29th Willem C. Vis

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

2021 – 2022

MEMORANDUM FOR JAJA BIOFUEL LTD

RESPONDENT

UNIVERSITY OF COLOGNE

CENTER FOR TRANSNATIONAL LAW (CENTRAL)

ON BEHALF OF:	**AGAINST:**
JAJA Biofuel Ltd	ElGuP plc
9601 Rudolf Diesel Street	156 Dendé Avenue
Oceanside	Capital City
Equatoriana	Mediterraneo
RESPONDENT	**CLAIMANT**

COUNSEL:

NOOMI	JESI	JOEL	LARA
HÖR	KIM	OHLER	STÖTZER

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INDEX OF ABBREVIATIONS

%	percentage
AC	Advisory Council
AGB	Allgemeine Geschäftsbedingungen (standard terms and conditions)
AIAC	Asian International Arbitration Centre
AIAC Rules	Rules of the Asian International Arbitration Centre
Art(t).	Article(s)
BGH	Bundesgerichtshof (Supreme Court of Justice, Germany)
CEO	Chief Executive Officer
cf.	confer (compare)
cif	cost, insurance, freight
CISG	United Nations Convention on Contracts for the International Sale of Goods
CLAIMANT	ElGuP plc
Co.	Company
CoA	Court of Appeal
COO	Chief Operating Officer
Corp.	Corporation
DAL	Danubian Arbitration Law
DCC	Danubian Civil Code
Doc.	Document
eds.	editors
ed.	edition
e.g.	exampli gratia (for example)
emph. add.	emphasis added
et al.	*et alia* (and others)
et seq.	*et sequens* (and that which follows)
et seqq.	*et sequentes* (and those that follow)
Ex. C	Claimant Exhibit
Ex. R	Respondent Exhibit

FOSFA	Federation of Oils, Seeds and Fats Association Ltd
GCoS	General Conditions of Sale
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
ibid.	*ibidem* (the same)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
i.e.	*id est* (that is)
Inc.	Incorporation
infra	see below
Intro	Introduction
Ltd	Limited
MCC	Mediterranean Civil Code
Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
Mr.	Mister
Ms.	Miss
No.	Number
NoA	Notice of Arbitration
NYC	New York Convention on the Enforcement of Foreign Arbitral Awards of 1958
p(p).	page(s)
para(s).	paragraphs(s)
PICC	UNIDROIT Principles for International Commercial Contracts
plc	Public Limited Company
PO	Procedural Order
PORAM	Palm Oil Refiners Association of Malaysia
RESPONDENT	JAJA Biofuel Ltd
RNoA	Response to the Notice of Arbitration
RSPO	Roundtable on Sustainable Palm Oil
S.A.	Société Anonyme
SC	Supreme Court

Summit	Palm Oil Summit
supra	see above
t	metric tons
UKHL	United Kingdom House of Lords
UKSC	The Supreme Court of the United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
US	United States
USD	US-Dollar
v.	*versus* (against)
Vol.	Volume

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UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts 2016

STATEMENT OF FACTS

1. The PARTIES to the present dispute are JAJA Biofuel Ltd ("**RESPONDENT**") and ElGuP plc ("**CLAIMANT**"), based in Equatoriana and Mediterraneo, respectively. While CLAIMANT is one of the largest producers of RSPO-certified palm oil, RESPONDENT is a pioneer in the production of biofuel and newcomer in the palm oil industry. In late 2018, RESPONDENT became a subsidiary of Southern Commodities but remained otherwise an entirely independent legal entity.
2. RESPONDENT, which had so far only produced biofuel from local energy crops, was now looking to expand into the supply of palm oil-based biofuel. At first, these expansion plans met opposition by environmental activist groups. RESPONDENT, however, immediately acknowledged these concerns and adapted its expansion plans accordingly. Ms. Lever, RESPONDENT's CEO, demonstrated RESPONDENT's continued commitment to sustainability when she announced that RESPONDENT would only produce biofuel from sustainable RSPO-certified palm oil.
3. At this point, the PARTIES had not yet entered into any (pre-)contractual relationship. Only CLAIMANT's COO, Mr. Chandra, knew Ms. Bupati, RESPONDENT's Head of Purchasing, from her previous employment at Southern Commodities.

28 March 2020 The PARTIES first got in touch at the Palm Oil Summit ("**the Summit**"), where Mr. Chandra approached Ms. Bupati. He revealed that a previous customer had recently terminated a long-term contract over two-thirds of CLAIMANT's annual palm oil production. While Mr. Chandra had managed to sell the 2020 quotations at a considerably low price, he was desperately looking to find a buyer for 2021–2025. Under these circumstances, CLAIMANT was willing to sell 100,000 tons of RSPO-certified palm oil at 5% below market price over 5 years. Though these terms were quite compelling, Ms. Bupati explained she needed to discuss any contract with her management prior to entering into a binding agreement. This was especially the case here, given the size of the contract and the political sensitivity of palm oil expansion.

