Twenty Fourth Annual

Willem C. Vis International Commercial Arbitration Moot

Vienna, April 7th – 13th 2017

MEMORANDUM FOR RESPONDENT

On behalf of
SantosD KG, Mediterraneo
(RESPONDENT)

Against
Wright Ltd, Equatoriana
(CLAIMANT)

JIN XIAOYU • GEORGE GAO • RICK HOGOBOOM
BENJAMÉN DOVALE • SUN BIYA • ZHU YAO • THEODORE ROBIE

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I. List of Abbreviations

ABBREVIATION	FULL CITATION
CAM-CCBC	Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
The Rules	Arbitration Rules of 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 (the Vienna Convention)
CISG-Digest	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods
ICC	International Chamber of Commerce International Court of Arbitration
ICSID	International Centre for Settlement of Investment Disputes
LCIA	The London Court of International Arbitration
Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985, with Amendments as adopted in 2006
p/ pp	Page/ pages
para./ paras.	Paragraph/ paragraphs
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDRIOT Principles	UNIDROIT Principles of International Comercial Contracts 2010

US$	United States Dollar
v.	Versus (against)
The Problem	The problem for the Twenty Fourth Annual Willem C. Vis International Commercial Arbitration Moot

II. Index of Authorities

Statues and Treaties

CAM-CCBC Rules	Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Rules
CISG	United Nations Convention on Contracts for the International Sale of Goods
ICC Rules	The International Chamber of Commerice International Court of Aritration Rules
LCIA Rules	The London Court of International Arbitration Rules
Model Law	UNCITRAL Model Law on International Commercial Arbitration
New York Convention	The Convention on the Recognition and Enforcement Arbitral Awards
UNIDROIT Principles	United Nations Principles of International Commercial Contracts of 2010
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules

Arbitration Awards

ICC	Case No. 14433, ICC International Court Bulletin Vol 25/ Supplement 2014. Cited as *ICC 14433* in para. 14.
ICC	Case No. 15218, ICC International Court Bulletin Vol 25/ Supplement 2014. Cited as *ICC 15218* in para. 28.
ICC	Case No. 11849 of 2003. Cited as *Fashion Products Case* in para. 103.
ICSID	RSM Production Corporation v. Saint Lucia, Case No. ARB/12/10. Cited as *RSM Production v. Saint Lucia* in para. 10, 22.

Court Cases

Australia	Downs Investments Pty Ltd v. Perjawa Steel SDN BHD, 11 November 2000, Supreme Court of Queensland, Case # 10680 of 1996. Cited as *Downs v. Perjawa* in para. 103.
Germany	Case # 6 U 228/92, Appellate Court of Dusseldorf, 18 November 1993. Cited as *Key Press Case* in para. 106.
Hong Kong	Grandeur Electrical Co Ltd v. Cheung Kee Fung Construction Company Co Ltd, High Court, 25 July 2006. Civil Appeal # 100 of 2006. Cited as *Grandeur v. Cheung Kee* in para. 56.
Netherlands	Sluiter Ellwood II et al. v. Blumenerdenwerk Stender GmbH, Rechtbank District Court, 17 March 2004, Case # 107309 /HA ZA 03-2099. Cited as *Sluiter v. Blumenerdenwerk* in para. 85.
New Zealand	Safe Kids in Daily Supervision Limited v McNeill, High Court, Auckland, 14 April 2010, Case # NZHC 605. Cited as *Safe Kids v. McNeill* in para. 39.
Switzerland	Maron Coal (USA) v. Transport en Handelmaatschappij Vekoma BV (Netherlands), Supreme Court, Case # 4P 284/1994/odi. Cited as *Maron v. Transport* in para. 55.
United Kingdom	Versloot Dredging BV v. HDI Gerling Industrie Versicherung AG, Supreme Court, 20 July 2016, Case # UKSC 2014/0252. Cited as *Versloot v. HDI* in para. 33.
Poland	Case concerning two agricultural property agencies, Warsaw Court of Appeal, 18 June 2015. Ref. Act I Aca 1822-1814. Cited as *Warsaw* in para. 57.

Scholarly Works and Articles

A.O. Rhodes, Vivour	"Security for the respondent's costs of arbitral proceedings with particular reference to the Arbitration and Conciliation Act Cap 19, 1990 Laws of Nigeria (ACA)," in: News Journal of the Chartered Institute of Arbitrators Nigerian Branch Vol. 2 No. 1, January 2005. Cited as *A.O. Rhodes* in para. 30.
Black, Henry Campbell	*Black's Law Dictionary*, 2nd Edition. The Lawbook Exchange, Ltd, 1995. Cited as *Black's Law Dictionary, 2nd Edition* in para. 7, 107.
Boeing	Boeing Financial Report 2006, pg. 40, "Foreign Currency Exchange Rate Risk." Cited as *Boeing* in para. 91.
Garner, Bryan A.	*Black's Law Dictionary*, 8th Edition, West Group, 2004. Cited as *Black's Law Dictionary, 8th Edition* in paras. 1, 32.
Hardy, Tim, *et al.*	"Applications for Security for Costs," in: Chartered Institute of Arbitrators, www.ciarb.org, accessed Nov. 9, 2016. Cited as *Hardy et al.* in paras. 35, 38.
Straube, Frederico J., et al.	*The CAM-CCBC Arbitration Rules: A Commentary*, Eleven International Publishing. Cited as *CAM-CCBC Commentary* in para. 6.
UNCITRAL	*Digest of Case Law of the United Nations Convention on Contracts for the International Sale of Goods*, 2012 Edition. Cited as *CISG Digest* in paras. 84, 85.

III. Statement of Facts

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

CLAIMANT is a highly specialized manufacturer of fan blades for jet engines, incorporated in Equatoriana.
RESPONDENT is a medium-sized manufacturer of jet engines, incorporated in Mediterraneo.

