TWENTY-NINTH ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

SOFIA UNIVERSITY

ST. KLIMENT OHRIDSKI
EST. 1888

On behalf of:

JAJA Biofuel Ltd

9601 Rudolf Diesel Street

Oceanside

Equatoriana

- RESPONDENT -

Against:

ElGuP plc

156 Dendé Avenue

Capital City

Mediterraneo

- CLAIMANT -

COUNSEL FOR RESPONDENT

IVAN IVANOV • SOFIA LEFTEROVA • JOANA VALOVA • DAYANA ZASHEVA

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AIAC	Asian International Arbitration Centre
Art./Arts.	Article/Articles
CIETAC	China International Economic and Trade Arbitration Commission
CIF	Cost, Insurance, and Freight
COO	Chief Operating Officer
ed./eds.	editor/editors
et al.	and others
etc.	et cetera
Ex. C	CLAIMANT's Exhibit
Ex. R	RESPONDENT's Exhibit
FOSFA	Federation of Oils, Seeds and Fats Associations
GCoS	General Conditions of Sale
i.e.	that is
Ibid.	in the same source
ICC	International Chamber of Commerce
KLRCA	Kuala Lumpur Regional Centre for Arbitration
NA	Notice of Arbitration
No.	Number
NYC	New York Convention

p./pp.	page/pages
para./paras.	paragraph/paragraphs
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
PORAM	Palm Oil Refiners Association of Malaysia
RNA	Response to the Notice of Arbitration
RSPO	Roundtable on Sustainable Palm Oil
SC	Southern Commodities
Sec.	Section
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States dollar
v.	versus
Vol.	Volume

INDEX OF LEGAL TEXTS

International Conventions	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) Cited as: *CISG*
	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) Cited as: *NYC*
National Legislation	Danubian Arbitration Law Cited as: *DAL*
Other	Asian International Arbitration Centre Arbitration Rules 2021 Cited as: *AIAC Rules 2021*
	Asian International Arbitration Centre Arbitration Rules 2018 Cited as: *AIAC Rules 2018*
	Kuala Lumpur Regional Centre for Arbitration Arbitration Rules 2018 Cited as: *KLRCA Rules 2013*
	UNCITRAL Model Law on International Commercial Arbitration (1985), with the 2006 amendments Cited as: *UNCITRAL Model Law*
	UNIDROIT Principles of International Commercial Contracts (Rome, 2010) Cited as: *PICC*

INDEX OF AUTHORITIES

Authors(s)	Citation	Cited in para(s):
Abolafia, Luis Bravo	Implied Choice of the Law Applicable to the Arbitration Agreement: The Effect on Non-Signatories in International Arbitration Kluwer Law International, Vol. 37, Issue 1 (2019) Cited as: *Abolafia*	92
Aksen, Gerald (ed.)	Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner ICC Publishing (2005) Cited as: *Author in: Aksen*	113
Alam, Habib	Application of CISG in Arbitration: A Combined Procedure or Parallel Procedure? International Journal of Community Service & Engagement, Vol. 2 (2021) Available at: https://journal.jis-institute.org/index.php/ijcse/article/view/192/156 Last accessed: 24 Jan 2022 Cited as: *Alam*	99
Altenkirch, Markus **Hagmann**, Johannes	German Federal Court of Justice applies CISG to validity of the arbitration agreement Available at:	98, 110

Authors(s)	Citation	Cited in para(s):
	https://globalarbitrationnews.com/german-federal-court-of-justice-applies-cisg-to-validity-of-the-arbitration-agreement/ Last accessed: 22 Jan 2022 Cited as: *Altenkirch/Hagmann*	
Andersen, Camilla B. **Schroeter**, Ulrich G. (eds.)	Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday Wildly, Simmonds and Hill Publishing, Vol. 28 (2008) Available at: https://jlc.law.pitt.edu/ojs/jlc/article/view/29/29 Last accessed: 24 Jan 2022 Cited as: *Author in: Andersen/Schroeter*	98, 104, 107
Ashford, Peter	The Proper Law of the Arbitration Agreement Chartered Institute of Arbitrators (2019) Cited as: *Ashford*	75, 92
Bamberger, G.H. **Roth**, Herbert (eds.)	Kommentar zum Bürgerlichen Gesetzbuch, Band 1, paras. 1–610, CISG Beck (2007) Cited as: *Author in: Bamberger/Roth*	18
Bantekas, Ilias **Ortolani**, Pietro **Ali**, Shahla	UNCITRAL Model Law on International Commercial Arbitration: A Commentary	114

Authors(s)	Citation	Cited in para(s):
Gomez, Manuel A. **Polkinghorne**, Michael (eds.)	Cambridge University Press (2020) Cited as: *Author in: Bantekas et al.*	
Berger, Klaus	International Economic Arbitration: Studies in Transnational Economic Law Kluwer Law International, Vol. 9 (1993) Cited as: *Berger*	74, 86
Bermann, George	International Arbitration and Private International Law The Pocket Books of The Hague Academy of International Law, Vol. 30 (2017) Cited as: *Bermann*	93
Betancourt, Julio-César	Defining Issues in International Arbitration Oxford University Press (2016) Cited as: *Betancourt*	77
Binder, Peter	The UNCITRAL Model Law on International Commercial Arbitration: A Commentary and International Comparison of Its Adoption Sweet & Maxwell (2000) Cited as: *Binder*	68
Blackaby, Nigel **Partasides**, Constantine **Redfern**, Alan **Hunter**, Michael	Redfern and Hunter on International Arbitration (Sixth Edition) Oxford University Press (2015) Cited as: *Blackaby et al.*	71, 77, 78, 83, 87, 91, 92, 114

Authors(s)	Citation	Cited in para(s):
Blanchard, Patrick	Offer and Acceptance in International Contract Negotiation: A Comparative Study International Business Law Journal, Vol. 2008 Cited as: *Blanchard*	14
Blessing, Marc	Arbitrability of Intellectual Property Disputes Arbitration International, Vol. 12, Issue 2 (1996) Cited as: *Blessing*	113
Born, Gary	The Law Governing International Arbitration Agreements: An International Perspective Singapore Academy of Law Journal (2014) Cited as: *Born*	68, 69, 70, 74, 77, 78, 86, 87
Born, Gary	International Commercial Arbitration (Third Edition) Kluwer Law International (2021) Cited as: *Born II*	72, 75, 107, 114, 116
Bridge, Michael G.	The International Sale of Goods Oxford University Press (2013) Cited as: *Bridge*	43
Briggs, Adrian	Agreements on Jurisdiction and Choice of Law Oxford Private International Law Series 20 Mar (2008) Cited as: *Briggs*	72, 77

Authors(s)	Citation	Cited in para(s):
Brödermann, Eckart	UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary Kluwer Law International (2018) Cited as: *Brödermann*	63
Brunner, Christoph **Gottlieb**, Benjamin (eds.)	Commentary on the UN Sales Law (CISG) Kluwer Law International (2019) Cited as: *Author in: Brunner/Gottlieb*	15, 30, 107
Butler, Allison E.	A Practical Guide to the CISG: Negotiations through Litigation Aspen publishers (2007 Supplement 2) Cited as: *A. Butler*	43
Butler, Petra	CISG and International Arbitration - A Fruitful Marriage? International Trade and Business Law, Vol. 17 (2014) Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2738236 Last accessed: 22 Jan 2022 Cited as: *P. Butler*	101
Butler, Petra **Mueller**, Bianca Maria	Acceptance of an Offer under the CISG Victoria University of Wellington Legal Research Papers, Vol. 7, Issue 2 (2017) Cited as: *Butler/Mueller*	24, 29

Authors(s)	Citation	Cited in para(s):
Cheshire, Joffrey	Private International Law Butterworth & Co Ltd. (1965) Cited as: *Cheshire*	93
Choi, Dongdoo	Torn Between Sulamérica and FirstLink? A Practical Solution to Choice of Law Issues at the Pre-Award Stage Asian Dispute Review, Vol. 18, Issue 1 (2016) Cited as: *Choi*	68
Coetzee, Juana	Private regulation in the context of international sales contracts Law, democracy and development, Vol. 24 (2020) Available at: https://www.ajol.info/index.php/ldd/article/view/213855 Last accessed: 22 Jan 2022 Cited as: *Coetzee*	105
Cvetkovic, Predrag	The Characteristics of an Offer in CISG and PECL Pace International Law Review, Vol. 14, Issue 1 (2002) Cited as: *Cvetkovic*	14
de-Carvalho, Jose Carlos	Note: Enka Insaat Ve Sanayi AS v. OOO "Insurance Company Chubb" & Ors [2020], Supreme Court of the United Kingdom, UKSC 38, 9 October 2020	68

Authors(s)	Citation	Cited in para(s):
	Kluwer Law International, Vol. 18, Issue 69 (2021) Cited as: *de-Carvalho*	
Del Duca, Louis F.	Implementation of Contract Formation State of Frauds, Parole Evidence, and Battle of Forms CISG Provisions in Civil and Common Law Countries Journal of Law and Commerce (2005) Cited as: *Del Duca*	39
Derains, Yves	ICC Arbitral Process: Part VIII. Choice of Law Applicable to the Contract and International Arbitration ICC International Court of Arbitration Bulletin, Vol. 6 (1995) Cited as: *Derains*	71, 78
Dicey, Albert Venn **Morris**, Carlile **Collins**, Lawrence (eds.)	Dicey, Morris and Collins on the conflict of laws Sweet & Maxwell (2012) Cited as: *Dicey et al.*	71
DiMatteo, Larry **Dhooge**, Lucien **Greene**, Stephanie **Maurer**, Virginia	The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence Northwestern Journal of International Law & Business, Vol. 24, Issue 2 (2004) Cited as: *DiMatteo/Dhooge/Greene/Maurer*	15, 29
DiMatteo, Larry A. (ed.)	International Sales Law: A Global Challenge	43, 56

Authors(s)	Citation	Cited in para(s):
	Cambridge University Press (2014) Cited as: *Author in: DiMatteo*	
DiMatteo, Larry A.	Critical Issues in the Formation of Contracts under the CISG Belgrade Law Review (2011) Cited as: *DiMatteo II*	14
Dobiáš, Petr	The Recognition and Enforcement of Arbitral Awards Set Aside in the Country of Origin Czech (& Central European) Yearbook of Arbitration, Vol. IX (2019) Available at: https://www.bargerprekop.com/downloads/resources/2019_CYArb_Peter_Petho-Roman_Prekop.pdf Last accessed: 22 Jan 2022 Cited as: *Dobiáš*	116
Dobrynski, Louise	The Incorporation of Standard Terms into International Sales Contracts under the CISG Quid? 1/2018 Available at: https://student.unifr.ch/quid/fr/assets/public/Dobrynski_Quid_1_2018.pdf Last accessed: 22 Jan 2022 Cited as: *Dobrynski*	43, 53

Authors(s)	Citation	Cited in para(s):
Eiselen, Sieg	The Requirements for the Inclusion of Standard Terms in International Sales Contracts Potchefstroom electronic law journal, Vol. 14, Issue 1 (2017) Cited as: *Eiselen*	43, 53
Felemegas, John (ed.)	An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law Cambridge University Press (2007) Cited as: *Author in: Felemegas*	29
Ferrari, Franco	Trade Usage and Practices Established Between the Parties under the CISG International Business Law Journal 571 (2003). Cited as: *Ferrari*	43
Ferrari, Franco **Flechtner**, Harry **Brand**, A. Ronald (eds.)	The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention Sellier: European Law Publishers (2004) Cited as: *Author in: Ferrari/Flechtner/Brand*	109
Ferrario, Pietro	The Adaptation of Long-Term Gas Sale Agreements by Arbitrators Kluwer Law International (2017) Cited as: *Ferrario*	92

Authors(s)	Citation	Cited in para(s):
Fillers, Aleksandrs	Application of the CISG to Arbitration Agreements European Business Law Review, Vol. 30, Issue 4 (2019) Cited as: *Fillers*	97, 98, 99, 101, 104, 110
Flecke-Giammarco, Gustav **Grimm**, Alexander	CISG and Arbitration Agreements: A Janus-Faced Practice and How to Cope with It Journal of Arbitration Studies, Vol. 25, Issue 3 (2015) Available at: http://www.koreascience.or.kr/article/JAKO201530360959869.pdf Last accessed: 24 Jan 2022 Cited as: *Flecke-Giammarco/Grimm*	100
Friedland, Paul D.	U.S. Courts' Misapplication of the 'Agreement in Writing' Requirement for Enforcement of an Arbitration Agreement under the New York Convention Mealey's International Arbitration Report 21, Vol. 13, Issue 5 (1998) Cited as: *Friedland*	102
Gaillard, Emmanuel **Savage**, John	Fouchard, Gaillard, Goldman on International Commercial Arbitration Kluwer Law International (1999) Cited as: *Gaillard/Savage*	68, 78, 92, 103
Geissler, Christina	The Incorporation of Standard Terms in Electronic Communications under the CISG	43

Authors(s)	Citation	Cited in para(s):
	Johannes-Kepler-Universität Linz (2018) Available at: https://epub.jku.at/obvulihs/download/pdf/2716332?originalFilename=true Last accessed: 22 Jan 2022 Cited as: *Geissler*	
Glick, Ian **Venkatesan**, Niranjan	Choosing the Law Governing the Arbitration Agreement Jurisdiction, Admissibility and Choice of Law in International Arbitration Kluwer Law International (2018) Cited as: *Glick/Venkatesan*	77, 78
Graffi, Leonardo	Remarks on Trade Usages and Business Practices in International Sales Law Journal of Law and Commerce, Vol. 29 (2011) Available at: https://jlc.law.pitt.edu/ojs/jlc/article/view/18/18 Last accessed: 22 Jan 2022 Cited as: *Graffi*	29
Graves, Jack	CISG Article 6 and Issues of Formation: The Problem of Circularity Anali Pravnog fakulteta u Beogradu, Vol. 59, Issue 3 (2011) Cited as: *Graves*	39

Authors(s)	Citation	Cited in para(s):
Gruber, Urs Peter	Convention on the International Sale of Goods (CISG) in Arbitration International Business Law Journal (2009) Cited as: *Gruber*	99
Guzeloglu, Fatma Esra	The CISG: Could the parties conclude a contract outside the scope of the traditional "offer and acceptance" model? Mondaq (2016) Available at: https://www.mondaq.com/turkey/contracts-and-commercial-law/532658/the-cisg-could-the-parties-conclude-a-contract-outside-the-scope-of-the-traditional-offer-and-acceptance-model Last accessed: 22 Jan 2022 Cited as: *Guzeloglu*	24
Hanotiau, Bernard	Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study (Second Edition) International Arbitration Law Library, Vol. 14 (2020) Cited as: *Hanotiau*	87
Heiskanen, Veijo	Forbidding Depecage: Law Governing Investment Treaty Arbitration Suffolk Transnational Law Review, Vol. 32 (2009) Cited as: *Heiskanen*	88

Authors(s)	Citation	Cited in para(s):
Henderson, Alastair	Lex Arbitri, Procedural Law and the Seat of Arbitration Singapore Academy of Law Journal (2014) Cited as: *Henderson*	92
Herbots, Jacques **Blanpain**, Roger (eds.)	International Encyclopaedia of Laws – Contracts, Supplement Kluwer Law International (2000) Cited as: *Author in: Herbots/Blanpain*	108
Hill, Jonathan	Claims that an arbitral tribunal failed to deal with an issue: the setting aside of awards under the Arbitration Act 1996 and the UNCITRAL Model Law on International Commercial Arbitration Arbitration International, Vol. 34, Issue 3 (2018) Cited as: *Hill*	114
Hinkelman, Edward **Manley**, Myron **Shippey**, Karla **Nolan**, James **Bidwell**, Wendy **Woznick**, Alexandra	Importers Manual USA: The Single Source Reference Encyclopedia for Importing to the United States World Trade Press (2003) Cited as: *Hinkelman et al.*	25
Honnold, John O.	Uniform Law for International Sales Under the 1980 United Nations Convention (Third Edition) Kluwer Law International (1999) Cited as: *Honnold*	108

Authors(s)	Citation	Cited in para(s):
Horvath, Günther	The Duty of the Tribunal to Render an Enforceable Award Journal of International Arbitration, Vol. 18, Issue 2 (2001) Cited as: *Horvath*	113, 116
Huber, Peter	Standard Terms under the CISG Vindobona Journal of International Commercial Law and Arbitration (2009) Cited as: *Huber*	109
Janssen, André	Application of the CISG in Dutch Courts Quo Vadis CISG? Celebrating The 25th Anniversary Of The United Nations Convention On Contracts For The International Sale Of Goods, Ferrari, Ed., Pp. 129-165, Sellier: European Law Publishers (2005) Cited as: *Janssen*	43
Janssen, André **Meyer**, Olaf (eds.)	CISG Methodology Sellier: European Law Publishers (2009) Cited as: *Author in: Janssen/Meyer*	107
Jenkins, Sarah Howard	Contract Resurrected! Contract Formation: Common Law – UCC – CISG North Carolina Journal of International Law and Commercial Regulations, Vol. 40 (2015) Cited as: *Jenkins*	24

