per the terms of Article 54**

62. There have been numerous decisions citing article 53 in cases involving judgments requiring the buyer to pay the price. [*Oberlandesgericht Saarbrücken, 12th May 2010*] It follows from this principle that the seller has to prove that the buyer must pay the price and also what that amount is. [*Landgericht Kassel, 15th Feb 1996*]

63. In cases where the buyer claims a reduction or discount, the buyer bears the burden of proving that it is entitled to reduce the initial contract price. [*City of Tijuana, State of Baja California, Sixth Civil Court of First Instance, 14th July 2000*] The dictionary definition of an addendum is “a thing to be added; an addition” Webster’s Encyclopedic Unabridged Dictionary of English Language. (Gramecy Books, New York, 1989) [Mark Kalin, Robert S. Weygant, Harold J. Rosen]

**[3.1.5] The RESPONDENT is not liable for additional payments.**
64. The obligation of the buyer to pay the price implies that a monetary performance is required. The impression that the price involves payment in money is strengthened by certain provisions concerning payment.

65. The obligations of the buyer under the Convention on Contracts for the International Sale of Goods (CISG) can be succinctly summarized as the obligations to take the goods and to pay for the goods. In most respects, any further qualification is a mere footnote or particularization of these two obligations.

66. Article 57 designates the place for payment when the parties fail to do so in the contract. This is a default provision, and this article only applies if the contract neither explicitly nor implicitly designates a place for delivery. If the contract does not designate a place of payment, normally payment would be at the seller's place of business as determined under Article 10.

67. Article 59 requires payment by the buyer without any affirmative action by the seller on the payment date. This provision was enacted to circumvent European legal systems that require a formal demand by the seller in order for payment to become due. Most of the reported cases simply refer to the obligation set out in the article without further analysis, however, one court appropriately noted that a buyer's failure to meet the requirements of Article 59 provides the seller to recourse under all of the other provisions of the CISG. [Henry Deeb Gabriel]

68. Article 59 states that the buyer must pay the price on the date fixed by or determinable from the contract or the Convention without the need for any request or compliance with any formality on the part of the seller. This provision makes it clear that payment is not subject to any formal demand by the seller in order to become due. Such rules exist at least in some European legal systems. The provision is not designed to deal with the question whether the buyer is required to pay before he has received an invoice. In cases where the buyer does not know the price until he receives an invoice, he cannot pay the price earlier. In other cases
usage may call for an invoice in order to trigger the buyer's obligation to pay the price. [Leif Sevón ]

69. In accordance with the principle that the offeror is the master of the offer, the acceptance must reach the offeror within the time which the offeror has fixed. If no time has been fixed, the CISG default rule is that the acceptance must reach its destination within a 'reasonable' time, taking due account of all the circumstances. Thus, an offer sent by telefax will require a more prompt reply than an offer sent by post. Absent contrary indication, an oral offer requires an 'immediate' acceptance. [Joseph Lookofsky ]

70. The commercial measures can include, as mentioned in the UNCITRAL Digest, the Secretariat's Commentary, and in the wealth of scholarly opinions, the opening of a letter of credit, establishment of security or obtaining a bank guarantee, or the acceptance of a bill of exchange. When complying with his commercial requirements, the buyer's standard of performance is that he must achieve a specific result. [Alejandro Osuna-González]

71. Article 8, which addresses the question of interpreting statements or other conduct of a party (i.e., intention), is part of the standard of Article 14(1). Although not of particular concern to the Court in Malev its tangential importance requires a brief divergence through Article 8. To begin with, Article 8(1) embodies the "subjective" approach to interpretation, relying on an understanding of "the actual intent of the party responsible for the statement or conduct that must be discerned." While troublesome, due to the practical difficulty in knowing what a party's actual, subjective intent may be, the application of the concept of subjective intent is limited in CISG to those situations "where the other party knew or could not have been unaware of what that intent was."

