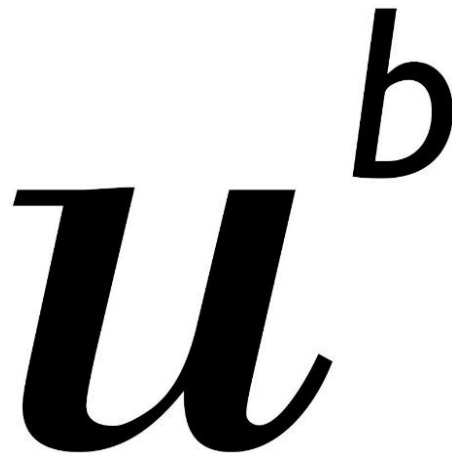


UNIVERSITY OF BERN



MEMORANDUM FOR CLAIMANT

AIAC/INT/ADM-123-2021

ON BEHALF OF

CLAIMANT

ElGuP plc
156 Dendé Avenue
Capital City
Mediterraneo

AGAINST

RESPONDENT

JAJA Biofuel Ltd
9601 Rudolf Diesel Street
Oceanside
Equatoriana

PATRICK GÜRTLER • ALINA KUSTER • LUCAS NOLD

ANNINA SCHMID • MARGARETHA SCHULZ • MICHELLE STÖCKLI

BERN, SWITZERLAND

9 DECEMBER 2021

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS AND DEFINITIONS..... V

STATEMENT OF FACTS.....1

INTRODUCTION.....3

ISSUE 1: THE PARTIES VALIDLY AGREED ON THE JURISDICTION OF THE TRIBUNAL4

A. THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT.....4

I. The choice of Mediterranean law is not applicable to the Arbitration Agreement.....5

1. The Parties did not choose the law of Mediterraneo to govern the Arbitration Agreement.....6

a) No explicit choice of law exists for the Arbitration Agreement.....6

b) No implicit choice of Mediterranean law exists for the Arbitration Agreement.....7

2. The choice of law governing the Sales Contract shall not presumptively extend to the Arbitration Agreement.....7

II. The law of the arbitral seat is applicable to the Arbitration Agreement9

1. The choice of Danubia as the arbitral seat constitutes an implicit choice of law9

2. Alternatively, the DAL and the NYC provide for a default rule that the law of the arbitral seat shall apply.....10

III. According to the validation principle, the law of Danubia, as the law under which the validity of the Arbitration Agreement is least contested, applies 11

B. THE ARBITRATION AGREEMENT IS VALID ACCORDING TO THE LAW OF DANUBIA..... 12

I. The Arbitration Agreement is formally valid, since the formal requirements of Art. 7 DAL have been met..... 13

II.	The Arbitration Agreement is substantively valid since the GCoS were validly included in the Sales Contract	14
C.	SHOULD THE LAW OF MEDITERRANEO BE FOUND TO GOVERN THE ARBITRATION AGREEMENT, THE CISG IS NOT APPLICABLE TO THE CONCLUSION THEREOF	14
I.	The CISG is merely applicable to the conclusion of contracts of sale.....	15
1.	Artt. 1-4 CISG limit the scope of the CISG to contracts of sale	15
2.	Artt. 19(3) and 81(1) CISG do not extend the scope of the CISG to the Arbitration Agreement.....	16
II.	The Tribunal should consider the jurisprudence in Danubia, which rejects the application of the CISG to arbitration agreements.....	17
D.	THE ARBITRATION AGREEMENT IS ALSO VALID ACCORDING TO THE LAW OF MEDITERRANEO.....	18
I.	The Arbitration Agreement is formally valid since the formal requirements of Art. 7 DAL have been met.....	18
II.	The Arbitration Agreement is substantively valid since the GCoS were validly included in the Sales Contract according to the non-harmonized contract law of Mediterraneo.....	18
III.	Alternatively, the Arbitration Agreement is substantively valid, since the GCoS were validly included in the Sales Contract according to the CISG	19
ISSUE 2:	THE PARTIES CONCLUDED A CONTRACT IN 2020.....	20
A.	THERE WAS CONSENT BETWEEN THE PARTIES TO CONCLUDE THE SALES CONTRACT.....	20
I.	RESPONDENT made an offer by email on 1 April 2020	21
1.	The proposal was sufficiently definite as it indicated that 20,000t of RSPO-certified palm oil were ordered at a specific price.....	22
2.	The proposal indicated RESPONDENT's intention to be bound by the Sales Contract in case of an acceptance by CLAIMANT.....	22

II. CLAIMANT accepted the offer by email on 9 April 2020.....23

1. CLAIMANT’s email of 9 April 2020 was not a counteroffer, because it did not materially alter the terms of RESPONDENT’s offer23

 a) The Parties discussed arbitration as their dispute resolution mechanism and in this context, the Arbitration Clause corresponds with RESPONDENT’s interests23

 b) The reference to an arbitration clause was consistent with the established practice between the Parties24

 aa) CLAIMANT and Southern Commodities had established a practice between them to refer to arbitration clauses24

 bb) The established practice between CLAIMANT and Southern Commodities must be attributed to RESPONDENT25

 c) The inclusion of arbitration clauses in contracts of sale is a common practice in the palm oil industry26

2. The email of 9 April 2020 constituted an acceptance of RESPONDENT’s offer to which RESPONDENT did not object without undue delay.....26

III. Even if CLAIMANT’s email of 9 April 2020 was to be considered a counteroffer, RESPONDENT implicitly accepted it27

1. RESPONDENT prepared its performance of the Sales Contract by arranging for the letter of credit.....27

2. RESPONDENT did not oppose the counteroffer in due course, despite its duty to notify CLAIMANT of any objections in a timely fashion28

B. IT IS IRRELEVANT THAT RESPONDENT DID NOT COUNTERSIGN THE SALES CONTRACT, SINCE COUNTERSIGNATURES WERE NOT REQUIRED.....29

ISSUE 3: THE GCOS WERE VALIDLY INCLUDED IN THE SALES CONTRACT..... 31

A. THE CISG ALLOWS FOR STANDARD TERMS TO BE IMPLICITLY INCLUDED IN A CONTRACT OF SALE..... 31

B. THE GCoS WERE IMPLICITLY INCLUDED IN THE SALES CONTRACT32

I. Due to the established practice between CLAIMANT and Southern Commodities, CLAIMANT did not have to provide RESPONDENT with the GCoS33

II. A sufficiently clear reference to the GCoS was made in CLAIMANT’s email of 9 April 2020 and in the contractual documents attached to it.....33

III. RESPONDENT was aware of the content of the GCoS.....34

IV. RESPONDENT accepted the inclusion of the GCoS in the Sales Contract.....34

PRAYER FOR RELIEF35

INDEX OF AUTHORITIES IX

INDEX OF CASES..... XXXVI

INDEX OF AWARDS LI

INDEX OF OTHER SOURCES LIII

CERTIFICATE OF INDEPENDENCE..... LVII

TABLE OF ABBREVIATIONS AND DEFINITIONS

§	Paragraph
§§	Paragraphs
A.Ş.	<i>Anonim Şirket</i> (joint-stock company)
AG	<i>Aktiengesellschaft</i> (joint-stock company)
AIAC	Asian International Arbitration Centre
AIAC Rules	AIAC Arbitration Rules 2021
Arbitration Agreement	Validly included and agreed upon Arbitration Clause contained in Art. 9 GCoS
Arbitration Clause	Arbitration Clause contained in Art. 9 GCoS
Art.	Article
Artt.	Articles
BGH	<i>Bundesgerichtshof</i> (German Federal Court of Justice)
BV	<i>Besloten Vennootschap</i> (private limited company)
C	CLAIMANT's Exhibit
CEO	Chief Executive Officer
<i>cf.</i>	<i>conferatur</i> (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods (11 April 1980)
CISG-AC Op.	CISG Advisory Council Opinion
COO	Chief Operating Officer
DAL	Danubian Arbitration Law, verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (Art. 7, Option 1)
<i>e.g.</i>	<i>exempli gratia</i> (for example)
ed.	Editor

eds.	Editors
<i>et al.</i>	<i>et alii</i> / <i>et aliae</i> (and others)
<i>et seq.</i>	<i>et sequens</i> (and the following page/paragraph)
<i>et seqq.</i>	<i>et sequentes</i> (and the following pages/paragraphs)
fn.	Footnote
FOSFA/PORAM	Federation of Oils, Seeds and Fats Associations / Palm Oil Refiners Associations of Malaysia
GCoS	General Conditions of Sale of CLAIMANT, version 2016
GCoS pre-2016	General Conditions of Sale of CLAIMANT, version before 2016
GmbH	<i>Gesellschaft mit beschränkter Haftung</i> (limited liability company)
<i>i.e.</i>	<i>id est</i> (that is)
<i>ibid.</i>	<i>ibidem</i> (in the same place)
ICC	International Chamber of Commerce
Inc	Incorporated
<i>infra</i>	Below
KLRCA	Kuala Lumpur Regional Center for Arbitration
<i>lex arbitri</i>	Law of the seat of the arbitral tribunal
LLC	Limited liability company
Ltd	Limited company
<i>modus operandi</i>	Method of procedure
Mr	Mister
Ms	Miss
No.	Number
NoA	CLAIMANT's Notice of Arbitration of 14 July 2021

NYC	United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
OGH	<i>Oberster Gerichtshof</i> (Austrian Supreme Court of Justice)
p.	Page
<i>pacta sunt servanda</i>	Agreements must be kept
Palm Oil Summit	Palm Oil Summit held in Capital City in Mediterraneo of 28 March 2020
Parties	CLAIMANT and RESPONDENT
pdf	Portable document format
plc	Public limited company
PO1	Procedural Order No. 1 of 8 October 2021
PO2	Procedural Order No. 2 of 8 November 2021
pp.	Pages
Pty Ltd	Proprietary limited
<i>quod non</i>	Which it does not
R	RESPONDENT's Exhibit
RabelsZ	<i>Rabels Zeitschrift für ausländisches und internationales Privatrecht</i> (The Rabel Journal of Comparative and International Private Law)
RNoA	RESPONDENT's Response to the Notice of Arbitration of 14 August 2021
RSPO	Roundtable on Sustainable Palm Oil
S.A.L	<i>Société anonyme libanaise</i> (joint-stock company in Lebanon)
S.a.r.l.	<i>Société à responsabilité limitée</i> (limited liability company)
SA	<i>Société anonyme</i> (limited company)
Sales Contract	Contract of sale for palm oil between RESPONDENT and CLAIMANT
SchiedsVZ	<i>Zeitschrift für Schiedsverfahren</i> (German Arbitration Journal)

sp. z o.o.	<i>Spółka z ograniczoną odpowiedzialnością</i> (limited liability company)
<i>supra</i>	Above
t	Tons
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts (2016)
USD	United States Dollar
<i>v.</i>	<i>versus</i>
Vol.	Volume

STATEMENT OF FACTS

ElGuP plc (“**CLAIMANT**”) is based in Mediterraneo and is one of the largest producers of RSPO-certified palm oil and palm kernel oil. The opposing party is JAJA Biofuel (“**RESPONDENT**”), a producer of biofuel based in Equatoriana. Since 2018, **RESPONDENT** has been a subsidiary of Southern Commodities, which is seated in Ruritania.

2010-2018 CLAIMANT and Southern Commodities entered into approximately forty contracts for the sale of palm kernel oil between 2010 and 2018. The contracts were concluded by Mr Chandra, the COO of CLAIMANT, and Ms Bupati, who worked in the purchasing department of Southern Commodities. In each case, Ms Bupati submitted an offer to Mr Chandra. If the offer was acceptable to him, he then sent her a contract with the appropriate content, which she usually countersigned and returned to him within a week. In three cases, however, she objected to the terms contained in the contract within the same time frame. In five cases, she did not return a signed version of the contract, but the unsigned contracts were nevertheless performed by both parties.

2014 During an arbitration between CLAIMANT and Southern Commodities, Ms Bupati took a closer look at the General Conditions of Sale of CLAIMANT (“**GCoS pre-2016**”). These contained an arbitration clause based on the FOSFA/PORAM Contract Form 81, providing for arbitration under the rules of a commodity arbitration institution. The GCOS pre-2016 also contained a choice of law clause in favor of substantive Danubian law.

2016 Mr Chandra informed Ms Bupati about the General Conditions of Sale of CLAIMANT, version 2016 (“**GCoS**”), as part of their ongoing contract negotiations. The arbitration clause in CLAIMANT’s contract template was removed and, thereafter, found only in the GCOS. At the same time, CLAIMANT replaced Art. 9 of the GCOS with the draft of the 2017 KLRCA model arbitration clause. In 2018, when the KLRCA changed its name to AIAC, the clause was updated accordingly (“**Arbitration Clause**”).

-
- 2018** RESPONDENT was acquired by Southern Commodities, and Ms Bupati was moved from Southern Commodities to RESPONDENT.
- 28 March 2020** Ms Bupati and Mr Chandra discussed a possible contract for the purchase of RSPO-certified palm oil at the Palm Oil Summit held in Capital City, Mediterraneo (“**Palm Oil Summit**”). They agreed that if Ms Bupati sent Mr Chandra a quotation, he would send her the contractual documents in return. This was their previous *modus operandi* when concluding contracts. Furthermore, they discussed legal terms, in particular, arbitration.
- 1 April 2020** By email, Ms Bupati ordered 20,000t of RSPO-certified palm oil per annum and asked Mr Chandra to prepare the necessary contractual documents.
- 9 April 2020** CLAIMANT sent the contractual documents to RESPONDENT by email. This email mentioned that the contract of sale (“**Sales Contract**”) would be governed by the law of Mediterraneo and that the purchase would be subject to the GCOS, which contained the Arbitration Clause, and which were not attached to the email. The reference to the GCoS was also contained in the contractual documents. Further, CLAIMANT requested that a signed copy of the contract be returned for CLAIMANT’s files.
- 3 May 2020** CLAIMANT and RESPONDENT (“**Parties**”) discussed formalities regarding the letter of credit that RESPONDENT was contractually required to open.
- 30 May 2020** RESPONDENT contacted several banks to get quotations for the letter of credit.
- June 2020** Following the cinematic release of “Saving Lucy”, actions by environmental activists gained traction and started to seriously affect RESPONDENT’s share price.
- 30 October 2020** CLAIMANT received a letter from RESPONDENT’s CEO, which declared the “*Termination of Negotiations*” and renounced all existing contractual relations.
- 14 July 2021** CLAIMANT served a Notice of Arbitration (“**NoA**”) on RESPONDENT.
- 14 August 2021** RESPONDENT issued a Response to the NoA (“**RNoA**”).
- 8 October 2021** Procedural Order No. 1 (“**PO1**”) was issued.
- 8 November 2021** Procedural Order No. 2 (“**PO2**”) was issued.

INTRODUCTION

- 1 RESPONDENT is more concerned about its reputation than its obligation. Once the darling of environmental groups, now the target of criticism, RESPONDENT wants to avoid two valid agreements: The Arbitration Agreement and the Sales Contract. However, RESPONDENT cannot have it both ways. It cannot rely on the contract when it works to its advantage and avoid its responsibilities when it works to its disadvantage – *pacta sunt servanda*.
- 2 **ISSUE 1:** The Tribunal has jurisdiction over this case since the Arbitration Clause in the GCoS constitutes a formally and substantively valid Arbitration Agreement. It is valid according to Danubian law, which applies as the law of the arbitral seat, in accordance with the intention of the Parties, the applicable choice of law provisions, and the validation principle. The choice of Mediterranean law governing the Sales Contract does not apply to the Arbitration Agreement, which is a separate contract. Should the law of Mediterraneo nevertheless apply (*quod non*), the CISG is not applicable to the conclusion of the Arbitration Agreement, since it merely applies to contracts of sale. In any event, the Arbitration Agreement would also be valid according to both the non-harmonized contract law of Mediterraneo as well as the CISG.
- 3 **ISSUE 2:** The Parties concluded a contract to which they are bound. Their negotiations for the sale of 20,000t of RSPO-certified palm oil led to the exchange of RESPONDENT's offer and CLAIMANT's acceptance. Based on this shared consent, the Parties were no longer at the negotiation stage, but instead, concluded a final and binding contract. Even if CLAIMANT's acceptance were to be considered a counteroffer (*quod non*), it was in turn implicitly accepted by RESPONDENT. Further, it is irrelevant that the Sales Contract was not countersigned, since neither the CISG nor the Parties required a countersignature.
- 4 **ISSUE 3:** The GCoS were validly included in the Sales Contract. CLAIMANT made a sufficiently clear reference to the GCoS. RESPONDENT was aware of the content of the GCoS and accepted their inclusion in the Sales Contract. The requirements to implicitly include standard terms in a contract of sale under the CISG have therefore been met.

THE PARTIES VALIDLY AGREED ON THE JURISDICTION OF THE TRIBUNAL

- 5 The Tribunal has jurisdiction to hear this case, since the Arbitration Clause is valid. This clause states that “[a]ny dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the ALAC Arbitration Rules. The seat of arbitration shall be Danubia [...]” [R4, p. 32]. RESPONDENT claims that the Tribunal lacks jurisdiction by alleging that the Arbitration Clause was not validly included in the contract [RNoA, p. 27 §14]. It will be shown that the Parties validly agreed on arbitration upon this Arbitration Clause (“**Arbitration Agreement**”), since it was validly included in the Sales Contract, and the Parties had reached a consensus regarding this clause.
- 6 The following legal framework is relevant: The *lex arbitri* is the Danubian Arbitration Law (“**DAL**”), since Vindobona in Danubia is the seat of arbitration [R4, p. 32]. The DAL is a verbatim adoption of the UNCITRAL Model Law [PO1, p. 47 §3]. Furthermore, all countries involved in the present case are member states of the New York Convention (“**NYC**”) [PO1, p. 47 §3]. Apart from Danubia they are all contracting states of the CISG [PO1, pp. 46 et seq. §3]. Finally, the Parties agreed during their telephone conference of 7 October 2021 to conduct the proceedings based on the AIAC Arbitration Rules 2021 (“**AIAC Rules**”) [PO1, p. 46 §II].
- 7 CLAIMANT will show that the Parties validly agreed on the jurisdiction of the Tribunal. Danubian law governs the Arbitration Agreement (**A**) and under Danubian law the Arbitration Agreement is valid (**B**). Should the law of Mediterraneo be found to apply to the Arbitration Agreement instead (*quod non*), the CISG does not apply to the conclusion thereof (**C**). In any event, the Arbitration Agreement is also valid under the law of Mediterraneo (**D**).

A. THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT

- 8 To determine the validity of the Arbitration Agreement, it is necessary to identify the law that governs it. Art. 9 of the GCoS contains a choice of law provision, which states that “[t]his contract shall be governed by the substantive law of Danubia” [R4, p. 32]. While CLAIMANT decided to change the applicable substantive law to Mediterranean law in January 2020, this change was not included in the text of the GCoS at the time the Parties concluded the Arbitration Agreement [C1, p. 10 §13; PO2, p. 50 §15]. It is uncontested that the Parties agreed that the law of Mediterraneo be applicable to the Sales Contract, since CLAIMANT informed RESPONDENT about the change from Danubian to Mediterranean law at the Palm Oil Summit [C1, p. 10 §13]. Furthermore, RESPONDENT confirmed in the email of 1 April 2020 that the law of Mediterraneo governed the Sales Contract [C2, p. 12; Letter of Acceptance and Declaration by ALAC, p. 38]. CLAIMANT will show that the

Arbitration Agreement is not governed by this choice of law (I) but by the law of the arbitral seat, which is Danubian law (II). Further, the application of Danubian law is in accordance with the validation principle (III).

I. The choice of Mediterranean law is not applicable to the Arbitration Agreement

- 9 The Arbitration Agreement must be treated separately from the Sales Contract. Therefore, the law applicable to the Arbitration Agreement must be determined independently.
- 10 The starting point for determining the meaning of a choice of law with respect to an arbitration agreement is the separability presumption, which provides that an arbitration agreement is separate from the underlying contract [*Born I*, p. 510; cf. *Lew/Mistelis/Kröll*, §6-9; *Redfern/Hunter I*, §2.101]. This presumption is a cornerstone and a general principle of international arbitration [*Born I*, p. 376; *Gaillard/Savage*, §392]. The separability presumption prevents any party from avoiding arbitration by alleging the invalidity of the underlying contract [*Graffi*, pp. 25 et seq.; *Lew/Mistelis/Kröll*, §6-9; *Redfern/Hunter I*, §5.100]. Therefore, the separability presumption ensures that the parties' originally agreed upon intention to submit disputes to arbitration cannot be easily circumvented [*Graffi*, p. 26; *Lew/Mistelis/Kröll*, §6-10; *Redfern/Hunter I*, §2.101 et seq.].
- 11 The Tribunal is bound by the separability presumption in the present case as is stated in the DAL and in the AIAC Rules. Art. 16(1) DAL enshrines the separability presumption by stating that “[...] *an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract*”. Furthermore, the Parties chose arbitration rules which emphasize the separability presumption. Art. 20.1(a) AIAC Rules stipulates the separability presumption using the same wording as the DAL. The fact that arbitration rules derive their authority from the intentions of the parties leads to the conclusion that “[...] *where parties have referred to arbitration rules which enshrine the principle of the autonomy of the arbitration agreement, those parties are presumed to have intended that the arbitration agreement be treated separately from the main contract*” [*Gaillard/Savage*, §393].
- 12 Due to the separability presumption, the arbitration agreement and the underlying contract may be governed by different laws [*Oil Producer Case*; *Born I*, pp. 510 et seq.; *Gaillard/Savage*, §§412 et seq.; *Redfern/Hunter I*, §3.13; *Waincymer*, p. 135]. This holds true under Art. 36(1)(a)(i) DAL and Art. V(1)(a) NYC, since the parties can choose the applicable law specifically for the arbitration agreement [cf. *Born I*, p. 529; *Redfern/Hunter I*, §3.14]. Further, pursuant to Art. 13.5(a) AIAC Rules, the power of the Tribunal includes “*determining the rules or law applicable to the substance of the dispute and the law governing the arbitration agreement in the absence of any agreement by the Parties*”. Hence, the Tribunal

has the power to determine the law applicable to the Arbitration Agreement independently from the law applicable to the Sales Contract.

- 13 CLAIMANT will demonstrate that the choice of Mediterranean law does not cover the Arbitration Agreement, because the Parties did not intend it to do so (1) and the choice of law governing the Sales Contract should not presumptively extend to the Arbitration Agreement (2).

1. The Parties did not choose the law of Mediterraneo to govern the Arbitration Agreement

- 14 The law governing the Arbitration Agreement must be determined in accordance with the principle of party autonomy, which enables parties to specify the law applicable to an arbitration agreement [*cf. Art. 13.5(a) ALAC Rules; Artt. 34(1)(a)(i) and 36(1)(a)(i) DAL; Art. V(1)(a) NYC*]. In the case at hand, the Parties neither explicitly (a) nor implicitly (b) chose the law of Mediterraneo to govern the Arbitration Agreement.

a) No explicit choice of law exists for the Arbitration Agreement

- 15 An explicit choice of law of an arbitration agreement must be expressed in words [*Ashford, p. 292*] and in itself provide a clear indication which law applies to the arbitration agreement [*Czernich, p. 78*]. In the GCoS pre-2016 there was a separate choice of law clause in Art. 9bis, which stated that the contract was to be “governed by the **substantive law of Danubia**” (emphasis added) [*PO2, p. 51 §24*]. Arbitration was not expressly mentioned in this clause. Further, the reference to substantive law indicates that only the underlying contract was supposed to be governed by the choice of law clause and not the arbitration agreement as a procedural contract [*cf. infra §27*]. Therefore, Art. 9bis GCoS pre-2016 did not contain an explicit choice of law for the Arbitration Agreement.

- 16 When CLAIMANT replaced its former arbitration clause in 2016 with the model arbitration clause of the KLRCA, the choice of law clause was included in the new Arbitration Clause in Art. 9 GCoS [*PO2, p. 51 §24; cf. R4, p. 32*]. Further, the text of the choice of law clause was replaced by the proposed text of the draft of the 2017 KLRCA model arbitration clause [*ibid.*]. The new provision states that “[t]his contract shall be governed by the substantive law of Danubia” [*R4, p. 32*]. The similar wording to the clause contained in the GCoS pre-2016 indicates that CLAIMANT understood the new choice of law clause in the same way, specifically that it was merely supposed to govern the Sales Contract and not the Arbitration Agreement. Therefore, no explicit choice of law exists for the Arbitration Agreement.

17 The lack of an explicit choice of law is confirmed by the fact that the Parties exclusively referred to the Sales Contract when they agreed – deviating from their previous practice – to apply Mediterranean law rather than Danubian law. In the email of 1 April 2020, RESPONDENT mentioned “[...] *the submission of the sales contract to Mediterranean law* [...]” (emphasis added) [C2, p. 12]. Furthermore, CLAIMANT stated in the email of 9 April 2020 that “[...] *the sale will be governed by the law of Mediterraneo*” (emphasis added) [C4, p. 17]. According to this correspondence, the Parties merely explicitly chose the law of Mediterraneo to govern the Sales Contract and not to govern the Arbitration Agreement.

b) No implicit choice of Mediterranean law exists for the Arbitration Agreement

18 The existence of an implicit choice of law for the arbitration agreement would require clear evidence that the parties mutually intended to agree on a certain law [Czernich, p. 79], which is not the case here. The reason for changing the chosen substantive law from Danubian to Mediterranean law was a potential substantive issue of the Sales Contract [C1, p. 10 §13; PO2, p. 49 §14]. In January 2020, one of CLAIMANT’s lawyers suggested changing the applicable law to the law of Mediterraneo, because this would be more favorable for CLAIMANT with respect to supply chain issues [*ibid.*]. Based on this, the Parties agreed to apply Mediterranean law to the Sales Contract [*supra* §§8, 17].

19 In addition, there is no apparent reason why the Parties would have intended to choose Mediterranean law to apply to the Arbitration Agreement as well. On the contrary, it would not be reasonable to choose a law to govern the Arbitration Agreement, under which its validity would be subject to stricter requirements [*cf. Graffi, p. 35; infra* §§44 *et seqq.*, 63 *et seqq.*, 67]. The Parties rather intended that the law of Danubia – as the law of the arbitral seat – continue to apply to the Arbitration Agreement [*infra* §§26 *et seqq.*]. This is underscored by the clear advice of CLAIMANT’s counsel not to change Danubia as the seat of arbitration when changing the choice of law clause to Mediterranean law [PO2, p. 50 §15]. For these reasons, the choice of Mediterranean law does not constitute an implicit choice of law governing the Arbitration Agreement.

2. The choice of law governing the Sales Contract shall not presumptively extend to the Arbitration Agreement

20 In *Enka v. Chubb* and *Kabab-Ji v. Kout (UK)*, the UK Supreme Court held under English law that if the law applicable to the arbitration agreement is not specified, the choice of law governing the underlying contract presumptively applies to the arbitration agreement and still applies even if it is different from the chosen seat of arbitration. This presumption, however, does not apply in the present case.

- 21 First, the legal background is different. Danubia is a civil law country [PO2, p. 53 §36] and has adopted the UNCITRAL Model Law [PO1, p. 47 §3], whereas the common law system of England and Wales has not adopted the UNCITRAL Model Law. The UK Supreme Court applied English common law rules for resolving conflicts of law and found that “[...] *businessmen should not be taken to have intended that different systems of law should apply to their relationship [...]*” [Enka v. Chubb]. Accordingly, the choice of law governing the Sales Contract should presumptively apply to the Arbitration Agreement as well [ibid.]. However, because in the present case, Art. 36(1)(a)(i) DAL and Art. V(1)(a) NYC apply [cf. PO2, p. 52 §32; infra §31], one must come to a different conclusion. According to the default rule provided by these provisions, the law of the seat applies absent a choice of law specifically for the arbitration agreement [infra §§30 et seqq.] and not presumptively the choice of law governing the underlying contract [cf. Berger II, p. 320; Chan/Jim Yang, p. 643; Working Group II, §284].
- 22 Second, applying a presumption that parties intend to submit their arbitration agreement to the same law as the underlying contract would not correspond to the principle of party autonomy. In reality, parties very rarely consider the arbitration clause when choosing the law governing the underlying contract [Berger II, p. 320; Bernardini, p. 197; Born I, p. 572; Plavec, p. 103]. Therefore, when choosing the law of the underlying contract, the parties have the terms of this contract and not the arbitration agreement in mind [Poudret/Besson, §297; cf. Born I, pp. 535 et seq.]. As shown above, the Parties only had the Sales Contract but not the Arbitration Agreement in mind when they agreed on the law of Mediterraneo [supra §§16 et seqq.]. Hence, it would be an intention imputed to the Parties to assume that they intended to apply the law of Mediterraneo to the Arbitration Agreement [cf. Chan/Jim Yang, pp. 642 et seq.].
- 23 Third, the separability presumption does not support the extension of the choice of law governing the underlying contract to the arbitration agreement, since the arbitration agreement is to be treated as a separate contract [Berger II, p. 319; Born I, p. 535; Czernich, pp. 79 et seq.; Scherer/Jensen, pp. 673 et seq.; cf. Bulbank case]. Thus, the law governing the Arbitration Agreement must be determined independently from the Sales Contract [supra §§9 et seqq.]. This is especially true in the present case, because the separability presumption must be applied and given particular weight [supra §11].
- 24 In conclusion, the law of Mediterraneo should not presumptively apply to the Arbitration Agreement, as it is stipulated by the UK Supreme Court. Rather the law of the arbitral seat shall apply [infra §§25 et seqq.], which is in line with several relevant court decisions [Bulbank Case; Isaac Glycer v. Moses Israel Glycer; Kabab-Ji v. Kout (France); National Thermal Power v. Singer] and arbitral awards [Oil Producer Case; Plant Case].

II. The law of the arbitral seat is applicable to the Arbitration Agreement

25 In the following, it will be shown that having chosen Danubia as the seat of arbitration, the Parties made an implicit choice of law for the Arbitration Agreement to be governed by Danubian law (1). If the Tribunal finds that the choice of the arbitral seat does not in itself constitute an implicit choice of law, the application of the law of the arbitral seat is further mandated by the default rule provided for in the DAL and the NYC (2).

1. The choice of Danubia as the arbitral seat constitutes an implicit choice of law

26 In accordance with Art. 14.1 AIAC Rules, which gives the parties the freedom to agree on a seat of arbitration, the Arbitration Clause provides for Danubia as the chosen seat of arbitration [R4, p. 32]. This choice has not been disputed by RESPONDENT [cf. RNoA, pp. 25 et seqq.]. By stipulating Danubia as the seat, the Parties implicitly agreed that the law of Danubia shall apply to the Arbitration Agreement.

27 The “[c]hoice of the seat indirectly effects a choice of the law governing the arbitral procedure. [...] Rather than directly choosing the law that governs the arbitration, the parties select a seat in a given state and the arbitration law of that state will apply, by operation of law” [Kaufmann-Kohler, p. 1319; cf. *Japan Educational v. Kenneth J. Feld; Commentary to Trans-Lex Principle XIV.1*]. The aspects governed by the law of that state – the *lex arbitri* – are also interrelated with the terms of the arbitration agreement, since the principal purpose of an arbitration agreement is to serve as a “procedural contract” [Schwab/Walter, Chapter 7 §37; Wagner, pp. 578 et seq.] prescribing the procedures of the arbitral process [Born I, p. 537]. As a result, the choice of the seat implies a choice of law for the arbitration agreement [Born I, pp. 537 et seq.; cf. Berger I, §20-57]. By explicitly choosing Danubia as the seat of arbitration in the GCOS [R4, p. 32], the Parties implicitly chose the law of Danubia as the *lex arbitri* governing all aspects of the arbitral proceedings. Given that the procedure is subject to Danubian law, it follows that the relevant procedural contract – the Arbitration Agreement – should be subject to the same law, because “[i]t makes no sense to subject the arbitration agreement – whose basic and principal purpose is to prescribe the procedures of the arbitral process – to a different law from that of the arbitral seat – whose law governs exactly the same arbitral process, sometimes in mandatory terms” [Born I, p. 537].

28 Considering the choice of the arbitral seat as an implicit choice of law for the arbitration agreement is in line with the view of many authorities as well as case law [Petrasol BV v. Stolt Spur; Thai-Lao v. Laos; Born I, pp. 537 et seq.; Glick/Venkatesan, p. 146; Kaufmann-Kohler, p. 1319; cf. Berger I, §20-57; Plavec, p. 105]. Applying the law of the seat to the arbitration agreement has an important harmonizing effect [cf. Berger II, p. 316; *Commentary to Trans-Lex Principle XIV.1*]. Contrary, subjecting the substantive validity of the arbitration agreement and the arbitral proceedings to two different

laws would give rise to uncertainties and possibilities of conflict that contradict the objectives of arbitration and the implicit choice the parties have made [*Born I*, p. 537; cf. *Plavec*, p. 109]. Therefore, it should be assumed that parties intend to have all questions relating to the arbitration agreement settled in accordance with the *lex arbitri* [cf. *Glick/Venkatesan*, p. 146]. Consequently, in order to avoid uncertainties and conflicts, the Arbitration Agreement shall be governed by Danubian law as the *lex arbitri*.

29 In conclusion, by choosing Danubia as the seat of arbitration, the Parties made an implicit choice of law in favor of Danubian law being applicable to the Arbitration Agreement.

2. Alternatively, the DAL and the NYC provide for a default rule that the law of the arbitral seat shall apply

30 According to Art. 13.5(a) AIAC Rules, the arbitral tribunal is empowered to determine the law governing the arbitration agreement in the absence of any agreement by the parties. If the Tribunal finds that the choice of the seat cannot be considered as an implicit choice of law, the law of the arbitral seat – *i.e.* Danubia – would still be applicable to the Arbitration Agreement according to the default rule in the DAL and NYC.

31 The default rule provided by the DAL and the NYC should generally be considered, when determining the law applicable to the arbitration agreement [*Berger II*, pp. 316 *et seq.*; *Born I*, p. 527]. All countries involved in the present case – Mediterraneo, Danubia and Equatoriana – are member states of both the DAL and the NYC [*PO1*, p. 47 §3]. Therefore, courts in Danubia determine the law applicable to the arbitration agreement according to the aforementioned provisions [*PO2*, p. 52 §32]. An award rendered by the Tribunal, which complies with the default rule provided by the DAL, would not be set aside by state courts in Danubia. Furthermore, such an award would be enforceable under the NYC [cf. *Waincymer*, p. 137]. Art. 1.5 AIAC Rules states that “[...] *the Arbitral Tribunal [...] shall make every reasonable effort to ensure that all Awards are legally enforceable*”. Therefore, in order to comply with this provision, the Tribunal should consider the provisions that will apply in setting aside and enforcement procedures.

32 According to Art. 34(2)(a)(i) DAL, an arbitral award may be set aside by the competent court if the arbitration agreement “[...] *is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State [i.e. Danubia] [...]*”. The same applies, according to Art. 36(1)(a)(i) DAL, to the refusal of recognition or enforcement of an arbitral award. Accordingly, absent a choice of law by the parties for their arbitration agreement, the law of the arbitral seat applies to proceedings for setting aside an arbitral award.