10 November 2009	CLAIMANT and RESPONDENT were both subsidiaries of Engineering International SA, a multinational based in Oceania. CLAIMANT and RESPONDENT met at the premises of Engineering International SA, which had also been attended by CLAIMANT'S CEO. During the meeting, it had been discussed that RESPONDENT should be "de-risked" to make RESPONDENT more attractive to potential buyers. In this context, the reduction of currency risk in existing contracts via the agreement of fixed exchange rates had been explicitly mentioned.
Spring 2010	RESPONDENT contacted CLAIMANT to discuss with CLAIMANT the joint development of a new fan blade on the basis of CLAIMANT's newest model TRF 192. The new fan blade was to be included into RESPONDENT's new JE 76/TL14b to be developed for the Earhart jet.
May 2010	Ms. Fang and Ms. Filmas agreed on the basic principles for the cooperation of both parties. Ms. Fang made clear that RESPONDENT had to agree already at that stage on a price that

	could, in turn, be used as the basis for a price-offer to Earhart SP. CLAIMANT and RESPONDENT reached an agreement on a price range with different costs and profit elements, including a maximum price that could serve as the basis for RESPONDENT's internal calculation of its offer to Earhart.
June 2010	CLAIMANT was sold to Wright Holding PLC.
July 2010	RESPONDENT was sold to SpeedRun.
1 August 2010	Both parties signed the Development and Sales Contract.
22 October 2010	Mr. Romario (RESPONDENT) sent an email to Ms. Beinhorn (CLAIMANT) to suggest signing an addendum to the Development and Sales Agreement for the purchase of the clamps, as well as having a fixed exchange rate governing the whole contract.
24 October 2010	Ms. Beinhorn (CLAIMANT), in her email, agreed to the Addendum and the fixed exchange rate.
26 October 2010	Both parties signed the addendum for clamps, with fixed exchange rate US$1 = EQD 2.01.
15 January 2015	RESPONDENT made payment of USD$ 20,336,367.20 for fan blades and US$ 183,343.28 for clamps after receiving both products. CLAIMANT sent follow-up email revealing a mistake in their accounting and asks for an additional US$ 22,723,800 based on current exchange rate of US$ 1 = EQD 1.79.
10 February 2015	RESPONDENT notified CLAIMANT that they effected payment

	of US$ 20,438,560 and did not know why US$ 102,192.80 of that sum was not credited to CLAIMANT's bank account. RESPONDENT later learned that Equatoriana Central Bank subtracts a 0.5% levy from any payment over US$ 2,000,000 for a money-laundering inspection fee.
31 March 2016	RESPONDENT and CLAIMANT met with the intension of reaching a settlement agreement. Both parties sent people authorized to sign such a settlement agreement should it be reached. However, due to fundamental differences, there was no agreement, and both parties left without agreeing to anything.
1 April 2016	CLAIMANT confirmed in an email to RESPONDENT that no amicable solution was reached when the parties met on March 31. CLAIMANT also informed RESPONDENT that they had instructed their lawyer to take the necessary steps to initiate arbitration.
31 May 2016	CLAIMANT sent the CAM-CCBC a request for arbitration, but CLAIMANT did not include the correct company name on their power of attorney form and CLAIMANT not pay the full registration fee.
7 June 2016	CLAIMANT sent the CAM-CCBC the corrected documents and paid the full registration fee.
1 Sept. 2016	The CAM-CCBC received notice that CLAIMANT had not complied with an arbitral award (from January 2016) ordering it to pay US$ 2,500,000 from another tribunal in a separate case that was operating under the CAM-CCBC rules. This information was made public on 2 Sept. 2016.

6 Sept. 2016	RESPONDENT submitted request for CLAIMANT to provide security for costs that RESPONDENT is likely to incur during this arbitration. This cost includes RESPONDENT's lawyer fees, Tribunal costs, and costs likely to be incurred by witnesses and experts. The request was received by President of the Arbitral Tribunal Mr. Ronald O. Zagallo. RESPONDENT estimates costs amount to a minimum of US$ 200,000, but would likely be higher.
8 Sept. 2016	The CAM-CCBC ordered CLAIMANT to reply to RESPONDENT's request by 16 September 2016. A further TelCo is scheduled for 6 October 2016.
16 Sept. 2016	CLAIMANT notified the CAM-CCBC that CLAIMANT rejects RESPONDENT's request for Security for Costs.

IV. Arguments

Issue A: The CAM-CCBC has the power and should use this power to order CLAIMANT to provide security for RESPONDENT's costs.

1. Security for costs is defined as, "Money, property, or a bond given to a court by a plaintiff or an appellant to secure the payment of court costs if that party loses" (Black's Law Dictionary, 8th Edition).

2. CLAIMANT has avoided payment of CAM-CCBC arbitration awards in the past when CLAIMANT did not comply with an award ordering it to pay US$ 2,500,000 to one of its suppliers (Respondent's Exhibit R6, p 47 of the Problem). CLAIMANT also is financially precarious, so even if CLAIMANT agrees to pay future adverse cost awards, it may not have the financial means to do so.

3. The CAM-CCBC has power to order security for costs pursuant to Article 8 of the CAM-CCBC Rules (the Rules). RESPONDENT's request for CLAIMANT to provide security for costs also meets all the requirements for such a request established under Article 17 of the UNCITRAL Model Law (the Model Law).

4. The Tribunal should order CLAIMANT to provide security for RESPONDENT's costs in order to prevent future evasion of payment. Security for costs will amount to a minimum of US$ 200,000, but may likely be higher.

1. The Tribunal has the power to order Security for Costs pursuant Article 8 of the CAM-CCBC rules.

5. As stated in Article 8.1 of the CAM-CCBC Rules, "Unless 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."

6. The official 2012 commentary to the CAM-CCBC Rules states, "It is widely accepted that arbitrators have the jurisdiction to grant interim or provisional measures" (CAM-CCBC Commentary).

7. A provisional order is defined as, "A court order that is made during a trial and is only temporary until the final outcome is delivered" (Black's Law Dictionary, 2nd Edition). Security for costs falls under the definition of a provisional order because security for costs is temporary or interim in nature, and it is enforced only until the final Tribunal decision is delivered.

8. Therefore, Article 8.1, which explicitly gives the Tribunal power to grant provisional measures, also gives the Tribunal power to order security for costs.

9. This interpretation of "provisional order" to encompass security for costs is also "in line with international arbitration practices," as stipulated by Section 21 of the Development and Sales Agreement (the Agreement) between the parties.

10. For example, ICSID Rules also awards their tribunal power to order provisional measures in Article 47. It was concluded in ICSID case ARB/12/10 (RSM Production v. Saint Lucia) that security for costs constituted a provisional measure, and that the ICSID unquestionably had power to order security for costs.

<u>(a) Even if it is decided that CAM-CCBC Rules do not clearly give the Tribunal power to order security for costs, then Article 17 of the Model Law would then give the Tribunal power to order security for costs.</u>

11. Danubia, the place of arbitration, has adopted the Model Law (Item 37 in Procedural Order No. 2, p 60 of the Problem). There is no case law on security for costs in

arbitration by Danubian courts, so *lex arbitri* (the law of the place where arbitration is to take place) regarding security for costs is the Model Law.