72. More pertinent is the "objective" approach to interpretation embodied in Article 8(2). It provides that statements or other conduct must be interpreted "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." Since it will be rare that the subjective standard of Article 8(1) is met, the
"reasonable person" standard of Article 8(2) will be the standard generally applied. [Paul Amato]

73. One of the most controversial issues arising under the CISG is the validity of an open price contract. CISG Article 14 requires that the price given in an offer be determinable. Several authors contend that a determinable price is a requirement for a valid contract. [Martin Karollus] Sometimes a proposal to sell or buy states the price of the goods, and sometimes -- as in flexible pricing -- provides a formula or other method by which the price of the goods can be determined. [E. Allan Farnsworth].

74. Other than the express or implied reference in the contract offer, is the question that arises with so-called open-price contracts, ie, whether the existence of a contract that says anything about that element is possible. The various legal systems do not agree on the treatment of this issue. So while the Spanish and French system, among others, do not allow the existence of a contract without price; in the legal systems of common law, American and English, for example, the existence of price contracts lacking element is allowed. The issue is complicated by the Convention - and was also highly debated during the previous-work because Article 14 CISG states that the contract offer must be a price, while Article 55 CISG establishes a way to remedy the lack of that element when the contract has been validly perfected; specifically it indicates that the price generally charged at the time of conclusion of the contract for such goods sold under comparable circumstances in the trade in question applies. The positions of the doctrine on this issue revolve from those who believe that it is not possible the existence of a contract without price, except in very particular circumstances, to those who argue yes and method price determination under Article 55 would come to meet this lack, through those who say it is a question of validity must be evaluated according to the rules of non-uniform national law is applicable.

75. In principle, a correct interpretation between Articles 14 and 55 CISG passes through the determination of the expression "when the contract has been validly concluded" which are the opening words of Article 55 CISG. We believe that the contract can be validly held
without it include the price when the will of the parties (Article 6) expressly or implicitly expressed leads to that conclusion, which, of course, happen in all circumstances where there is execution of contract. It is recognized, therefore, the possible exclusion of implied price element specified in Article 14 CISG; for it shall assist one of the interpretative assistance Article 8 CISG. More problematic are situations where there is no execution of the contract. The jurisprudence has faced these assumptions has declared the impossibility of understanding the improved contract. For example, it cannot be understood perfected when the supply contract does not set the price of one of the aircraft engines offered in; and not when the offer (counter-Art.19.1) does not mention the price of the products or forecast form for determination. [Maria del Pilar Perales Viscasillas]

76. Article 18(3) provides that in certain situations an acceptance can be effective through the conduct of the offeree. The situations in which conduct and not oral or written communications can be a means of acceptance include: (1) the offer expressly states or authorizes an acceptance by conduct, (2) the parties through previous dealings have established a practice of acceptance by conduct; and (3) a trade usage recognizes such a means of acceptance. However, a German court held that a partial delivery may indicate consent, but is not an effective acceptance under Article 18(3). The court held that the delivery of less than the full quantity ordered amounted to a counter-offer that the buyer was free to accept or reject. [Dr. Larry A. DiMatteo]

77. One of the consequences of globalization and the fast pace of an everyday changing world is the increasing use of open terms in international contracts and more particularly, the use of open price terms. The concept of open terms is developed in contraposition to the concept of “closed or fixed terms”; closed or fixed terms are those that are accurately determined and agreed upon at the time in which the parties to a contract enter into it. [Carlos A. Gabuardi]

78. Perhaps the most obvious answer to this question is one which we may label "psychological". This answer would run something as follows: The breach of a promise arouses in the promisee a sense of injury. This feeling is not confined to cases where the promisee has
relied on the promise. Whether or not he has actually changed his position because of the promise, the promisee has formed an attitude of expectancy such that a breach of the promise causes him to feel that he has been "deprived" of something which was "his". Since his sentiment is a relatively uniform one, the law has no occasion to go back of it. It accepts it as a datum and builds its rule about it. [L. L. Fuller and William R. Perdue, Jr.]