- 33 Furthermore, the same default rule applies for recognition and enforcement according to Art. V(1)(a) NYC [*Di Pietro*, p. 73]. Due to the substantially identical wording, the structure and the purpose of Art. V(1)(a) NYC, Artt. 34(2)(a)(i) and 36(1)(a)(i) DAL, it is submitted that the same analysis should apply to all these provisions [*Born I*, p. 568; *Ortolani*, p. 859]. This rule, set out in Art. V(1)(a) NYC, also applies to proceedings for the recognition and enforcement of an arbitration agreement pursuant to Art. II NYC [*Born I*, pp. 529 et seq.; *Wilske/Fox*, Art. II §§289 et seq.].
- 34 The arbitration agreement has the closest connection to the arbitral seat [*Berger II*, pp. 315 et seq.; *Born I*, p. 536; *Plavec*, pp. 105 et seq.; *Scherer/Jensen*, p. 679; *Redfern/Hunter II*, §2-90]. Likewise, the default rule provided by the DAL and the NYC is also based on this premise [*cf. Scherer/Jensen*, p. 679]. This is because an arbitration agreement is to be considered a procedural contract [*supra* §27] and, therefore, has almost identical regulatory content as covered by the *lex arbitri* [*Born I*, p. 537]. Accordingly, the arbitration agreement often regulates the same procedural aspects as the *lex arbitri* [*supra* §27]. Therefore, the Arbitration Agreement has the closest connection to the *lex arbitri* and the arbitral seat. No reason exists in the case at hand to deviate from the default rule.
- 35 As shown above, if the Tribunal finds that there has been no implicit choice of law by the Parties, the Tribunal should consider the default rule provided by the DAL and the NYC, as it would apply in both setting aside and enforcement proceedings. Accordingly, the Arbitration Agreement is governed by Danubian law as the law of the arbitral seat.

III. According to the validation principle, the law of Danubia, as the law under which the validity of the Arbitration Agreement is least contested, applies

- 36 In order to ensure the Parties' primary objective of submitting their disputes to arbitration, the law shall apply under which the Arbitration Agreement is rather validated than invalidated. Therefore, Danubian law applies to the Arbitration Agreement, since it has more lenient requirements for the validity of an arbitration agreement than Mediterranean law.
- 37 The main motive for the parties to conclude an arbitration agreement is to settle their disputes in a final, efficient, and neutral procedure [*Born II*, §53; *cf. Redfern/Hunter I*, §§1.94 et seqq.]. Thus, it should be assumed that the parties always intend to conclude a valid arbitration agreement [*ibid.*]. In the present case, Mr Chandra emphasized at the Palm Oil Summit that no dispute resolution mechanism other than arbitration was an option for CLAIMANT [*C1*, p. 10 §11]. Being aware of this, Ms Bupati nevertheless made an offer by email on 1 April 2020 in which she did not generally oppose subjecting the contract to arbitration [*C2*, p. 12]. Hence, she necessarily accepted the

submission to arbitration. She merely expressed concerns about investment arbitration, because of the strong opposition to it in Equatoriana, and therefore, she suggested selecting a non-industry related arbitration institution [C2, p. 12; C5, p. 18 §5]. However, when Ms Bupati raised these concerns, she admittedly had forgotten about the amendment to the Arbitration Clause that now subjects disputes arising under the Sales Contract to the non-industry related AIAC Rules, which are in line with RESPONDENT's interests [RNoA, p. 27 §12]. Furthermore, her concerns about the opposition in Equatoriana were unfounded, because the Parties are not subject to investment arbitration but rather to commercial arbitration [cf. C5, p. 18 §5]. Consequently, both Parties viewed arbitration as their preferred dispute resolution mechanism and agreed to entrust a non-industry institution with the administration of potential disputes arising from the Sales Contract.

38 To ensure the parties' intention, courts and arbitral tribunals should apply the law that validates the arbitration agreement, rather than the law that invalidates it [*Blood Pressure Case*; *Berger II*, p. 313; *Born II*, §56; cf. *Yang*, p. 135]. This is in accordance with the validation principle [*ibid.*], which is recognized by both the NYC and the DAL. Namely, Art. II(1), (3) NYC establishes a rule of presumptive validity applicable to international arbitration agreements [*Berger II*, p. 317; *Born I*, p. 530; *Yang*, p. 135]. As *Born* explains, “[r]ead in conjunction, these two provisions [Art. II(1), (3)] establish a uniform international rule that international arbitration agreements are presumptively valid and enforceable, subject only to defined exceptions determined by reference to generally-applicable rules of contract law [...]” [*Born II*, §27]. Art. II NYC is paralleled by Art. 8 DAL [*Binder*, p. 147; *Born I*, p. 567; cf. *Yang*, p. 135]. Thus, under these provisions, there is an implied choice of law by the parties in favor of the law that will confirm their arbitration agreement rather than invalidate it [*Born I*, p. 615].

39 CLAIMANT will show that the validity of the Arbitration Agreement is least contested under Danubian law [cf. *infra* §§44 et seqq., 63 et seqq., 67]. Therefore, according to the validation principle, Danubian law is applicable to the Arbitration Agreement.

B. THE ARBITRATION AGREEMENT IS VALID ACCORDING TO THE LAW OF DANUBIA

40 An arbitration agreement comes into existence if the form requirements (formal validity) [*Lew/Mistelis/Kröll*, §7-5] and the requirements for the conclusion of a contract (substantive validity) [*Graffi*, p. 47; *Lew/Mistelis/Kröll*, §7-34] are fulfilled. CLAIMANT will show that the Tribunal has jurisdiction to hear this case since the Arbitration Agreement is formally (I) and substantively (II) valid according to the law of Danubia.

I. The Arbitration Agreement is formally valid, since the formal requirements of Art. 7 DAL have been met

- 41 Danubia adopted Option 1 of Art. 7 UNCITRAL Model Law, which provides the formal requirements of an arbitration agreement [PO1, p. 47 §3]. According to this provision, the Arbitration Agreement is formally valid, since the requirements of Art. 7(2) in conjunction with Art. 7(6) DAL have been met.
- 42 The formal validity of an arbitration agreement is governed by the law of the arbitral seat [Berger II, p. 324; cf. Born I, p. 663]. If an arbitration agreement provides for arbitration in a jurisdiction, which has adopted the UNCITRAL Model Law, the formal requirements of its Art. 7 apply [Born I, p. 665]. This is provided by Art. 1(2) DAL stating that the provisions of this law apply to any arbitration agreement providing for arbitration within national territory of a Model Law country [cf. Born I, p. 661; Lew/Mistelis/Kröll, §6-45]. Thus, because Danubia is the seat of arbitration and has adopted the UNCITRAL Model Law [PO1, p. 46 §3], the DAL applies to the formal validity.
- 43 Applying Art. 7 DAL, the Arbitration Agreement is formally valid. Art. 7(2) DAL states that “[t]he arbitration agreement shall be in writing”. According to Art. 7(6) DAL, this requirement is also met by a “[...] reference in a contract to any document containing an arbitration agreement [...], provided that the reference is such as to make that clause part of the contract”. A reference or other links to a written contractual document containing an arbitration clause is therefore sufficient to establish the formal validity of the arbitration agreement [Holtzmann et al., p. 103; Working Group IV, §17]. It is sufficient if the reference only refers to the document without specifically mentioning the arbitration clause therein [Guangdong v. Chiu Shing; Gaillard/Savage, §495-1; Working Group I, §19; Working Group III, §30]. Furthermore, Art. 7 DAL does not require any of the parties’ signatures [Daouda, p. 29; Holtzmann et al., p. 156]. Thus, the fact that RESPONDENT did not sign the Sales Contract [C3, p. 16] is no hindrance for the formal validity of the Arbitration Agreement. In the present case, the GCoS contain the written Arbitration Clause [R4, p. 32]. There is a reference in the Sales Contract, which states that the “*Seller’s General Conditions of Sale apply*” [C3, p. 13]. Whether the reference is such as to make the clause part of the contract is to be answered under the law applicable to the substantive validity [cf. Working Group IV, §17; Holtzmann et al., p. 156; *infra* §§44 et seq.]. This reference, together with the Arbitration Clause, constitutes a formally valid arbitration agreement in writing.

II. The Arbitration Agreement is substantively valid since the GCoS were validly included in the Sales Contract

44 In order for an arbitration clause contained in standard terms to be substantively valid, the standard terms need to be included in the underlying contract [*cf. Born I, p. 878*]. The DAL does not contain any special rules for the formation of arbitration agreements beyond those in Art. 7 DAL [*PO2, p. 53 §35*]. It instead leaves the issue of substantive validity to the contract law of Danubia, which is based on the UPICC [*ibid.*]. Applying Danubian contract law, the Arbitration Agreement is substantively valid since the GCoS were validly included in the Sales Contract.

45 Where one party uses standard terms in concluding a contract, the general rules on formation apply, subject to Artt. 2.1.20-2.1.22 UPICC [*Art. 2.1.19(1) UPICC*]. Therefore, “[...] *standard terms are incorporated into the contract if they formed part of an offer that was accepted*” [*Naudé, Art. 2.1.19 §6; cf. Brödermann, p. 62*]. If the standard terms are contained in a separate document, the parties must expressly refer to the standard terms in order for them to be included in the contract [*Brödermann, p. 62; Naudé, Art. 2.1.19 §12*]. In the present case, the Parties concluded the Sales Contract [*infra §§69 et seqq.*], which contains an explicit reference to the GCoS [*C3, p. 13; C4, p. 17*].

46 The fact that CLAIMANT did not provide RESPONDENT with the GCoS [*NoA, p. 5 §7*], when the Parties concluded the Sales Contract does not hinder its valid inclusion. Under Danubian contract law, the inclusion of standard terms in an existing contract merely requires a clear statement that such conditions are to be applied but does not require that they are made available to the other party [*PO1, p. 47 §3*]. Consequently, the requirements for the inclusion of the GCoS in the Sales Contract under Danubian contract law have been met and therefore, the Arbitration Agreement is substantively valid.

C. SHOULD THE LAW OF MEDITERRANEO BE FOUND TO GOVERN THE ARBITRATION AGREEMENT, THE CISG IS NOT APPLICABLE TO THE CONCLUSION THEREOF

47 In the event that the law of Mediterraneo applies to the Arbitration Agreement, it is governed by the non-harmonized contract law of Mediterraneo, while the Sales Contract is governed by the CISG [*infra §§70, 109*]. This is a consequence of the separability presumption [*cf. supra §§9 et seqq.*]. The CISG is not applicable to the conclusion of the Arbitration Agreement, since it is merely applicable to the conclusion of contracts of sale (I). Further, the Tribunal should not apply the CISG to the Arbitration Agreement, because the jurisprudence in Danubia rejects its application (II).

I. The CISG is merely applicable to the conclusion of contracts of sale

48 CLAIMANT will show that, according to Artt. 1-4 CISG, the application of the CISG is limited to contracts of sale (1) and that Artt. 19(3) and 81(1) CISG do not extend the scope of the CISG to arbitration agreements (2).

1. Artt. 1-4 CISG limit the scope of the CISG to contracts of sale

49 The CISG does not intend to regulate the conclusion of the Arbitration Agreement. Pursuant to Artt. 1-3 CISG, the sphere of application of the CISG is limited to contracts of sale [Kröll, p. 45]. Therefore, no one would apply the CISG to an arbitration agreement that was concluded as a separate agreement after a dispute arose or after the main contract was concluded [*ibid.*]. “*That the arbitration agreement is incorporated into a contract in the form of an arbitration clause does not change its nature as a separate contract, as is evidenced by the doctrine of separability*” [Kröll, p. 45; cf. Flecke-Giammarco/Grimm, p. 41]. Consequently, whether the parties concluded an arbitration clause is a question outside the sphere of application of the CISG [Kröll, p. 45].

50 Art. 4 CISG stipulates that the CISG is merely applicable to the conclusion of contracts for the sale of goods and to the rights and obligations of the seller and buyer arising therefrom. In other words, the CISG only governs substantive issues since procedural issues are not covered by the CISG [Gutta-Werke v. Dörken-Gutta; Spare Parts Case]. The arbitration agreement is not a contract of sale [Huber, Art. 4 §43] but a procedural contract regulating the process of dispute settlements [*supra* §27]. Furthermore, the rights and obligations related to an arbitration agreement do not arise from the sale of goods, as would be required by Art. 4 CISG [cf. Fillers, p. 688]. Consequently, the conclusion of the arbitration agreement is not within the scope of Art. 4 CISG [Huber, Art. 4 §43], and therefore, not subject to the CISG.

51 Moreover, the provisions on contract formation of the CISG [Artt. 14 et seqq. CISG] are merely applicable to the formation of contracts of sale. They do not apply to other agreements (e.g. arbitration agreements) that may be concluded as part of a contract of sale [cf. Industrial Product Case; Huber/Mullis, p. 61]. The requirements under Art. 14(1) CISG only refer to classic sales elements (i.e. “goods”, “quantity”, “price”) [Huber/Mullis, p. 61; cf. Spagnolo, Art. 14 §2]. Even if one would consider these provisions to be applicable to an arbitration agreement (*quod non*), the practical gain of doing so would be small, while complicating the matter [cf. Huber, Art. 4 §43]. Outside of questions of contract formation pursuant to Artt. 14 et seqq. CISG, all other aspects of substantive validity would, in any case, be governed by the applicable (domestic) law according to Art. 4(a) CISG [Huber, Art. 4 §43; cf. Garro II, pp. 117 et seq.]. Thus, the validity of the Arbitration Agreement would still be governed by the non-harmonized law of Mediterraneo. To avoid

unnecessary complexities as to which law applies to which aspect of the Arbitration Agreement, CLAIMANT requests that the Tribunal submits the Arbitration Agreement in its entirety to the non-harmonized law of Mediterraneo, instead of the CISG.

2. Artt. 19(3) and 81(1) CISG do not extend the scope of the CISG to the Arbitration Agreement

52 RESPONDENT is likely to rely on the *Mace Case* of the German Federal Court of Justice (“BGH”), which, to a certain extent, applied the CISG to an arbitration agreement. The BGH justified its holding by stating that Artt. 19(3) and 81(1) CISG speak in favor of an application. However, CLAIMANT will show that this assumption is incorrect, since these provisions are not about the validity of arbitration agreements, but instead, merely address the relationship of an arbitration agreement to a contract of sale [*Huber, Art. 4 §43; cf. Flecke-Giammarco/Grimm, p. 49*].

53 According to Art. 19(1) in conjunction with Art. 19(2) CISG, a reply to an offer which purports to be an acceptance, but which contains material additions, limitations, or other modifications, is a rejection of the offer and constitutes a counteroffer. Art. 19(3) CISG states that “[a]dditional or different terms relating, among other things, to [...] the settlement of disputes are considered to alter the terms of the offer materially”. Despite this wording, which might be read to imply that a contract of sale covers an arbitration agreement, it will be shown in the following that Art. 19 CISG does not relate to the scope of the CISG. Art. 19 CISG applies to all additions, limitations, and other modifications of an offer and is not limited only to those that otherwise fall within the material scope of the CISG [*Fillers, p. 681*]. This interpretation complies with the text of Art. 19 CISG, which does not make a distinction between terms governed in principle by the CISG and those falling outside its scope [*ibid.*]. Consequently, Art. 19(3) CISG does not presuppose that arbitration agreements are covered by the CISG. Instead it simply states that they could generally be of such importance that the insertion or modification of such a clause during the negotiation process might also affect the conclusion of the contract of sale [*Huber/Mullis, p. 61; cf. Flecke-Giammarco/Grimm, p. 49*].

54 Furthermore, the legislative history does not provide support for the assumption that the CISG was meant to apply to arbitration agreements. The delegates at the Vienna Conference in 1980 did discuss the language of Art. 19(3) CISG [*Official Records, pp. 284 et seqq.*]. However, the delegates did not discuss arbitration agreements or any such expansion of the CISG’s scope of application as determined by Artt. 1-6 CISG [*Fillers, p. 686; Official Records, pp. 284 et seqq., 328 et seq.*]. Hence, the CISG drafters never intended to subject arbitration agreements to the CISG.

55 Art. 81(1) CISG states that “[a]voidance does not affect any provision of the contract for the settlement of disputes [...]”. This wording might be read to imply that a contract of sale covers an arbitration agreement and is also governed by the CISG. However, Art. 81(1) CISG only reflects the separability presumption [*Flecke-Giammarco/Grimm*, p. 49; *Vorobey*, pp. 137 et seq.; cf. *Garro I*, p. 238]. Indeed, Art. 81(1) CISG merely states that the avoidance of the contract of sale does not extend to the arbitration agreement [*Flecke-Giammarco/Grimm*, p. 49]. Consequently, the provision does not affect national arbitration law. It only limits the effects of a contract of sale on an arbitration agreement [*Fillers*, p. 683]. In conclusion, Art. 81(1) CISG does not extend the scope of the CISG to the Arbitration Agreement as part of the Sales Contract.

56 Lastly, there is yet another reason why RESPONDENT cannot rely on the *Mace Case*, because the BGH decided that the CISG is applicable to the conclusion of an arbitration agreement, at least in those cases in which the form requirements of Art. II(2) NYC are not met. In such cases, the national substantive law or the law according to the conflict of laws rule shall apply, in accordance with the most favorable law test under Art. VII(1) NYC. The BGH did not rule on whether the CISG applies to questions regarding the substantive formation of an arbitration agreement when the review is not conducted in the context of the most favorable law test [*Masser/Harraschain*, p. 104]. In any event, in the present case the formal requirements of an arbitration agreement have been met [*infra* §62] and thus, the CISG would not be applied under the most favorable law test under Art. VII(1) NYC.

57 In conclusion, Artt. 19(3) and 81(1) CISG do not extend the scope of the CISG to the Arbitration Agreement and the most favorable law test is not applicable. Consequently, RESPONDENT cannot rely on the *Mace Case* of the BGH. Therefore, the Tribunal shall not subject the Arbitration Agreement to the CISG, but to the non-harmonized Mediterranean law.