Authors(s)	Citation	Cited in para(s):
Joseph, James E.	Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code Dickinson Journal of International Law, Vol. 3 (1984) Cited as: *Joseph*	14, 38
Kaplan, Neil **Moser**, Michael	Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles Wolters Kluwer (2018) Cited as: *Kaplan/Moser*	68, 69, 83
Kazimi, Leila	Can't Budge: The Curious Case of Kabab-Ji and the New York Convention Kluwer Arbitration Blog (15 Nov 2021) Available at: http://arbitrationblog.kluwerarbitration.com/2021/11/15/cant-budge-the-curious-case-of-kabab-ji-and-the-new-york-convention/ Last accessed: 22 Jan 2022 Cited as: *Kazimi*	74
Kröll, Stefan M.	Selected Problems Concerning the CISG's Scope of Application Journal of Law and Commerce, Vol. 25 (2005) Cited as: *Kröll*	109

Authors(s)	Citation	Cited in para(s):
Kröll, Stefan M. **Mistelis**, Loukas A. **Viscasillas**, Maria Pilar Perales **Rogers**, V. (eds.)	International Arbitration and International Commercial Law: Synergy, Convergence and Evolution Kluwer Law International (2011) Cited as: *Author in: Kröll et al.*	43
Kröll, Stefan M. **Mistelis**, Loukas A. **Viscasillas**, Maria Pilar Perales (eds.)	UN Convention on Contracts for the International Sale of Goods (CISG) Beck/Hart (2011) Cited as: *Author in: Kröll et al. II*	109
Lakhina, Bhawna	Applicability of the CISG to Arbitration Clauses Law et Justicia Law Review, Vol. 1 (2020) Available at: https://lawetjusticia.com/applicability-of-the-cisg-to-arbitration-clauses/ Last accessed: 22 Jan 2022 Cited as: *Lakhina*	103, 105
Lando, Ole	Udenrigshandelens krontrakter Jurist-og Økonomforbundets Forlag (1987) Cited as: *Lando*	93
Lautenschlager, Felix	Current Problems Regarding the Interpretation of Statements and Party Conduct under the CISG – the Reasonable Third Person, Language Problems and Standard Terms and Conditions	43, 56

Authors(s)	Citation	Cited in para(s):
	The Vindobona Journal of International Commercial Law and Arbitration, Vol. 11, Issue 2 (2007) Cited as: *Lautenschlager*	
Lew, Julian D. M. **Mistelis**, Loukas A. **Kröll**, Stefan M.	Comparative International Commercial Arbitration Kluwer Law International (2003) Cited as: *Lew/Mistelis/Kröll*	69, 71, 78, 92, 102, 113, 116
Loos, Marco B. M.	Standard Contract Terms Regulation in the Proposal for a Common European Sales Law Zeitschrift für Europäisches Privatrecht, Issue 4 (2012) Cited as: *Loos*	43
Mankowski, Peter **Wurmnest**, Wolfgang (eds.)	Festschrift für Ulrich Magnus Otto Schmidt/De Gruyter european law publishers (2014) Cited as: *Author in: FS Magnus*	99
Marxen, Karl	Commercial Letters of Confirmation and the CISG European Journal of Commercial Contract Law, Vol. 6 (2014) Cited as: *Marxen*	24
Morrissey, Joseph **Graves**, Jack	International Sales Law and Arbitration Kluwer Law International (2008) Cited as: *Morrissey/Graves*	18

Authors(s)	Citation	Cited in para(s):
Moses, Margaret L.	The Principles and Practice of International Commercial Arbitration (Third Edition) Cambridge University Press (2017) Cited as: *Moses*	116
Nazzini, Renato	The Law Applicable on Arbitration Agreements: Towards Transnational Principles International and Comparative Law Quarterly, Vol. 65 (2016) Cited as: *Nazzini*	71
Oelofse, A. N.	The Law of Documentary Letters of Credit in Comparative Perspective Interlegal (1997) Cited as: *Oelofse*	25
Oviedo Alban, Jorge	Usages and Practices in Contracts for the International Sale of Goods Vniversitas, Vol. 66, Issue 135 (2017) Available at: http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0041-90602017000200255 Last accessed: 23 Jan 2022 Cited as: *Oviedo Alban*	30
Pamboukis, Charalambos	The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods	30

Authors(s)	Citation	Cited in para(s):
	Journal of Law and Commerce, Vol. 25, Issue 1 (2005) Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/pamboukis.pdf Last accessed: 23 Jan 2022 Cited as: *Pamboukis*	
Park, William	The Lex Loci Arbitri and International Commercial Arbitration The International and Comparative Law Quaterly, Vol. 32 (1983) Cited as: *Park*	87
Pearson, Sabrina	Sulamérica v. Enesa: The Hidden Pro-validation: Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement Arbitrational International, Vol. 29, Issue 1 (2013) Cited as: *Pearson*	74, 86
Perloff, Saul	The Ties That Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration Penn Law: Legal Scholarship Repository (2014) Cited as: *Perloff*	69

Authors(s)	Citation	Cited in para(s):
Piltz, Burghard	Internationales Kaufrecht: das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung Beck (1993) Cited as: *Piltz*	98, 107
Platte, Martin	An Arbitrator's Duty to Render Enforceable Awards Journal of International Arbitration, Vol. 20, Issue 3 (2003) Cited as: *Platte*	113
Posch, Willibald **Petz**, Thomas	Austrian Cases on the UN Convention on Contracts for the International Sale of Goods Vindobona Journal of International Commercial law and Arbitration (2002) Cited as: *Posch/Petz*	18
Praštalo, Boris	Uniformity in the Application of the CISG: Analysis of the Problem and Recommendations for the Future Global Trade Law Series, Vol. 52 (2020) Cited as: *Praštalo*	17
Ramachandran, Dhanaram	Arbitration Agreements - BCY v. BCZ and Beyond DR Law Chambers (2020) Available at: https://www.drlawchambers.com/post/arbitration-agreements-bcy-v-bcz-and-beyond	84

Authors(s)	Citation	Cited in para(s):
	Last accessed: 22 Jan 2022 Cited as: *Ramachandran*	
Rau, Alan	The Agreement to Arbitrate and the Applicable Law Public Law and Legal Theory Research Paper Series 664 (2017) Cited as: *Rau*	91
Redfern, Alan **Hunter**, Martin	Law and Practice of International Commercial Arbitration Thomson Professional Pub Canada (1999) Cited as: *Redfern/Hunter*	113
Russel, Francis	Russell on Arbitration (Twenty-fourth Edition) Sweet & Maxwell (2015) Cited as: *Russel*	93
Sambugaro, Giulia	Incorporation of Standard Contract Terms and the "Battle of Forms" under the 1980 Vienna Sales Convention (CISG) RDA/IBLJ, N°1 (2009) Cited as: *Sambugaro*	43, 56
Samuel, Adam	Jurisdictional problems in international commercial arbitration: a study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German law Schulthess (1989)	68

Authors(s)	Citation	Cited in para(s):
	Cited as: *Samuel*	
Saunders, Kurt **Rymsza**, Leonard	Contract Formation and Performance under the UCC and CISG: A Comparative Case Study Journal of Legal Studies Education, Vol. 32, Issue 1 (2015) Cited as: *Saunders/Rymsza*	14
Scherer, Maxi **Jensen**, Ole	Towards a Harmonized Theory of the Law Governing the Arbitration Agreement Indian Journal of Arbitration Law (2021) Cited as: *Scherer/Jensen*	93
Schlechtriem, Peter **Schwenzer**, Ingeborg	Commentary on the UN Convention on the International Sale of Goods (Third Edition) Oxford University Press (2010) Cited as: *Schlechtriem/Schwenzer*	14, 15, 17, 18, 22, 24, 25, 29, 30, 32, 35, 38, 43, 45, 48, 49, 50, 53, 55, 97, 98, 99, 107, 109
Schlechtriem, Peter **Schwenzer**, Ingeborg	Commentary on the UN Convention on the International Sale of Goods (Fourth Edition) Oxford University Press (2016) Cited as: *Schlechtriem/Schwenzer II*	98, 99, 104, 105
Schluchter, Anne-Kathrin	Die Gültigkeit von Kaufverträgen unter dem UN-Kaufrecht Nomos (1996) Cited as: *Schluchter*	98
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Authors(s)	Citation	Cited in para(s):
	Annals of the Faculty of Law in Belgrade – International Edition (2011) Available at: https://anali.rs/xml/201-/2011c/2011-3e/Annals_2011_211-223.pdf Last accessed: 24 Jan 2022 Cited as: *Schmidt-Ahrendts*	
Schwarz, Franz	Die Durchführung des Schiedsverfahrens, as cited in: Christoph Liebscher/Paul Oberhammer/Walter H. Rechberger, Schiedsverfahrensrecht Handbuch: Band II, Verlag Österreich (2016) *Cited as: Schwarz*	69
Schwenzer, Ingeborg **Hachem**, Pascal **Kee**, Christopher	Global Sales and Contract Law Oxford University Press (2012) Cited as: *Schwenzer/Hachem/Kee*	15, 18, 29, 55
Schwenzer, Ingeborg **Mohs**, Florian	Old Habits Die Hard: Traditional Contract Formation in a Modern World Internationales Handelsrecht (2006) Cited as: *Schwenzer/Mohs*	24, 29
Schwenzer, Ingeborg **Tebel**, David	The Word is not Enough - Arbitration, Choice of Forum and Choice of Law Clauses under the CISG ASA Bulletin, Vol. 31, Issue 4 (2013) Cited as: *Schwenzer/Tebel*	97, 98, 99, 100, 103

Authors(s)	Citation	Cited in para(s):
Schwenzer, Ingeborg **Spagnolo**, Lisa (eds.)	Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference Eleven International Publishing (2011) Cited as: *Author in: Schwenzer/Spagnolo*	60
Singarajah, Frederico	Has the English Court of Appeal changed its mind on the proper law of the arbitration agreement? Kluwer Law International (2020) Cited as: *Singarajah*	91
Tarawali, Naomi **Gerardy**, Patrick	The Law Governing the Arbitration Agreement – A Fresh Look at an Old Debate after the UK Supreme Court's Enka Judgment and Recent Clarification by the German Federal Court of Justice German Arbitration Journal, Vol. 19, Issue 4 (2021) Cited as: *Tarawali/Gerardy*	70
Tepes, Nina	The more favorable right provision of Art. VII of the New York Convention and its application to the form of the arbitration agreement Croatian Arbitration Yearbook, Vol. 12 (2005) Cited as: *Tepes*	101, 103
Thadikkaran, Manu	Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be? Journal of International Arbitration, Vol. 31, Issue 5 (2014)	116

Authors(s)	Citation	Cited in para(s):
	Cited as: *Thadikkaran*	
Torremans, Paul **Grusic**, Ugljesa **Heinze**, Christian **Merrett**, Louise **Mills**, Alex **Otero**, Carmen **Trimmings**, Katarina **Tang**, Zheng Sophia **Walker**, Lara **Fawcett**, James J. (eds.)	Cheshire, North & Fawcett: Private International Law (Fifteenth Edition) Oxford University Press (2017) Cited as: *Torremans/Fawcett et al.*	91
Tung, Sherlin **Ye**, Alex **Tan**, Kelly	Enka v. Chub Russia: The Law of the Arbitration Agreement – an End to the Continuous Battle between the Law of the Seat and the Law of the Underlying Contract Contemporary Asia Arbitration Journal (2021) Cited as: *Tung/Ye/Tan*	91
van den Berg, Albert Jan (ed.)	Improving the Efficiency of Arbitration and Awards: 40 Years of Application of the New York Convention Kluwer Law International (1999) Cited as: *Author in: van den Berg*	102
Viscasillas, Maria Pilar Perales	"Battle of the Forms" under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles	43

Authors(s)	Citation	Cited in para(s):
	Pace International Law Review, Vol. 10, Issue 1 (1998) Available at: https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1256&context=pilr Last accessed: 22 Jan 2022 Cited as: *Viscasillas*	
Viscasillas, Maria Pilar Perales	Contract Conclusion under CISG Journal of Law and Commerce (1997) Cited as: *Viscasillas II*	24
Viscasillas, Maria Pilar Perales **Muñoz**, David Ramos	CISG & Arbitration Spain Arbitration Review, Issue 10 (2011) Cited as: *Viscasillas/Muñoz*	98, 100, 102, 103, 104, 107, 108
Vorobey, Dmytro	CISG and Arbitration Clauses: Issues of Intent and Validity Journal of Law and Commerce, Vol. 31 (2013) Available at: https://jlc.law.pitt.edu/ojs/index.php/jlc/article/view/50/41 Last accessed: 24 Jan 2022 Cited as: *Vorobey*	101, 103, 104, 105, 109
Vural, Belkis	Formation of Contract According to the CISG Ankara Bar Review (2013)	38

Authors(s)	Citation	Cited in para(s):
	Cited as: *Vural*	
Walker, Janet	Agreeing to Disagree: Can We Just Have Words?, CISG Article 11 and the Model Law Writing Requirement Journal of Law and Commerce, Vol. 25, Issue 1 (2005) Available at: https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2410&context=scholarly_works Last accessed: 24 Jan 2022 Cited as: *Walker*	97, 98, 102, 107
Weinacht, Felix	Enforcement of Annulled Foreign Arbitral Awards in Germany Journal of International Arbitration, Vol 19, Issue 4 (2002) Cited as: *Weinacht*	116
Wildner, Kaia	Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law: The Decision of the Federal Supreme Court of Germany of 9 January 2002 Pace International Law Review, Vol. 20 (2008) Cited as: *Wildner*	17
Winship, Peter	Formation of International Sales Contracts under the 1980 Vienna Convention International Lawyer (1983)	14

Authors(s)	Citation	Cited in para(s):
	Cited as: *Winship*	
Zhao, Mary	Transparency in International Commercial Arbitration: Adopting a Balanced Approach Virginia Journal of International Law (2019) Cited as: *Zhao*	19

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Arbitral Institution	Case	Cited in para(s):
China International Economic and Trade Arbitration Commission (CIETAC)	12 Mar 2004 Case No.: CISG/2004/04 Available at: https://cisg-online.org/search-for-cases?caseId=7518 Last accessed: 27 Jan 2022 Cited as: *Fireworks case*	43, 53
International Chamber of Commerce	22 May 2014 Rock Resource Ltd. v. Altos Hornos de México Case No.: 18133/CYK Available at: https://jusmundi.com/en/document/decision/en-rock-resource-limited-v-altos-hornos-de-mexico-s-a-b-de-c-v-final-award-thursday-22nd-may-2014 Last accessed: 27 Jan 2022 Cited as: *Rock Resource v. Altos Hornos de Mexico*	14
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	ICC Case No. 3540 1980	92

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	ICC Case No. 6840 1991 Cited as: *ICC Award 6840/1991*	71
	ICC Cases No. 6515 and 6516 1994 Cited as: *ICC Award 6515/1994*	68
	ICC Case No. 5029 1986 Available at: http://translex.uni-koeln.de/204145/_/icc-award-no-4145-yca-1987-at-97-et-seq-/ Last accessed: 24 Jan 2022 Cited as: *ICC Award 5029/1986*	69
	ICC Case No. 1526 1974 Available at: http://translex.uni-koeln.de/196152/_/derains-yves-note-to-icc-award-no-1526-clunet-1974-at-918-et-seq/	68