12. Article 17(2)(c) of the Model Law includes in its description of an interim measure as "any temporary measure, whether in the form of an award or in another 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 … Provide a means of preserving assets out of which a subsequent award may be satisfied."

13. Therefore, the Tribunal has power to order security for costs because security for costs falls under the auspices of a temporary measure that would provide a means of preserving assets out of which a later award may be satisfied, as allowed by Article 17 of the Model Law.

14. This interpretation of "interim measure" to encompass security for costs is also in line with international arbitration practice. The ICC Rules, for example, awards the ICC power to grant interim measures in Article 28. In the 2008 ICC case 14433, it was decided that the arbitrator had "the power to make orders for security for costs under the applicable rules" and that "it is within the Sole Arbitrator's discretion to order security for costs" (ICC 14433).

2. The Tribunal should use their power to order CLAIMANT to provide security for RESPONDENT's costs.

<u>(a) Respondent's request for Security for Costs meets the guidelines established in Article 17(A) of the Model Law.</u>

15. Article 17(A)(1) lists the conditions for granting interim measures, such as security for costs. It states:

> "*The party requesting an interim measure under Article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:*

a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination."

<u>(i) RESPONDENT is likely to suffer irreparable harm if no security for costs is ordered.</u>

16. In regards to Article 17(A)(1)(a), "Harm not adequately reparable by an award of damages" in this case is the loss of payment suffered by RESPONDENT if the Tribunal decides in RESPONDENT's favor on the merits. Arbitration law and procedural law are based on the "cost follows the event" principal (page 58 of the problem), which means that the losing party must pay the Tribunal costs and the winning party's legal costs, as well as hearing expenses for witnesses and experts.

17. The reason this harm would be irreparable for the RESPONDENT should RESPONDENT win the case is because both the CLAIMANT's past behavior and its current financial situation show that CLAIMANT is unlikely to pay any adverse costs if it were ordered to do so.

18. CLAIMANT has in the past avoided payment of adverse costs as directed by the CAM-CCBC, specifically when CLAIMANT failed to comply with an arbitral award in January 2016 ordering it to pay US$ 2,500,000 to one of its suppliers (Respondent's Exhibit R6, p 47 of the Problem).

19. CLAIMANT's lack of payment was illegal under Article 11.1 of the CAM-CCBC Rules, which states that, "The parties are obliged to comply with the arbitral award as issued, in the manner and by the time provided for in it."

20. CLAIMANT argues that it had requested a set-off for the payment (para. 11 of CLAIMANT memo). However, the supplier to whom CLAIMANT owes money has objected to the set-off (Item 30 in PO2, p 59 of the problem).

21. Indeed, CLAIMANT has no legal basis to ask for a set-off. According to Article 8 of the UNIDROIT Principles, conditions of a set-off calls for both parties to “owe each other money or other performances of the same kind.” Currently, the supplier does not actually owe money to the CLAIMANT, only vise-versa. The set-off money CLAIMANT refers to is still under arbitration and has not yet been finalized. Therefore, CLAIMANT is not able to use this alleged payment as a set-off.

22. CLAIMANT’s past behavior of nonpayment suggests that it is at risk of nonpayment in the future. In the ICSID case ARB/12/10 (RSM Production v. Saint Lucia), it was stated that security for costs would be ordered if CLAIMANT has a track record of “failure to comply with previous awards,” a condition that applies to the current situation.

23. Even if CLAIMANT decides to pay RESPONDENT any adverse cost award, CLAIMANT may not be financially able to do so. According to CLAIMANT’s financial statement (item 28 of Procedural Order No. 2), CLAIMANT’s ability to immediately satisfy an adverse cost award is risky at best.

24. RESPONDENT estimates that the adverse cost award would be at minimum US$ 200,000. But the CLAIMANT’s ability to satisfy an adverse cost award is precarious: CLAIMANT only has US$ 199,950 in cash and cash equivalents. CLAIMANT also has more than US$ 40,000,000 in current loans and liabilities. In order to pay an adverse award, CLAIMANT may be required to sell its non-current assets, which it may not be willing to do.

25. CLAIMANT is at present potentially insolvent. Its current assets to liabilities ratio has plummeted since 2010. CLAIMANT is also over-leveraged. Its short-term debt

ratio, which evaluates how able a company is to pay its short-term debts based on its short-term assets, is 60 to 1 (anything above 1 is considered an unhealthy ratio). Subsequently, CLAIMANT's credit rating, as evidenced by its reduction of bank loans and its increase of loans from its mother company, is also likely deteriorating.

26. Additionally, a news article published by *Carioca Business News* on 5 September 2016 states that CLAIMANT has long been financially at risk. The article states that CLAIMANT's lack of payment of the previously mentioned adverse cost award "refuels concerns about the financial situation of Wright Ltd" (Exhibit R6, p 47 of the Problem). CLAIMANT argues that the news article cannot be considered as a trustworthy source of information (para. 17 of CLAIMANT memo). However, it was stated in Procedural Order No 1 that neither party challenged the veracity of any of the documents submitted, which includes the news article (p 52 of the Problem).

27. CLAIMANT also owes an additional US$ 2.5 million from the aforementioned January 1 Tribunal award that CLAIMANT has not yet complied with (Respondent's Exhibit R6, p 47 of the Problem). This amount is not yet reflected on CLAIMANT's public balance sheet, making it even more potentially insolvent.

28. Because CLAIMANT's financial situation is precarious, the CAM-CCBC should order CLAIMANT to provide security for costs in order to avoid future non-payment. This precedent was set in ICC case 15218 in Bern, Switzerland, which stated that security for costs can be awarded if "the applicant puts forward with a reasonable degree of certainty that its possible future claim of recovery would be deprived failing an immediate securing of those costs" (ICC 15218).

<u>(ii) The irreparable harm RESPONDENT would suffer outweighs any harm CLAIMANT would suffer if ordered to pay security for costs.</u>

29. CLAIMANT may argue that, given its financial situation, the harm it suffers from paying security for costs outweighs the harm RESPONDENT suffers from not

getting paid RESPONDENT's legal fees. CLAIMANT may claim that if it pays security for costs, it may not be able to afford to go through with arbitration.