79. Under the rule that foreseeability is required at the time of the making of the contract, Danzig pointed out that a person in Athos' predicament has difficulty in making a sound decision on the results of the breach. A sounder decision can be made nearer the time of performance or breach. The true loss to the party who will be injured by a breach will be, on the average, more apparent the closer in time to the intended breach one tries to predict that loss. Fresher data will be available -- a knowledge of prices at a time closer to when performance would be due, for example. Difficulty in predicting the loss does not encourage breach. An intentional breach of a contract for the sale of goods, however, will not necessarily produce a benefit to society. [Arthur G. Murphey, Jr.]

80. One scholar submits that a general principle which may be relevant is that of reasonableness because of the pervasive use of the term in the CISG. The scholar Albert Kritzer has pointed out that the term reasonableness is mentioned in no less than thirty-seven provisions of the CISG, thus it would appear justified as a general principle of the Convention. The application of the standard of reasonableness as a general principle will lead to the conclusion that losses need only be proved with a degree of precision that can reasonably be expected from the circumstances. Under this interpretation, the scholar Djakhongir Saidov states that the standard becomes very similar to that fixed in the UNIDROIT Principles, where losses need to be proved with a "reasonable degree of certainty. [Damon Schwartz]

81. Generally speaking, as to be discussed in details in the following sections, a fundamental breach as defined in CISG Art. 25 requires:
that the defaulting party have violated a duty it was obliged to perform either under the contract, under trade usages, practices established between the parties, or under the
that the breach frustrate or essentially deprive the aggrieved party of its justified contract expectations; what expectations are justified depends on the specific contract and the risk allocation envisaged by the contract provisions, on usages, where they exist, and on the additional provisions of the Convention; and

that the party in breach have foreseen the result of the breach of contract; even if the defaulting party did not foresee that result, the breach remains fundamental when a reasonable person would have foreseen such a result, because in such cases the breach would equally deprive the other party of most or all of the benefit of the contract. [Chengwei Liu]

82. From the language of Article 25, it can be derived that the extent of the detrimental consequences of a breach of contract must be assessed by reference to what the damaged party "could have expected under the contract." This does not mean, however, that one must take into consideration the non-defaulting party's will or the interests it wanted to reach. As the express reference in Article 25 to the contract indicates, one must rather take into account the more objective contractual expectations as they result from the specific contract. This is a matter of contract interpretation. In this context, one must have regard not only to the contractual language, but also to the practice established between the parties, and other circumstances preceding the conclusion of the contract (such as the contractual negotiations). [Franco Ferrari]

83. The notion of breach of contract under the CISG comprises any non-fulfillment of contractual obligations originating in the contract between the parties, in the Convention, established practices and usages. A breach of contract constitutes an objective fact irrespective of whether the party who commits the breach is at fault or not. Fault is not mentioned as a requirement of any remedy in the Convention, including the remedy of avoidance. This is true whether avoidance is as a result of non-payment, non-delivery of generic goods, or if the goods are defective. Furthermore, as for the defects themselves, the Convention does not distinguish between liability for breach of contract and guarantee
liability. On the other hand, the party may be exempted from certain consequences of failure to perform his obligations, if, for example he has not been able to prevent the breach, and the breach is caused by the conduct of the other party. The objective character of the breach of contract is visible in cases of anticipatory breach when avoidance may be exercised, irrespective of whether the performance is prevented by objective circumstances or whether anticipated non-performance by the seller is intentional. [Anna Kazimierska]

84. The phrase used is that a fundamental breach destroys the legitimately expected outcome of a contract. The question therefore is what is the legitimate expectation? To answer that particular question Art. 8 needs to be consulted. The Oberlandesgericht München ruled that a late delivery in this instance did not constitute a fundamental breach, as otherwise Art. 49(1)(b) would not have been a necessary inclusion into the CISG. The court furthermore proclaimed that without setting of a Nachfrist the buyer is not entitled to avoid the contract. The court came to its conclusion as the investigation of the intent of the parties indicated, that an order was only given by the buyer after they examined a sample hence late delivery was never an expectation which was fundamental to the contract. [Bruno Zeller]