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	Case	Cited in para(s):
Argentina	Court of Appeals Buenos Aires 14 Oct 1993 Inta S.A. v. MCS Officina Meccanica S.p.A. Case No.: 45.626 Available at: https://iicl.law.pace.edu/cisg/case/argentina-cámara-nacional-de-apelaciones-en-lo-comercial-appellate-court-inta-sa-v-mcs Last accessed: 24 Jan 2022 Cited as: *Inta v. Officina Meccanica*	111
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Case	Cited in para(s):
oberster-gerichtshof-supreme-court-austrian-case-citations-do-not-generally-44 Last accessed: 22 Jan 2022 Cited as: *MAP case*	
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France	Supreme Court 9 Oct 1984 Société Pabalk Ticaret Limited Sirketi v. Société Norsolor Case No.: 83-11.355 Available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=118 Last accessed: 22 Jan 2022 Cited as: *Société Pabalk Ticaret Limited Sirketi case*	116
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	Court of Appeals Grenoble 13 Sep 1995 M. Caiato Roger v. La Société française de factoring international factor France "S.F.F." (SA) Case No.: 93/4126 Available at: https://iicl.law.pace.edu/cisg/case/france-ca-aix-en-provence-ca-cour-dappel-appeal-court-m-caiato-roger-v-la-soci%C3%A9t%C3%A9 Last accessed: 23 Jan 2022 Cited as: *Cheese case*	30
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	21 Oct 1999 Calzados Magnanni v. Shoes General International Case No.: 97/03974 Available at: https://iicl.law.pace.edu/cisg/case/france-ca-aix-en-provence-ca-cour-dappel-appeal-court-st%C3%A9-calzados-magnanni-v-sarl-shoes Last accessed: 23 Jan 2022 Cited as: *Calzados Magnanni case*	
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Supreme Court 26 Nov 2020 Case No.: I ZR 245/19 Available at: https://iicl.law.pace.edu/cisg/case/germany-november-26-2020-bundesgerichtshof-federal-supreme-court?fbclid=IwAR1fovOwqlyqsAw5Bf3LYeye6teWNhqfcQgckXaBb18gVbU7Nk6rjZccNm8 Last accessed: 22 Jan 2022 Cited as: *Spice case*	107, 110
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Case	Cited in para(s):
Appellate Court Hamburg 12 Mar 1998 Case No.: 6 U 110/97 Available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=238&opac_view=2 Last accessed: 22 Jan 2022 Cited as: *Case 6 U 110/97*	114
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	District Court Hamburg 17 Jun 1996 Roberto Catinari & Ovaldo Raccosta v. Florencemoda GmbH Case No.: 417 O 165/95 Available at: https://iicl.law.pace.edu/cisg/case/germany-june-17-1996-landgericht-regional-court-roberto-catinari-ovaldo-raccosta-v Last accessed: 10 Jan 2022 Cited as: *Catinari & Raccosta v. Florencemoda*	110
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India	Supreme Court 25 Aug 2008 M/S. Indtel Technical Services Pvt. Ltd. v. W.S. Atkins Rail Ltd. Case No.: 16 of 2006 Available at: https://indiankanoon.org/doc/1679578/ Last accessed: 25 Jan 2022 Cited as: *M/S Indtel Tech v. W.S. Atkins Rail*	71, 72
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	Cited as: *Euroflash Impression S.a.s. v. Arconvert S.p.A.*	
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Available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2003:AF5674 Last accessed: 25 Jan 2022 Cited as: *Horse case*	
District Court Arnhem 17 Jan 2007 Hibro Compensatoren B.V. v. Trelleborg Industri Aktiebolag Case No.: 146453 / HA ZA 06-1789 Available at: https://iicl.law.pace.edu/cisg/case/netherlands-january-17-2007-rechtbank-district-court-hibro-compensatoren-bv-v-trelleborg Last accessed: 22 Jan 2022 Cited as: *Hibro Compensatoren B.V. v. Trelleborg Industri Aktiebolag*	110
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	Case	Cited in para(s):
	Court of Appeal for the Second Circuit 23 Dec 1974 Parsons and Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA) Case No.: 508 F.2d 969 Available at: https://casetext.com/case/parsons-wh-ov-v-societe-g-de-l-du-p Last accessed: 10 Jan 2022 Cited as: *Parsons and Whittemore Overseas Co. case*	114
	District Court Delaware 9 May 2008 Solae, LLC v. Hershey Canada, Inc Case No.: 07-140-JJf Available at: https://iicl.law.pace.edu/cisg/case/united-states-may-9-2008-district-court-solae-llc-v-hershey-canada-inc Last accessed: 22 Jan 2022 Cited as: *Solae, LLC v. Hershey Canada, Inc*	99
	District Court for the Northern District of Illinois, Eastern Division 19 Nov 2002 Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Company, Inc. d/b/a Maurice Lenell Cooky Company	107

Case	Cited in para(s):
Case No.: 01-3402, 02-1867, 02-1915 Available at: https://iicl.law.pace.edu/cisg/case/united-states-november-19-2002-circuit-court-zapata-hermanos-sucesores-sa-v-hearthside Last accessed: 24 Jan 2022 Cited as: *Cookie tin case*	
District Court Minnesota 16 Jun 2008 BTC-USA Corporation v. Novacare et al. Case No.: 07-3998 ADM/JSM Available at: https://iicl.law.pace.edu/cisg/case/united-states-june-16-2008-district-court-btc-usa-corporation-v-novacare-et-al Last accessed: 22 Jan 2022 Cited as: *BTC-USA Corporation v. Novacare et al.*	99
District Court of New York 14 Apr 1992 Filanto S.p.A. v. Chilewich International Corp. Case No.: 92 Civ. 3253 (CLB) Available at: https://scholar.google.com/scholar_case?case=7465841174193959179&q=Filanto%20S.p.A.%20v.%20Chilewich%20International%20Corp.&hl=en&as_sdt=6%2C33	29, 105, 110

Case	Cited in para(s):
Last accessed: 23 Jan 2022 Cited as: *Filanto v. Chilewich*	
District Court of New York 6 Apr 1998 Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd. Case No.: 96 Civ. 8052 (HB) (THK) Available at: https://iicl.law.pace.edu/cisg/case/united-states-april-6-1998-district-court-calzaturificio-claudia-snc-v-olivieri-footwear Last accessed: 22 Jan 2022 Cited as: *Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd.*	30
District Court Pennsylvania 28 Oct 2021 Jiangsu Beier Decoration Materials Co. v. Angle World LLC Case No.: 21-2845 Available at: https://iicl.law.pace.edu/cisg/case/united-states-october-28-2021-district-court-jiangsu-beier-decoration-materials-co-v-angle Last accessed: 22 Jan 2022 Cited as: *Jiangsu Beier Decoration v. Angle World*	107

Case	Cited in para(s):
District Court, Central District California, Eastern Division 5 May 2003 Chateau des Charmes Wines Ltd. v. Sabaté USA Inc., Sabaté S.A. Case No.: 02-15727 Available at: https://iicl.law.pace.edu/cisg/case/united-states-may-5-2003-circuit-court-chateau-des-charmes-wines-ltd-v-sabate-usa-inc Last accessed: 22 Jan 2022 Cited as: *Chateau des Charmes Wines case*	99
District Court, District of Columbia 31 Jul 1996 Chromalloy Aeroservices v. Arab Republic of Egypt Case No.: 94-2339 Available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1139 Last accessed: 20 Jan 2022 Cited as: *Chromalloy Aeroservices v. Egypt*	116

INDEX OF OTHER SOURCES

		Cited in para(s):
CISG Advisory Council Opinions	CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG Rapporteur: Professor Sieg Eiselen Cited as: *CISG-AC 13*	13, 43, 55, 62
Commentaries	UNIDROIT Principles of International Commercial Contracts Official Commentary (2016) Cited as: *PICC Commentary*	63
Dictionaries	Online Cambridge English Dictionary Available at: https://dictionary.cambridge.org/dictionary/english/ Last accessed: 22 Jan 2022 Cited as: *Cambridge Dictionary*	115
UN Documents	Report of the United Nations Commission on International Trade Law on the work of its eighteenth session U.N. Doc. No.: A/40/17 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N85/325/11/PDF/N8532511.pdf?OpenElement Last accessed: 10 Jan 2022 Cited as: *U.N. Doc. A/40/17*	113

		Cited in para(s):
	Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York 10 Jun 1958 Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a2e.pdf Last accessed: 22 Jan 2022 Cited as: *UNCITRAL Arts. II and VII NYC Recommendation*	103
	United Nations Conference on Contracts for the International Sale of Goods Vienna, 10 Mar-11 Apr (1980) Doc. No.: A/CONF.97/L.19 Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf Last accessed: 22 Jan 2022 Cited as: *UN Official Records*	100
Reports	Arbitration Institute of the Stockholm Chamber of Commerce Stockholm Arbitration Report Vol. 2002:1 Juris Publishing Inc Cited as*: Stockholm Arbitration Report*	92

		Cited in para(s):
	Justitia et Pace Institut de Droit International Session of Amsterdam – 1957 Arbitration in Private International Law (Fourteenth Commission, Rapporteur: Mr Etienne Szászy) Cited as: *ILI Resolution*	
	2004 Berlin Conference on International Commercial Arbitration Interim Report: Res judicata and Arbitration Cited as: *ILA Report*	69, 83
FOSFA/PORAM Templates	Palm Oil Refiners Association of Malaysia/ The Federation of Oils, Seeds and Fats Associations Ltd Contract Template 81 Cited as: *FOSFA/PORAM 81 Template*	63, 105

STATEMENT OF FACTS

1. ElGuP plc (*hereinafter* "**CLAIMANT**") is one of the largest producers of RSPO-certified palm oil and palm kernel oil based in Mediterraneo. JAJA Biofuel Ltd (*hereinafter* "**RESPONDENT**") is one of the pioneers in the production of sustainable biofuel in Equatoriana with an excellent reputation. Since 2018 RESPONDENT has been a 100% subsidiary of Southern Commodities (*hereinafter* "**SC**") but otherwise remained a separate legal entity. After the acquisition Ms. Bupati, previously a SC employee, was appointed as the Head of Purchasing for RESPONDENT. Over Ms. Bupati's 15 years with SC she negotiated around 40 contracts with CLAIMANT, only 5 of which were performed without SC returning a signed version of the contract.

2. On **28 March 2020** Mr. Chandra, CLAIMANT's COO, and Ms. Bupati met at the Palm Oil Summit (*hereinafter* "**the Summit**") for the first time in Ms. Bupati's new position. They discussed a possible contract between CLAIMANT and RESPONDENT (*hereinafter* "**the Parties**") for the sale of RSPO-certified palm oil (*hereinafter* "**the Contract**") and agreed on commercial terms but did not conclude the Contract at the Summit as Ms. Bupati required prior approval from RESPONDENT's management.

3. On **1 April 2020** Ms. Bupati sent CLAIMANT an e-mail, reflecting the commercial terms negotiated at the Summit, and asked CLAIMANT to prepare the contractual documents for signature. In that e-mail Ms. Bupati stated that it would be a problem to agree to arbitration and Mediterranean law.

4. On **9 April 2020** CLAIMANT sent the Contract signed by Mr. Chandra and noted that the sale would be governed by the law of Mediterraneo. CLAIMANT also informed RESPONDENT that CLAIMANT's General Conditions of Sale (*hereinafter* "**GCoS**") would apply but it did not attach them to the e-mail, nor provided them in any other way. RESPONDENT had never received any version of the GCoS, while Ms. Bupati had received a copy in 2011 when working for SC. CLAIMANT had meanwhile amended the arbitration and the choice of law clauses in the GCoS, in 2016 and 2020 respectively.

5. On **3 May 2020** RESPONDENT contacted CLAIMANT to discuss the letter of credit required prior to performance of the Contract. RESPONDENT also suggested two changes in the terms of the contractual documents. The Parties never reached an agreement on RESPONDENT's suggestion to change the documents requested for presentation.

6. On **30 October 2020** RESPONDENT stated it terminated the negotiations with CLAIMANT citing suspicions that CLAIMANT's subcontractors issued fake RSPO certificates.

7. The Parties did not manage to settle their dispute amicably through mediation and on **14 July 2021** CLAIMANT initiated the proceedings at hand.

SUMMARY OF ARGUMENTS

I. The Parties have not concluded a contract in 2020

8. RESPONDENT's e-mail from 1 April 2020 does not constitute an offer within the meaning of Art. 14 CISG. Even if it was an offer, CLAIMANT materially modified its terms, thereby rejecting it. Alternatively, RESPONDENT's objection to the modifications was timely, and thus no Contract was concluded. CLAIMANT's e-mail from 9 April 2020 can at most be considered a counter-offer which, however, was never accepted by virtue of RESPONDENT's conduct under Art. 18(1) CISG. Moreover, RESPONDENT's subsequent silence does not constitute acceptance of the counter-offer since there is no practice between the Parties under Art. 9(1) CISG to accept offers by silence. Such silence does not constitute acceptance under Art. 18(1) CISG even when interpreted in conjunction with RESPONDENT's overall conduct.

II. Even if the Parties concluded the Contract, the GCoS were not validly incorporated in it

9. The Parties have not established any practice to include CLAIMANT's GCoS in their contracts without providing them to RESPONDENT as this is the first time the Parties were negotiating a contract. Even if any alleged practice between CLAIMANT and SC could be transferred to RESPONDENT, it has been terminated by the changes CLAIMANT introduced to the GCoS. In any case, RESPONDENT has not agreed on the inclusion of the GCoS under Art. 14 *et seq.* CISG and did not have a reasonable opportunity to take notice of the GCoS as they were never provided to it.

III. The TRIBUNAL lacks jurisdiction under the law of Mediterraneo which is applicable to the arbitration agreement

10. The Parties chose Mediterranean law to govern the arbitration agreement. Absent any explicit choice, the arbitration agreement is governed by the law of Mediterraneo as the law governing the underlying Contract and the separability principle does not lead to any other conclusion. The choice of Danubia as the seat of arbitration does not indicate the law governing the arbitration agreement, especially since the Parties agreed on law to govern the underlying Contract. In addition, Danubian law is not the law most closely connected to the arbitration agreement.

IV. If the arbitration agreement is governed by Mediterranean law, CISG is applicable.

11. In case Mediterranean law applies to the arbitration agreement, the TRIBUNAL shall apply CISG. CISG applies entirely to arbitration agreements, as CISG expressly governs dispute settlement clauses and there is no conflict between CISG and any other international or domestic legal instrument. In any event, CISG applies to the present case because the Parties do not dispute the formal validity of the Contract but its formation and the incorporation of CLAIMANT's GCoS which is not excluded from the scope of CISG by virtue of Art. 4 CISG. Finally, there are no risks for the validity and the enforcement of the award, as the application of CISG to arbitration agreements would not violate Danubia's public policy.

ARGUMENTS ON MERITS

I. THE PARTIES DID NOT ENTER INTO A CONTRACT

12. CLAIMANT's e-mail from 9 April 2020 does not constitute acceptance under Art. 19(2) CISG **(A)**. If that e-mail is considered a counter-offer, it was not accepted through RESPONDENT's conduct in accordance with Art. 18 CISG **(B)**. Further, RESPONDENT did not accept the counter-offer by virtue of its silence under Art. 18 CISG **(C)**.

A. The Contract was not concluded with CLAIMANT's e-mail under Art. 19(2) CISG

13. RESPONDENT's e-mail from 1 April 2020 does not constitute an offer under Art. 14 CISG **(1)**. Alternatively, CLAIMANT's response from 9 April 2020 does not constitute acceptance as it made material additions to the alleged offer **(2)**. In any event, RESPONDENT objected to the proposed alterations without undue delay **(3)**.

1. RESPONDENT's e-mail is not a valid offer within the meaning of Art. 14 CISG

14. The Parties are in agreement that CISG applies to the material issues of the dispute [*PO2, p. 52, para. 33; Cl. Memo., p. 5, para. 12*]. Therefore, the question of contract formation must be analysed in light of the requirements for a valid offer and acceptance. Under Art. 14 CISG, an offer is valid when it is sufficiently definite and expresses the offeror's intention to be bound by it [*Schlechtriem/Schwenzer, p. 258, para. 1; Joseph, p. 120; Saunders/Rymsza, p. 12; DiMatteo II, p. 72; Blanchard, p. 8; Cvetkovic, p. 122; Winship, p. 5; Rock Resource v. Altos Hornos de Mexico, para. 81*]. As the two requirements are cumulative [*Ibid.*], if even one of them is missing, there would be no valid offer. RESPONDENT agrees with CLAIMANT that the e-mail from Ms. Bupati [*Ex. C2, p. 12*] was sufficiently definite [*Cl. Memo., pp. 6-7,*

paras. 18-20]. However, contrary to CLAIMANT's view [*Cl. Memo., p. 7, para. 24*], that e-mail does not constitute a valid offer because it was not intended to bind RESPONDENT [*Art. 14(1) CISG*].

15. The standard when determining RESPONDENT's intention to be bound is the understanding a reasonable person of the same kind as CLAIMANT would have of RESPONDENT's conduct [*Art. 8(2) CISG; Schlechtriem/Schwenzer, p. 270, para. 24; DiMatteo/Dhooge/Greene/Maurer, p. 399; Schwenzer/Hachem/Kee, p. 136, para. 10.19; Brunner/Pfisterer in: Brunner/Gottlieb, p. 139, para. 4; Dutch fabrics case, para. 3*]. RESPONDENT's e-mail which constitutes the alleged offer referenced "*further discussions*" taking place between the Parties [*Ex. C2, p. 12*]. Thus, RESPONDENT explicitly indicated that it is not firm in its proposal as additional issues during the negotiations may arise. In fact, such issues arose in relation to the arbitration provision which RESPONDENT was hesitant about and which it stated was subject to discussion: "*At least <u>we</u> should select a non-industry related arbitration institution…*" [*Ex. C2, p. 12*]. This statement reflected RESPONDENT's general unwillingness to submit to arbitration, and its demand to participate in the careful choice of a suitable institution. Hence, RESPONDENT made it abundantly clear that even the essential details, such as the dispute resolution mechanism, were not settled. Thus, RESPONDENT could not have had the intention to be bound by terms that it expressly indicated were problematic and needed further negotiations.