30. Paradoxically, the more at financial risk the CLAIMANT is, the more it is necessary to protect RESPONDENT from incurring irrecoverable and unjust costs (A.O. Rhodes). However, it should be noted that CLAIMANT would be financially precarious whether or not it pays security for costs; US$ 200,000 should be a relatively insignificant amount of money for any healthy company to set aside temporarily.

31. More importantly, there is no reason that CLAIMANT would be denied the right to arbitrate if it puts up security for costs. CLAIMANT would not suffer additional harm if it were to provide security for costs. Although CLAIMANT does not currently have the liquidity to pay security for costs, it has other options to post security for costs. For example, CLAIMANT can take loans from its mother company, like it has done so recently. CLAIMANT can also post a bank guarantee from a reliable bank, promising to deliver on future tribunal orders. Finally, CLAIMANT has US$ 37.6 million worth of property, plants and equipment that it can post as security, if it so choses to.

32. Indeed, Article 17(2) of the Model Law on interim measures says that, to pay this cost, the party only needs to "provide a means of preserving assets." Assets for security for costs is not limited to capital but can also include "property or a bond," according to Black's law dictionary's definition of security for costs (8th Edition).

33. For example, in 2013, an English high court decided that not only bank guarantees but even the applicant's "After the Events" (ATE) insurer would also be able to post security (Versloot v. HDI). The point is, it is common to allow a variety of means to post security for costs other than cash that would be less intrusive to CLAIMANT's daily operations.

34. This interpretation is also in line with international arbitration practice. Article 25(1)(i) of the London Court of International Arbitration Rules regarding interim measures states that the Tribunal has power to order a party to provide security "by way of deposit or bank guarantee or in any other manner" (LCIA Rules).

(iii) RESPONDENT and CLAIMANT have similar merits based on first impression, therefore the "prospect of success" of the parties should not be a factor that denies RESPONDENT's request for security for costs.

35. The Chartered Institute of Arbitrators recommends that the Tribunal only consider the prospective success of the case *prima facie*, meaning "based on the first impression." This way, the Tribunal can avoid predetermining the merits of the case and inserting biases (Hardy et. al).

36. Therefore, this consideration regarding "prospect of success" should not be a high threshold. As the Model Law states, "The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination."

37. CLAIMANT states that RESPONDENT has no reasonable possibility of success based on the merits and therefore should not be granted security for costs (para. 26 of CLAIMANT memo). However, based on the Model Law and on the Chartered Institute of Arbitrators recommendations, the Tribunal *should not* consider merits before deciding on security for costs, because that process would inject bias well before the Tribunal begins hearing arguments on merits from both sides. It would "affect the discretion of the tribunal in making an subsequent determination."

38. Indeed, both parties have reasonable prospects for success *prima facie,* and neither party exhibited bad faith in the arbitration so far. Therefore, as recommended by the

Chartered Institute of Arbitrators, the Tribunal may conclude that "this factor is not helpful in determining whether an order for security is appropriate" (Hardy et al.)

39. In 2007, a New Zealand high court, which was one of the first to adopt the Model Law with 2006 amendments, interpreted the "reasonable possibility" requirement to mean whether or not there was "a serious question to be tried," applying this test directly to consider whether or not to order security for costs (Safe Kids v. McNeill).

40. Based on first impression, RESPONDENT indeed has a reasonable possibility for success, and the question at hand is indeed a "serious question to be tried." RESPONDENT has offered grounded defenses in its answer to CLAIMANT's request for arbitration, all of which are supported by valid exhibits. If there was no reasonable possibility and if there was no "serious question to be tried," then arbitration would not be necessary in the first place, for the dispute's resolution should be obvious. The actual merits of this case should instead be decided in the substantive portion of the arbitration (the merits), without previous bias inserted during consideration for security for costs.

<u>(b) "Urgency" is not a requirement for the Tribunal to order security for costs, as CLAIMANT suggests.</u>

41. Under *lex arbitri*, which is the Model Law, and under the CAM-CCBC Rules, there is no requirement of "urgency" as a prerequisite for the Tribunal to order security for costs, as CLAIMANT suggests (para. 22 of CLAIMANT memo).

42. Even if "urgency" was a requirement, RESPONDENT's request would meet this requirement. CLAIMANT states that the circumstance for "urgency" is as follows: "provisional measures will only be appropriate where a question cannot await the outcome of the award on the merits" (para. 22 of CLAIMANT memo). Indeed, by definition, RESPONDENT's request for security for costs *cannot* await the final

outcome, and must be instead decided before then or it loses its purpose. Both parties agree on that principle.

43. In RESPONDENT's view, the decision on security for costs is "urgent" (as defined by CLAIMANT) and must be decided before the final outcome on merits is decided, as CLAIMANT suggests. The reason the measure on security for costs should be decided beforehand is because CLAIMANT is at risk of avoiding future adverse cost payments.

<u>(c) CLAIMANT states that granting request for security for costs is against the "cost follow the event" principle. However, CLAIMANT misinterpreted this principle.</u>

44. Both parties agree that the "costs follow the event" or "loser pays" principle applies to this dispute. But CLAIMANT states that ordering CLAIMANT to provide security for costs would mean that the Tribunal's actions would be "contrary to this general principle and therefore unlawful" (para. 27 of CLAIMANT memo).

45. However, it is RESPONDENT's position that ordering CLAIMANT to pay security for costs up front does not violate the "costs follow the event" principle. There is no inherent contradiction between "security for costs" and the "costs follow the event" principle. If CLAIMANT loses the arbitration, it would pay RESPONDENT's costs out of the security it provided. If RESPONDENT loses the arbitration, then RESPONDENT would pay CLAIMANT's costs, and CLAIMANT would get its securities back. These two concepts can complement each other.

<u>(d) CLAIMANT states that RESPONDENT's request for security for costs cannot be justified by third party funding. However, this statement is irrelevant.</u>

46. CLAIMANT states that RESPONDENT's request for an interim measure cannot be justified by third party funding. But RESPONDENT does not use third party funding to justify security for costs.

47. The only relevance CLAIMANT's efforts to obtain third party funding has to RESPONDENT's request for security for costs is that it provides further evidence of CLAIMANT's financial risk and future inability to pay adverse cost awards. If CLAIMANT was financially healthy, and if it was confident that it would win this arbitration, then CLAIMANT would not need to seek third party funding.

Conclusion for Issue A.

48. CLAIMANT is at risk of nonpayment of potential adverse cost awards, as evidenced by its past behavior and by its financial situation. Since it is established that Article 8 of the Rules gives the Tribunal power to order security for costs, and that all the requirements for this request have been met pursuant to Article 17 of the Model Law (which in this case is *lex arbitri*), the Tribunal should order CLAIMANT to provide security for RESPONDENT's costs.