II. The Tribunal should consider the jurisprudence in Danubia, which rejects the application of the CISG to arbitration agreements

58 The Tribunal should not apply the CISG to the Arbitration Agreement. In the unlikely case that the Tribunal finds that the CISG is applicable and decides, based on the CISG, that the Arbitration Clause was not validly included in the Sales Contract [*cf. infra* §§109 et seqq.], a state court in Danubia would likely set aside such an award.

59 Since the Tribunal has its seat in Danubia [*R4*, p. 32], the state courts in Danubia would have the procedural competency to set aside the arbitral award pursuant to Art. 34(2) DAL [*cf. Redfern/Hunter I*, §§10.25, 10.38]. A setting aside procedure against a negative jurisdictional

decision by an arbitral tribunal is possible based on Art. 34(2)(a)(iv) DAL. According to this provision, a decision of an arbitral tribunal may be challenged if the procedure agreed upon by the parties has not been followed. This should also be applied where an arbitral tribunal “[...] *fails entirely to give effect to the agreed dispute resolution of arbitration by wrongfully declining jurisdiction*” [Born I, p. 1196].

60 In Danubia, courts have generally rejected the application of the CISG to arbitration clauses contained in contracts of sale, even if the law governing the arbitration agreement was the law of a contracting state [PO1, p. 47 §4]. Thus, a decision of the Tribunal denying its jurisdiction based on the application of the CISG to the Arbitration Agreement would likely be set aside by a state court in Danubia. The Tribunal should therefore, in order to minimize the risk of rendering an award that would likely be set aside, not apply the CISG to the conclusion of the Arbitration Agreement.

D. THE ARBITRATION AGREEMENT IS ALSO VALID ACCORDING TO THE LAW OF MEDITERRANEO

61 Should the Tribunal conclude that the law of Mediterraneo applies to the Arbitration Agreement, the Parties nevertheless validly agreed on the jurisdiction of the Tribunal. CLAIMANT will show that the Arbitration Agreement is formally valid (I). Furthermore, it is substantively valid according to both the non-harmonized contract law of Mediterraneo (II), or alternatively, the CISG (III).

I. The Arbitration Agreement is formally valid since the formal requirements of Art. 7 DAL have been met

62 The formal validity of an arbitration agreement is governed by the law of the arbitral seat [*supra* §42]. Thus, the DAL governs the formal validity of the Arbitration Agreement, even if the substantive validity was governed by the law of Mediterraneo [*ibid.*]. Therefore, the Arbitration Agreement is formally valid [*supra* §§41 *et seqq.*].

II. The Arbitration Agreement is substantively valid since the GCoS were validly included in the Sales Contract according to the non-harmonized contract law of Mediterraneo

63 The Arbitration Agreement is substantively valid since the GCoS were validly included in the Sales Contract under the UPICC. The UPICC, as the non-harmonized contract law of Mediterraneo, applies [PO1, p. 47 §3] because the substantive validity of the Arbitration Agreement is not covered by the scope of the CISG [*supra* §§47 *et seqq.*].

64 As shown above, the UPICC require that in order for standard terms to be included, an explicit reference must be made to them and that a contract must be concluded [*supra* §45]. In the case at hand, these requirements have been met [*ibid.*]. Unlike the contract law of Danubia, the non-harmonized contract law of Mediterraneo does not contain an explicit provision stating that standard terms do not need to be made available to the other party [*cf. supra* §46]. However, it is possible under the UPICC to expressly include standard terms in a contract by a mere reference, without having to convey the content of it to the other party, when there exists a usage [*Nandé, Art. 2.1.19* §25]. Thus, a reference to a standard term which is widely used in a particular trade is sufficient [*ibid.*]. This view is in line with the fact that the UPICC has more lenient requirements for the inclusion of standard terms than the CISG does [*PO2, p. 50* §16]. In the palm oil industry, the common business practice is to include arbitration clauses in standard terms [*PO2, p. 49* §11]. Thus, a usage of including standard terms containing arbitration clauses in a contract exists. Therefore, the GCoS were expressly included without the need of making them available to RESPONDENT.

65 If the Tribunal finds that the requirements for an express inclusion of the GCoS are not met in the present case, the standard terms were, in any event, implicitly included. According to the official comments on the UPICC, even an implied inclusion of standard terms may be admitted if there exists a practice established between the parties or usage to that effect [*UPICC Comment on Art. 2.1.19, §3; cf. Bonell, p. 154*]. As just shown, such a usage exists [*supra* §64]. Further, in accordance with Art. 1.9 UPICC, there is an established practice between CLAIMANT and RESPONDENT to refer to arbitration clauses [*cf. infra* §§85 *et seq.*, 118 *et seq.*]. Consequently, there is a usage as well as an established practice of including standard terms containing arbitration clauses in a contract, and therefore, the GCoS were implicitly included and did not need to be made available to RESPONDENT.

66 In conclusion, the Arbitration Agreement is substantively valid since the GCoS were validly included in the Sales Contract pursuant to the non-harmonized contract law of Mediterraneo.

III. Alternatively, the Arbitration Agreement is substantively valid, since the GCoS were validly included in the Sales Contract according to the CISG

67 If the Tribunal were to find that the CISG is applicable to the conclusion of the Arbitration Agreement (*quod non*), the Parties nevertheless agreed on the jurisdiction of the Tribunal. It will be shown under Issue 3 [*infra* §§109 *et seq.*] that the GCoS containing the Arbitration Clause were validly included in the Sales Contract under the CISG. Therefore, the Arbitration Agreement is substantively valid.

* * *

68 In conclusion to **Issue 1**, the Parties validly agreed on the jurisdiction of the Tribunal, since the Arbitration Clause is valid. The choice of Mediterranean law merely applies to the Sales Contract while the separate Arbitration Agreement is governed by Danubian law. Should Mediterranean law govern the Arbitration Agreement, the CISG would not apply to the conclusion thereof, since it is merely applicable to contracts of sale. In any event, both the non-harmonized contract law of Mediterraneo and the CISG lead to the conclusion that the Parties validly agreed on arbitration.

THE PARTIES CONCLUDED A CONTRACT IN 2020

69 During the Palm Oil Summit on 28 March 2020, Mr Chandra (CLAIMANT's COO) approached Ms Bupati (RESPONDENT's Head of Purchasing) to discuss the sale of 20,000t of RSPO-certified palm oil annually over the course of five years [NoA, p. 5 §4]. At this time, CLAIMANT was looking for a new customer for its supply of sustainably sourced palm oil [NoA, p. 4 §3] and RESPONDENT was eager to enlarge its business in this sector [NoA, p. 5 §4; cf. R3, p. 31 §5]. With this in mind, the Parties both showed great interest in commercially engaging with each other [RNoA, p. 26 §4]. CLAIMANT will show that the ensuing negotiations culminated in the consent of the Parties to conclude the Sales Contract (**A**) and that it is irrelevant that the contractual documents were not countersigned by RESPONDENT (**B**).

70 As a matter of clarification, it should be noted that the law governing the Sales Contract is to be determined separately from the Arbitration Agreement due to the separability presumption [*supra* §§9 *et seqq.*]. It is widely accepted that a general choice of law of a contracting state does not qualify as an implied exclusion of the CISG since it forms part of the law of the respective contracting state [*Paprika Powder Case IV; Potato Chips Plant Case; Turkish Yarn Case; Manner/Schmitt, Art. 6 §5*]. In the present case, the Parties agreed on the law of Mediterraneo to govern the Sales Contract [*supra* §8], which includes the CISG [*PO1, p. 46 §3*]. Therefore, the CISG governs the conclusion of the Sales Contract.

A. THERE WAS CONSENT BETWEEN THE PARTIES TO CONCLUDE THE SALES CONTRACT

71 By email of 1 April 2020, RESPONDENT made an offer (**I**). CLAIMANT accepted the offer by email of 9 April 2020 (**II**). Even if CLAIMANT's email of 9 April 2020 was to be considered a counteroffer, RESPONDENT implicitly accepted it (**III**).

72

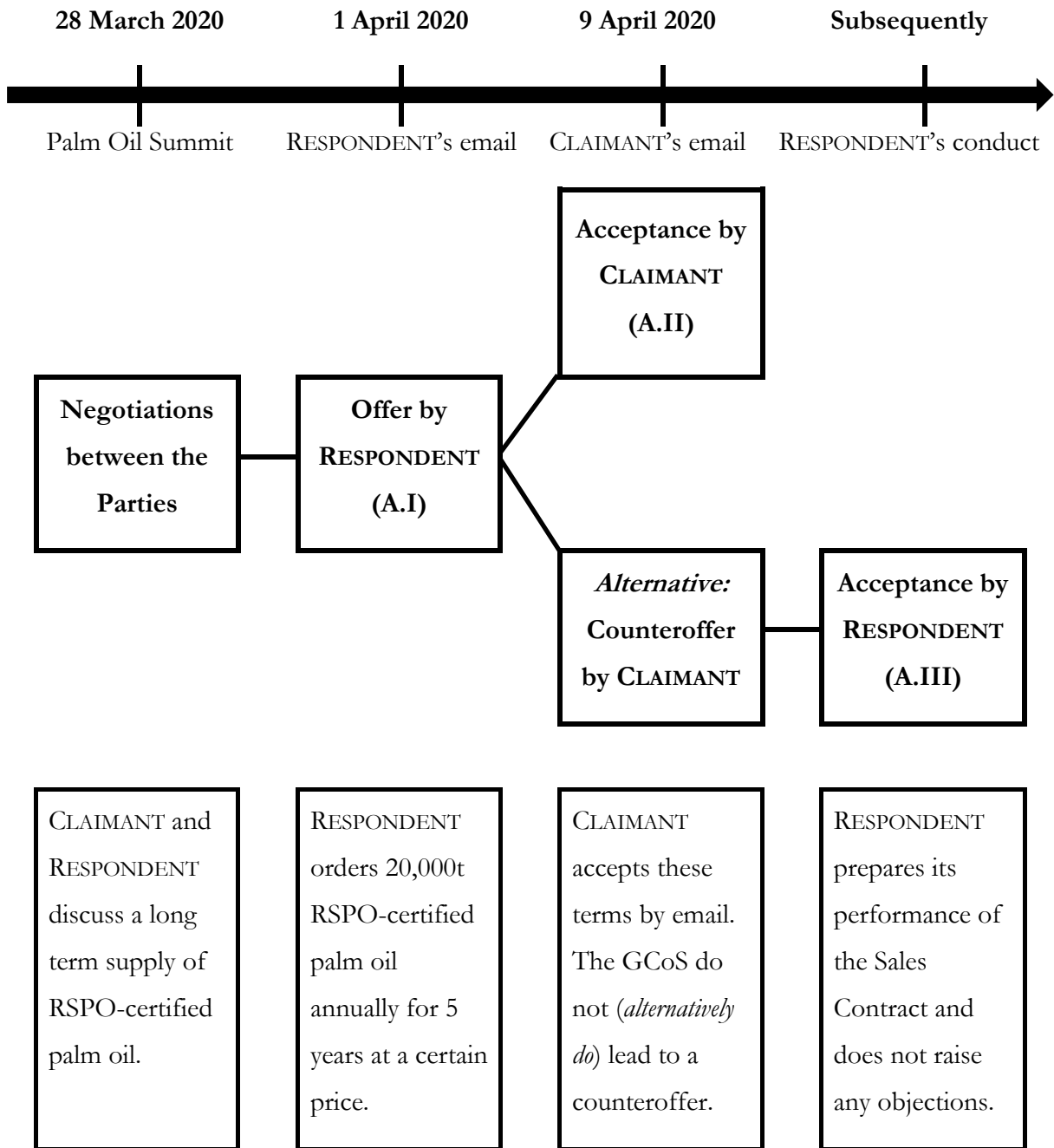


Table 1: Timeline of the conclusion of the Sales Contract

I. RESPONDENT made an offer by email on 1 April 2020

73

A proposal constitutes an offer if it is sufficiently definite and indicates the intention to be bound to the contract in case of an acceptance [Art. 14(1) CISG]. RESPONDENT's email of 1 April 2020 is sufficiently definite, because it specifies that 20,000t of RSPO-certified palm oil for a certain price were ordered (1) and indicates RESPONDENT's intention to be bound to the Sales Contract in case of an acceptance by CLAIMANT (2).

1. The proposal was sufficiently definite as it indicated that 20,000t of RSPO-certified palm oil were ordered at a specific price

74 A proposal is sufficiently definite if it indicates the goods and fixes the quantity and the price [Art. 14(1) CISG]. Ms Bupati ordered 20,000t of RSPO-certified palm oil per annum for the years 2021-2025 at the price of USD 900/t for the first year and for the years thereafter at the market price minus 5% at time of shipment [C2, p. 12]. Therefore, the goods, the quantity, and their price were determined, which made the proposal sufficiently definite.

2. The proposal indicated RESPONDENT's intention to be bound by the Sales Contract in case of an acceptance by CLAIMANT

75 RESPONDENT claims that the Parties never entered into a contract, because they were still at the stage of negotiations [C7, p. 20; cf. RNoA, p. 27 §16]. However, RESPONDENT's email of 1 April 2020 expressed its intention to be bound by a contract for the sale of RSPO-certified palm oil.

76 Pursuant to Art. 14(1) CISG, a proposal must indicate the intention to be bound in order to constitute an offer. The intention to be bound draws the line between non-binding negotiations and a binding offer, and therefore, is an important prerequisite for the conclusion of a contract [Brunner/Pfisterer/Köster, Art. 14 §5; Schroeter, Art. 14 §25; Schwenzler/Hachem/Kee, §10.19]. When there are doubts about one party's intention to be legally bound, its statement is to be interpreted with the understanding that a reasonable person of the same kind as the addressee would have had under the same circumstances [Schroeter, Art. 14 §26; Spagnolo, Art. 14 §9; cf. Art. 8(2) CISG]. For the interpretation of statements, the circumstances of the case, including the contract negotiations between the parties, shall be taken into account [Brunner/Hurni/Kissling, Art. 8 §§7, 17; cf. Art. 8(3) CISG]. In one instance, a buyer who used the terms "order" and "we order" in its fax message to a seller was found to have indicated its intention to be bound [Plotters Case].

77 In December 2019, RESPONDENT announced that it planned on increasing its production of palm oil-based biofuel while upholding a commitment to protect the environment [RNoA, p. 25 §3]. Considering this, Ms Bupati was very happy when Mr Chandra approached her at the Palm Oil Summit and offered her a long-term supply of the environmentally friendly but limitedly available RSPO-certified palm oil at a very favorable price [C1, p. 10 §11; RNoA, p. 26 §§4, 7]. After negotiating the commercial terms of the sale, both agreed that Ms Bupati would – unless her management did not approve – submit a definite offer to Mr Chandra [NoA, p. 5 §5; RNoA p. 26 §8]. RESPONDENT's CEO approved the transaction [RNoA, p. 26 §9], and accordingly, Ms Bupati's email of 1 April 2020 contained the exact commercial terms agreed between the Parties at the Palm Oil Summit [C1, p. 12; cf. RNoA, p. 26 §9]. Furthermore, this email had the subject

“Purchase offer” and explicitly stated that “[...] I would like to place the following **order** with you [...]” (emphasis added) [C2, p. 12]. If RESPONDENT thought the negotiations were still ongoing [C7, p. 20; cf. RNoA, p. 27 §16], it did not make this known to CLAIMANT. Thus, to the understanding of a reasonable person of the same kind as CLAIMANT pursuant to Art. 8(2), (3) CISG, the email of 1 April 2020 shows RESPONDENT’s intention to be bound to the Sales Contract.

78 Consequently, RESPONDENT’s email of 1 April 2020 amounts to a binding offer pursuant to Art. 14(1) CISG, because it is sufficiently definite and indicates RESPONDENT’s intention to be bound to the Sales Contract.

II. CLAIMANT accepted the offer by email on 9 April 2020

79 CLAIMANT’s email of 9 April 2020 cannot be considered a counteroffer (1), and therefore, constitutes an acceptance, to which RESPONDENT did not object without undue delay (2).

1. CLAIMANT’s email of 9 April 2020 was not a counteroffer, because it did not materially alter the terms of RESPONDENT’s offer

80 Pursuant to Art. 19(1), (2) CISG, a response to an offer containing material alterations constitutes a counteroffer. Generally, terms relating to the settlement of disputes are considered to alter the terms of the offer materially [Art. 19(3) CISG]. However, according to the prevailing opinion, this rule is refutable in individual cases [Jumping Horse Case; Monoammonium Phosphate Case; Brunner/Pfisterer/Köster, Art. 19 §5; Ferrari, Art. 19 §10; Schroeter, Art. 19 §15; Schulze, Chapter 8 §61; Spagnolo, Art. 19 §14]. Whether the alteration is material depends on the circumstances of the case, such as the negotiations between the parties, their established practice, and applicable usages [ibid.].

81 CLAIMANT’s email of 9 April 2020, in response to RESPONDENT’s offer of 1 April 2020, referred to the GCoS which contain an arbitration clause [C4, p. 17; R4, p. 32]. Even if this clause concerns the settlement of disputes, this did not materially alter the terms of RESPONDENT’s offer because of the preliminary negotiations between the Parties (a), the established practice between their representatives (b), and the according usage in the palm oil industry (c).

a) The Parties discussed arbitration as their dispute resolution mechanism and in this context, the Arbitration Clause corresponds with RESPONDENT’s interests

82 Because of the prior discussions between the Parties at the Palm Oil Summit, CLAIMANT’s reference to the Arbitration Clause in its email of 9 April 2020 cannot be interpreted as a material alteration to the terms of RESPONDENT’s offer. On account of the preliminary negotiations between the parties, a reference to an arbitration clause does not have to result in a material

alteration of an offer [*supra* §80]. This is even more the case if the alteration benefits the offeror [*Monoammonium Phosphate Case; Schulze, Chapter 8 §61; Perales Viscasillas, Editorial Remarks, at fn. 6*].