16. Contrary to CLAIMANT's assertion [*Cl. Memo., p. 7, para. 23*], RESPONDENT's statement that it "*would like to place the following order*" does not indicate an intention to be bound. The *German Seller v. Swiss Buyer case* referenced by CLAIMANT [*Cl. Memo., p. 7, para. 23*] is inappropriate because in that case delivery was due immediately [*German Seller v. Swiss Buyer case, para. 5(a)*]. Thus, it was evident that the offeror was not proposing additional discussions as there would have been no time. On the contrary, here delivery would be due in 9 months from Ms. Bupati's e-mail during which the Parties could iron out the problems indicated by RESPONDENT regarding the arbitration and the governing law. Hence, RESPONDENT's statement merely communicated to CLAIMANT that Ms. Bupati had obtained the necessary approval from RESPONDENT's management to potentially enter into a Contract with CLAIMANT [*NA, p. 5, para. 5*]. Thus, as RESPONDENT identified more issues to be negotiated, it did not intend to be bound, and its e-mail does not constitute an offer under Art. 14 CISG.

2. Alternatively, CLAIMANT's e-mail contained material modifications to RESPONDENT's offer

17. Even if RESPONDENT's e-mail is considered an offer [*Cl. Memo., p. 8, para. 27*], CLAIMANT's e-mail from 9 April 2020 constitutes a rejection of that offer. Pursuant to Art. 19 CISG a reply to an offer that purports to indicate assent but contains material modifications to the offer is a rejection. The reply constitutes acceptance only if the proposed changes are immaterial and the offeror does not object to them in a timely manner [*Schlechtriem/Schwenzer, p. 345, para. 26*; *Praštalo, p. 44; Wildner, p. 2*]. Presently, CLAIMANT's e-mail contained material modifications to RESPONDENT's offer, and hence, the Contract was not formed. Contrary to CLAIMANT's view [*Cl. Memo., pp. 9-10, paras. 34-38*], the dispute resolution mechanism is not the only addition that CLAIMANT introduced to the alleged offer. CLAIMANT also omitted the reference to a transparency provision proposed by RESPONDENT, and it chose Mediterranean law as governing the Contract [*Ex. C3, pp. 13-16; Ex. C4, p. 17*].

18. The choice of law and dispute resolution provisions are encompassed under Art. 19(3) CISG as examples of material modifications to an offer. Admittedly, even the alterations under Art. 19(3) CISG could be immaterial if the parties do not deem them essential [*Schlechtriem/Schwenzer, p. 340, para. 15; Morrissey/Graves, p. 128; Saenger in: Bamberger/Roth, Art. 19, para. 5; Posch/Petz, pp. 11-12; MAP case; Horse case, para. 4.5; Paving stones case I*]. However, Art. 19(3) CISG creates a general assumption that can be rebutted only in rare individual cases [*MAP case*]. Thus, when a party proposes alterations to an offer, their materiality must be determined based on the negotiations and the specific circumstances [*Schlechtriem/Schwenzer, p. 340, para. 15; Schwenzer/Hachem/Kee, p. 152, para. 10.70; Paving stones case I*]. Presently, CLAIMANT's additions to the offer are material considering the Parties' negotiations.

19. First, RESPONDENT indicated that it considered the choice of an arbitration institution as essential due to the anti-arbitration sentiments of the public in Equatoriana. In its alleged offer, RESPONDENT referred to arbitration as "*a problem*" and a potential ground "*to attack our businesses*" [*Ex. C2, p. 12*]. Contrary to CLAIMANT's assertion [*Cl. Memo., p. 10, para. 37*], the reference to AIAC Rules did not mitigate these concerns or make the Contract "*more favorable for RESPONDENT*". On the contrary, the arbitration rules chosen unilaterally by CLAIMANT oblige the Parties to keep the proceedings confidential, unless otherwise agreed [*Rule 44.1 AIAC Rules 2021*]. Having confidential proceedings would harm RESPONDENT's interest due to the potential backlash of Equatorianian activists who oppose arbitration's "*lack of transparency*" [*Ex. C2, p. 12*]. Such backlash from environmental activists is impactful as it can negatively affect RESPONDENT's share price [*Ex. C6, p. 19*]. Even though

RESPONDENT later agreed that the reference to UNCITRAL Transparency Rules proposed by it is inappropriate, it still wanted to provide "*some sort of transparency*" [*Ex. C2, p. 12*]. It is possible to insert transparency provisions even in commercial arbitration proceedings [*Zhao, p. 197*], and yet CLAIMANT did not include such. Further, RESPONDENT indicated that if an arbitration clause was to be added, both Parties should agree on the arbitration institution [*Ex. C2, p. 12; supra para. 15*]. However, CLAIMANT directly picked the arbitration institution in its alleged acceptance without ever discussing it with RESPONDENT. Therefore, the reference to AIAC Rules without a transparency provision constitutes a material modification of RESPONDENT's offer.

20. Secondly, CLAIMANT has not rebutted the presumption under Art. 19(3) CISG that the choice of Mediterrenean law as governing the Contract is an essential issue to RESPONDENT. Even though RESPONDENT stated in its alleged offer that the choice of law provision is "*less a problem*" [*Ex. C2, p. 12*], this does not make the applicable law a marginal issue. RESPONDENT never firmly committed to having Mediterranean law govern the Contract. In fact, calling it "*less a problem*" compared to the arbitration provision merely indicated that future discussions or compromise would take place if CLAIMANT insisted on this choice of law [*infra para. 50*]. Thus, the fact that RESPONDENT never indicated that the provision on the applicable law is non-essential to it means that the presumption under Art. 19(3) CISG must be upheld. Additionally, the court in the *MAP case* referenced by CLAIMANT [*Cl. Memo., p. 10, paras. 36-37*] ruled that the offeree's additions are non-material only when they are in favour of the offeror. However, CLAIMANT openly admits that it selected Mediterranean law because it would favour it over RESPONDENT in case of potential supply chain issues [*Ex. C1, p. 10, para. 13*]. Thus, according to CLAIMANT's own understanding of materiality, the reference to Mediterranean law constitutes a material modification of RESPONDENT's offer.

21. As CLAIMANT's additions materially altered RESPONDENT's offer, CLAIMANT's e-mail does not constitute acceptance within the meaning of Art. 19(2) CISG.

3. In any event, RESPONDENT objected to the alterations in a timely manner

22. Even if CLAIMANT's additions to RESPONDENT's offer were immaterial, RESPONDENT objected to them and thus, no Contract was concluded. Under Art. 19(2) CISG, when an acceptance contains immaterial modifications to the offer, it is valid unless the offeror objects to the alterations without undue delay. The timeliness of the acceptance should be evaluated in accordance with the individual

circumstances of the case [*Schlechtriem/Schwenzer, p. 345 para. 28*]. Contrary to CLAIMANT's view [*Cl. Memo., p. 11, para. 41*], RESPONDENT objected to the additional terms in a timely manner.

23. RESPONDENT's employee Ms. Fauconnier contacted CLAIMANT on 3 May 2020 to express her "*concerns relating to some of the documents requested for presentation*" [*Ex. C5, p. 18, para. 4*]. She emphasised that the Parties had "*to negotiate open issues*" and there were "*also two other issues where I would suggest changes*" [*Ex. R2, p. 30*]. If, as CLAIMANT insists [*Cl. Memo., p. 11, para. 41*], a contract was already formed, there would have been no room for any negotiations or changes. Thus, RESPONDENT was clear in its understanding that the Parties were still in the process of finalising the Contract. The subsequent discussions evidently did not lead to an agreement as Ms. Fauconnier expressly stated that she would have to consult with RESPONDENT's lawyers regarding the issues raised [*Ex. C5, p. 18, para. 4*]. Thus, RESPONDENT's acceptance was manifestly put on hold. Ms. Fauconnier's objection was timely given the fact there were still 8 months prior to the delivery time under the Contract. Therefore, as Ms. Fauconnier never retracted her objection, the Contract was not formed.

B. RESPONDENT did not accept CLAIMANT's offer by virtue of its conduct under Art. 18(1) CISG

24. CLAIMANT's e-mail that materially altered RESPONDENT's alleged offer can at most be considered a counter-offer. However, the terms of this e-mail were never accepted by RESPONDENT. Admittedly, acceptance can be expressed through a party's conduct after receiving an offer [*Art. 18(1) CISG; Schwenzer/Mohs, p. 242; Viscasillas II, p. 328; Butler/Mueller, p. 303; Marxen, p. 22; Guzeloglu, p. 2*] when such conduct is notified to the offeror [*Art. 18(2) CISG; Schlechtriem/Schwenzer, p. 321, para. 14*]. Whether the offeree's conduct constitutes acceptance depends on the objective understanding of the offeror under Art. 8(2) CISG [*Schlechtriem/Schwenzer, p. 321, para. 13; Jenkins, p. 259; Twisted yarn case*]. Thus, whether RESPONDENT's conduct constitutes acceptance depends on the understanding that a reasonable person of the same kind as CLAIMANT would have of this conduct. Contrary to CLAIMANT's view [*Cl. Memo., p. 15, para. 64*], RESPONDENT's inquiry about the acceptable banks could not have been understood by CLAIMANT as an indication of acceptance.

25. Instances when the commencement of an act has been considered as acceptance include concluding a cover transaction or commencing production of the goods [*Schlechtriem/Schwenzer, p. 320, para. 13; Scafom & Orion v. Exma*]. In those cases, it is clear that the respective conduct would make it difficult or disadvantageous to the party not to finalise the performance. Thus, even if the "*commencement of an*

act" to which CLAIMANT refers can sometimes be considered as acceptance [*Cl. Memo., p. 14, para. 61*], this applies when the conduct itself creates an incentive for the party to perform. Here, the mere inquiry about the acceptable banks exposes RESPONDENT to virtually no risk as it can still decide not to open a letter of credit. On the contrary, the issuing bank would have required the payment of charges and fees for the issuance only if the letter of credit was actually opened [*Hinkelman et al., pp. 140-141; Oelofse, p. 139, para. 5.5.1*]. In such an instance RESPONDENT's acceptance would have been demonstrated by the undertaken financial commitment which is missing in the case at hand.

26. Further, RESPONDENT only requested the list because the biennial discussions with its bank were upcoming anyway [*Ex. R2, p. 30*]. As a prominent merchant and a part of a multinational conglomerate, it is normal for RESPONDENT to hold such regular discussions with its banks for all potential business activities. The future Contract with CLAIMANT would have cost RESPONDENT USD 18,000,000 just in the first year [*Ex. C2, p. 12*]. This justifies RESPONDENT bringing up the potential future commitment with its banks during their routine discussions. Hence, CLAIMANT could not have understood this inquiry as RESPONDENT's firm and unequivocal acceptance.

27. Contrary to CLAIMANT's assertion [*Cl. Memo., p. 15, para. 63*], the ruling in the *Grain case* it references cannot be applied by analogy because the factual circumstances are vastly different. In the *Grain case*, the buyer had completed all necessary steps for opening a letter of credit but was objectively impeded from opening one due to the bank's blockage [*Grain case, para. 2.2*]. The court ruled that the buyer's actions were sufficient for the formation of a contract. Here, CLAIMANT would have the TRIBUNAL believe that the sole reason the letter of credit was not opened was Ms. Fauconnier's sick leave. However, even after Ms. Fauconnier returned to work, a letter of credit was still not opened [*PO2, p. 51, para. 23*]. Further, the sick leave is evidently not an external and insurmountable obstacle that RESPONDENT could not have overcome, unlike the bank's blockage. Additionally, in the *Grain case*, the buyer did not reserve its right to modify the terms of the contact when it notified the seller of its intention to open the letter of credit [*Grain case, para. 2.2*]. On the contrary, when Ms. Fauconnier inquired about the acceptable banks, she indicated that some issues were still unresolved and she had to receive a final confirmation from RESPONDENT's lawyers [*Ex. C5, p. 18, para. 4*]. Thus, CLAIMANT's reference to the *Grain case* is inappropriate and no acceptance by conduct occurred in the present case.

C. RESPONDENT did not accept the counter-offer by virtue of its silence

28. CLAIMANT and SC have not formed a practice of accepting offers by silence **(1)**. In any event, the practice is not applicable to the relations between CLAIMANT and RESPONDENT **(2)**. Even when interpreted in light of its overall conduct, RESPONDENT's silence does not constitute acceptance **(3)**.

1. There is no established practice between SC and CLAIMANT to accept offers by silence

29. Under Art. 9(1) CISG, the parties to a contract are bound by practices they have established between themselves. This rule applies to issues concerning both the formation and the content of a contract [*Schlechtriem/Schwenzer, p. 183, para. 3*]. Under Art. 18(1) CISG, silence in itself does not constitute acceptance. Silence needs to be supported by an established practice in order for a valid acceptance to occur [*DiMatteo/Dhooge/Greene/Maurer, p. 344; Oviedo Alban in: Felemegas, p. 100; Schwenzer/Hachem/Kee, pp. 147-148, para. 10.58; Schwenzer/Mohs, p. 242; Butler/Mueller, p. 306; Graffi, p. 279; Filanto v. Chilewich, para. 1240; Calzados Magnanni case*]. Presently, contrary to CLAIMANT's view [*Cl. Memo., pp. 15-16, para. 69*], CLAIMANT and SC did not form a practice to accept offers by silence.

30. A practice constitutes a conduct established among two parties occurring with a certain frequency and duration [*Schlechtriem/Schwenzer, p. 186, para. 8; Oviedo Alban, p. 263; Pamboukis, p. 116; Tantalum powder case II; Vine wax case; Cheese case, paras. 2-3*] so that it appears justified for one party to rely on a particular conduct as being usual [*Brunner/Hurni/Kissling in: Brunner/Gottlieb, p. 100*]. Here, CLAIMANT asserts that there is a practice between itself and SC to raise objections to an offer "*within one week, or at most, a month upon receipt of the contractual documents*" [*Cl. Memo., p. 16, para. 74*]. In CLAIMANT's view, unless such objection is expressed, a contract would be formed by virtue of SC's silence. CLAIMANT is the one that bears the burden of proving the practice's prerequisites [*Schlechtriem/Schwenzer, p. 187, para. 8; Cutlery case, Sec. III(B), para. 4(b); Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd.*]. CLAIMANT in no way justifies that SC's conduct of raising objections within a certain timeframe is characterised by frequency and duration. Thus, as CLAIMANT does not even try to meet its burden, the assertion that a practice exists between the Parties should be dismissed.

31. Even if CLAIMANT had analysed the frequency and duration of SC's conduct, it still would have concluded that no practice exists between SC and CLAIMANT. First, the one-week period for objection proposed by CLAIMANT [*Cl. Memo., p. 16, para. 74*] is based on the time it took Ms. Bupati to object to amendments made by SC to her offers [*PO2, p. 49, para. 9*]. CLAIMANT and SC have concluded around 40 contracts for sale [*Ex. C1, p. 9, para. 2*], out of which in only 3 instances Ms. Bupati had any

objections to SC's proposed alterations [*PO2, p. 49, para. 9*]. When put into the perspective of the overall relationship between SC and CLAIMANT, it is evident that those 3 instances are actually infrequent. Thus, they cannot form the basis of a practice whereby Ms. Bupati would be obliged to always object within a week. Secondly, it is completely unclear how CLAIMANT estimated its alternative timeframe for objection, i.e., "*a month upon receipt of the contractual documents*" [*Cl. Memo., p. 16, para. 74*]. There is no indication that at any point during the relationship between SC and CLAIMANT objections were raised within a month. Hence, there is neither duration, nor frequency in this alleged conduct.

32. Additionally, in order for a practice to exist, it is essential that the parties recognise their behaviour as such [*Schlechtriem/Schwenzer, p. 186, para. 8*]. Presently, CLAIMANT has failed to identify clearly what is the exact conduct that forms a practice. CLAIMANT puts no arguments forward as to why the acceptance was expressed through SC's silence and not through its subsequent performance. In fact, in all the instances when SC had remained silent to CLAIMANT's offers, the silence was always followed by SC's voluntary performance [*Ex. C1, p. 11, para. 14; PO2, p. 49, para. 10*]. Thus, in those cases acceptance could have occurred at the moment when a letter of credit was opened or when delivery was made. Moreover, the difficulty in identifying the conduct that constitutes a practice is best exemplified by CLAIMANT's own arguments. CLAIMANT itself is uncertain whether the practice is to object "*within one week*" or "*a month*" precisely because it cannot recognise the behaviour that is relevant to form a practice [*Cl. Memo., p. 16, para. 74*]. Thus, as CLAIMANT cannot recognise the precise conduct that constitutes the alleged practice, no such practice had been formed.

33. Considering that Ms. Bupati's conduct in maintaining silence was infrequent and that in any event no precise behaviour can be discerned, there is no practice between SC and CLAIMANT to accept offers by silence.