Issue B: CLAIMANT's claim to arbitration is not admissible because proceedings were initiated too late and were in violation of Section 21 of the original Development and Sales Agreement between the parties.

49. Section 21 of the Development and Sales Agreement (the Agreement) states, "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" (pp 10-11 of the Problem).

1. The 60-day time bar agreed upon by the parties regarding the initiation of arbitration proceedings should be followed strictly.

50. The rationale for contractual time bars for initiating arbitration is straightforward: Shorter time periods allow for less commercial risk and greater commercial certainty. This time bar allows parties to continue conducting business without the potential threats of unpredictable arbitration claims and proceedings.

51. Manufacturing companies such as both CLAIMANT's and RESPONDENT's operate according to production schedules. These businesses need to efficiently allocate their resources and plan ahead for future allocation of resources. If arbitration claims suddenly spring up outside of the 60-day window (for example 70 days after failure of negotiations or 200 days after failure of negotiations), then this introduces uncertainty and risk, forcing a party to allocate unplanned resources in short notice to deal with arbitration. This greatly affects daily business operations.

52. Under the "Veil of Ignorance," meaning a situation in which neither party has bias and both parties approach the question form a neutral perspective, it was decided between the then neutral parties to include this 60-day time bar, as evidenced by Section 21 of the Agreement. The reason this time bar was included was because, at the time, it was in both parties' best interest to do so.

53. RESPONDENT would like to use and enforce this 60-day time bar in future sales contracts with other clients for the reasons mentioned above. In order for this time bar to be effective, it must be enforced strictly every single time. Otherwise, if parties know that this time bar has no teeth, then there is the risk of "moral hazard"—meaning that future parties may disobey the time bar because they think it has no consequences.

54. Furthermore, according to item 21 of Procedural Order #2, the 60-day deadline had been used on numerous occasions in past agreements between CLAIMANT and RESPONDENT (p 57 of the Problem).

55. There is precedent in strictly enforcing time bars. In the 1995 case Maron Coal (USA) v. Transport en Handelmaatschappij Vekoma BV (Netherlands), the Swiss Supreme Court reversed an arbitral award rendered by an ICC tribunal after the ICC tribunal misapplied a contractual provision that required any arbitration to be initiated within 30 days of failure of negotiations. The Swiss court determined the failure of negotiations to have been earlier (Maron v. Transport).

56. In the 2006, a dispute between Grandeur Electrical Co LTD and Cheung Kee Fung Construction Company Co LTD went to trial at Hong Kong's High Court because the 28-day time bar on arbitration expired, which prevented the dispute from going instead to arbitration (Grandeur v. Cheung Kee Fung).

57. In 18 June 2015, a tribunal rejected to hear a case between two agricultural property agencies because the 14-day time bar on initiating arbitration had expired. This dispute was instead decided by a common court (Warsaw).

2. Negotiations failed on 31 March 2016, and the deadline to initiate arbitration was 60 days afterward on May 30.

58. CLAIMANT suggests that April 1 was the day negotiations failed. However, it is clear that March 31 is the actual date negotiations failed. Both parties agree that there existed an agreed upon time limit, but it is RESPONDENT's position that this time limit was from March 31 to May 30.

59. Representatives from both parties met on March 31 with the goal of reaching a settlement agreement. These persons were authorized to sign a settlement agreement should such an agreement be reached. However, there were fundamental differences

between the parties, and no agreement was reached. Both parties left without signing anything (Item 23, PO2, p58 of the problem). Therefore, it is very clear that March 31 was the date in which negotiations failed.

60. Indeed, Section 21 of the Agreement states that all disputes "shall be settled amicably," and that if no amicable agreement could be reached, then the 60-day time bar for initiating arbitration goes into effect. CLAIMANT's email written by Ms. Beinhorn on April 1 clearly states that "the outcome of *yesterday*'s meeting *(meaning March 31)* shows that it is presently not possible to find an *amicable solution*" (Exhibit R3, p29 of the Problem, emphasis mine). Therefore, it is clear that CLAIMANT also understood the March 31 meeting to be a failure, since no agreement was reached during that meeting.

61. In the email, Ms. Beinhorn also informed RESPONDENT that she had "instructed a lawyer to take the necessary steps to initiate arbitration," and that "from now on the costs incurred for our lawyer must be part of any settlement reached". These are not "amicable" actions, which further suggests that the "amicable" negotiations required by Section 21 of the Agreement have already failed.

62. Sixty days after the failure of negotiations (March 31) is May 30. CLAIMANT's right to initiate, or commence, arbitration existed only in this window of time.

3. CLAIMANT did not initiate arbitration until June 8, fully 9 days after the deadline.

63. According to Article 21 of the Model Law, "the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration *is received by the respondent*" (emphasis mine). This article follows the spirit of Section 21 of the Agreement, which ensures that parties are notified of arbitration claims in a timely manner.

64. Respondent received no notification of any kind regarding any arbitration claims until June 8, which was 69 days after failure of negotiations and 9 days after the agreed upon deadline for initiation (p 22 of the Problem).

4. Even if April 1 was the date of the failure of negotiation and May 31 was the deadline, CLAIMANT still did not submit the necessary power of attorney document and the correct payment pursuant to Article 4 of the Rules.

65. Even if the Tribunal decides that April 1 was the date of the failure of negotiation, then the requirements set forth by Article 21 of the Model Law for initiation were still not met by the hypothetical May 31 deadline (they were only met on June 8).

66. Even if the Tribunal decides that April 1 was the date of the failure of negotiation *and* that the initiation requirements in Article 21 of the Model Law should not be applied in addition to the requirements in Article 4 of the CAM-CCBC Rules, CLAIMANT still failed to successfully initiate arbitration.

67. CLAIMANT failed to submit all the required items necessary to initiate arbitration pursuant to Article 4.1 and Article 4.2 of the rules. CLAIMANT failed to submit the proper power of attorney form within the 60-day window, and CLAIMANT also failed to pay the Registration Fee (p 22 of the Problem).

68. CLAIMANT may argue that the Rules give the CAM-CCBC President the authority to grant extensions to amend or supplement claims, for example to fix the Power of Attorney form, or to pay the Registration Fee. However, Section 21 of the Agreement is not a claim to be amended, it is a deadline inherent in a sales contract between RESPONDENT and CLAIMANT made well before any Arbitration proceedings.