85. The fact that the parties are bound by usages to which they have agreed derives from the general principles of party autonomy (Article 6). Indeed the parties may either negotiate all the terms of their contract or for certain aspects simply refer to other sources including usages. In such a case the usages become an integrated part of the contractual agreement. The parties may refer to any usage irrespective of its original sphere of application. Thus they may stipulate the application of a usage developed in a region or trade sector to which neither party belongs, or of a usage relating to a different type of contract. It is even conceivable that the parties agree on the application of what are sometimes misleadingly called usages, i.e., a set of rules issued by a particular trade association under the title of «usages», but which reflect only in part established general lines of conduct. { This is related to article 9 of CISG, usage is the current exchange rate which was used by the parties in previous transactions} [Michael Joachim Bonell]
86. To determine whether a fundamental breach has occurred, a dual test must be applied. The elements of this dual test are (1) 'substantial detriment' and (2) 'unforeseeability'. In addition it must also be pointed out that the party wishing to avoid the contract must send a clear declaration of avoidance to the breaching party. Article 25 contains what may be termed an obvious statement in the form of its guarantee that the CISG will protect what 'a party is entitled to expect under the contract'. To take the promisee's expectations into account requires a clear reference to Arts. 8(1) and (2).

87. Article 8 is therefore of great importance, as it allows the court to take into account not only the objective intent of the parties but also their subjective intent. All the 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' can be used to determine the intent of the parties. The threshold issue for the court is to determine what the party expected to receive under the bargain in question. The second step is then to find out whether there was a breach of the contract. As a third step, the court must determine whether a fundamental breach has occurred by applying the dual test. [Bruno Zeller]

88. Under article 8, courts must first attempt to establish the meaning of a party's statement or conduct by looking to the intent of that party, as an arbitral tribunal has emphasized; however, "most cases will not present a situation in which both parties to the contract acknowledge a subjective intent [...]. In most cases, therefore, article 8(2) of the [Convention] will apply, and objective evidence will provide the basis for the courts decision." According to one arbitral tribunal, application of article 8(1) requires either that the parties have a close relationship and know each other well, or that the import of the statements or conduct was clear and easily understood by the other party. Where it is not possible to use the subjective intent standard in article 8(1) to interpret a party's statements or conduct, one must resort to "a more objective analysis" as provided for in article 8(2). Under this provision, statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same
circumstances. One court has characterized the result of an interpretation based on this criterion as a "reasonable interpretation". [Martin Karollus]

89. A problem with regard to Art. 8 as a whole is the usage of different languages in international trade. [Felix Lautenschlager]. The leading principle under the CISG is that interpretation must follow the intent of the party. Is the common law any different from Article 8 of the CISG? The casual observer might say that common law has its equivalent to each of the paragraphs of Article 8 of the CISG. It is submitted here that, as with languages, a little similarity can be dangerous. One must beware of faux amis (false friends).

90. While common law, too, does allow reference to the true intent of a party, this is in very limited circumstances. The question of when and whether the true intent should override the objective interpretation has launched voluminous treatises. For a start, there is no general principle in common law that one should immediately look for the true intent of the parties to interpret the contract.

91. In Reardon-Smith Line Ltd v Hansen-Tangen, 1976] 1 WLR 989, Lord Wilberforce clarifies the common law approach: According to Article 61, the failure to perform any obligation under the contract of sale may justify a claim for damages, independent of the existence of a fault of the buyer. This leaves space for a wide application of this remedy. [Fabio Bortolotti]

[3.2] RESPONDENT is not liable to pay US$ 102, 192.80 for the fees deducted by the central bank.