83 As a consequence of the negotiations between the Parties, Ms Bupati necessarily accepted arbitration as their dispute resolution mechanism [*supra* §37]. When expressing her concerns about investment arbitration [*C2, p. 12*], she had forgotten that CLAIMANT's Arbitration Clause, no longer provides for arbitration under an industry-related institution [*cf. RNoA, p. 27 §12*]. Thus, the Arbitration Clause contained in the GCoS falls in line with RESPONDENT's demand and interests, as expressed in the email of 1 April 2020 [*C2, p. 12*].

b) The reference to an arbitration clause was consistent with the established practice between the Parties

84 CLAIMANT's reference to an arbitration clause in the email of 9 April 2020 does not qualify as a material alteration to RESPONDENT's offer of 1 April 2020, because it is in line with the practice established between the Parties' representatives. Alterations to terms relating to the settlement of disputes can be classified as non-material, due to practices established between the parties [*supra* §80]. Although the Parties themselves have not directly concluded contracts in the past, CLAIMANT and Southern Commodities established a practice to refer to arbitration clauses in the contracts concluded between them (**aa**), which must be attributed to RESPONDENT (**bb**).

aa) CLAIMANT and Southern Commodities had established a practice between them to refer to arbitration clauses

85 Mr Chandra and Ms Bupati have established a practice pursuant to Art. 9(1) CISG to refer to arbitration clauses when concluding contracts for CLAIMANT and Southern Commodities. According to Art. 9(1) CISG, the parties are bound by any practices which they have established between themselves. For a practice to be considered as established, the conduct in question must occur for a certain duration and/or appear in several concluded contracts [*Pizza Boxes Case; Tantalum Powder Case II; Brunner/Hurni/Kissling, Art. 9 §3; Perales Viscasillas, Art. 9 §8; Schmidt-Kessel, Art. 9 §8*]. Thereby, at least three or four previous dealings are necessary [*Pizza Boxes Case; Perales Viscasillas, Art. 9 §11; cf. Bulgarian White Urea Case; Schmidt-Kessel, Art. 9 §8*]. This will enable the parties to justifiably expect that the same practice will be observed again in a similar instance [*Brunner/Hurni/Kissling, Art. 9 §3; Schmidt-Kessel, Art. 9 §8; cf. Schroeter, Art. 14 §77*].

86 From 2010 to 2018, CLAIMANT and Southern Commodities concluded approximately forty contracts [*R3, p. 31 §2*], always relying on the same contract template [*C1, p. 9 §4*]. Until 2016, this contract template, as well as the GCoS pre-2016, provided for arbitration [*PO2, p. 52 §25*].

Ms Bupati, in her former role at Southern Commodities, was familiar with this arbitration clause as she once took a closer look at it in 2014 [RNoA, p. 27 §11]. When CLAIMANT changed its contractual templates as well as the GCoS pre-2016, Mr Chandra notified Ms Bupati of this [C1, p. 9 §4; RNoA, p. 27 §12; PO2, p. 50 §18]. For the eight contracts that were concluded over the following two years between CLAIMANT and Southern Commodities, both continued using this template containing the reference to the GCoS including the Arbitration Clause [PO2, p. 48 §7]. This enabled CLAIMANT to justifiably expect to proceed according to this conduct in the future. Consequently, this constitutes an established practice between CLAIMANT and Southern Commodities, in accordance with Art. 9(1) CISG, to refer to arbitration clauses in the contracts concluded between them.

bb) The established practice between CLAIMANT and Southern Commodities must be attributed to RESPONDENT

87 It is irrelevant that the Parties have not directly concluded contracts in the past, because the practice established between CLAIMANT and Southern Commodities must be attributed to RESPONDENT. Art. 79(1), (2) CISG is based on the principle that a party is liable for any person it engages [Brunner, Art. 79 §9; Schwenzler, Art. 79 §§10, 21]. Employees are included in this category [Magnus, Art. 79 §43; Schwenzler, Art. 79 §41]. According to this general principle of the CISG, a party must carry the risk of assigning other persons to perform its obligations, since it benefits from their work [Atamer, Art. 79 §60]. Therefore, any conduct and knowledge of such people must be attributed to the engaging party [Art. 7(2) CISG; Schwenzler, Art. 79 §10]. This corresponds with the general principle that facts which are known to the agent, e.g. an employee, are attributable to the principal [Magnus, §22], regardless of their source [DeMott, p. 304; cf. Carter v. Gugliuzzi]. An exception might only apply if the agent learned the knowledge under circumstances creating a duty of confidentiality to another party [DeMott, p. 304], which is not the case here.

88 Ms Bupati is the Head of Purchasing in RESPONDENT's palm oil unit [R3, p. 31 §4]. Therefore, she is an employee of RESPONDENT and, in particular, the person responsible for the conclusion of the present Sales Contract [PO2, p. 49 §12]. Her work in the purchasing department at Southern Commodities has made Ms Bupati experienced in the palm oil industry and has created connections between her and palm oil producers [R3, p. 31 §§2, 4]. CLAIMANT is precisely such a connection of Ms Bupati's. For this reason, RESPONDENT's parent company, Southern Commodities, deliberately moved Ms Bupati into her current position [R3, p. 31 §4; PO2, p. 48 §5]. While Ms Bupati acquired the relevant knowledge while she was engaged at Southern Commodities, this is irrelevant in view of the principle of imputed knowledge established

above [*supra* §87]. Since RESPONDENT benefits from Ms Bupati's work, her knowledge, experience, and the practices she established within the palm oil industry must be attributed to RESPONDENT.

89 In conclusion, the practice between CLAIMANT and Southern Commodities to refer to arbitration clauses in their contracts must be attributed to RESPONDENT.

c) The inclusion of arbitration clauses in contracts of sale is a common practice in the palm oil industry

90 CLAIMANT's reference to an arbitration clause in its email of 9 April 2020 [C4, p. 17] cannot be qualified as a material alteration to RESPONDENT's offer of 1 April 2020, as there is a common business practice in the palm oil industry to include arbitration clauses in contracts [*cf.* PO2, p. 49 §11]. Due to usages, a change to the terms of an offer that concerns the settlement of disputes can be qualified as non-material [*supra* §80]. Pursuant to Art. 9(2) CISG, the parties to an international sales contract are presumed to comply with the rules of their particular trade [Gillette/Walt, p. 121; *cf.* Brunner/Hurni/Kissling, Art. 9 §1; Mankowski, Art. 9 §7], when they knew or ought to have known this usage, which is widely known and regularly observed by the majority involved in their industry [Art. 9(2) CISG; Bonell, Art. 9 §2.2; Perales Viscasillas, Art. 9 §20].

91 Most contracts used in the palm oil industry are based on contract models that provide for arbitration [PO2, p. 49 §11]. Thus, there is a usage in the palm oil industry to include arbitration clauses in contracts [*cf.* PO2, p. 49 §11]. On RESPONDENT's behalf, it is Ms Bupati who is responsible for the present Sales Contract, whose knowledge must be attributed to RESPONDENT [*supra* §§87 *et seqq.*]. It must be assumed that she knew of this usage, since she has been working in this industry since 2010 [R3, p. 31 §2]. Consequently, RESPONDENT was aware of the usage in the palm oil industry to refer to arbitration clauses in contracts.

92 In conclusion, CLAIMANT's reference to an arbitration clause did not materially alter the terms of RESPONDENT's offer and was, therefore, not a counteroffer pursuant to Art. 19(1), (2) CISG, because of the preliminary negotiations between the Parties, the established practice between their representatives, and the according usage in the palm oil industry.

2. The email of 9 April 2020 constituted an acceptance of RESPONDENT's offer to which RESPONDENT did not object without undue delay

93 A statement made by the offeree indicating assent to an offer is an acceptance [*cf.* Art. 18(1) CISG]. It may be explicit or implied and can be made in any form [Brunner/Pfisterer/Köster, Art. 18 §3; Ferrari, Art. 18 §4]. Further, the statement of acceptance must express a corresponding intent to be bound to the terms of the offer [Brunner/Pfisterer/Köster, Art. 18 §4; Schroeter, Art. 18 §2].

94 Attached to the email of 9 April 2020, CLAIMANT sent a pdf-file of the contractual documents [C4, p. 17] to RESPONDENT in which the terms of Ms Bupati's offer had been included [C3, p. 13]. This email read "I have inserted the terms of your offer into the Contract, which we accept" [C4, p. 17]. Thus, CLAIMANT explicitly indicated assent to the terms of RESPONDENT's offer. Furthermore, CLAIMANT wanted to be bound to RESPONDENT's offer because it had just lost a major customer and was looking for a replacement [NoA, p. 4 §3]. Therefore, CLAIMANT's email of 9 April 2020 is an acceptance of RESPONDENT's offer.

95 An acceptance which does not materially alter the terms of an offer retains its function as an acceptance and leads, unless the offeror objects, to the conclusion of a contract [Art. 19(2) CISG]. This objection must be made expressly and without undue delay [Bridge, §11.10; Enderlein, Art. 19 §6; Mankowski, Art. 19 §30; Spagnolo, Art. 19 §22]. Generally, it should be made within a maximum of three working days [Gruber, Art. 19 §16; Schroeter, Art. 19 §28; cf. Rapeseed Dregs Case; Dornis, Art. 19 §28]. When RESPONDENT sent its letter of 30 October 2020 concerning the "Termination of Negotiations" [C7, p. 20], over half a year had passed since CLAIMANT's acceptance [C4, p. 17]. Thus, this objection was significantly delayed. Consequently, RESPONDENT did not object to CLAIMANT's acceptance without undue delay. Pursuant to Art. 18(1) CISG in conjunction with Art. 19(2) CISG, the Sales Contract should, therefore, be deemed to have been concluded shortly after CLAIMANT's email of 9 April 2020.

III. Even if CLAIMANT's email of 9 April 2020 was to be considered a counteroffer, RESPONDENT implicitly accepted it

96 Even if the Tribunal is of the opinion that CLAIMANT's email of 9 April 2020 did constitute a counteroffer (*quod non*), RESPONDENT implicitly accepted it by preparing its performance under the Sales Contract (1) and by raising no objections in a timely fashion (2).

1. RESPONDENT prepared its performance of the Sales Contract by arranging for the letter of credit

97 The initiation of the opening of the letter of credit by RESPONDENT should be deemed an act of performance pursuant to Art. 18(1) CISG. An acceptance can be made by statement or by other conduct indicating assent to an offer [Art. 18(1) CISG]. Whether conduct indicates assent to an offer must be determined in accordance with Art. 8(2), (3) CISG, considering all circumstances of the individual case [Dornis, Art. 18 §21; Schroeter, Art. 18 §13]. Accordingly, the opening of a letter of credit can be considered as indicating assent to an offer [Magellan v. Salzgitter; Brunner/Pfisterer/Köster, Art. 18 §6; Dornis, Art. 18 §22; Schroeter, Art. 18 §13]. Furthermore, complete performance is not required [DiMatteo, p. 78; Farnsworth, Art. 18 §2.2; Spagnolo, Art. 18 §11]. Acts of

preparation for performance, such as arranging for a letter of credit, may also qualify as conduct equivalent to an acceptance pursuant to Art. 18(1) CISG [*Farnsworth, Art. 18 §2.2*].

98 The Sales Contract requires RESPONDENT to open a letter of credit [*C3, p. 14 §7a*]. When RESPONDENT asked CLAIMANT for suitable banks to open the letter of credit on 3 May 2020, RESPONDENT had just experienced problems with another customer who tried to get out of a contract by alleging that the letter of credit was not issued by an acceptable bank [*PO2, p. 51 §22; R2, p. 30*]. By discussing this preemptively, RESPONDENT wanted to avoid similar problems with CLAIMANT [*cf. PO2, p. 51 §22*]. After this, Ms Bupati's assistant contacted several banks on 30 May 2020 regarding opening the letter of credit, thereby preparing the performance of RESPONDENT's obligations arising out of the Sales Contract [*PO2, p. 51 §23*]. While the letter of credit had not yet been opened in October 2020, because Ms Bupati's assistant was suddenly absent from work for two months, there was still enough time, upon the assistant's return to open the letter of credit [*ibid.*]. In any event, RESPONDENT's arrangements regarding opening a letter of credit are sufficient to indicate assent to CLAIMANT's counteroffer [*cf. Farnsworth, Art. 18 §2.2*].

2. RESPONDENT did not oppose the counteroffer in due course, despite its duty to notify CLAIMANT of any objections in a timely fashion

99 If RESPONDENT was not willing to enter into the Sales Contract, it should have notified CLAIMANT by objecting to the email of 9 April 2020 within a timely fashion. As found in *Filanto v. Chilewich*, “[a]n offeree who [...] fails to notify the offeror of its objection to the terms of the contract within a reasonable time will, under certain circumstances, be deemed to have assented to those terms”. Not only do courts [*Calzados Magnanni v. Shoes General; Iroko Wood Case*] and commentators [*Farnsworth, Art. 18 §2.3; Schroeter, Art. 18 §19; Schulze, Chapter 8 §55; Spagnolo, Art. 18 §13; Official Records, p. 23 §4*] support this, but the provisions of the CISG themselves recognize this rule. Although silence in itself does not constitute an acceptance [*Art. 18(1) CISG*], the Tribunal should, in accordance with Art. 8(3) CISG, consider the practice between the Parties pursuant to Art. 9(1) CISG when deciding whether RESPONDENT's lack of objection can be regarded as an implied acceptance [*ibid.*]. As shown above, Art. 9(1) CISG requires the repeated confirmation of a conduct to create a justified expectation that it will be observed again [*supra §85*], and any practice established between CLAIMANT and Southern Commodities must be attributed to RESPONDENT [*supra §§87 et seqq.*].

100 When concluding contracts on behalf of Southern Commodities, Ms Bupati would, in every case, expressly object within a week if she did not accept CLAIMANT's terms [*PO2, p. 49 §9; cf. R3, p. 31 §3*]. Because of this, CLAIMANT could justifiably expect for this to remain unchanged if its terms were not agreed with. Thus, RESPONDENT was obliged to timely object if it did not agree

with the terms of CLAIMANT's email of 9 April 2020. However, between this email and RESPONDENT's letter concerning the "*Termination of Negotiations*" on 30 October 2020, over half a year had passed [*supra* §95]. Until actions by environmental activists started to affect its share price [C6, p. 19], RESPONDENT never objected to CLAIMANT's email of 9 April 2020. On the contrary, RESPONDENT even took steps to prepare its performance of the Sales Contract [*supra* §§97 *et seqq.*]. Since Ms Bupati put her assistant in charge during her absence, who would "[...] *take care of further discussions, if any, and the implementation of the Contract*" [C2, p. 12; cf. PO2, p. 49 §12; PO2, p. 51 §21], there is no satisfactory explanation for why RESPONDENT did not timely object to CLAIMANT's email of 9 April 2020 if it was unwilling to conclude the Sales Contract in the first place.

101 As a result of interpreting RESPONDENT's preparations for the performance of the Sales Contract pursuant to Art. 8(2), (3) CISG, RESPONDENT should be deemed to have implicitly accepted the counteroffer in accordance with Art. 18(1) CISG. Specifically, RESPONDENT arranged for the letter of credit to be opened and did not object in a timely fashion. Consequently, even if the Tribunal considered CLAIMANT's email of 9 April 2020 as constituting a counteroffer (*quod non*), the Sales Contract would have been concluded in this case as well.

B. IT IS IRRELEVANT THAT RESPONDENT DID NOT COUNTERSIGN THE SALES CONTRACT, SINCE COUNTERSIGNATURES WERE NOT REQUIRED

102 RESPONDENT might argue that the Parties did not fulfill the necessary formal requirements to conclude a contract of sale, because RESPONDENT never signed the contractual documents [cf. *NoA*, p. 28 §17]. However, this is irrelevant, because neither the CISG nor the Parties required a specific form to conclude the Sales Contract.

103 First, there are no form requirements under the CISG in order to conclude contracts [Brunner/Balogh, Art. 11 §1; Huber/Mullis, p. 37]. Art. 11 CISG states that "[a] *contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. [...]*". It follows that the CISG does not require contracts to be signed in order to be validly concluded [cf. *Schmidt-Kessel*, Art. 11 §20]. As a result, RESPONDENT was not required by the CISG to sign the Sales Contract to be bound by it.

104 Second, in accordance with Artt. 6 and 9(1) CISG, it is possible for parties to agree on or establish a practice of formal requirements [*Schmidt-Kessel*, Art. 11 §20; cf. *Brunner/Balogh*, Art. 11 §4; *Huber/Mullis*, p. 39; *Manner/Schmitt*, Art. 6 §8]. An agreement requires explicit or implicit consent between parties [*Schmidt-Kessel*, Art. 11 §20]. To establish a practice, a justified expectation that the parties will proceed correspondingly in the future needs to be created [*supra* §85]. This rule is an

expression of the general prohibition of going against one's own conduct and refers to the element of trust which has emerged between the parties [*cf. Schmidt-Kessel, Art. 9 §8*].

105 However, during the negotiations, the Parties never explicitly stated that both their signatures would be required for the conclusion of the Sales Contract. Nor could RESPONDENT have reasonably believed that a signature requirement had been agreed on implicitly. The Parties had previously merely discussed the template used for the Sales Contract [C2, p. 12] and the only time a signature was requested was in the email sent by CLAIMANT on 9 April 2020. Even so, CLAIMANT only asked for the return of a signed version of the contractual documents “[...] for [its] files and the necessary paperwork for shipments” [C4, p. 17]. A reasonable person pursuant to Art. 8(2) CISG in the same situation as RESPONDENT could not have understood this to mean that a signature was a prerequisite for contract conclusion.