69. While RESPONDENT acknowledges that the Tribunal has power to extend deadlines for issues related to CAM-CCBC Rules, the Tribunal *does not* have power

to extend the contractual time limit agreed by the parties under the original Development and Sales Agreement, which precedes CAM-CCBC commencement.

70. Section 21 of the Development and Sales Agreement between the two parties takes precedence over the Rules, since Section 21 is what gives CAM-CCBC power to carry out arbitration. Because the 60-day time bar in Section 21 of the Agreement was violated, the CAM-CCBC president's extension of time periods for arbitration is irrelevant.

Conclusion for Issue B

71. CLAIMANT's claims are inadmissible because they have been submitted after the 60-day deadline that was originally established during the parties' Development and Sales Agreement. This 60-day time bar in the contract should be strictly enforced.

ISSUE C: CLAIMANT is not entitled to the additional payments from the RESPONDENT in full, neither for the fan blades nor for the fees deducted by the Equatoriana Central Bank.

Issue C(i): The fixed exchange rate should be applied to the whole Development and Sales Agreement including its Addendum, with the CLAIMANT not 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.

1. The Development and Sales Agreement clearly states that the exchange rate for the whole agreement should be fixed at the exchange rate of US$ 1= EQD 2.01.

(a) The term "agreement" refers to the whole Development and Sales Agreement including both the "main Agreement" and its "Addendum".

72. In the Development and Sales Agreement, the parties specifically used the term "Agreement" (with emphasis on the capitalized "A") on three different occasions, including in Clause 3 of Section 2 BACKGROUND, Section 20 CHOICE OF LAW and Section 21 DISPUTE RESOLUTION. From this repeated and consistent usage, it is obvious that the parties intended "Agreement" with a capitalized initial "A" to refer to the main portion of the contract concerning the fan blades.

73. Likewise, the term "agreement" with the lowercased "a" refers to the whole contract, including the main portion of the Development and Sales Agreement concerning the fan blades and its Addendum concerning the clamps. This is evidenced in the Addendum, which states, "The exchange rate for the agreement is fixed to US$ 1= EQD 2.01." The Addendum specifically uses the word "agreement" with the lowercase "a" while not referring solely to the Addendum.

74. Article 8(3) of the CISG addresses issues of intent through its consideration of "[…] relevant circumstances a reasonable person would have had," and states that, "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." This objective measure of a reasonable person's evaluation of the case at hand would have reached the same conclusion as RESPONDENT.

75. That is, if the parties intended for the fixed exchange rate to be only applicable to the Addendum, they would have replaced the term "agreement" with "Addendum" to reflect such an intention.

76. From the usage of "agreement" in the above sentence, it can be seen that the fixed exchange rate clause is not only applicable to the Addendum but to the whole contract. This usage was prominently employed in Mr. Romario's email on 22 October 2010, which stated, "I would suggest the following terms to be added by hand to the agreement" and "The exchange rate for the agreement is fixed to US$ 1= EQD 2.01." A singular term's meaning in the same email should be interpreted consistently, which in the case of Mr. Romario's email refers to the entirety of the Development and Sales Agreement and not simply the Addendum.

77. Per Article 4.4 of the UNIDROIT Principles, "Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear." In this case the term "agreement" never referred exclusively to the Addendum but rather to the contract in omnibus. Therefore, the clause in the Addendum concerning the exchange rate shall be applied to the entire contract.

78. Article 8 of the CISG establishes a two-part test by which statements should be interpreted in light of their subjective and objective meanings. Article 8(1) of the CISG requires that parties interpret statements according to the intent which could have not been unknown by the other party, i.e. the CLAIMANT. Mr. Romario maintained an intention to apply a fixed exchange rate at the final time of contracting, which derived entirely from their earlier practices from their two prior

dealings. Thus, this common intention to apply fixed exchange rates was entirely within CLAIMANT's realm of awareness.

79. This is evidenced by his testimony to the Arbitral Tribunal in which Mr. Romario states, "In principle, the now express solution merely spells out what had already been the understanding of the parties when they entered into the Development and Sales Agreement but merely did not mention explicitly. It reflects the practice between the parties during their two previous co-operations for the TRF 163-I and the TRF 150-II. In calculating the price for the fan blades developed under these two contracts the Parties always applied the exchange rate at the time the contract was concluded" (RESPONDENT Exhibit R5).

(b) The clauses in the Addendum should be applied to the whole agreement, unless it explicitly stated otherwise.

80. The clauses in the Addendum is part of the Development and Sales Agreement. This intention can also be seen clearly in the email exchanges between the parties. In Mr. Romario's email on 22 October 2010 he wrote, "I would suggest the following terms to be added by hand to the agreement." Ms. Beinhorn in her email reply on 22 October 2010 firmly agreed to such an arrangement.

81. From this exchange, the intention of the two parties to affix the Addendum to the main portion of the Development and Sales Contract is clear. If the parties wanted to limit the fixed exchange rate clause to just the Addendum, the parties should express it explicitly. If the clause did not express clearly that it should only be applicable to the Addendum, then it is applicable to the whole agreement.

82. If the CLAIMANT asserts that the fixed exchange rate clause shall only be applied to the Addendum, then CLAIMANT has the burden of proof to provide evidence to show that during the negotiation of the Addendum the parties agreed and/or had the

intent to limit the fixed exchange rate clause to include solely the clamps in the Addendum.

(c) CLAIMANT and RESPONDENT reached a consensus on the applicability of the fixed exchange rate to the whole agreement.

83. In an email sent by the RESPONDENT to the CLAIMANT on 22 October 2010, Mr. Romario wrote, "I would suggest the following terms to be added by hand to the *agreement*" (emphasis RESPONDENT author) and, "The exchange rate for the agreement is fixed to US$ 1= EQD 2.01" (p 28 of the Problem). In this context, "agreement" does not refer to the "Addendum" as there is a distinction in usage between "Agreement" (referring to the main portion of the Development and Sales Agreement) and "agreement," a distinction which was outlined prior. Moreover, the literal interpretation of the words "[…] exchange rate for the agreement is fixed to US$ 1= EQD 2.01" demonstrates that the fixed exchange rate is applicable to the contract related to the fan blades. Further reaffirming CLAIMANT's tacit acceptance of these terms, CLAIMANT in their email reply on 24 October 2010 wrote that, "I also agree to the fixed exchange rate" (p 34 of the Problem). This exchange shows the parties reached a consensus that fixed exchange rates should be applied to the entirety of the Development and Sales Agreement.