2. In any event, the alleged practice is inapplicable

34. Even if there was a practice between SC and CLAIMANT to accept offers by silence, it is not applicable to the relationship between CLAIMANT and RESPONDENT. Under Art. 9(1) CISG, the parties are bound by practices that they have established "*between <u>themselves</u>*". Hence, a practice would bind only the parties that have formed it [*Tantalum powder case II*]. In the case at hand, the Parties that allegedly entered into the Contract are CLAIMANT and RESPONDENT, not CLAIMANT and SC. Even though RESPONDENT is SC's subsidiary, it still remains a separate legal entity [*PO2, p. 48, para. 4*]. Thus, RESPONDENT is not bound by the practices established between CLAIMANT and SC.

35. Contrary to CLAIMANT's view [*Cl. Memo., p. 16, paras. 71-72*], the fact that Ms. Bupati has knowledge of the alleged practice between SC and CLAIMANT does not mean that RESPONDENT is bound by it. First, a practice will cease to exist if the original relationship undergoes a change [*Schlechtriem/Schwenzer, p. 187, para. 9*]. Presently, the relationship between SC and CLAIMANT evidently changed as SC transferred its palm kernel oil unit to a different legal entity [*PO2, p. 48, para. 5*]. Hence, any practice that Ms. Bupati was aware of was nevertheless terminated as the original relationship between SC and CLAIMANT was altered. Secondly, Art. 19(1) CISG encompasses practices between the parties to the contract [*Schlechtriem/Schwenzer, p. 186, para. 8*] – here SC and RESPONDENT, and not between individual employees of a company [*infra para. 45*]. Ms. Bupati and Mr. Chandra are not parties to those contracts, but merely employees of RESPONDENT and CLAIMANT. Thirdly, Ms. Bupati led the negotiations on behalf of RESPONDENT along with Ms. Fauconnier who also had powers to bind the company [*PO2, p. 49, para. 12*]. Thus, Ms. Fauconnier also represents "*the directing mind and will*" of RESPONDENT [*Cl. Memo., p. 16, para. 71*], and yet she does not possess imputed knowledge of the practices between SC and CLAIMANT. Therefore, Ms. Bupati's knowledge is not sufficient to make the practices between SC and CLAIMANT applicable to RESPONDENT.

36. In any event, the facts around the alleged practice are different from the ones in the case at hand. The dealings between SC and CLAIMANT concerned the sale of non-certified palm kernel oil [*Ex. C1, p. 9, para. 2*], while in the case at hand the transaction relates to RSPO-certified palm oil [*Ex. C2, p. 12*]. The price of certified oils is significantly greater than the one for non-certified oils [*RNA, p. 26, para. 6*]. Thus, it is sensible for RESPONDENT to take more time to consider CLAIMANT's offer since the purchase of RSPO-certified palm oil represents a greater financial commitment. Hence, any alleged practice of objecting within a certain timeframe for contracts for the sale of cheaper oils would not be applicable. Further, as neither SC nor RESPONDENT have any experience in purchasing RSPO-certified palm oil from CLAIMANT [*PO2, p. 48, para. 3*], RESPONDENT is not well-acquainted with the product quality offered by CLAIMANT. In contrast, the alleged practice always concerned the sale of non-certified palm kernel oil that SC had purchased multiple times from CLAIMANT. Thus, SC had already gathered impressions of CLAIMANT's product, and it did not require a longer period of negotiations. Here, it could not have been reasonably expected that it would take only a week for RESPONDENT to consider a crucial 5-year-long commitment concerning a product that it was not familiar with. Hence, the alleged practice is inapplicable.

37. CLAIMANT could argue that it was entitled to expect in good faith that its practice with SC would be observed in the case at hand [*German garments case, Sec. III, para. 2.4*]. However, CLAIMANT was given indications that RESPONDENT is not just a mere continuation of SC's business and that the dealings between the Parties would undergo a change [*RNA, p. 26, para. 5*]. First, RESPONDENT is subject to massive public pressure to comply with environmental standards, while this has never been a major consideration to SC. Further, RESPONDENT has an established prior business and an excellent reputation [*Ex. C1, p. 10, para. 9*] and green policy in the production of biofuel [*Ex. C6, p. 19; Ex. R1, p. 29*], which is completely different from SC's controversial notoriety [*Ex. C6, p. 19*]. Thus, it was evident to CLAIMANT that RESPONDENT would exercise greater caution when concluding contracts related to its biofuel activities compared to SC. Hence, CLAIMANT was not entitled to expect that its practices with SC would remain unchanged and be transferred to RESPONDENT.

3. The totality of circumstances still does not make RESPONDENT's silence a valid indication of acceptance

38. CLAIMANT may argue that despite the lack of an established practice, RESPONDENT's silence could be interpreted cumulatively with other factors as acceptance. While silence could constitute acceptance, it must be considered in conjunction with additional circumstances such as pre-contractual negotiations [*Schlechtriem/Schwenzer, p. 323, para. 19; Hispafruit BV v. Amuyen S.A., para. 4.6*] and the parties' conduct [*Joseph, p. 129; Vural, p. 139*]. However, RESPONDENT's conduct unequivocally shows that its silence could not have been interpreted as acceptance.

39. In its alleged offer, RESPONDENT indicated its intention to sign the contractual documents by stating: "*Could you please prepare the necessary contractual documents for signature…*" [*Ex. C2, p. 12*]. Admittedly, signing is not a mandatory step of contract formation [*Art. 11 CISG; Del Duca, p. 137; Graves, p. 135; Dutch fabrics case, para. 2*]. However, the fact that RESPONDENT expressed its intention to sign and yet no signature was given demonstrates that it consciously did not accept the offer in the pre-determined way. Further, RESPONDENT was later asked multiple times by CLAIMANT to provide a signed version of the Contract, but it never did [*Ex. C4, p. 17; Ex. C5, p. 18, para. 6*]. RESPONDENT's non-compliance with CLAIMANT's request should be examined in light of the fact that the Parties had pending disagreements about multiple contractual provisions. Those disagreements concerned the documents requested for presentation, and they persisted until the termination of the negotiations [*Ex. C5, p. 18, para. 4*]. Thus, the circumstances surrounding RESPONDENT's silence merely evidence RESPONDENT's

unwillingness to enter into a contract before clarifying all terms. Hence, CLAIMANT's offer was not accepted by virtue of RESPONDENT's silence.

CONCLUSION ON THE FIRST ISSUE

40. The Parties have not concluded a Contract with RESPONDENT's e-mail from 9 April 2020. Further, RESPONDENT did not accept CLAIMANT's counter-offer by virtue of its conduct under Art. 18(1) CISG when it inquired about the acceptable banks. Additionally, there is no practice between the Parties to accept offers by silence. Even when interpreted in light of its overall conduct, RESPONDENT's silence does not amount to acceptance.

II. THE PARTIES HAVE NOT INCLUDED THE GCOS UNDER THE CONTRACT

41. Even if the Parties concluded the Contract, they have not incorporated the GCoS in it by virtue of an established practice **(A)**. Further, the requirements to incorporate the GCoS under Art. 14 *et seq.* CISG are not fulfilled **(B)**.

A. The GCoS were not incorporated in the Contract by virtue of an established practice

42. The Parties have not established any practice to incorporate CLAIMANT's GCoS without sending a copy to RESPONDENT **(1)**. Even if there was such practice, it is irrelevant to the present case **(2)**.

1. The Parties never established any practice for the incorporation of the GCoS

43. CISG does not expressly regulate the issue of inclusion of standard terms [*Schlechtriem/Schwenzer, p. 80, para. 12; Zeller in: DiMatteo, p. 20; Kruisinga in: DiMatteo, p. 490*]. However, it is established both in case law [*Machinery case, p. 4, para. 13; Dutch plants case I, p. 4, para. 19; Conveyor belts case, p. 9, para. 5.2.; René Vidal & Cie v. Verotex Industries; "Bloemen en Planten" v. PS; Fireworks case*] and in legal doctrine [*CISG-AC 13, p. 2, para. 1; Schlechtriem/Schwenzer, p. 225, para. 5; Bridge, p. 543; Dobrynski, p. 1; Eiselen, p. 4; Sambugaro, p. 71; Loos, p. 8; Lautenschlager, p. 275; Koch in: Kröll et al., p. 599; A. Butler, p. 15; Janssen, p. 13*] that the questions regarding incorporation of standard terms are governed by CISG and particularly by Art. 14 *et seq.* and Art. 8 CISG for the formation and interpretation of a contract, which is agreed by CLAIMANT [*Cl. Memo., p. 18, paras. 80-82*]. The general consensus, also supported by CLAIMANT [*Cl. Memo., p. 19, para. 86*] is that parties need not only agree on the incorporation of the standard terms but also make them available [*Machinery case, p. 4, paras. 14-15; CISG-AC 13, p. 2, para. 2.*]. Although it is generally possible to incorporate standard terms through an established practice under Art. 9(1) CISG and thus avoid the need to make them available [*Schlechtriem/Schwenzer, p. 175, para. 56; Bridge, p.*

543; Geissler, p. 7; Viscasillas, p. 113; Janssen, p. 197; Ferrari, p. 573; Conveyor belts case, p. 9, para. 5.2.; Propane gas case, p. 10, para. 2.7.; Dutch plants case I, p. 4, para. 21], such practice is not present here.

44. CLAIMANT itself admits that a deviation of the making available standard requires a "*constant business relationship*" with "*previous agreements subject to the same standard terms*" [*Cl. Memo., p. 19, para. 87*]. However, CLAIMANT and RESPONDENT have never had any contractual relationships of any kind [*PO2, p. 48, para. 3*]. As SC and RESPONDENT are completely different entities, any previous practices with CLAIMANT cannot be imputed to RESPONDENT [*supra para. 34*].

45. CLAIMANT's main argument on the alleged established practice is founded on erroneously imputing to RESPONDENT Ms. Bupati's knowledge of an old version of the GCoS which she once received [*Cl. Memo., p. 20, para. 91*]. However, CLAIMANT never explains or gives any legal ground for such an imputation, instead citing general commentary on the duties of preservation of the goods [*Cl. Memo., p. 16, para. 71*], without any relation to Art. 9 CISG. It is true that previously Mr. Chandra and Ms. Bupati concluded a few contracts for their respective companies without requiring final signature [*Ex. R3, p. 31, para. 3*] or a copy of the GCoS [*PO2, p. 48, para. 7*]. However, as elaborated [*supra para. 35*] the binding practice under Art. 9(1) CISG refers to the dealings between the parties to the contract – here SC and RESPONDENT, and not between individual employees of the company [*Schlechtriem/Schwenzer, p. 182, para. 1*].

46. In any case, all previous contracts were concluded while Mr. Chandra and Ms. Bupati occupied different positions and Ms. Bupati even worked for SC – an entirely different entity [*NA, p. 5, para. 4*]. Further, at the Summit Ms. Bupati stated that she had to ask RESPONDENT's management for approval before binding it in order to ensure that the Contract was in line with RESPONDENT's policy which is different from SC's [*NA, p. 5, para. 5; PO2, p. 49, para. 12; supra para. 37*]. Evidently, it was made clear to CLAIMANT that Ms. Bupati's representative powers are not sufficient and that it would be necessary for RESPONDENT to sanction the conclusion of the Contract. Thus, Ms. Bupati's knowledge is irrelevant and cannot be automatically imputed to RESPONDENT.

47. Therefore, the default provisions of CISG need to be met so that the GCoS are incorporated in the Contract, which is not the case here.

2. Alternatively, the practice is not applicable due to the changes in the GCoS

48. Even if there was any previous practice regarding the incorporation of the GCoS that could bind RESPONDENT, that practice is not applicable to the case at hand due to the changes in the GCoS. An established practice could be ended by a change to the original relationship [*Schlechtriem/Schwenzer, p. 188, para. 9; supra para. 35*]. Here, CLAIMANT has introduced two essential changes in the GCoS. First, in 2016 CLAIMANT modified the arbitration clause [*PO2, p. 48, para. 7*]. Secondly, in 2020 CLAIMANT changed the law applicable to the sale from Danubian to Mediterranean law [*Ex. C1, p. 10, para. 13*]. CLAIMANT itself insisted on pointing out that the present content of the GCoS is "*in deviation from the previous practice*" [*Ex. C4, p. 17*] and even "*contrary*" to it [*Ex. C1, p. 10, para. 13*].

49. Both of these changes are material and therefore should be deemed capable of ending the practice. The insertion of a dispute resolution clause such as the arbitration clause in a declaration of acceptance constitutes a counter-offer [*Schlechtriem/Schwenzer, pp. 79-80, para. 11; Printed works for CD covers case, p. 4*; *supra paras. 18-19*]. Evidently, as such a change is sufficiently material to prevent the conclusion of a contract through offer and acceptance, it should equally prevent the unilateral imposition of such a clause through any alleged established practice. What is more, the arbitration clause in all previous transactions between CLAIMANT and SC was placed in the body of the contract templates, while now there is only a reference to arbitration in Clause 7 of the Contract [*PO2, p. 52, para. 25; RNA, p. 27, para. 12*]. Thus, SC had the opportunity to take notice of the arbitration clause with a simple glance at the contract. Conversely, in the present case RESPONDENT did not have the opportunity to see the text of the clause either in the GCoS, or in the Contract itself.

50. Further, the alteration of the law applicable to the sale is also material and could end the practice [*Schlechtriem/Schwenzer, p. 186, para. 9*]. The change from Danubian to Mediterranean law led to the application of CISG [*PO1, pp. 46-47, para. 3*] with all its comprehensive provisions, changing fundamentally the obligations of the Parties and the content of the Contract. If there was no major change, CLAIMANT would not have consistently insisted on applying the law of Mediterraneo in the first place [*Ex. C1, p. 10, para. 13; Ex. C4, p. 17; infra paras. 79-80*]. The fact that RESPONDENT refers to this alteration as "*less a problem*" does not mean that it views it as immaterial, but only that the arbitration clause is an even bigger concern in comparison [*Ex. C2, p. 12; supra para. 20*].

51. In conclusion, even if there was a previous practice imputable to RESPONDENT, it is inapplicable to the case at hand due to the material changes in the GCoS made by CLAIMANT.

B. The reference to the GCoS in the Contract is not sufficient to incorporate them pursuant to Art. 14 *et seq.* CISG

52. The Parties did not agree on the incorporation of the GCoS at the time of formation of the Contract **(1)** and RESPONDENT was not given a reasonable opportunity to take notice of them **(2)**.

1. The Parties have not agreed on the inclusion of the GCoS

53. Whether the Parties have agreed to the inclusion of the GCoS needs to be established under Art. 14 *et seq.* in conjunction with Art. 8 CISG [*Schlechtriem/Schwenzer, p. 175, para. 55; Dobrynski, p. 1; Eiselen, p. 5; supra para. 43*]. Standard terms are applicable when they are clearly made part of the offer, provided that the counterparty has a reasonable opportunity to take notice of them and it accepts the offer [*Schlechtriem/Schwenzer, p. 281, para. 41; CISG AC-13, p. 7, para. 1.6.; Fireworks case*].

54. During the Summit the Parties negotiated the commercial terms of the Contract, i.e., "*description of goods, quantity, delivery terms, price*" with no detailed discussion about any GCoS [*PO2, p. 49, para. 13*]. It is true that CLAIMANT mentioned the change in governing law [*PO2, p. 49, para. 13*]. However, those discussions do not constitute an offer in which the GCoS could be included. CLAIMANT itself stated that Ms. Bupati's order included the exact same terms which it had proposed [*Ex. C1, p. 19, para. 12*] but that order notably did not even mention CLAIMANT's GCoS [*Ex. C2, p. 12*]. Ms. Bupati only mentioned the change of the applicable law and arbitration clause which were brought to her attention separately and not as part of the GCoS [*Ex. C2, p. 12*]. It is true that Ms. Bupati referred to "*the documents for the sale*" but she specified that what she meant was only CLAIMANT's FOSFA/PORAM 81 Model Contract. Therefore, the GCoS were not made part of Ms. Bupati's offer as required for their inclusion under Art. 14 *et seq.* CISG.

2. Even if the Parties agreed on the GCoS, they were not made available by CLAIMANT

55. Even if there was a clear reference to the application of the GCoS before the conclusion of the Contract, they were still not incorporated because they were not made available. Under CISG the assessment whether a party had a sufficient opportunity to take notice of the counter-party's standard terms shall be made on a case-by-case basis by observing the general principle of reasonable availability [*CISG-AC 13, p. 12, para. 3.1.*]. What is important is that the party has the opportunity to see the actual text of the standard terms [*Schlechtriem/Schwenzer, p. 281, para. 41; Machinery case, p. 4, para. 15*] – whether they would be physically present on a paper copy at the time of concluding a contract [*CISG-AC 13,*

p. 13, para. 3.3.] and the party could read them [*Schlechtriem/Schwenzer, p. 284, para. 48; Schwenzer/Hachem/Kee, p. 169, para. 12.16*], or downloadable and storable for future reference when concluding the contract online [*CISG-AC 13, p. 13, para. 3.4.; Schlechtriem/Schwenzer, p. 284, para. 49*].