[3.2.1] The fees deducted are not bank charges under normal definition of bank charges

92. The fees deducted by the Equatoraina Central Bank are deductions under section 12 regulation ML/2010C wherein the financial unit subtracts a 0.5% levy from every sum of money investigated[CE 8, p.17]. Such fees are not ordinary bank charges but are charges for investigation which have to be paid by the CLAIMANT.
93. The bank customer perceives a bank charge as a minor amount of money debited to his account on a monthly or quarterly basis, or set off against a credit made to his account, e.g., the credit of a cheque, a bill of exchange, or the principal of a loan. Considered merely as an accounting operation, these transactions are of an apparently uniform character [Nobert].

94. Bank Charges are fees charged by the bank for the service of maintaining a chequing account (i.e current account). The charges deducted from the firms current account [Hosein]

**There exists a practice between the parties relating to the payment of bank charges**

95. There were two instances where the CLAIMANT in their role as seller had paid the levy.

   I. The first was the case wherein the CLAIMANT in their previous contract with Jet Propulse had paid the bank charges themselves citing reasons that Jet propulse was a long standing customer [PO 2, p.55].

   II. The second was the case wherein the CLAIMANT in their contract with Jumbogly wherein the CLAIMANT decided not to claim bank charges as it made it a profit of 8% [PO 2, p.56].

**There was no express agreement between the CLAIMANT and the RESPONDENT to agree on public law regulations**

96. The best solution for both parties is often to agree to pay the bank charges in their respective country, but whatever the agreement, it should be included in the sales contract [Anders Grath].

97. It has been held that, the mere fact the seller was to deliver the shellfish to a storage facility located in the buyer's country did not constitute an implied agreement under article 35(1) to meet that country's standards for resaleability, or to comply with its public law provisions governing resaleability [High Court of New Zealand, 30 July 2010].

98. Bank charges in respect of transfers are payable by the first beneficiary unless otherwise specified. [Chia-Jui Cheng, Jiarui Cheng]. With regard to the reliance element, one court has
stated that in the usual case, a buyer cannot reasonably rely on the seller's knowledge of the importing country's public law requirements or administrative practices relating to the goods, unless the buyer pointed such requirements out to the seller [NETHERLANDS Rechtsbank Rotterdam 15 October 2008 (Eyroflam S.A. v. P.C.C. Rotterdam B.V.)]. The court concluded that the arbitration panel acted properly in finding that the seller should have been aware of and was bound by the buyer's country's regulations because of "special circumstances" within the meaning of the opinion of the court that rendered the aforementioned decision. According to another decision, the fact that the seller had previously advertised and sold the good in the buyer's jurisdiction could have constituted "special circumstances" that would, under the approach in the aforementioned mussels case, oblige the seller to comply with regulations of the buyer's jurisdiction [UNITED STATES District Court, Eastern District of Louisiana 17 May 1999]

There was also no implied agreement between the buyer and seller regarding the bank charges

99. The court found that the seller had not impliedly agreed to comply with recommended (but not legally mandatory) domestic standards for cadmium in shell fish existing in the buyer's country (for the court the mere fact the seller was to deliver the shellfish to a storage facility located in the buyer's country did not constitute an implied agreement under Article 35(1) to meet the standards for resale in the buyer's country or to comply with public law provisions of the buyer's country governing resale) [Bundesgerichtshof, Germany, 8 March 1995].
REQUEST FOR RELIEF

In Response to the Tribunal’s Procedural Orders, Counsel makes the above submissions on behalf of RESPONDENT. For the reasons stated in the Memorandum, Counsel respectfully requests the Arbitral Tribunal to find that:

1. The CLAIMENT’S claim has to be rejected as not admissible as arbitral proceedings were not commenced within the prescribed time.
2. The CLAIMENT must bear the security of cost.
3. The RESPONDENT is not liable to pay the additional amount of US$2,285,240.00 and the bank charges of US$102,192.

Respectfully Submitted,

Siddharth Sharma
Shubham Kaushik
Kajri Roy
Suhas K Hosamani