2. In accordance with their previous transactions, the exchange rate of the time of the contract conclusion should be applied.

84. Practices under Article 9(1) of the CISG refers to conduct that occurs with a certain frequency and during a certain period of time set by the parties, which the parties can then assume in good faith will be observed again in a similar instance (CISG-Digest, para. 7, p 66).

85. The previous transactions between CLAIMANT and RESPONDENT for the TRF 163-I and TRF 150-II both used the exchange rate at the time of contracting for the

conversion of the cost elements. The TRF 155-II contract was concluded on 4 March 2003 and TRF 163-I contract on 3 January 2005 (p 54 of the Problem). The cooperation between the two parties spanned for more than a decade from 2003 to the present day, which by any measure can certainly be considered as a long-term relationship. The CLAIMANT may argue that a long period of cooperation does not establish practice *per se* (Sluiter v. Blumenerdenwerk), however in the current case, the parties had already concluded and performed two important contracts, namely the contract for the TRF 163-I and the contract for the TRF 150-II. Given this background, CLAIMANT and RESPONDENT exist in a context unique to the aerospace industry in which time horizons from the conclusion of contracts to their final performance often span many years. Within this context, RESPONDENT would like the Tribunal to consider the unique situation of the practice between the parties, which, in the RESPONDENT's view, establish a practice of using the fixed exchange rate of the time of the conclusion of the contract.

3. It is agreed between the parties that the RESPONDENT should be "de-risked" via fixed exchange rate to make it more attractive to potential buyers.

86. In November 2009, then parent company Engineering International held a meeting on its premises during which CEOs of both the CLAIMANT and RESPONDENT were in attendance.

87. One of the points discussed was the need to "de-risk" the RESPONDENT to make it more attractive to potential buyers (p 27 of the Problem). In this context, the reduction of currency risk in existing contracts by means of fixed exchange rates was explicitly mentioned (p 24 of the Problem). It was clear to both the CLAIMANT and RESPONDENT that the exchange rate of the contracts should be fixed. Based on the evidence provided by both the CLAIMANT and RESPONDENT, the main Agreement for the fan blades had already concluded negotiations in May 2010, during which the sale of CLAIMANT was still confidential. The negotiations about the sale of CLAIMANT were kept confidential

until 30 June 2010 when the deal was concluded (p 54 of the Problem). Shortly thereafter, the RESPONDENT was sold on 3 August 2010. Given that these two incidences occurred during the negotiations of the main Agreement, both parties were still subsidiaries of Engineering International S.A., thus reaffirming the expectation to both parties that the historical practice of employing fixed exchange rates should also apply to their recently concluded contracts.

4. The calculation of the likely cost of the fan blades requires the exchange rate to be fixed.

88. The calculation of the likely cost of the fan blades is based on Equatoriana Denars (EQD) but the variable pricing structure is based on U.S. Dollars. Given this contract feature, unless the exchange rate is fixed for the purchase price, it would become impossible for the parties to convert the likely cost of the fan blades from Equatoriana Denars (EQD) to U.S. Dollars.

89. Given that the variable pricing structure is designed to ensure that the final price is in line with the calculated price, the lack of a fixed exchange rate would render the economic rationale for the parties to design a variable pricing structure meaningless, (It's worth noting that the exchange rate had largely stayed the same for the prior three years, fluctuating between US$ 1 = EQD 2.00 and US$ 1 = EQD 2.02 during that period.) The variable pricing structure is the basis for RESPONDENT's internal calculation of its offer to Earhart, which the CLAIMANT was fully aware of at that time.

90. Thus, the inclusion of a clause of a fixed exchange rate at US$ 1= EQD 2.01 in the Addendum, which is surely applicable to the whole agreement, was just a reflection of the intention of the parties.

5. Exchange rates fixed at the conclusion of contractual negotiations are common features of the aerospace industry and do not damnify the risk sharing system.

91. Contrary to the assertions of CLAIMANT, a fixed exchange rate set at the time of contractual negotiations is both prudent and in line with common industry practice. Industry leaders including Boeing employ various strategies to ensure currency headwinds do not risk profitability. This is achieved primarily through two mechanisms: set exchange rates between themselves and their suppliers at the conclusion of the contractual negotiations (similar to the strategy employed between RESPONDENT and CLAIMANT) as well as the purchase of third-party currency hedging products (Boeing).

92. Given that the exchange rate has remained relatively stable over the last years, fluctuating between US$1 = EQD 2.00 and US$1 = 2.02, it was within both parties' expectation that such a rate would reflect the incurred costs. Under a fixed exchange rate regime governing the entire Agreement, the real world exchange rate may increase or decrease in favor of the CLAIMANT or RESPONDENT, respectively. Thus, the CLAIMANT cannot conclude in hindsight that the fixed exchange rate mechanism outlined in the Addendum by some manner rendered the risk-sharing mechanism moot.

93. Thus, it is not appropriate for CLAIMANT to argue that the presence of a fixed exchange rate would impact the risk-sharing element of the variable pricing mechanism.

Conclusion for Issue C(i):

94. The fixed exchange rate should be applicable to the whole agreement, which is also the intention of the parties at the time of the inclusion of the Addendum. RESPONDENT had fully paid its contractual price based on the fixed exchange rate,

just as the price stated in the invoice issued by the CLAIMANT with the accurate formula.

Issue C(ii): RESPONDENT is not obligated to pay the bank fee levied by Equitoriana Central Bank for the amount of US$ 102,192.80.

95. First, the fee is not a bank charge for the transfer as intended by the agreement. Second, the fee falls outside the scope of Article 54 CISG, and therefore also outside of RESPONDENT's obligations. Finally, even if the bank fee is under RESPONDENT's obligations, Article 80 CISG exempts RESPONDENT from paying due to CLAIMANT acting in bad faith.

1. The bank fee is not a bank charge for the transfer. First, it is not a bank charge for the transfer, but rather a charge that occurred during the transfer (a). Second, CLAIMANT could not be unaware of RESPONDENT's intent in including this clause in the contract (b).

(a) The fee levied by the central bank is not a "bank charge for the transfer."

96. The language in section 4.3 of the contract reads, "The bank charges for the transfer of the amount are to borne by the BUYER" (CLAIMANT Exhibit 2). The word "for" in this clause designates the purpose of the bank charge, namely it explicitly obligates RESPONDENT to pay for the charges that a bank would normally charge as a service fee for the transfer of the amount.