56. Contrary to CLAIMANT's assertions [*Cl. Memo., p. 20, paras. 92-97*], the GCoS were not incorporated via mere reference without providing RESPONDENT with a copy of them. CLAIMANT relies only on the *Dutch seller v. Italian buyer case* where the standard terms were incorporated via clear reference from one party, to which the other party did not object [*Cl. Memo., p. 21, para. 94*]. However, the factual circumstances in that case are different to the present one. The party in that case was aware of the content of the general conditions when it entered into the disputed contracts [*Dutch seller v. Italian buyer case, para. 35*], while presently Ms. Bupati was aware only of an outdated version of the GCoS [*infra para. 58*]. Further, the party in the *Dutch seller v. Italian buyer case* sent its order with a reference to its standard terms on the front page and a printed copy of them on the back, which is considered sufficient [*Lautenschlager, p. 276*]. Conversely, not presenting the text of the GCoS in any way, but merely relying on a reference in an e-mail [*Ex. C4, p. 17*] or in the Contract [*Ex. C3, p. 13*], as in the present case, could not lead to their incorporation [*Sambugaro, p. 71*]. A mere reference would be sufficient only if there was an established practice, although some courts tend to deny even this possibility [*Kruisinga in: DiMatteo, p. 493*]. However, as elaborated [*supra paras. 43-51*] no practice between the Parties exists and this left RESPONDENT unaware what general conditions would apply.

57. In any case, as established in the leading *Machinery case*, RESPONDENT has no duty to inquire about the content of the GCoS as this would contradict the principle of good faith under Art. 7(1) CISG [*Machinery case, p. 5, para. 16*]. The general statement of the German Supreme Court is entirely relevant in the case at hand. It would be contrary to any business logic to require RESPONDENT to constantly inquire about every change in the GCoS in order to stay updated. The onus should be on CLAIMANT to notify its counterparties when modifying its GCoS and to send any amended versions of the GCoS as the party who possesses them in the spirit of the general obligation of cooperation and information between the parties, as highlighted in the *Machinery case* [*Machinery case, p. 5, para. 16*].

58. In order to support its position CLAIMANT relies on the fact that Ms. Bupati had once received a copy of a prior version of the GCoS [*Cl. Memo., p. 20, para. 89*]. However, she received this copy 9 years before negotiating the current Contract and while working for a different company [*RNA, p. 27, para. 11*]. What is more, those GCoS were amended twice [*supra paras. 48-50*] and it is undisputed that she did not have access to the current version of the GCoS when negotiating and concluding the Contract

[*PO2, p. 50, para. 18*]. The version RESPONDENT has does not include those amendments and it is practically impossible to take notice of something that one has not seen. Additionally, CLAIMANT's GCoS are not easily accessible on its website [*PO2, p. 50, para. 18*].

59. Indeed, RESPONDENT was told about the changes in broad terms [*supra para. 54*]. However, the way RESPONDENT was made aware of the changes does not constitute a reasonable opportunity to take notice of the GCoS. CLAIMANT notified RESPONDENT of the change of the arbitration clause via phone in 2016 [*RNA, p. 27, para. 12; PO2, p. 48, para. 7*]. The communication via phone leaves no retrievable mark and RESPONDENT does not have the opportunity to look up and verify the actual text of the change. Additionally, CLAIMANT's method created a risk that RESPONDENT would not hear, understand, or remember the standard terms correctly, as it happened [*RNA, p. 27, para. 12*].

60. The situation with the change of the applicable law is similar. Mr. Chandra told Ms. Bupati at the Summit that CLAIMANT would from now on submit its contracts to Mediterranean law. However, the GCoS previously seen by Ms. Bupati still reflected that Danubian law would govern the Contract [*Ex. C1, p. 10, para. 13*]. Oral communication without presenting the actual text of the GCoS, especially where changes are introduced, is misleading and creates ambiguities and, thus, should not be considered a reasonable way to take notice of standard terms [*Kruisinga in: Schwenzer/Spagnolo, p. 77*]. This is evidenced by the fact that the Parties disagree whether the change applies to the whole transaction, including the arbitration agreement, or only to the underlying contract [*infra paras. 70-71*]. What is more, the oral communications place a burden on Ms. Bupati to provide all relevant persons of RESPONDENT's management with the exact details of the transaction. This is evidently not a reasonable way to conduct high-value long-term transactions between large companies.

61. The complete inadequacy of CLAIMANT's notification of its GCoS is perfectly exemplified by the changes of the arbitration clause. Originally, in its relationship with SC CLAIMANT's arbitration clause referred to arbitration in Malaysia in accordance with Arbitration Act of Malaysia 1952 and in accordance with PORAM Rules of Arbitration and Appeal [*Ex. R4, p. 32*]. Then, in 2016, CLAIMANT changed the arbitration clause to KLRCA (AIAC) model clause [*PO2, p. 48, para. 7*]. Mr. Chandra told Ms. Bupati via phone that the new arbitration clause was the model clause of the KLRCA (AIAC) providing for the seat of arbitration in Danubia and the application of Danubian law to the contract [*PO2, p. 48, para. 7*]. However, this was misleading as the new clause in fact also specified the language of the arbitration and provided an obligation to pursue mediation [*Ex. R4, p. 32*]. These details were not part of the default model clause at the time [*KLRCA Rules 2013*] and even in the updated versions

of the Rules they were still part only of the AIAC recommended additions [*AIAC Rules 2018, p. 2; AIAC Rules 2021, pp. 5-6*]. Even if RESPONDENT made its best efforts to recreate the arbitration clause between the outdated version of the GCoS and Mr. Chandra's phone calls, it still could not have deduced the final text of the arbitration clause as it appears in CLAIMANT's current GCoS. In fact, the first time RESPONDENT saw the actual text of the clause is only when the present dispute arose. Even RESPONDENT's reaction to the surprising mediation provision is made under reservation that it could not be considered an acceptance of CLAIMANT's position as to the conclusion of an agreement on Clause 9 of CLAIMANT's GCoS [*PO2, p. 52, para. 27*]. This clearly shows that the GCoS were never properly made available to RESPONDENT.

62. In any case, the dispute resolution clause contained in the GCoS cannot be incorporated since it is surprising for RESPONDENT [*CISG-AC 13, p. 17, para. 7.2.*]. In this regard the CISG Advisory Council refers to PICC to establish whether a term is surprising [*CISG-AC 13, p. 18, para. 7.2.*]. Art. 2.1.20 PICC provides that a party is not bound by standard terms which are of such a character that the other party could not reasonably have expected them. This should be established by analysing the terms' content, language, and presentation [*Art. 2.1.20, para. 2 PICC*].

63. First, the content would be surprising if a reasonable person of the same kind as RESPONDENT would not have expected it in the type of standard terms involved [*PICC Commentary, p. 69; Brödermann, p. 65*]. This determination must take into account whether the content of the standard terms is uncommon for the particular trade sector or inconsistent with the individual relationship between the parties [*PICC Commentary, p. 70*]. The change to a non-industry related arbitration institution is not common for the palm oil industry, where arbitration is typically conducted under specialised commodity arbitration institutions, as was the case before the change in the GCoS in 2016 [*PO2, p. 49, para. 11*]. Additionally, the inclusion of a mediation clause is not typical for the palm oil sector as evidenced in the FOSFA/PORAM 81 model arbitration clause [*FOSFA/PORAM 81 Template*]. Thus, the change in the GCoS is uncommon both for the palm oil industry and for the previous dealings between Mr. Chandra and Ms. Bupati, if those dealings are to be considered at all.

64. The presentation of the terms was also not sufficiently clear. As elaborated [*supra paras. 59-60*], oral communication without any retrievable trace could lead to misunderstandings, as it happened in the present case. Despite what the Parties had negotiated during the Summit, RESPONDENT was left with the impression that the GCoS would remain the same [*RNA, p. 26, para. 10*]. Thus, the changes in the GCoS came as a surprise to it. Further, the way CLAIMANT presented the change of the arbitration

clause as merely stating it was the AIAC model clause, without providing any details [*supra para. 61*], left RESPONDENT in the position of not knowing what exactly to expect.

65. In conclusion, the GCoS were not incorporated in the Contract since CLAIMANT did not make them available to RESPONDENT.

CONCLUSION ON THE SECOND ISSUE

66. CLAIMANT and RESPONDENT have not established any previous practice for the inclusion of CLAIMANT's GCoS without presenting a copy. The practice between CLAIMANT and SC is irrelevant to RESPONDENT as it was materially different and between different companies. Therefore, CLAIMANT had an obligation to make the text of the GCoS available to RESPONDENT. CLAIMANT failed to do so as the mere reference to the GCoS provided by CLAIMANT was insufficient.

ARGUMENTS ON PROCEDURE

III. THE TRIBUNAL LACKS JURISDICTION AS THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAW OF MEDITERRANEO

67. Contrary to CLAIMANT's arguments, the arbitration agreement is governed by the law of Mediterraneo as the law applicable to the underlying Contract **(A)**. Additionally, the Parties did not implicitly choose the law of Danubia to govern the arbitration agreement **(B)**. In any case, Danubian law is not the law most closely connected to the arbitration agreement **(C)**.

A. The arbitration agreement is governed by the law of the underlying Contract

68. Pursuant to Rule 20.1 AIAC Rules, the TRIBUNAL has the power to determine its own jurisdiction, which reflects the universally accepted competence-competence principle [*Born, p. 1141; Binder, para. 4-006; Gaillard/Savage, para. 416; Samuel, p. 178; ICC Award 6515/1994; ICC Award 1526/1974*]. When ruling on its jurisdiction, the TRIBUNAL shall examine the law governing the arbitration agreement. RESPONDENT agrees with CLAIMANT's assertion that this process involves a widely recognised three-step test [*Cl. Memo., p. 23, para. 105*; *Kaplan/Moser, pp. 134-135*; *Choi, p. 1; de-Carvalho, p. 3; Firstlink case, para. 11; Sulamérica case, para. 11; BCY v. BCZ, paras. 56-59*].

69. Under this test, if there is no explicit choice to be analysed, the TRIBUNAL shall consider the implicit choice of the Parties. Lastly, in the absence of an implicit choice, the TRIBUNAL shall consider the law

bearing the closest connection to the arbitration agreement. This analysis shall be made by referring to the intentions of the Parties under the *lex arbitri* [*Born, p. 525; Schwarz, para. 125; Lew/Mistelis/Kröll, paras. 6-55; Perloff, p. 329; Kaplan/Moser, pp. 134-135; ICC Award 5294/1988; ICC Award 5029/1986; Hamlyn case; Bangladesh Chem. Indus. Corp. case; Halpern case, para. 55; Egon Oldendorff v. Libera Corporation; ILI Resolution*]. This is also affirmed by the applicable procedural rules since under Rule 13.5(a) AIAC Rules the TRIBUNAL may determine the law applicable to the arbitration clause in the absence of an agreement between the Parties.

70. As noted by CLAIMANT itself, the Parties have not made an express choice of law governing the arbitration agreement, as opposed to the choice of law for the underlying Contract [*Cl. Memo., p. 24, para. 116; Ex. C4, p. 17*]. Under the applicable *lex arbitri* – DAL [*PO1, p. 47, para. 3*], in such circumstances, the arbitration agreement is governed by their implied choice of law [*Arts. 34(2)(a)(i), 36(1)(a)(i) DAL*; *Born, p. 3466; Tarawali/Gerardy, p. 6*].

71. However, CLAIMANT erroneously claims that in the absence of a separate choice of law for the arbitration agreement, the law of the underlying contract does not extend to it [*Cl. Memo., p. 24, para. 108*]. This assertion runs contrary to the general assumption that the law of the substantive contract applies [*Blackaby et al., p. 162; Lew/Mistelis/Kröll, paras. 6-58; Nazzini, pp. 688-689; Derains, p. 16; Dicey et al., para. 16.017; Sonatrach v. Ferrell, para. 32; BMO v. BMP, paras. 35-43; Klöckner Pentaplast v. Advance Technology, paras. 7-8, 27; Tonicstar v. American Home Assurance, para. 11; M/S Indtel Tech v. W.S. Atkins Rail, para. 24; Inheritance case; ICC Award 2626/1977; ICC Award 6840/1991, para. 469*].

72. In fact, it would be "*exceptional*" for the law governing the agreement to arbitrate to be different from the governing or substantive law [*Channel Tunnel Group Ltd. v. Balfour Beatty Ltd.*]. This is because, as recently confirmed by the UK Supreme Court, when entering into a contract, businesspersons likely expect that the law they choose to govern their contract will also apply to the arbitration clause contained within [*Briggs, p. 1007; Born II, p. 827; Sonatrach v. Ferrell, para. 32; Enka v. Chubb, para. 107*]. This scenario is perfectly illustrated by the case at hand where the Parties made numerous references [*Ex. C1, p. 10, para. 13; Ex. C2, p. 12; Ex. C4, p. 17; Ex. C5, p. 18, para. 6*] to their relationship being governed by the law of Mediterraneo. Accordingly, tribunals have found that the governing law clause is "*at the least a strong pointer*" to the intent of choosing a law applicable to the arbitration agreement [*Arsanovia case, paras. 21-24*]. Hence, the law governing the arbitration agreement "*would ordinarily be the same as the law governing the contract itself*" [*M/S Indtel Tech v. W.S. Atkins Rail, para. 24*].

73. CLAIMANT's main argument in support of the application of Danubian law relies on invoking the separability doctrine to argue that the choice of Mediterranean law for the Contract does not extend to the arbitration agreement [*Cl. Memo., p. 24, paras. 108-118*]. However, CLAIMANT's contention is both legally and logically unsupported.

74. First, as CLAIMANT itself points out, the separability doctrine is related to rules of validity and subsequent enforcement of arbitral awards under NYC [*Cl. Memo., p. 24, para. 111*] and not to determining the governing law. Particularly, the separability principle aims to preserve the validity of the arbitration agreement where the underlying contract is threatened to be invalidated [*Born, p. 542; Pearson, p. 125; Berger, p. 312; Premium Nafta Products case, para. 17; Sulamérica case, para. 11; Enka v. Chubb, paras. 95-109; Kabab-Ji I, paras. 49-53*]. However, this principle is applicable only to situations where the parties have consented to arbitration, but the validity of the agreement is jeopardised by the potential applicable law [*Enka v. Chubb, paras. 95-109; Kabab-Ji I, paras. 49-53*]. Thus, the separability doctrine does not "*insulate*" the arbitration clause [*Enka v. Chubb, paras. 63-66, 94*] and by no means requires the application of a different law than the one governing the substantive contract. As stated by the UK Supreme Court as recently as October 2021, the very purpose of this principle is to determine the validity of an existing arbitration agreement, and not to address matters of its formation and to "*create an agreement which would not otherwise exist*" [*Kazimi, pp. 1-3; Kabab-Ji I, para. 51*].

75. If the TRIBUNAL relies on the separability principle to avoid applying the law applicable to the underlying contract, it would create uncertainties and complexities due to the lack of clear rules to determine which should be then the law applicable to the arbitration agreement [*Born II, pp. 820-821*]. Any uncertainties and complexities arising out of the application of two sets of laws would only be exacerbated in the case at hand due to the multi-tiered arbitration clause [*NA, p. 6, para. 14*]. While the underlying Contract may be subject to one law and the arbitration clause – to another, it is unclear what law would apply to the mediation clause and if so, how would the dispute resolution clause work altogether. Conversely, it would be much more consistent to apply the same law to all parts of the uniform contract – substantive and procedural [*Ashford, p. 289*].

76. Presently, the TRIBUNAL does not have grounds to apply the separability principle as there is no consent to arbitration to be preserved. RESPONDENT made clear to CLAIMANT from the very beginning of the negotiations that the submission to arbitration is a "*problem*" for it [*Ex. C2, p. 12*]. Instead, RESPONDENT favoured a potential trial before the courts of Equatoriana, as they are known to be "*very receptive to arguments based on the environment*" which was a major concern for RESPONDENT

[*RNA, p. 12, para. 6; supra para. 19*]. Moreover, RESPONDENT had never even seen the allegedly applicable arbitration clause before this dispute arose [*supra paras. 56-57*]. Hence, it could not be reasonably expected that RESPONDENT consented to arbitration lightly and with no further discussions or compromises. As RESPONDENT never clearly agreed to arbitrate, there is no consent to arbitration and thus, no room for the separability principle to safeguard such consent.

77. In any case, the separability doctrine does not establish a presumption that the law governing the contract and the law of the arbitration agreement shall be necessarily different. Rather, it would be "*perverse*" to deduce from the principle of separability that the law governing the arbitration agreement shall be identified without reference to the underlying contract [*Briggs, p. 1006*]. Hence, even if the underlying contract and the arbitration agreement are separate, they can still be subject to the same governing law [*Blackaby et al., p. 167; Born, pp. 464, 476; Betancourt, pp. 95-96; Glick/Venkatesan, p. 137; BCY v. BCZ, paras. 56-59*].