106 Furthermore, while established practices between Mr Chandra and Ms Bupati must indeed be attributed to the respective party [*supra* §§87 *et seqq.*], Ms Bupati has failed on at least five previous occasions to return countersigned versions of other contracts [C1, p. 9 §3]. Even so, the respective contracts were always performed [C1, p. 9 §3]. CLAIMANT could not justifiably expect that future contracts would not be concluded, simply because countersigned versions were not returned. In fact, concerning the Sales Contract, CLAIMANT was not worried when Ms Bupati had not countersigned in early May 2020, since she had forgotten to do so in the past [C5, p. 18 §7].

107 Finally, RESPONDENT cannot be allowed to use a missing signature in order to avoid being bound by the Sales Contract. In the past, CLAIMANT never insisted on Ms Bupati's signature, and still performed its part of the contracts [*cf. C1, p. 9 §3*]. RESPONDENT should not now be able to hold CLAIMANT's past leniency towards Ms Bupati's negligence against CLAIMANT. In summary, RESPONDENT was not required to countersign in order to conclude the Sales Contract, neither by the CISG, nor by party agreement, nor by established practice. It is, therefore, irrelevant that RESPONDENT did not return the countersigned Sales Contract.

* * *

108 In conclusion to **Issue 2**, the Parties agreed on the terms of the contract and intended to be bound by it. It is irrelevant that the contractual documents were not countersigned by RESPONDENT, since a countersignature was not required. The Tribunal should therefore find that the Sales Contract was concluded in 2020.

THE GCoS WERE VALIDLY INCLUDED IN THE SALES CONTRACT

109 CLAIMANT will show that the GCoS were validly included in the Sales Contract. As shown above, the CISG is applicable to the Sales Contract [*supra* §70]. Also, it is undisputed between the Parties that the law of Mediterraneo, including the CISG, governs at least all provisions of the Sales Contract apart from the Arbitration Clause [PO2, p. 52 §33].

110 The inclusion of the GCoS under the CISG is not only relevant in the event the Arbitration Agreement's substantive validity is found to be governed by the law of Mediterraneo, including the CISG [*supra* §67]. Other substantive provisions of the GCoS may become relevant at a later stage of the proceedings. In particular, Art. 4 GCoS provides the seller (*i.e.* CLAIMANT) with an opportunity to take remedial action in case of any breach of contract before the buyer (*i.e.* RESPONDENT) may terminate the contract [PO2, p. 52 §31]. RESPONDENT alleges a breach of contract, in case the Sales Contract is found to have been concluded [RNoA, p. 28 §20]. Therefore, it is necessary to decide whether the entire GCoS were included in the Sales Contract.

111 It will be shown that the CISG allows for standard terms to be implicitly included in a contract (A) and the GCoS were accordingly included in the Sales Contract (B).

A. THE CISG ALLOWS FOR STANDARD TERMS TO BE IMPLICITLY INCLUDED IN A CONTRACT OF SALE

112 The CISG does not expressly state the specific requirements under which standard terms are included in a contract. As a result, courts must interpret the CISG's general provisions on the formation of contracts to determine the relevant requirements [*Tantalum Powder Case I; Tantalum Powder Case II; Ferrari, Art. 14 §38; Schmidt-Kessel, Art. 8 §§56 et seqq.; Schroeter, Art. 14 §40*]. In this respect, the following two approaches have been adopted in cases rendered under the CISG.

113 First, in the *Machinery Case*, the German Federal Court of Justice (BGH) established a strict "making available" requirement. Accordingly, standard terms must have been transmitted to the offeree when contracting, or at least must have been otherwise accessible [*Machinery Case*]. This view has been accepted by some legal authorities [*Piltz, p. 135; Spagnolo, Art. 14 §19; cf. Huber/Mullis, p. 32*] and was followed in other cases [*Car Phones Case; Multimedia Recorders Case; Sesame Seeds Case*].

114 Second, in the *Propane Gas Case*, the Austrian Supreme Court of Justice (OGH) held that the inclusion of standard terms "[...] can also be done implicitly or can be inferred from the negotiations between the parties or a practice which has developed between them". Consequently, pursuant to this second approach, courts must look at the specific circumstances of each case to determine whether

standard terms have been included in a contract [*Propane Gas Case*; cf. *Schmidt-Kessel, Art. 8 §59*]. This approach was followed in other cases before Austrian courts [*Spacers for Insulation Glass Case*; *Tantalum Powder Case I*; *Tantalum Powder Case II*]. Furthermore, it has been accepted in other jurisdictions such as Belgium [*Gantry v. Research Consulting Marketing*] and Germany [*Dutch Plants Case*; *Vine Wax Case*] as well as by several legal scholars [*Berger III, p. 17*; *Eiselen, p. 21*; *Schmidt-Kessel, Art. 8 §59*; cf. *Schroeter, Art. 14 §45*].

115 In the present case, the OGH approach should be preferred. The “making available” requirement by the BGH in the *Machinery Case* is based on the assumption that the offeree, without having at least been given access to the standard terms by the offeror, could not have known that to which it is agreeing [*Köhler, p. 106*]. However, this assumption may turn out to be wrong in a situation where the offeree could well have known that to which it is agreeing [cf. *Eiselen, p. 13*; *Köhler, p. 111*]. This is precisely the case here, since Ms Bupati was sufficiently familiar with the GCoS, based on her previous dealings with CLAIMANT on behalf of Southern Commodities, whose knowledge must be attributed to RESPONDENT [*supra* §§87 et seqq.]. Therefore, the approach adopted by the OGH and other authorities is preferable, as it takes the specific circumstances of a particular case into account, as mandated by Art. 8(3) CISG [cf. *Berger III, p. 17*; *Eiselen, p. 14*; *Schmidt-Kessel, Art. 8 §59*].

116 As shown above, in accordance with the approach of the OGH, the inclusion of standard terms can be inferred from the negotiations or from an established practice between the parties, even if the standard terms were not made available to the offeree. Furthermore, according to the doctrine and case law “[...] a reasonable person of the same kind as the party under the same circumstances” pursuant to Art. 8(2) CISG must understand that the person sought to include the standard terms [*Propane Gas Case*; *Tantalum Powder Case I*; *Tantalum Powder Case II*; *Schmidt-Kessel/Meyer, p. 178*; *Schroeter, Art. 14 §43*]. Two requirements must be met. First, there must be a reference to the standard terms, which makes it sufficiently clear that they shall apply to the specific contract [*Piltz, p. 135*; *Schmidt-Kessel, Art. 8 §56*]. Second, the offeree must have been aware of the content of the standard terms [*Schroeter, Art. 14 §§43, 78*]. This can be assumed if they were validly included in one or more previous contracts and were, therefore, made available in the past [*ibid.*]. Lastly, according to Artt. 18 et seqq. CISG, it is necessary that the standard terms were accepted [*Schroeter, Art. 14 §81*]. Consequently, the CISG allows for standard terms to be included implicitly in a contract.

B. THE GCoS WERE IMPLICITLY INCLUDED IN THE SALES CONTRACT

117 It will be shown that under the present circumstances, the GCoS were implicitly included in the Sales Contract, according to the approach taken by the OGH. This can be inferred from the

practice which has been developed between CLAIMANT and Southern Commodities and must be attributed to RESPONDENT (I). Furthermore, a sufficiently clear reference was made (II). Also, RESPONDENT was aware of the GCoS (III) and accepted their inclusion (IV).

I. Due to the established practice between CLAIMANT and Southern Commodities, CLAIMANT did not have to provide RESPONDENT with the GCoS

118 In accordance with the approach of the OGH, the Tribunal should consider the relevant circumstances of the present case as mandated by Art. 8(3) CISG. Accordingly, established practices between the parties are such circumstances [*cf. Art. 8(3) CISG*]. These practices are not limited to contract formation or contract content, but also apply in respect to the inclusion of certain terms, *e.g.* standard terms [*Perales Viscasillas, Art. 9 §10; Schmidt-Kessel, Art. 9 §3*]. As shown above, the repeated confirmation of conduct must create a justified expectation that it will be observed again [*supra §85*]. Also, any practice established between CLAIMANT and Southern Commodities must be attributed to RESPONDENT [*supra §§87 et seqq.*].

119 CLAIMANT and Ms Bupati, when working for Southern Commodities, concluded around forty contracts [*R3, p. 31 §2; cf. C1, p. 9 §2*], in which references to the relevant standard terms were made in the accompanying letters or emails [*C1, p. 9 §4*]. The relevant standard terms themselves were, however, not usually attached [*cf. NoA, p. 7 §20*]. Instead, CLAIMANT relied on Southern Commodities to be aware of their content [*NoA, p. 7 §20; cf. C1, p. 9 §4*]. Because of this established practice, CLAIMANT did not have to provide RESPONDENT with the GCoS. Consequently, CLAIMANT need not to provide RESPONDENT with the GCoS where it had prior knowledge of the content of the standard terms [*cf. Propane Gas Case; CISG-AC Op. No. 13, §2.6*].

II. A sufficiently clear reference to the GCoS was made in CLAIMANT's email of 9 April 2020 and in the contractual documents attached to it

120 A reference is sufficiently clear when it is clear to “[...] a reasonable person of the same kind as the party under the same circumstances” [*Art. 8(2) CISG; Tantalum Powder Case I; Berger III, p. 17*]. There was a reference in both the contractual documents [*C3, p. 13*] and in CLAIMANT's email of 9 April 2020 [*C4, p. 17*]. Both references state: “*Seller's General Conditions of Sale apply*” [*C3, p. 13; C4, p. 17; PO2, p. 53 §40b*]. CLAIMANT had informed Ms Bupati about the change to the GCoS in 2016, and without any objection, they concluded eight more contracts with the reference to the GCoS in the following two years [*PO2, p. 48 §7*]. A reasonable person of the same kind as RESPONDENT under the same circumstances would understand these references to mean that the GCoS, and not the GCoS pre-2016 would be applicable to the Sales Contract. Consequently, the reference to the GCoS was sufficiently clear.

III. RESPONDENT was aware of the content of the GCoS

121 Through Ms Bupati, RESPONDENT was aware of the content of the GCoS. In continuous business relationships, ongoing awareness of the content of standard terms can be assumed if the following requirements are met: The text of the standard terms must have been made available in the past, and the standard terms must have been validly included in one or more contracts afterwards [*Spacers for Insulation Glass Case; Tantalum Powder Case II; Schroeter, Art. 14 §§58, 78*]. Further, consideration must be given to the specific circumstances of the case at hand, such as the duration of the business relationship, the number of, and the intervals between, the transactions [*Schroeter, Art. 14 §59*].

122 From 2010 to 2018, CLAIMANT and Southern Commodities concluded around four to five contracts of sale per year, for which the relevant negotiations were done by Ms Bupati [*C1, p. 9 §2*]. In 2011, Southern Commodities was provided with a copy of the GCoS pre-2016 by CLAIMANT [*NoA, p. 7 §20; RNoA, p. 27 §11*], which Ms Bupati took a closer look at in 2014, due to arbitration between these parties [*RNoA, p. 27 §11; PO2, p. 50 §18*]. Ms Bupati was therefore both provided with and aware of the content of the GCoS pre-2016 [*NoA, p. 7 §20; cf. RNoA, p. 27 §11*].

123 The only change made to the GCoS pre-2016 was the revision of Art. 9 [*C1, p. 9 §4; R4, p. 32*]. It is undisputed that CLAIMANT discussed the details of this change with Ms Bupati in 2016 [*C1, p. 9 §4; PO2, p. 48 §7; PO2, p. 50 §18*], thereby providing her with the new content of the GCoS. In the following two years, eight more contracts of sale were concluded between CLAIMANT and Southern Commodities, in which the GCoS were referenced without objection [*PO2, p. 48 §7*]. Since these contracts were subsequently performed [*ibid.*], it can be assumed that the GCoS were validly included in these contracts.

124 In conclusion, there were frequent dealings over a period of eight years, during which around forty contracts of sale were concluded and performed. Meanwhile, CLAIMANT kept Ms Bupati informed about the one and only change to its standard terms. It is fair to assume that Ms Bupati, now acting for RESPONDENT, was sufficiently aware of the content of the GCoS when the Sales Contract was concluded. Ms Bupati's knowledge and business practices must be attributed to RESPONDENT [*supra §§87 et seqq.*]. Therefore, RESPONDENT was aware of the content of the GCoS.

IV. RESPONDENT accepted the inclusion of the GCoS in the Sales Contract

125 RESPONDENT accepted the inclusion of the GCoS in the Sales Contract. The GCoS were implicitly included in RESPONDENT's offer of 1 April 2020, which was accepted by CLAIMANT on 9 April 2020. Alternatively, if CLAIMANT's email of 9 April 2020 was to be considered a

counteroffer, its reference to the GCoS and the terms contained therein were implicitly accepted by RESPONDENT.

126 An offer, as any other statement by a party, must be interpreted based on the understanding a reasonable person under the same circumstances would have [*Art. 8(2) CISG*]. Ms Bupati's email of 1 April 2020 states that "[...] I assume the documents for the sale of palm oil are largely comparable to those for the sale of kernel oil and are based on your shortened version of the FOSFA/PORAM Model Contract?" [*C2, p. 12*]. By interpreting her statement pursuant to *Art. 8(2) CISG*, this reference indicated that she anticipated the Parties would conclude the Sales Contract as they usually had done in the past, which included the GCoS. As shown above, CLAIMANT accepted this offer by email on 9 April 2020 [*supra §94*]. Thus, the Parties agreed on the inclusion of the GCoS in the Sales Contract.

127 Even if CLAIMANT's email of 9 April 2020 was to be considered a counteroffer, it is not required for a valid acceptance of standard terms that their inclusion in a contract is expressly confirmed [*Schroeter, Art. 14 §82*]. Rather, acceptance of the standard terms can result from the conduct of the offeree indicating that it has accepted them [*Centrifuge Case; CISG-AC Op. No. 13, §2.13; cf. Schmidt-Kessel, Art. 8 §56*]. As stated above, RESPONDENT's preparations for opening a letter of credit constitute an act of performance pursuant to *Art. 18(1) CISG* [*supra §§97 et seqq.*]. Hence, RESPONDENT accepted the inclusion of the GCoS in the Sales Contract.

* * *

128 In conclusion to **Issue 3**, the GCoS were validly included in the Sales Contract. The CISG allows standard terms to be implicitly included in a contract of sale, which the Parties accordingly did in the present case.

PRAYER FOR RELIEF

129 For the stated reasons, CLAIMANT respectfully requests the Tribunal to find that:

- 1) The Parties validly agreed on the jurisdiction of the Tribunal;
 - a. The law of Danubia governs the Arbitration Agreement;
 - b. In the event that the Arbitration Agreement is governed by the law of Mediterraneo, the CISG is not applicable;
- 2) The Parties concluded the Sales Contract in 2020;
- 3) The GCoS were validly included in the Sales Contract; and
- 4) RESPONDENT shall bear the cost of these arbitral proceedings.

INDEX OF AUTHORITIES

Cited as	Reference
<i>Ashford</i>	Ashford, Peter The Proper Law of the Arbitration Agreement In <i>Arbitration: The International Journal of Arbitration, Mediation and Dispute Management</i> , Vol. 85, Issue 3 (2019) pp. 276-299 Cited in §15
<i>Atamer, Art. 79</i>	Atamer, Yeşim M. Article 79 In Kröll, Stefan / Mistelis, Loukas A. / Perales Viscasillas, Pilar (eds.) <i>UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary</i> 2 nd edition, C.H. Beck, Hart, Nomos (2018) Cited in §87
<i>Berger I</i>	Berger, Klaus Peter Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration 3 rd edition, Kluwer Law International (2015) Cited in §§27, 28

Berger II

Berger, Klaus Peter

Re-examining the Arbitration Agreement: Applicable law – Consensus or Confusion?

In Van den Berg, Albert Jan (ed.)

International Arbitration 2006: Back to Basics?, ICCA Congress Series, No. 13

Kluwer Law International (2006)

Cited in §§21, 22, 23, 28, 31, 34, 38, 42

Berger III

Berger, Klaus Peter

Die Einbeziehung von AGB in internationale Kaufverträge

In Berger, Klaus Peter / Borges, Georg / Herrmann, Harald / Schlüter, Andreas / Wackerbarth, Ulrich (eds.)

Zivil- und Wirtschaftsrecht im Europäischen und Globalen Kontext / Private and Commercial Law in a European and Global Context: Festschrift für Norbert Horn zum 70. Geburtstag

De Gruyter (2006)

Cited in §§114, 115, 120

Bernardini

Bernardini, Piero

Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause

In Van den Berg, Albert Jan (ed.)

Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of the Application of the New York Convention, ICCA Congress Series, No. 9

Kluwer Law International (1999)

Cited in §22

Binder

Binder, Peter

**International Commercial Arbitration and Mediation in
UNCITRAL Model Law Jurisdictions**4th edition, Kluwer Law International (2019)

Cited in §38

Bonell

Bonell, Michael Joachim

**An International Restatement of Contract Law: The
UNIDROIT Principles of International Commercial Contracts**3rd edition, Transnational Publishers (2009)

Cited in §65

Bonell, Art. 9

Bonell, Michael Joachim

Article 9 CISG [Usages and Practices]

In Bianca, Cesare M. / Bonell, Michael J. (eds.)

*Commentary on the International Sales Law: The 1980 Vienna Sales
Convention*

Giuffrè (1987)

Cited in §90

Born I

Born, Gary B.

International Commercial Arbitration3rd edition, Kluwer Law International (2021)

Cited in §§10, 12, 22, 23, 27, 28, 31, 33, 34, 38, 42, 44, 59

Born II

Born, Gary B.

The Law Governing International Arbitration Agreements: An International Perspective

In Singapore Academy of Law Journal, Special Issue, Vol. 26 (2014)

pp. 814-848

Cited in §§37, 38

Bridge

Bridge, MG

The International Sale of Goods4th edition, Oxford University Press (2017)

Cited in §95

Brödermann

Brödermann, Eckart

Art. 2.1.19 (Contracting under Standard Terms)

In Brödermann, Eckart (ed.)

UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary

Kluwer Law International (2018)

Cited in §45

Brunner, Art. 79

Brunner, Christoph

Art. 79 [Impediment Excusing a Party From Damages]

In Brunner, Christoph / Gottlieb, Benjamin (eds.)

Commentary on the UN Sales Law (CISG)

Kluwer Law International (2019)

Cited in §87

Brunner/Balogh, Art. 11 Brunner, Christoph / Balogh, Krisztina

Article 11 [Inapplicability of Domestic Requirement that Contract be in Writing and of Other Domestic Requirements as to Form]

In Brunner, Christoph / Gottlieb, Benjamin (eds.)

Commentary on the UN Sales Law (CISG)

Kluwer Law International (2019)

Cited in §§103, 104

*Brunner/Hurni/Kissling,
Art. 8* Brunner, Christoph / Hurni, Christoph / Kissling, Michael

Article 8 [Interpretation of Statements or Other Conduct of a Party]

In Brunner, Christoph / Gottlieb, Benjamin (eds.)

Commentary on the UN Sales Law (CISG)

Kluwer Law International (2019)

Cited in §76

*Brunner/Hurni/Kissling,
Art. 9* Brunner, Christoph / Hurni, Christoph / Kissling, Michael

Article 9 [Usages and Practices Applicable to the Contract]

In Brunner, Christoph / Gottlieb, Benjamin (eds.)

Commentary on the UN Sales Law (CISG)

Kluwer Law International (2019)

Cited in §§85, 90

Brunner/Pfisterer/Köster,
Art. 14

Brunner, Christoph / Pfisterer, Stefanie / Köster, Pascale

Art. 14 [Requirements for an Offer]

In Brunner, Christoph / Gottlieb, Benjamin (eds.)

Commentary on the UN Sales Law (CISG)

Kluwer Law International (2019)

Cited in §76

Brunner/Pfisterer/Köster,
Art. 18

Brunner, Christoph / Pfisterer, Stefanie / Köster, Pascale

Art. 18 [Acceptance: Time and Manner for Indicating Assent]

In Brunner, Christoph / Gottlieb, Benjamin (eds.)

Commentary on the UN Sales Law (CISG)

Kluwer Law International (2019)

Cited in §§93, 97

Brunner/Pfisterer/Köster,
Art. 19

Brunner, Christoph / Pfisterer, Stefanie / Köster, Pascale

Art. 19 [“Acceptance” with Modifications]

In Brunner, Christoph / Gottlieb, Benjamin (eds.)

Commentary on the UN Sales Law (CISG)

Kluwer Law International (2019)

Cited in §80

Chan/Jim Yang

Chan, Darius / Jim Yang, Teo

Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention When There is NoneIn *Journal of International Arbitration*, Vol. 37, Issue 5 (2020)

pp. 635-648

Cited in §§21, 22

Czernich

Czernich, Dietmar

Chapter I: The Arbitration Agreement and Arbitrability, The Law Applicable to the Arbitration Agreement

In Klausegger, Christian / Klein, Peter / Kremsehner, Florian / Petsche, Alexander / Pitkowitz, Nikolaus / Power, Jenny / Welser, Irene / Zeiler, Gerold (eds.)

Austrian Yearbook on International Arbitration

C.H. Beck, Manz, Stämpfli (2015)

Cited in §§15, 18, 23

Daouda

Daouda, Cisse Amed

The Validity of International Commercial Arbitration AgreementIn *Global Journal of Politics and Law Research*, Vol. 4, Issue 5 (2016)

pp. 10-50

Cited in §43

DeMott

DeMott, Deborah A.

When Is a Principal Charged with an Agent's Knowledge?

In Duke Journal of Comparative & International Law, Vol. 13,
Issue 3 (2003)

pp. 291-320

Cited in §87

Di Pietro

Di Pietro, Domenico

Applicable Laws Under the New York Convention

In Ferrari, Franco / Kröll, Stefan (eds.)

Conflict of Laws in International Arbitration

Sellier. European Law Publishers (2011)

Cited in §33

DiMatteo

DiMatteo, Larry A.

Critical Issues in the Formation of Contracts under the CISG

In Annals of the Faculty of Law in Belgrade – Belgrade Law Review,
Vol. 59, No. 3 (2011)

pp. 67-83

Cited in §97

Dornis, Art. 18

Dornis, Tim W.

Art. 18 [Begriff der Annahme]

In Honsell, Heinrich (ed.)

Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG)

2nd edition, Springer (2010)

Cited in §97

Dornis, Art. 19

Dornis, Tim W.

Art. 19 [Ergänzungen, Einschränkungen und sonstige Änderungen zum Angebot]

In Honsell, Heinrich (ed.)

Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG)

2nd edition, Springer (2010)

Cited in §95

Dornis, Art. 79

Dornis, Tim W.

Article 79

In Mankowski, Peter (ed.)

Commercial Law: Article-by-Article Commentary

C.H. Beck, Hart, Nomos (2019)

Cited in §87

Eiselen

Eiselen, Sieg

The Requirements for the Inclusion of Standard Terms in International Sales Contracts

In Potchefstroom Electronic Law Journal , Vol. 14, No. 1 (2011)

pp. 1-31

Cited in §§87, 114, 115

Enderlein, Art. 19

Enderlein, Fritz

Art. 19: Ergänzungen oder Änderungen

In Enderlein, Fritz / Maskow, Dietrich / Strohbach, Heinz (eds.)

Internationales Kaufrecht: Kaufrechtskonvention, Verjährungskonvention, Vertretungskonvention, Rechtsanwendungskonvention

Haufe (1991)

Cited in §95

Farnsworth, Art. 18

Farnsworth, Allan E.

Article 18 CISG [Acceptance of Offer]

In Bianca, Cesare M. / Bonell, Michael J. (eds.)

Commentary on the International Sales Law: The 1980 Vienna Sales Convention

Giuffrè (1987)

Cited in §§97, 98, 99

Ferrari, Art. 14

Ferrari, Franco

Article 14

In Kröll, Stefan / Mistelis, Loukas A. / Perales Viscasillas, Pilar (eds.)

*UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary*2nd edition, C.H. Beck, Hart, Nomos (2018)

Cited in §112

Ferrari, Art. 18

Ferrari, Franco

Article 18

In Kröll, Stefan / Mistelis, Loukas A. / Perales Viscasillas, Pilar (eds.)

*UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary*2nd edition, C.H. Beck, Hart, Nomos (2018)

Cited in §93

Ferrari, Art. 19

Ferrari, Franco

Article 19

In Kröll, Stefan / Mistelis, Loukas A. / Perales Viscasillas, Pilar (eds.)

*UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary*2nd edition, C.H. Beck, Hart, Nomos (2018)

Cited in §80

Fillers

Fillers, Aleksandrs

Application of the CISG to Arbitration Agreements

In European Business Law Review, Vol. 30, Issue 4 (2019)

pp. 663-693

Cited in §§50, 53, 54, 55

Flecke-

Flecke-Giammarco, Gustav / Grimm, Alexander

Giammarco/Grimm

CISG and Arbitration Agreements: A Janus-Faced Practice and How to Cope with It

In Journal of Arbitration Studies, Vol. 25, Issue 3 (2015)

pp. 35-58

Cited in §§49, 52, 53, 55

Gaillard/Savage

Gaillard, Emmanuel / Savage, John

Fouchard, Gaillard, Goldman On International Commercial Arbitration

Kluwer Law International (1999)

Cited in §§10, 11, 12, 43

Garro I

Garro, Alejandro M.

The U.N. Sales Convention in the Americas: Recent Developments

In Journal of Law and Commerce, Vol. 17, Issue 2 (1998)

pp. 219-244

Cited in §55

Garro II

Garro, Alejandro M.

Some Misunderstandings about the U.N. Sales Convention in Latin America

In Ferrari, Franco (ed.)

Quo Vadis CISG?: Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods

Sellier. European Law Publishers (2005)

Cited in §51

Gillette/Walt

Gillette, Clayton P. / Walt, Steven D.

The UN Convention on Contracts for the International Sale of Goods: Theory and Practice

2nd edition, Cambridge University Press (2016)

Cited in §90

Glick/Venkatesan

Glick, Ian / Venkatesan, Niranjan

Chapter 9: Choosing the Law Governing the Arbitration Agreement

In Kaplan, Neil / Moser, Michael J. (eds.)

Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles

Kluwer Law International (2018)

Cited in §28

Graffi

Graffi, Leonardo

The Law Applicable to the Validity of the Arbitration Agreement: A Practitioner's View

In Ferrari, Franco / Kröll, Stefan (eds.)

Conflict of Laws in International Arbitration

Sellier. European Law Publishers (2010)

pp. 19-62

Cited in §§10, 19, 40

Gruber, Art. 19

Gruber, Urs Peter

Art. 19 [Ablehnung des Angebots; Gegenangebot]

In Westermann, Harm Peter (ed.)

Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 4, Schuldrecht – Besonderer Teil I, §§ 433-534, Finanzierungsleasing, CISG

8th edition, C.H. Beck (2019)

Cited in §95

Holtzmann et al.

Holtzmann, Howard M. / Neuhaus, Joseph / Kristjánsdóttir, Edda / Walsh, Thomas W.

Model Law, Chapter II, Article 7 – as amended [Definition and form of arbitration agreement]

In Holtzmann, Howard M. / Neuhaus, Joseph / Kristjánsdóttir, Edda / Walsh, Thomas W. (eds.)

A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary

Kluwer Law International (2015)

Cited in §43

Huber, Art. 4

Huber, Peter

Art. 4 [Sachlicher Geltungsbereich]

In Westermann, Harm Peter (ed.)

*Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 4, Schuldrecht – Besonderer Teil I, §§ 433-534, Finanzierungsleasing, CISG*8th edition, C.H. Beck (2019)

Cited in §§50, 51, 52

Huber/Mullis

Huber, Peter / Mullis, Alastair

The CISG: A New Textbook for Students and Practitioners

Sellier. European Law Publishers (2007)

Cited in §§51, 53, 103, 104, 113

Kaufmann-Kohler

Kaufmann-Kohler, Gabrielle

Globalization of Arbitral Procedure

In Vanderbilt Journal of Transnational Law, Vol. 36, Issue 4 (2003)

pp. 1313-1333

Cited in §§27, 28

Köhler

Köhler, Martin F.

**Das UN-Kaufrecht (CISG) und sein Anwendungsausschluss:
Unter besonderer Berücksichtigung der Benutzung
Allgemeiner Geschäftsbedingungen und der internationalen
Rechtsprechung zum stillschweigenden Ausschluss**

In Magnus, Ulrich (ed.)

Beiträge zum UN-Kaufrecht (Band 6)

Peter Lang (2007)

Cited in §115

Kröll

Kröll, Stefan

Selected Problems Concerning the CISG's Scope of Application

In Journal of Law and Commerce, Vol. 25, Issue 1 (2005)

pp. 39-57

Cited in §49

Lew/Mistelis/Kröll

Lew, Julian D. M. / Mistelis, Loukas A. / Kröll, Stefan M.

Comparative International Commercial Arbitration

Kluwer Law International (2003)

Cited in §§10, 40, 42

Magnus

Magnus, Ulrich

Die allgemeinen Grundsätze im UN-Kaufrecht

In RabelsZ, Vol. 59 (1995)

pp. 469-494

Cited in §87

Magnus, Art. 79

Magnus, Ulrich

Art. 79

In Magnus, Ulrich (ed.)

Staudinger BGB: Wiener UN-Kaufrecht (CISG)

De Gruyter (2018)

Cited in §87

Mankowski, Art. 9

Mankowski, Peter

Article 9

In Mankowski, Peter (ed.)

Commercial Law: Article-by-Article Commentary

C.H. Beck, Hart, Nomos (2019)

Cited in §90

Mankowski, Art. 19

Mankowski, Peter

UN-Kaufrechts-Übereinkommen Art. 19 [Ablehnung des Angebots; Gegenangebot]

In Ferrari, Franco / Kieninger, Eva-Maria / Mankowski, Peter / Otte, Karsten / Saenger, Ingo / Schulze, Götz / Staudinger, Ansgar (eds.)

Internationales Vertragsrecht: Rom I-VO, CISG, CMR, FactÜ

3rd edition, C.H. Beck (2018)

Cited in §95

Manner/Schmitt, Art. 6

Manner, Simon / Schmitt, Moritz

Article 6 [The Contract and the Convention (Primacy of the Contract)]

In Brunner, Christoph / Gottlieb, Benjamin (eds.)

Commentary on the UN Sales Law (CISG)

Kluwer Law International (2019)

Cited in §§70, 104

Masser/Harraschain

Masser, Anna / Harraschain, Nadja

Anwendbarkeit des CISG auf die Schiedsabrede

In SchiedsVZ, Issue 2 (2021)

pp. 97-104

Cited in §56

Naudé, Art. 2.1.19

Naudé, Tjakié

Art. 2.1.19 [Contracting Under Standard Terms]

In Vogenauer, Stefan (ed.)

*Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*2nd edition, Oxford University Press (2015)

Cited in §§45, 64

Ortolani

Ortolani, Pietro

Art. 34 [Application for Setting Aside as Exclusive Recourse Against Arbitral Award]

In Bantekas, Ilias / Ortolani, Pietro / Ali, Shahla / Gomez, Manuel A. / Polkinghorne, Michael (eds.)

UNCITRAL Model Law on International Commercial Arbitration: A Commentary

Cambridge University Press (2020)

Cited in §33

Perales Viscasillas, Art. 9

Perales Viscasillas, Pilar

Article 9

In Kröll, Stefan / Mistelis, Loukas A. / Perales Viscasillas, Pilar (eds.)

UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary

2nd edition C.H. Beck, Hart, Nomos (2018)

Cited in §§85, 90, 118

Piltz

Piltz, Burghard

AGB in UN-Kaufverträgen

In Internationales Handelsrecht, Vol. 4, Issue 4 (2004)

pp. 133-138

Cited in §§113, 116

Plavec

Plavec, Katharina

The Law Applicable to the Interpretation of Arbitration Agreements Revisited

In University of Vienna Law Review, Vol. 4, No. 2 (2020)

pp. 82-127

Cited in §§22, 28, 34

Poudret/Besson

Poudret, Jean-François / Besson, Sébastien

Comparative Law of International Arbitration2nd edition, Sweet & Maxwell (2007)

Cited in §22

Redfern/Hunter I

Blackaby, Nigel / Partasides, Constantine / Redfern, Alan / Hunter, Martin

Redfern and Hunter on International Arbitration6th edition, Oxford University Press (2015)

Cited in §§10, 12, 37, 59

Redfern/Hunter II

Redfern, Alan / Hunter, Martin / Blackaby, Nigel / Partasides, Constantine

Law and Practice of International Commercial Arbitration4th edition, Sweet & Maxwell (2004)

Cited in §34

Scherer/Jensen

Scherer, Maxi / Jensen, Ole

Of Implied Choices and Close Connections: Two Pervasive Issues Concerning the Law Governing the Arbitration Agreement

In Bedard, Julie / Pearsall, Patrick W. (eds.)

State of Arbitration – Essays in Honour of Professor George Bermann

Juris Legal Information (2022)

Cited in §§23, 34

Schmidt-Kessel, Art. 8

Schmidt-Kessel, Martin

Article 8

In Schlechtriem, Peter / Schwenger, Ingeborg (eds.)

Commentary on the UN Convention on the International Sale of Goods (CISG)

4th edition, Oxford University Press (2016)

Cited in §§112, 114, 115, 116, 127

Schmidt-Kessel, Art. 9

Schmidt-Kessel, Martin

Article 9

In Schlechtriem, Peter / Schwenger, Ingeborg (eds.)

Commentary on the UN Convention on the International Sale of Goods (CISG)

4th edition, Oxford University Press (2016)

Cited in §§85, 104, 118

Schmidt-Kessel, Art. 11

Schmidt-Kessel, Martin

Article 11

In Schlechtriem, Peter / Schwenger, Ingeborg (eds.)

*Commentary on the UN Convention on the International Sale of Goods (CISG)*4th edition, Oxford University Press (2016)

Cited in §§103, 104

Schmidt-Kessel/Meyer

Schmidt-Kessel, Martin / Meyer, Linus

Allgemeine Geschäftsbedingungen und UN-Kaufrecht

In Internationales Handelsrecht, Vol. 8, Issue 5 (2008)

pp. 177-180

Cited in §116

Schroeter, Art. 14

Schroeter, Ulrich

Article 14

In Schlechtriem, Peter / Schwenger, Ingeborg (eds.)

*Commentary on the UN Convention on the International Sale of Goods (CISG)*4th edition, Oxford University Press (2016)

Cited in §§76, 85, 112, 114, 116, 121, 127

Schroeter, Art. 18

Schroeter, Ulrich

Article 18

In Schlechtriem, Peter / Schwenger, Ingeborg (eds.)

*Commentary on the UN Convention on the International Sale of Goods (CISG)*4th edition, Oxford University Press (2016)

Cited in §§93, 97, 99

Schroeter, Art. 19

Schroeter, Ulrich

Article 19

In Schlechtriem, Peter / Schwenger, Ingeborg (eds.)

*Commentary on the UN Convention on the International Sale of Goods (CISG)*4th edition, Oxford University Press (2016)

Cited in §§80, 95

Schulze, Chapter 8

Schulze, Reiner

Chapter 8: Formation of Contract

In DiMatteo, Larry / Janssen, André / Magnus, Ulrich / Schulze, Reiner (eds.)

*International Sales Law: A Handbook*2nd edition, C.H. Beck, Hart, Nomos (2021)

Cited in §§80, 82, 99

Schwab/Walter, Chapter 7 Schwab, Karl-Heinz / Walter, Gerhard

Schiedsgerichtsbarkeit: Systematischer Kommentar zu den Vorschriften der Zivilprozessordnung, des Arbeitsgesetzes, der Staatsverträge und der Kostengesetze über das privatrechtliche Schiedsgerichtsverfahren

7th edition, C.H. Beck, Helbing Lichtenhahn (2005)

Cited in §27

Schwenzer, Art. 79

Schwenzer, Ingeborg

Article 79

In Schlechtriem, Peter / Schwenzer, Ingeborg (eds.)