97. The central bank's levy, however, is not for the purpose of transferring the amount. Rather, Equitoriana Central Bank's purpose in levying this fee was to cover their costs in checking if large sums of money entering Equitoriana is legal, as well as providing funding for its budget (Procedural Order 2).

98. To argue a counterfactual, if the language in the contract had used the word "during" rather than "for" CLAIMANT would have a much stronger case. The levy is certainly a charge that occurred during the transfer (Procedural Order 2). That fact alone, however, does not change the reality that this fee was not for the transfer itself. As such, it falls outside the scope of RESPONDENT's obligations enumerated by the contract, and RESPONDENT is not liable.

<u>(b) Furthermore, CLAIMANT must have known, or could not have been unaware, of RESPONDENT's intent to not include this type of bank charge when including Section 4.3 in the contract.</u>

99. The provision was taken verbatim from a prior contract between the parties written in 2003 (Procedural Order 2, para. 6). Regulation ML/2010C, however, did not come in to effect until 2010. Regulation ML/2010C did not exist at the time of writing this clause.

100. Furthermore, the law in Equitoriana is rather unique, so it is doubtful that RESPONDENT knew of such laws elsewhere. [Answer to Request for Arbitration] In light of this evidence, it is impossible that RESPONDENT intended for money laundering fees by central banks to be included in this clause, and it is equally impossible that CLAIMANT was unaware of this intention to not include money-laundering fees.

2. RESPONDENT is not liable for the bank charge as it falls outside the scope of RESPONDENT's obligations under Article 54 of CISG.

101. CISG Article 54 enumerates the buyer's fundamental obligation to pay the price by stating, "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 (CISG Article 54).

102. CLAIMANT will likely contend that bank charges in any shape or form will fall under the scope of this article. Therefore, in their view, CISG does obligate RESPONDENT to pay for the bank charges. This interpretation, however, is incorrect and Article 54 is inapplicable to bank charges.

103. Reviewing the case law on CISG article 54, the CISG digest states that "the contract may provide for the opening of a letter of credit, the establishment of security to guarantee payment, or the acceptance of a bill of exchange. Preparatory actions required by applicable laws or regulations might involve, for example, an administrative authorization needed for the transfer of funds to enable payment to be made" (CISG Digest). This interpretation is confirmed in numerous specific cases. (For example, see Fashion Products Case, as well as Downs v. Perjawa).

104. While the above list is not exhaustive, the key thread is that all focus on preparatory actions that enable the price to be paid. The regulation in question is an associated cost, and therefore falls outside the scope of preparatory actions, and outside the scope of Article 54. RESPONDENT is not liable.

3. Finally, even if the bank fee does fall under RESPONDENT's obligations, RESPONDENT should still be exempt from payment of the fee under CISG Article 80.

105. CISG Article 80 is an exemption from obligations. The article reads, "A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission." In this instance, RESPONDENT's failure to perform was caused by CLAIMANT's omission.

106. Article 80 entails two distinct requirements. First, that the failure to perform be due to an act or omission of the first party against its obligations. Second, that the other party's failure to perform was indeed caused by that act or omission. (Key Press Case). Both requirements are met in this case.

107. CLAIMANT's act of omission is the source of the current unfortunate situation. Article 7 CISG obligates both parties to act in good faith, an obligation that CLAIMANT did not uphold (CISG Art. 7). Black's Law Dictionary defines good faith has "Sometimes legally binding due diligence around the effort made, information given, or transaction done, honestly, objectively, with no deliberate intent to defraud the other party" (Black's Law Dictionary, 2nd Edition).

108. Though CLAIMAINT only actually looked at the provisions of ML/2010C in mid June 2010 during which the parties had already agreed on taking over Section 4, CLAIMANT still knew about the law as early as December 2009, and in two prior instances had paid the price of the levy (Procedural Order No. 2 Para 8). There was clearly ample time for CLAIMANT to inform RESPONDENT of the bank levy before payment was due. Dealing in good faith would obligate CLAIMANT to inform RESPONDENT of a possibly detrimental situation to that party.

109. The second requirement is that RESPONDENT's failure to perform was caused by CLAIMANT's omission. Additionally, RESPONDENT must not have been able to easily overcome the hardship caused by CLAIMANT's omission.

110. In the first instance, CLAIMANT's actions did directly cause RESPONDENT's failure to uphold its obligations. If CLAIMANT had informed RESPONDENT of Regulation ML 2010/C, actions could have been taken to avoid triggering the levy. Regulation ML 2010/C only applies to payments over USD 2 million (Claimant Exhibit 8). With this knowledge, RESPONDENT could have broken up

its payments in to smaller segments of less than USD 2 million, and therefore avoid paying the money laundering fee.

111. Claimant may argue that RESPONDENT did not act with due diligence by being ignorant of a fee that existed in a country where it was planning to send a large sum of money. This logic is deeply flawed since CLAIMANT themselves were unaware of the fee.

112. CLAIMANT, who has their place of business in Equitoriana, and therefore should reasonably be more up to date on its business practices, and even in spite of increased media coverage was still unaware of the fee until they were forced to pay it (Procedural Order No. 2, para. 8). By contrast, the media in Mediterraneo simply reported that Equitoriana's government had taken action on money laundering, without going in to details (Procedural Order No. 2, para 7).

113. Since both of the requirements of CISG Article 80 are met, even if the bank charge does fall in to the realm of RESPONDENT's obligations, the act of omission by CLAIMANT exempts RESPONDENT from this obligation under CISG Article 80.

Conclusion for Issue C(ii):

114. RESPONDENT has upheld its obligation to pay the price both by the letter of the contract and under the terms of the CISG. Even if it is found that RESPONDENT did not uphold this obligation, this failure to perform was indeed due to an omission on the part of CLAIMANT, and under Article 80 CISG RESPONDENT is exempt from that obligation

V. Request for Relief

Counsel for RESPONDENT respectfully requests the Tribunal to:

1. Order CLAIMANT to provide security for the costs that RESPONDENT is likely to incur in this arbitration.
2. Conclude that CLAIMANT's claims are inadmissible because they have been submitted out of time.
3. Conclude that CLAIMANT is not entitled to additional payments from RESPONDENT for the fan blades based on the present exchange rate.
4. Conclude that CLAIMANT is not entitled to additional payments from RESPONDENT for the fees deducted by the Central Bank.

Certificate

Nanjing, China, 26 January 2017,

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

Jin Xiaoyu George Gao Richard Hogoboom Sun Biya

Benjamėn DoVale Zhu Yao Theodore Robie