78. Further, contrary to CLAIMANT's arguments [*Cl. Memo., pp. 24-26, paras. 108-118*], the separability doctrine does not isolate the arbitration agreement from the substantive contract [*Sulamérica case, para. 26; Blackaby et al, p. 159; Derains, p. 16*]. Rather, CLAIMANT's assertions fail to acknowledge the intimate connection between the arbitration agreement and the underlying contract [*Born, p. 518*; *Glick/Venkatesan, p. 137*] as the arbitration clause remains an integral part of the underlying contract [*Gaillard/Savage, para. 424; BGH case; Arsanovia case, para. 22; infra para. 105*]. In its recent jurisprudence the UK Supreme Court has gone so far as to say that it is "*impermissible*" to treat the arbitration agreement as entirely separable [*Enka v. Chubb, para. 93*]. In fact, the very inclusion of the arbitration clause in an underlying contract indicates the Parties' intention to apply the law governing the contract to it [*Lew/Mistelis/Kröll, p. 120*]. Presently, even CLAIMANT itself treated the arbitration agreement as part of its contractual offer by referring to arbitration in Clause 7 of its contract template and further, by demanding the incorporation of its GCoS, including the arbitration clause, together with other substantive terms.

79. CLAIMANT also makes recourse to the drafting language of the choice of law clause in the Contract when assessing the law governing the arbitration agreement [*Cl. Memo., pp. 26-27, paras. 122-124*]. While CLAIMANT argues that the choice of Mediterranean law was restricted only to the underlying contract, it omits to mention that the only choice of law the Parties ever discussed was Mediterranean law [*NA, p. 5, para. 4; Ex. C4, p. 17*]. Even the updated text of Clause 9 of CLAIMANT's own GCoS provides that "*this contract shall be governed by the law of Mediterraneo*" without any distinction between the arbitration

clause and the underlying contract [*PO2, p. 50, para. 15*]. Notably, the revision of Clause 9 GCoS was done on the specific advice of CLAIMANT's outside counsel, Mr. Langweiler, evidencing CLAIMANT's awareness of the legal consequences of the updated Clause 9 GCoS [*PO2, p. 50, para. 15*].

80. Moreover, CLAIMANT also did not make any distinction between the arbitration clause and the underlying contract in its e-mail informing RESPONDENT that the "*sale*" shall be governed by the law of Mediterraneo, meaning all rights and obligations related to their commercial relations [*Ex. C4, p. 17*]. As that e-mail contained the contract template, which makes multiple references to "*awards of arbitration*" and "*arbitration*" [*Ex. C3, p. 16*], it was reasonable for RESPONDENT to assume that the referenced arbitration agreement is not distinguished from the "*sale*" subjected to Mediterranean law. This is especially true, as the only reference to the applicable law is contained in the arbitration clause itself [*Ex. R4, p. 32*]. Moreover, even when CLAIMANT notified RESPONDENT of the change in the governing law in Clause 9 of its updated GCoS, it never specified that the change applies only to the substantive contract. Hence, it was logical for RESPONDENT to expect that the governing law clause in Clause 9 GCoS is extended to the arbitration agreement as well.

81. CLAIMANT itself cites the Court of Appeal decision in the recent *Kabab-Ji case* [*Cl. Memo., p. 25, para. 113-114*], where the English court concluded that an express choice of law governing the underlying contract also constituted an express choice of law for the arbitration agreement [*Kabab-Ji II, para. 62*]. This approach was subsequently confirmed by the Supreme Court [*Kabab-Ji I, para. 53*]. The decision of the court was based on the specific construction of the agreement in question, which is different from the case at hand. However, this decision nevertheless shows that the choice of law for the underlying contract is usually extended to the arbitration agreement. This is consistent with the trend of courts and tribunals to assume that the law of the contract extends to the arbitration agreement by virtue of the implicit choice of the parties [*BMO v. BMP, paras. 35-43; Klöckner Pentaplast v. Advance Technology, paras. 7-8; Tonicstar v. American Home Assurance, para. 11*].

82. Consequently, by choosing the law for the Contract, the Parties agreed on Mediterranean law as governing the arbitration agreement as well.

B. The Parties did not implicitly choose the law of the seat to govern the arbitration agreement

83. Contrary to CLAIMANT's arguments [*Cl. Memo., p. 27, para. 125*], the TRIBUNAL shall not assume that the law of the seat of arbitration is the one governing the arbitration agreement [*Kaplan/Moser, pp. 134-*

135; Blackaby et al., p. 167; ILA Report, p. 2]. Even the AIAC model clause evidences this, as it recommends the addition of both the arbitral seat and the law governing the arbitration clause [*AIAC Rules 2021, pp. 5-6*]. Logically, if the indication of the seat was sufficient to establish a presumption as to the applicable law to the arbitration agreement, there would be no need to insert a separate provision as to that conclusion.

84. CLAIMANT also relies on the case law of the Singaporean courts in the 2014 *Firstlink case* [*Cl. Memo., pp. 22, 27, paras. 100, 125*] which states that the choice of the seat supersedes the law of the underlying contract. However, the Singapore High Court has since departed from that reasoning in its more recent jurisprudence. As exemplified by the 2016 *BCY v. BCZ*, it is to be expected that the parties would specifically limit the application of the law governing the underlying contract if they did not intend for it to apply to the arbitration agreement [*BCY v. BCZ, para. 59*]. Absent an express agreement to the contrary, the governing law of the underlying contract remains a strong indicator of the law governing the arbitration agreement [*BCY v. BCZ, para. 57*]. This presumption is not overturned by the fact that the law of the seat was different from that of the underlying contract [*BCY v. BCZ, para. 56; Arsanovia case, para. 21; Habas case, para. 101*]. This approach has since been consistently followed by Singaporean courts in other cases [*Ramachandran, paras. 11-12; Dyna-Jet Pte Ltd v. Wilson Taylor Asia Pacific, paras. 12-23*; *BMO v. BMP, paras. 35-43*]. Thus, the Singaporean case law referenced by CLAIMANT does not support its contentions and CLAIMANT provides no argument for applying the outdated approach.

85. Moreover, unlike the approach in the *Firstlink case*, other prominent common law jurisdictions, such as the UK, have already established a presumption that the law of the contract governs the arbitration agreement, as provided in the well-known *Sulamérica case*. Similarly to the *Sulamérica case*, the Parties have explicitly chosen a law for the underlying contract different from the law of the seat [*Ex. C4, p. 17; Sulamérica case, para. 30*]. Hence, following the *Sulamérica case* it shall be concluded that the Parties implicitly chose Mediterranean law to govern the arbitration agreement. More importantly, this approach was confirmed by the UK Supreme Court as recently as October 2021 in the *Kabab-Ji case* [*Kabab-Ji I, para. 70*]. Moreover, CLAIMANT provides no arguments why the TRIBUNAL should favour the approach in *Firstlink case* over the more recent practice of the Singapore High Court or the practice in the UK.

86. Even if the approach in the *Firstlink case* is upheld, it would still not lead to the application of Danubian law to the arbitration agreement. The court's reasoning in the *Firstlink case* was primarily based on the

fact that an arbitration agreement has to be valid under the law of the seat for the resulting award to be enforceable, as noted by CLAIMANT itself [*Cl. Memo., p. 27, para. 126*]. This approach is also known as validation principle [*Enka v. Chubb, paras. 95-97; Kabab-Ji I, para. 51*]. It is derived from the parties' commercial interest to have their disputes resolved by arbitration as one single efficient dispute resolution mechanism [*Born, p. 542; Pearson, p. 125; Berger, p. 312; Sulamérica case, para. 11; Kabab-Ji I, para. 51*]. However, the validation principle does not apply to questions of "*validity in the expanded sense*" as used in Art. V(1)(a) NYC [*Kabab-Ji I, para. 51*]. The very purpose of the validation principle is to determine validity of an existing arbitration agreement, while in the present case RESPONDENT never consented to arbitration [*supra para. 77*].

87. Further, CLAIMANT seeks to bind RESPONDENT against its will to arbitrate by invoking the application of Danubian law to the arbitration agreement. By doing so CLAIMANT is acting against the principles of good faith, equity, and fairness recognised, among others, by NYC [*Born, pp. 1589-1590; Hanotiau, p. 47, para. 134*]. These principles prevent a party from acting in such a way as to gain an undue advantage [*Born, p. 1585*]. Here, CLAIMANT seeks to unilaterally drag RESPONDENT into proceedings which would be contrary to the most fundamental principles of arbitration – the principle of party autonomy and the consent to arbitration [*Blackaby et al., p. 30; Park, pp. 1, 8*].

88. Further, CLAIMANT erroneously asserts that the regime under Art. 36(1)(a)(iv) UNCITRAL Model Law and Art. V(1)(a) NYC indicate that the law of the seat should apply to an arbitration agreement absent any express choice [*Cl. Memo., pp. 27-28, para. 126*]. In fact, these rules merely specify the framework for setting aside an arbitral award. For this reason, the law of the seat could be applied to arbitration agreement only if the parties have not chosen a law applicable to the contract [*Heiskanen, p. 381*]. Hence, Danubian law does not govern the arbitration agreement as the Parties have chosen Mediterranean law to apply to the contract [*Ex. C4, p. 17*].

89. Finally, CLAIMANT relies on the suggestion that the Parties never discussed the application of Mediterranean law to the arbitration agreement [*Cl. Memo., p. 27, para. 27*]. However, CLAIMANT fails to acknowledge that the Parties never even mentioned the application of Danubian law during the negotiations, as well. While Danubia was used by CLAIMANT and SC as the seat of arbitration in their previous relations, this is not an indication that the seat has any bearing on the law applicable to the arbitration agreement between CLAIMANT and RESPONDENT. This is especially true since one of the contentious issues between the Parties was RESPONDENT's deterrence to opt for arbitration [*PO2, p. 48, para. 7, supra para. 77*]. Even if the relationship between CLAIMANT and SC is considered, the law

applicable to the underlying Contract would still extend to the arbitration agreement. While CLAIMANT and SC had stipulated a seat in the arbitration clauses, they always also provided for a specific choice of law [*PO2, p. 48, para. 7*]. Accordingly, the seat was not sufficient to establish unequivocally that Danubian law applied to the prior arbitration agreements. Rather, CLAIMANT and SC provided the governing law of the arbitration agreements by stipulating the law for the underlying contracts, even when the law governing the contract was the same as the seat of arbitration. Thus, the Parties' choice of Mediterranean law applies to the arbitration agreement as well [*PO2, p. 50, para. 15*]. Moreover, the Parties specifically did not exclude the application of CISG to the Contract – hence, they envisaged the application of Mediterranean law, as a CISG contracting state, to the arbitration agreement [*infra para. 98*]. Thus, it is unreasonable to presume that the Parties would choose Danibuan law, considering that Danubia is not a contracting state to CISG.

90. Consequently, the choice of Danubia as the seat of arbitration did not constitute a choice of law applicable to the arbitration agreement.

C. Danubian law is not the law most closely connected to the arbitration agreement

91. As noted by CLAIMANT [*Cl. Memo., p. 28, para. 128*], absent any choice of law, the arbitration agreement is governed by the law most closely connected to it [*Blackaby et al., p. 162; Torremans/Fawcett et al., pp. 668-669; Tung/Ye/Tan, p. 143; Singarajah, p. 3; Rau, p. 63; C v. D, para. 26; Sulamérica case, para. 32*].

92. However, CLAIMANT erroneously suggests that the law of Danubia as the seat of arbitration is the law most closely connected to the arbitration agreement [*Cl. Memo., p. 28, para. 131*]. While in some cases the seat of arbitration indicates a connection to the law governing the arbitration agreement [*Gaillard/Savage, p. 223; C v. D, para. 26*], the seat of arbitration might be chosen for reasons unrelated to the law applicable to the arbitration agreement [*Gaillard/Savage, p. 223; Stockholm Arbitration Report, p. 61*]. For instance, the seat is of particular importance not because it indicates the applicable law but because the *lex arbitri* governs both the arbitral proceedings and the setting aside of the final award [*Henderson, pp. 887-888; Ashford, p. 289*]. However, CLAIMANT fails to demonstrate any risks connected to either when applying Mediterranean law to the arbitration agreement. Moreover, by agreeing on a seat of arbitration, parties often merely compromise on a neutral venue [*Blackaby et al., p. 165; Lew/Mistelis/Kröll, paras. 4-48; Ferrario, p. 135; Abolafia, p. 77; ICC Award 3540/1980*]. This is evident in the present case considering that the Parties come from different countries [*PO1, p. 46, paras. 1-2*].

Thus, the reasons for choosing a seat in the present case have nothing in common with the law applicable to the arbitration agreement.

93. As noted even by CLAIMANT [*Cl. Memo., p. 28, para. 130*], an alternative view is that the law of the underlying contract is the one most closely connected to the arbitration agreement [*Russel, paras. 2-121; Scherer/Jensen, p. 12*]. This is especially true when there are multiple factors leading to the closest and most real connection such as the place where the contract is negotiated, concluded, and performed, or the residence of the parties [*Cheshire, para. 190; Bermann, para. 156; Lilydale case, para. 10*]. Presently, not only did the Parties choose Mediterranean law to apply to the Contract, but CLAIMANT even amended the arbitration clause in Clause 9 GCoS to reflect this [*Ex. C4, p. 17; PO2, p. 50, para. 15*]. Moreover, the idea to enter into the Contract and the arbitration agreement was incepted in Mediterraneo during the Palm Oil Summit in Capital City [*NA, p. 5, para. 4-5*]. This is not surprising as all of CLAMANT's palm oil production is entirely based in Mediterraneo [*PO2, p. 48, para. 1*]. Importantly, Mediterraneo will also be the place of performance under the Contract, considering that CLAMANT as the seller must provide the goods under the commercial transaction [*Lando, p. 143*]. Finally, the arbitration clause itself is contained in the GCoS tailored by the party incorporated in Mediterraneo – CLAIMANT [*NA, p. 4, para. 1*].

94. Consequently, when taken in conjunction, these facts indicate that it is Mediterranean law that is most closely connected to the arbitration agreement as opposed to Danubian law.

CONCLUSION ON THE THIRD ISSUE

95. The Parties implicitly chose Mediterranean law to govern the arbitration agreement. Absent any explicit choice, the arbitration agreement is governed by the law of the Contract. The choice of the seat of arbitration does not indicate the law governing the arbitration agreement. In addition, Danubian law is not the law most closely connected to the arbitration agreement.

IV. IF THE ARBITRATION AGREEMENT IS GOVERNED BY MEDITERRANEAN LAW, CISG SHALL APPLY

96. CISG applies to arbitration agreements in general **(A)** and in any case, it applies to the incorporation of the GCoS containing the arbitration agreement **(B)**. Further, the application of CISG to the arbitration agreement does not jeopardise the validity and the enforcement of the final award **(C)**.

A. CISG regulates arbitration agreements

97. If the TRIBUNAL finds that the law of Mediterraneo governs the Contract, including the arbitration agreement [*supra paras. 67-95*], CISG would be applicable to the arbitration agreement. Contrary to CLAIMANT's argument [*Cl. Memo., p. 32, para. 148*], the fact that Arts. 1-3 CISG state that the Convention applies to sales contracts should not be interpreted to mean that arbitration agreements are excluded from its scope. This traditional dichotomy is nowadays considered outdated as the arbitration agreement is a contractual clause like any other and therefore should fall within the scope of CISG similarly to the remaining contractual terms [*Schwenzer/Tebel, pp. 747-748; Schlechtriem/Schwenzer, p. 77, para. 5; Walker, pp. 163-165; Fillers, p. 675*].

98. The fact that arbitration agreements shall not be treated differently from the other provisions of an international sales contract is evident from the various references in CISG to dispute resolution clauses [*Schlechtriem/Schwenzer, p. 184, para. 4; Walker, p. 163; Schlechtriem/Schwenzer II, pp. 232-234, paras. 17-20; Schwenzer/Tebel, pp. 745-746; Schluchter, pp. 91, 93; Altenkirch/Hagmann*]. Accordingly, two provisions of CISG, Art. 19(3) and Art. 81(1), refer explicitly to settlement of disputes and their inclusion in the Convention suggests that it applies to any kind of dispute resolution agreements [*Walker, p. 163; Koch in: Andersen/Schroeter, pp. 270-271; Schwenzer/Tebel, p. 746; Viscasillas/Muñoz, pp. 73-74; Piltz, p. 106*]. According to the principle that the same term must have the same meaning under the same legal instrument, the fact that Arts. 19 and 81 CISG subsume dispute settlement terms under the notion of a sales contract, shows that the term "*contract of sale*" used throughout CISG should encompass dispute settlement clauses [*Fillers, p. 689*].