Commentary on the UN Convention on the International Sale of Goods (CISG)

4th edition, Oxford University Press (2016)

Cited in §87

Schwenzer/Hachem/Kee

Schwenzer, Ingeborg / Hachem, Pascal / Kee, Christopher

Global Sales and Contract Law

Oxford University Press (2012)

Cited in §76

Spagnolo, Art. 14

Spagnolo, Lisa

Article 14

In Mankowski, Peter (ed.)

Commercial Law: Article-by-Article Commentary

C.H. Beck, Hart, Nomos (2019)

Cited in §§51, 76, 113

Spagnolo, Art. 18

Spagnolo, Lisa

Article 18

In Mankowski, Peter (ed.)

Commercial Law: Article-by-Article Commentary

C.H. Beck, Hart, Nomos (2019)

Cited in §§97, 99

Spagnolo, Art. 19

Spagnolo, Lisa

Article 19

In Mankowski, Peter (ed.)

Commercial Law: Article-by-Article Commentary

C.H. Beck, Hart, Nomos (2019)

Cited in §§80, 95

Vorobey

Vorobey, Dmytro V.

CISG and Arbitration Clauses: Issues of Intent and ValidityIn *Journal of Law and Commerce*, Vol. 31 (2013)

pp. 133-161

Cited in §55

Wagner

Wagner, Gerhard

Prozessverträge: Privatautonomie im Verfahrensrecht

Mohr Siebeck (1998)

Cited in §27

Waincymer

Waincymer, Jeffrey Maurice

Procedure and Evidence in International Arbitration

Kluwer Law International (2012)

Cited in §§12, 31

Wilske/Fox, Art. II

Wilske, Stephan / Fox, Todd J.

Article II [Recognition of Arbitration Agreements]

In Wolff, Reinmar (ed.)

*New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Article-by-Article Commentary*2nd edition, C.H. Beck (2019)

Cited in §33

Yang

Yang, Fan

The Proper Law of the Arbitration Agreement: Mainland Chinese and English Law ComparedIn *Arbitration International*, Vol. 33, Issue 1 (2017)

pp. 121-137

Cited in §38

INDEX OF CASES

Cited as**Reference**

Austria*Blood Pressure Case***Federal Supreme Court of Austria (Oberster Gerichtshof)**

26 August 2008

Case No. 4 Ob 80/08f

Available in:

Yearbook Commercial Arbitration 2009 – Vol. XXXIV,
pp. 404-408

Cited in §38

*Monoammonium Phosphate
Case***Federal Supreme Court of Austria (Oberster Gerichtshof)**

20 March 1997

Case No. 2 Ob 58/97m

Available at:

<https://cisg-online.org/search-for-cases?caseId=6243>

(Consulted 9 December 2021)

Cited in §§80, 82

*Paprika Powder Case IV***Federal Supreme Court of Austria (Oberster Gerichtshof)**

14 February 2012

Case No. 10 Ob 4/12d

Available at:

<https://cisg-online.org/search-for-cases?caseId=8224>

(Consulted 9 December 2021)

Cited in §70

*Propane Gas Case***Federal Supreme Court of Austria (Oberster Gerichtshof)**

6 February 1996

Case No. 10 Ob 518/95

Available at:

<https://cisg-online.org/search-for-cases?caseId=6198>

(Consulted 9 December 2021)

Cited in §§114, 116, 119

*Spacers for Insulation Glass
Case***Court of Appeal Linz (Oberlandsgericht)**

8 August 2005

Case No. 3 R 57/05f

Available at:

<https://cisg-online.org/search-for-cases?caseId=7011>

(Consulted 9 December 2021)

Cited in §§114, 121

*Tantalum Powder Case I***Federal Supreme Court of Austria (Oberster Gerichtshof)**

17 December 2003

Case No. 7 Ob 275/03x

Available at:

<https://cisg-online.org/search-for-cases?caseId=6754>

(Consulted 9 December 2021)

Cited in §§112, 114, 116, 120

*Tantalum Powder Case II***Federal Supreme Court of Austria (Oberster Gerichtshof)**

31 August 2005

Case No. 7 Ob 175/05v

Available at:

<https://cisg-online.org/search-for-cases?caseId=7017>

(Consulted 9 December 2021)

Cited in §§85, 112, 114, 116, 121

Belgium*Gantry v. Research Consulting
Marketing***Commercial Court Nivelles (Tribunal de Commerce)**

Gantry S.A. v. Research Consulting Marketing

19 September 1995

Case No. R.G. 1707/93

Available at:

<https://cisg-online.org/search-for-cases?caseId=6338>

(Consulted 9 December 2021)

Cited in §114

France

*Calzados Magnanni v. Shoes
General*

Court of Appeal Grenoble (Cour d'appel)

Calzados Magnanni v. Shoes General International S.a.r.l.

21 October 1999

Case No. 97/03974

Available at:

<https://cisg-online.org/search-for-cases?caseId=6538>

(Consulted 9 December 2021)

Cited in §99

Kabab-Ji v. Kout (France)

Paris Court of Appeal (Cour d'appel)

Kabab-Ji S.A.L Company v. Kout Food Group Company

23 June 2020

Case No. 17/22943

Available at:

<https://jusmundi.com/en/document/decision/en-kabab-ji-s-a-l-company-v-kout-food-group-company-judgment-of-the-paris-court-of-appeal-tuesday-23rd-june-2020?pdf=true>

(Consulted 9 December 2021)

Cited in §24

Germany*Car Phones Case***Court of Appeal Düsseldorf (Oberlandesgericht)**

21 April 2004

Case No. I-15 U 88/03

Available at:

<https://cisg-online.org/search-for-cases?caseId=6840>

(Consulted 9 December 2021)

Cited in §113

*Dutch Plants Case***District Court Coburg (Landgericht)**

12 December 2006

Case No. 22 O 38/06

Available at:

<https://cisg-online.org/search-for-cases?caseId=7367>

(Consulted 9 December 2021)

Cited in §114

*Iroko Wood Case***Court of Appeal Cologne (Oberlandesgericht)**

22 February 1994

Case No. 22 U 202/93

Available at:

<https://cisg-online.org/search-for-cases?caseId=6105>

(Consulted 9 December 2021)

Cited in §99

*Mace Case***German Federal Court of Justice (Bundesgerichtshof)**

26 November 2020

Case No. I ZR 245/19

Available at:

<https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=3&nr=112973&pos=19&anz=619>

(Consulted 9 December 2021)

Cited in §§52, 56, 57

*Machinery Case***German Federal Court of Justice (Bundesgerichtshof)**

31 October 2001

Case No. VIII ZR 60/01

Available at:

<https://cisg-online.org/search-for-cases?caseId=6575>

(Consulted 9 December 2021)

Cited in §§113, 115

*Multimedia Recorders Case***Court of Appeal Celle (Oberlandesgericht)**

24 July 2009

Case No. 13 W 48/09

Available at:

<https://cisg-online.org/search-for-cases?caseId=7823>

(Consulted 9 December 2021)

Cited in §113

*Pizza Boxes Case***Local Court Duisburg (Amtsgericht)**

13 April 2000

Case No. 49 C 502/00

Available at:

<https://cisg-online.org/search-for-cases?caseId=6602>

(Consulted 9 December 2021)

Cited in §85

*Potato Chips Plant Case***German Federal Court of Justice (Bundesgerichtshof)**

7 December 2017

Case No. VII ZR 101/14

Available at:

<https://cisg-online.org/search-for-cases?caseId=8875>

(Consulted 9 December 2021)

Cited in §70

*Spare Parts Case***German Federal Court of Justice (Bundesgerichtshof)**

25 March 2015

Case No. VIII ZR 125/14

Available at:

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=71114&pos=13&anz=533>

(Consulted 9 December 2021)

Cited in §50

Vine Wax Case

Court of Appeal Zweibrücken (Oberlandesgericht)

31 March 1998

Case No. 8 U 46/97

Available at:

<https://cisg-online.org/search-for-cases?caseId=6449>

(Consulted 9 December 2021)

Cited in §114

Hong Kong

Guangdong v. Chiu Shing

Supreme Court of Hong Kong, High Court

Guangdong New Technology Import & Export Corporation
Jiangmen Branch v. Chiu Shing Trading as B.C. Property &
Trading Company

23 August 1991

Case No. MP 16253

Available in:

Yearbook Commercial Arbitration 1993 – Vol. XVIII, pp. 385-388

Cited in §43

India

*National Thermal Power v.
Singer*

Supreme Court of India

National Thermal Power Corporation v. The Singer Company and
Others

7 May 1992

Case No. 1978

Available in:

Yearbook Commercial Arbitration 1993 – Vol. XVIII, pp. 403-414

Cited in §24

Japan

*Japan Educational v. Kenneth
J. Feld*

High Court of Tokyo

Japan Educational Corporation v. Kenneth J. Feld

30 May 1994

Available in:

Yearbook Commercial Arbitration 1995 – Vol. XX, pp. 745-749

Cited in §27

Malaysia*Thai-Lao v. Laos***Federal Court of Malaysia**

Thai Lao Lignite Co Ltd et al. v. Government of the Lao People's Democratic Republic

17 August 2017

Case No. 02(f)-91-12-2015

Available in:

Yearbook Commercial Arbitration 2018 – Vol. XLIII, pp. 836-842

Cited in §28

Netherlands

Isaac Glycer v. Moses Israel Glycer
Glycer

Provisions Judge of the District Court of Rotterdam

Isaac Glycer v. Moses Israel Glycer and Estera Glycer-Nottman

24 November 1994

Available in:

Yearbook Commercial Arbitration 1996 – Vol. XXI, pp. 635-642

Cited in §24

Jumping Horse Case

Court of Appeal 's-Hertogenbosch (Gerechthof)

25 February 2003

Case No. C0200320 / HE

Available at:

<https://cisg-online.org/search-for-cases?caseId=7751>

(Consulted 9 December 2021)

Cited in §80

*Petrasol BV v. Stolt Spur***Court of First Instance of Rotterdam
(Arrondissementsrechtbank)**

Petrasol BV v. Stolt Spur Inc

28 September 1995

Available in:

Yearbook Commercial Arbitration 1997 – Vol. XXII, pp. 762-765

Cited in §28

*Sesame Seeds Case***District Court Utrecht (Rechtbank)**

21 January 2009

Case No. 253099 / HAZA 08-1624

Available at:

<https://cisg-online.org/search-for-cases?caseId=7732>

(Consulted 9 December 2021)

Cited in §113

Sweden*Bulbank Case***Swedish Supreme Court**

Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc

27 October 2000

Case No. T 1881-99

Available in:

Yearbook Commercial Arbitration 2001 – Vol. XXVI, pp. 291-298

Cited in §§23, 24

Switzerland*Bulgarian White Urea Case***Court of First Instance Basel-Stadt (Zivilgericht)**

3 December 1997

Case No. P4 1996/00448

Available at:

<https://cisg-online.org/search-for-cases?caseId=6318>

(Consulted 9 December 2021)

Cited in §85

*Gutta-Werke v. Dörken-Gutta***Swiss Federal Supreme Court (Bundesgericht)**

Gutta-Werke AG v. Dörken-Gutta sp. z o.o.

11 July 2000

Case No. 4C.100/2000

Available at:

<https://cisg-online.org/search-for-cases?caseId=6582>

(Consulted 9 December 2021)

Cited in §50

*Plotters Case***Commercial Court Canton St. Gall (Handelsgericht)**

5 December 1995

Case No. HG 45/1994

Available at:

<https://cisg-online.org/search-for-cases?caseId=6219>

(Consulted 9 December 2021)

Cited in §76

*Turkish Yarn Case***Commercial Court Canton Aargau (Handelsgericht)**

15 February 2011

Case No. HOR.2009.29/DP/DP

Available at:

<https://cisg-online.org/search-for-cases?caseId=8346>

(Consulted 9 December 2021)

Cited in §70

United Kingdom*Enka v. Chubb***Supreme Court of the United Kingdom**Enka Insaat Ve Sanayi A.Ş. (Respondent) v. OOO Insurance
Company Chubb (Appellant)

9 October 2020

Case No. [2020] UKSC 38

Available at:

<https://www.supremecourt.uk/cases/uksc-2020-0091.html>

(Consulted 9 December 2021)

Cited in §§20, 21

*Kabab-Ji v. Kout (UK)***Supreme Court of the United Kingdom**

Kabab-Ji SAL (Lebanon) (Appellant) v. Kout Food Group
(Kuwait) (Respondent)

27 October 2021

Case No. [2021] UKSC 48

Available at:

<https://www.supremecourt.uk/cases/uksc-2020-0036.html>

(Consulted 9 December 2021)

Cited in §20

USA*Carter v. Gugliuzzi***Supreme Court of Vermont**

Diana Carter v. Flavia Gugliuzzi, et al. and Synergy Group, Inc

22 May 1998

Case No. (97-094); 168 Vt. 48; 716 A.2d 17

Available at:

<https://caselaw.findlaw.com/vt-supreme-court/1382736.html>

(Consulted 9 December 2021)

Cited in §87

*Centrifuge Case***United States District Court for the Eastern District of California**

Golden Valley Grape Juice and Wine, LLC v. Centriys Corporation / Centriys Corporation v. Separator Technology Solutions Pty Ltd

21 January 2010

Case No. CV F 09-1424 LJO GSA

Available at:

<http://www.unilex.info/cisg/case/1510>

(Consulted 9 December 2021)

Cited in §127

*Magellan v. Salzgitter***United States District Court for the Northern District of Illinois**

Magellan International Corporation v. Salzgitter Handel GmbH

7 December 1999

Case No. 99 C 5153

Available at:

<https://cisg-online.org/search-for-cases?caseId=6409>

(Consulted 9 December 2021)

Cited in §97

INDEX OF AWARDS

Cited as	Reference
<i>Industrial Product Case</i>	Court of Arbitration of the International Chamber of Commerce Award 2000 ICC Case No. 10329 Available in: Collection of ICC Arbitral Awards, Recueil des sentences arbitrales de la CCI, 2001-2007, pp. 249-271 Cited in §51
<i>Oil Producer Case</i>	Court of Arbitration of the International Chamber of Commerce Interim Award 1986 ICC Case No. 4504 Available in: Collection of ICC Arbitral Awards, Recueil des sentences arbitrales de la CCI, 1986-1990, pp. 279-292 Cited in §§12, 24

*Plant Case***Court of Arbitration of the International Chamber of Commerce**

Award

1988

ICC Case No. 5832

Available in:

Collection of ICC Arbitral Awards, Recueil des sentences arbitrales de la CCI, 1986-1990, pp. 533-547

Cited in §24

*Rapeseed Dregs Case***China International Economic & Trade Arbitration Commission**

Award

10 June 2002

Case No. CISG/2002/02

Available at:

<https://cisg-online.org/search-for-cases?caseId=7448>

(Consulted 9 December 2021)

Cited in §95

INDEX OF OTHER SOURCES

Cited as	Reference
<i>CISG-AC Op. No. 13</i>	Eiselen, Sieg (Rapporteur) CISG-AC Opinion No. 13, Inclusion of Standard Terms under the CISG Adopted by the CISG Advisory Council following its 17 th Meeting in Villanova, Pennsylvania, USA (20 January 2013) Cited in §§119, 127
<i>Commentary to Trans-Lex Principle XIV.1</i>	University of Cologne Commentary to Trans-Lex Principle Available at: https://www.trans-lex.org/973000 (Consulted 9 December 2021) Cited in §§27, 28
<i>Official Records</i>	United Nations Conference on Contracts for International Sale of Goods Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees (A/CONF.97/19) New York (1991) Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf (Consulted 9 December 2021) Cited in §§54, 99

*Perales Viscasillas, Editorial
Remarks*

Perales Viscasillas, Pilar

Editorial Remarks (2002)

In Guide to Art. 19, Comparison with Principles of European Contract Law (PECL)

Available at:

<https://iicl.law.pace.edu/cisg/page/guide-article-19-comparison-principles-european-contract-law-pecl#Comment>

(Consulted 9 December 2021)

Cited in §82

*UPICC Comment on
Art. 2.1.19*

International Institute for the Unification of Private Law

UNIDROIT Principles of International Commercial Contracts 2016

Available at:

<https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf>

(Consulted 9 December 2021)

Cited in §65

Working Group I

United Nations Commission on International Trade Law

Report of the Working Group on International Contract Practices on the Work of its 7th Session (A/CN.9/246)

New York (1984)

Available at:

<https://undocs.org/en/A/CN.9/246>

(Consulted 9 December 2021)

Cited in §43

Working Group II

United Nations Commission on International Trade Law

Report of the United Nations Commission on International Trade Law on the Work of its 18th Session (A/40/17)

New York (1985)

Available at:

[https://undocs.org/en/a/40/17\(supp\)](https://undocs.org/en/a/40/17(supp))

(Consulted 9 December 2021)

Cited in §21

Working Group III

United Nations Commission on International Trade Law

Report of the Working Group on Arbitration on the Work of its 36th Session (A/CN.9/508)

New York (2002)

Available at:

<https://undocs.org/en/A/CN.9/508>

(Consulted 9 December 2021)

Cited in §43

Working Group IV

United Nations Commission on International Trade Law

Note by the Secretariat to the 39th Session of the United Nations Commission on International Trade Law (A/CN.9/606)

New York (2006)

Available at:

<https://undocs.org/en/A/CN.9/606>

(Consulted 9 December 2021)

Cited in §43

CERTIFICATE OF INDEPENDENCE

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



Patrick Gürtler

Alina Kuster

Lucas Nold

Annina Schmid

Margaretha Schulz

Michelle Stöckli

BERN, SWITZERLAND

9 DECEMBER 2021