99. In fact, many courts have applied CISG to arbitration clauses [*Sociedad v. La Palentina*]. For example, there is an abundance of case law applying Art. 29 CISG to determine the inclusion of forum or arbitration clauses after the conclusion of a contract [*BTC-USA Corporation v. Novacare et al.; Solae, LLC v. Hershey Canada, Inc; Chateau des Charmes Wines case; Euroflash Impression S.a.s. v. Arconvert S.p.A.*]. Moreover, some courts have even concluded that under Art. 9 CISG an established practice of including a written arbitration clause in 5 written sales contracts means that subsequent oral contracts were also accompanied by an arbitration agreement [*Schlechtriem/Schwenzer, p. 184, para. 3; Fillers, p. 672; Wafer case; Case 16 U 47/05*]. Many courts have also applied Art. 8 CISG to interpret arbitration clauses [*Schlechtriem/Schwenzer, p. 148, para. 5; Schlechtriem/Schwenzer II, pp. 233-234, para. 19; Schwenzer/Tebel in: FS Magnus, pp. 319, 327; Machine case, para. 22*]. This approach is logical, given that CISG is a flexible [*Art. 6 CISG*], widely accepted instrument that was tailored to enhance international standards of

interpretation [*Gruber, p. 18; Alam, p. 52*]. Applying CISG to arbitration clauses would even be beneficial for the development of CISG itself as it would foster its uniform application, which is one of its core principles [*Schlechtriem/Schwenzer II, pp. 122, 124-128, paras. 7, 10-15*], and would promote factual diversity of cases under the Convention [*Schmidt-Ahrendts, p. 222*].

100. Contrary to CLAIMANT's submission, the application of CISG to arbitration agreements will not have "*undesirable effects of contravening national rules on jurisdiction*" [*Cl. Memo., p. 32, para. 150*]. At the time the Convention was drafted, arbitration had already been a common part of international sales contracts [*Viscasillas/Muñoz, p. 73*]. In fact, Mexico, Panama and Peru proposed a dispute settlement provision to be included in the Convention [*UN Official Records, p. 174*]. Although the proposed article was rejected merely because it fell "*outside the competence of the Conference*" [*UN Official Records, p. 228*], this does not change the fact that CISG is suitable and was intended to apply to arbitration agreements [*Schwenzer/Tebel, pp. 745-746*]. While the drafters did not expressly discuss the application of CISG to arbitration agreements [*Flecke-Giammarco/Grimm, p. 686*], they also did not find it necessary to exclude the application of the Convention to arbitration clauses [*Schwenzer/Tebel, pp. 745-746*]. Thus, contrary to CLAIMANT's view [*Cl. Memo., p. 32, para. 151*], the drafters did not address any possible conflicts between CISG and other legal instruments or concepts because they did not recognise such.

101. Additionally, the possible interplay between CISG and other international instruments like NYC or domestic law is sufficiently covered by Art. 4 CISG which excludes questions of formal validity of the contract [*Fillers, p. 676; infra paras. 107-108*]. In any case, the drafters included Art. 12 CISG which provides for the derogation of Art. 11 CISG, if such was deemed necessary by the contracting states. Moreover, Art. 11 CISG is entirely suitable for arbitration clauses, as it fosters the trend to modernise the written requirement for arbitration agreements [*Vorobey, p. 153; Tepes, pp. 125-126*]. This is supported by the fact that CISG is more often applied by arbitral tribunals than national courts and a significant percentage of international arbitration disputes are governed by CISG [*P. Butler, p. 323; Schmidt-Ahrendts, p. 211*]. Evidently, parties tend to combine commercial contracts subject to CISG with arbitration clauses with no complications resulting thereof.

102. CLAIMANT may argue that CISG cannot apply to arbitration clauses as Art. 90 CISG prevents the Convention from overriding any conflicting international agreement such as Art. II NYC, to which CLAIMANT refers [*Cl. Memo., p. 32, para. 150*]. However, there is no such issue here. Admittedly, Art. 11 CISG releases the contract from any form requirements whereas Art. II NYC states that a written arbitration agreement must be recognized. Yet, Art. II NYC does not impose a requirement for

arbitration agreements to be in written form and does not address other forms of arbitration agreements, such as oral ones [*Walker, p. 164*]. The purpose of Art. II NYC is not to oppose other forms of arbitration agreements, but rather to set a threshold and prevent states from imposing additional formal requirements [*Viscasillas/Muñoz, pp. 77-78; Lew/Mistelis/Kröll, p. 113, paras. 6-39; Alvarez in: van den Berg, p. 69; Friedland, p. 25*].

103. In line with the above, UNCITRAL has urged all Model Law jurisdictions to read the reference to "*writing*" in Art. II NYC not as a requirement, but as permitting arbitration agreements in all forms [*UNCITRAL Arts. II and VII NYC Recommendation; Schwenzer/Tebel, p. 743; Viscasillas/Muñoz, p. 78*]. This recommendation is consistent with the efforts to modernise the outdated mandate of Art. II NYC and is supported by leading arbitration jurisdictions [*Tepes, pp. 125-126; Vorobey, p. 153*]. The same conclusion is also supported by Art. VII NYC, which allows the application of a more favourable law of the enforcing state that would lead to the validity of the award. Art. 11 CISG constitutes precisely more favourable law, as it allows for oral agreements [*Vorobey, pp. 151-152; Gaillard/Savage, pp. 69-70; Lakhina, p. 17*]. Thus, the application of CISG will not conflict with NYC.

104. Further, the application of CISG to arbitration clauses does not contravene the doctrine of separability, which CLAIMANT tries to invoke under the guise of Art. 81(1) CISG [*Cl. Memo., p. 32, para. 149*]. This doctrine merely provides that the invalidity of the main contract does not in itself lead to the invalidity of the arbitration clause [*Schlechtriem/Schwenzer II, pp. 234-235, para. 20; Viscasillas/Muñoz, p. 75; supra para. 74*]. CISG does not recognise a general doctrine of separability [*Fillers, p. 675; Koch in: Andersen/Schroeter, p. 282*; *Vorobey, p. 139*] and, as CLAIMANT itself rightfully states, the purpose of Art. 81(1) CISG is only to clarify that the avoidance of the sales contract does not necessarily extend to the arbitration agreement [*Cl. Memo., p. 32, para. 149*]. This only shows that CISG treats the underlying contract and the arbitration agreement together, except for the specifically carved out cases.

105. In any case, arbitration and sales agreements are not separate *per se*, but merely "*separable*" meaning that it is within the parties' freedom of contract to subject them to a different law [*Vorobey, p. 141; Lakhina, p. 7; Filanto v. Chilewich, para. 1239*]. However, this is not the case here. The Parties included the arbitration clause in a sales contract governed by CISG [*PO2, p. 52, para. 33*]. The original FOSFA/PORAM 81 template on which CLAIMANT based the Contract [*PO2, p. 49, para. 11*] explicitly excludes the application of CISG [*PO2, p. 49, para. 11; Coetzee, p. 38*]. CLAIMANT itself removed the exclusion, thus subjecting the Contract, including Clause 7 which refers to arbitration, to CISG.

Moreover, the Parties have not excluded the application of CISG under Art. 6 CISG, although they were free to do so [*Schlechtriem/Schwenzer II, pp. 109-115, paras. 15-26*], nor has CLAIMANT ever mentioned to RESPONDENT that it wanted the law of Mediterraneo without CISG to govern the Contract [*PO2, p. 50, para. 16*]. Considering that Mediterraneo is a contracting state to CISG [*PO1, p. 46, para. 3; supra para. 89*], both the substantive and arbitration provisions are subject to the same law.

106. In conclusion, CISG applies to arbitration agreements in general without raising any conflicts with any other domestic or international instruments.

B. In any event, CISG applies to the present case as it does not concern the formal validity of the arbitration agreement

107. Contrary to CLAIMANT's view [*Cl. Memo., p. 31, para. 144*], Art. 4 CISG does not impede the application of the Convention to the arbitration clause. CLAIMANT may argue that the core issue in the present dispute is the formal validity of the arbitration agreement, which is indeed excluded from the scope of CISG [*Born II, pp. 504-505; Brunner/Murmann/Stucki in: Brunner/Gottlieb, pp. 47, 63; Koch in: Andersen/Schroeter, p. 286; Mistelis in: Janssen/Meyer, p. 394; Cookie tin case; Spice case, para. 58; Replacement parts for ships case, para. 56; Jiangsu Beier Decoration v. Angle World*]. However, the contentious point is whether RESPONDENT consented to the arbitration agreement contained in CLAIMANT's GCoS, as CLAIMANT itself bases the TRIBUNAL's jurisdiction solely on the arbitration agreement in the GCoS [*Problem, p. 3; NA, p. 6, para. 14*]. This, however, is a question of formation of the arbitration agreement, not of its validity, and it falls within the scope of CISG [*Schlechtriem/Schwenzer, pp. 79, 229, paras. 11, 16; Piltz, p. 69; Viscasillas/Muñoz, pp. 63, 70; Walker, p. 163*].

108. Under Art. 4 CISG validity refers to the effects of certain pathological issues during the process of contract formation – lack of capacity, immorality or illegality, mistake, error, and fraud [*Viscasillas/Muñoz, p. 72; Honnold, pp. 66-67; Lookofsky in: Herbots/Blanpain, p. 42; Schmidt-Ahrendts, p. 216*]. None of these exhaustively listed issues have ever been raised by either party in the present case, as the Parties dispute whether there was a valid consent given for the conclusion of a contract, including the GCoS [*PO1, p. 46, para. III*] and they agree that CISG applies to the resolution of this dispute [*PO2, p. 52, para. 33*]. This is even more evident, as the discussions surrounding the arbitration clause were determinative for the conclusion of the whole Contract [*supra paras. 19, 49*].

109. The question in the case at hand shall be decided by recourse to the declarations of the Parties [*Kröll, p. 46; Djordjevic in: Kröll et al. II, p. 73, para. 24; Vorobey, p. 138*]. As such, this is an issue of contract

formation and interpretation of the Parties' intention related to the timing, form, and conditions for effectively incorporating standard terms into a sales contract which is an issue governed by CISG [*Schlechtriem/Schwenzer, pp. 79, 229, paras. 11, 16; Djordjevic in: Kröll et al. II, p. 73, para. 24*; *Kröll, p. 47; Viscasillas in: Ferrari/Flechtner/Brand, p. 265; Huber, p. 125; supra para. 43*].

110. Courts have also found CISG applicable when deciding whether an arbitration clause in standard terms has been incorporated [*Hibro Compensatoren B.V. v. Trelleborg Industri Aktiebolag; Filanto v. Chilewich, paras. 1239-1241; Case 2977/1996; Catinari & Raccosta v. Florencemoda*]. In a similar and very recent case from 2020 the German Supreme Court analysed the incorporation of standard terms including an arbitration agreement and concluded that the relevant requirements to be met were those of CISG [*Spice case, para. 61; Altenkirch/Hagmann*]. Even commentators agree that this issue is less controversial in practice than from an academic standpoint [*Fillers, p. 674; Fruit and vegetables case; Filanto v. Chilewich, paras. 1239-1241; Case 2977/1996; Catinari & Raccosta v. Florencemoda*]. In fact, adjudicators are not likely to refrain from applying CISG to arbitration agreements [*Fillers, p. 674*].

111. The only case cited by CLAIMANT in support of its position [*Cl. Memo., p. 33, para. 152*] does not lead to any other conclusion. Indeed, the Argentinian court in *Inta v. Officina Meccanica* ruled that the issue of contract formation, including the forum selection clause, fell outside the scope of CISG but this was due to the fact that the parties did not determine a law applicable to their contract [*Inta v. Officina Meccanica*], unlike in the present case [*supra para. 70*]. Moreover, the court still applied Art. 18 CISG in relation to the interpretation of the buyer's conduct and decided that a contract including the forum selection clause was formed, as per Art. 18(3) CISG [*Inta v. Officina Meccanica*].

112. In summary, CISG is applicable to the present dispute as at issue is not the formal validity of the arbitration agreement but its valid incorporation into the Contract as part of CLAIMANT's GCoS.

C. There is no risk that the award would be set aside or denied enforcement

113. CLAIMANT is correct that the TRIBUNAL is obliged to render an enforceable award [*Cl. Memo., para. 155; Redfern/Hunter, p. 386; Lew/Mistelis/Kröll, p. 537; Horvath, p. 135; Karrer in: Aksen, pp. 429-435*]. In order for an arbitral tribunal to render an enforceable award it must satisfy itself as to its own jurisdiction to hear the case [*Rule 20.1 AIAC Rules 2021; Art. 16 UNCITRAL Model Law; U.N. Doc. A/40/17; Platte, p. 309*]. However, CLAIMANT's argument that jurisdiction should be declined out of fear that the award may not be enforced in some states [*Cl. Memo., pp. 33-34, paras. 155-160*] is not a ground for lack of enforceability [*Platte, p. 310; Blessing, p. 191*]. Accordingly, in *ICC Award 4695/1984*

the tribunal held that the fact that the respondent's home jurisdiction did not allow the specific type of arbitration clauses was irrelevant to deciding upon the tribunal's jurisdiction. Although the award may not be enforced in every country, when the tribunal finds it has jurisdiction it should exercise it, otherwise it will deny justice [*ICC Award 4695/1984*]. This contention is equally applicable here.

114. In any case, the application of CISG to the arbitration agreement cannot be regarded as a violation of Danubian public policy leading to the annulment of the award under Art. 34(2)(b)(ii) DAL. First, the practice of the Danubian state courts is not binding upon this TRIBUNAL [*Born II, p. 4151*]. Secondly, CLAIMANT cites a single authority [*Cl. Memo., p. 33, para. 156*] to submit that public policy is a broad notion which covers all existing case law in the place of enforcement. However, this is inconsistent with the widely accepted view that public policy is a narrow concept which is engaged only if an award "*would violate the forum state's most basic notions of morality and justice*" [*Born II, pp. 3603-3606; Ortolani in: Bantekas et al., pp. 892-893; Blackaby et al., pp. 644-647; Hill, pp. 394-395; Parsons and Whittemore Overseas Co. case; Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H. case*]. For example, public policy is violated when the award requires the performance of an act prohibited by the law or payment of damages for not performing a prohibited act [*Born II, pp. 3603-3606; Case 6 U 110/97*].

115. In the present case, the issue of the application of CISG is not of such nature, as CLAIMANT fails to demonstrate any fundamental principles in Danubia that would be violated by applying CISG to the arbitration agreement. Moreover, according to the Danubian case law the courts "*generally*" reject the application of CISG to arbitration agreements [*PO1, p. 47, para. 4*]. However, "generally" means "in most cases", not always [*Cambridge Dictionary*]. Therefore, there are cases in Danubia where CISG has been applied to arbitration agreements.

116. In support of its argument CLAIMANT cites *Maximov v. OJSC Novolipetsky* where the English courts refused to enforce an award which was set aside. However, this is not persuasive as it is only logical that courts would refuse enforcement of annulled awards, which is not the case here. It is worth noting that there are cases where courts have enforced even annulled awards [*Born II, pp. 3974-3988; Moses, pp. 238-241; Dobiáš, pp. 5-22; Comissa v. Pemex; Chromalloy Aeroservices v. Egypt; Société Hilmarton Ltd case; Société Pabalk Ticaret Limited Sirketi case; Sonatrach v. Ford; Yukos Capital v. Rosneft; Kajo-Erzeugnisse Essenzen case*] by utilising the discretionary power in Art. V NYC, which merely provides that enforcement "*may*" be refused if the award is vacated and the states are free to apply a more favourable law under Art. VII NYC [*Lew/Mistelis/Kröll, pp. 707, 718; Horvath, p. 152; Weinacht, p. 321; Thadikkaran, p. 590*].

117. Finally, there is no danger that the award in the present dispute would be denied enforcement. CLAIMANT is situated in Mediterraneo, whereas RESPONDENT is based in Equatoriana [*NA, paras. 1-2*]. Therefore, it is likely that the award would be enforced in one of these states, as any relevant assets of the Parties would likely be located there. However, the jurisprudence of both states has consistently applied CISG to arbitration agreements [*PO1, p. 47, para. 4*]. Hence, even if the TRIBUNAL applies CISG to the arbitration clause, it would not contravene any domestic provision or case law at the place of enforcement. In any case, even if it did, the award could be still enforced under the more favourable law rule contained in Art. VII(1) NYC.

CONCLUSION ON THE FOURTH ISSUE

118. The arbitration agreement is subject to CISG because the Convention applies to arbitration agreements in general. In any case, CISG applies to the issue in question as it relates not to the formal validity of the arbitration agreement under Art. 4 CISG but to the rules for incorporation of standard terms. Finally, there is no risk that the final award would be set aside or denied enforcement under either DAL and NYC. Thus, the TRIBUNAL shall apply the law of Mediterraneo, including CISG, to the arbitration clause and rule that it lacks jurisdiction to hear the case.

REQUEST FOR RELIEF

For the above reasons, RESPONDENT respectfully requests the TRIBUNAL:

1. to find that the Parties did not conclude a contract in 2020;

2. alternatively, to rule that CLAIMANT's GCoS were not validly included in the Contract;

3. to declare that it does not have jurisdiction to rule on the dispute.

CERTIFICATE OF AUTHENTICITY

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

IVAN IVANOV

SOFIA LEFTEROVA

JOANA VALOVA

DAYANA ZASHEVA

SOFIA, 27 JANUARY 2022