1 April 2020 Ms. Bupati informed Mr. Chandra via email that RESPONDENT was interested to contract, subject to further negotiations. She asked Mr. Chandra to send over a draft of the contractual documents. However, she also stressed that – contrary to CLAIMANT's policy – RESPONDENT did not want to agree on arbitration due to transparency concerns. Similarly, she stressed that it was absolutely crucial to RESPONDENT that the palm oil would be RSPO-certified and the supply chain must be properly monitored.

9 April 2020 In response to Ms. Bupati's email, Mr. Chandra's assistant, Mr. Rain, sent over the contractual documents. In the accompanying email, he asked Ms. Bupati to send back a signed copy and pointed out that CLAIMANT wanted its General Conditions of Sale ("**GCoS**") to govern the contract.

3 May 2020 Ms. Fauconnier, Ms. Bupati's assistant, contacted Mr. Rain to set up a meeting to negotiate open issues in person. These discussions included the payments terms and further changes to the contractual documents.

May 2020 Mr. Rain and Ms. Fauconnier discussed the payment terms and some of RESPONDENT's concerns regarding the arbitration clause as well as the documents requested for presentation. Ms. Fauconnier informed Mr. Rain that she would have to check with her lawyers before she could say whether the terms needed to be amended. Lastly, Mr. Rain reminded Ms. Fauconnier that the return of the signed version of the contractual documents was still outstanding.

June 2020 With the release of "Saving Lucy" in Equatoriana, it was uncovered that some of CLAIMANT's suppliers produced their palm oil in violation of the RSPO standards. It was alleged that CLAIMANT had not implemented the requested control system to verify the RSPO conformity of the oil it was obtaining. Quite to the contrary, at least one of its purchasing managers had engaged in a flourishing sale of the required certificates.

28 October 2020 In light of the severe allegations uncovered by "Saving Lucy", RESPONDENT had examined all of its potential palm oil suppliers' compliance with the UN Sustainable Development Goals. The severity of the allegations against CLAIMANT and the effect they had on RESPONDENT's business forced RESPONDENT to publicly terminate the negotiations.

14/15 July 2021 In response, CLAIMANT commenced arbitration proceedings and filed the Notice of Arbitration ("**NoA**") as well as a commencement request with the Asian International Arbitration Centre ("**AIAC**").

14 August 2021 RESPONDENT filed its Response to the Notice of Arbitration ("**RNoA**").

SUMMARY OF ARGUMENTS

4. CLAIMANT's desperation to sell off its palm oil surplus, it assumed a contract where there is none. Now it is trying to force RESPONDENT to perform a contract it never entered into in front of a forum it never agreed to.
5. In light of this, RESPONDENT will address the following issues:
6. **ISSUE A:** The PARTIES did not agree on the Arbitral Tribunal's jurisdiction to hear the present dispute as they never formed an agreement to arbitrate. The existence of an agreement to arbitrate is determined under Mediterranean law, the law governing the underlying contract and not Danubian law, the law of the seat. Within Mediterranean law, the CISG, and not the Mediterranean Civil Code is applicable. However, under any potentially applicable laws, the arbitration clause in Art. 9 GCoS was not incorporated into the alleged contract and there was no intent to be legally bound to any agreement to arbitrate. In any case, even if an agreement were to exist, it would not comply with the pertinent form requirements of the NYC or *lex arbitri*.
7. **ISSUE B:** The PARTIES did not enter into the alleged contract. First, the alleged contract does not comply with the form requirement, the PARTIES had agreed on. Second, at no point did the negotiations between CLAIMANT and RESPONDENT amount to contract formation. At the Summit, neither PARTY intended to enter into a contract. Subsequently, CLAIMANT and RESPONDENT had only been negotiating and did not enter into any binding agreement. Lastly, CLAIMANT can also not draw an entire contract formation from a practice CLAIMANT has established with Southern Commodities.
8. **ISSUE C:** CLAIMANT's GCoS were not incorporated into the alleged contract. CLAIMANT tried to incorporate its GCoS into the alleged contract without even giving RESPONDENT the possibility to become aware of their terms. RESPONDENT was also not already aware of the terms in any other way or could have been presumed to know them. Therefore, CLAIMANT was obligated to provide our client with a reasonable opportunity to become aware of the content of its GCoS. However, CLAIMANT failed to comply with this obligation as it never made its GCoS available to RESPONDENT.

9. RESPONDENT will not comment on CLAIMANT's assertions regarding the termination of the alleged contract [*Cl. Memo., ISSUE 6*]. In The Arbitral Tribunal explicitly ordered not to address issues concerning the termination of the contract at this stage of the proceedings [*PO1 II, III*].

ISSUE A: THE PARTIES DID NOT VALIDLY AGREE ON THE JURISDICTION OF THE ARBITRAL TRIBUNAL

10. RESPONDENT respectfully requests the Arbitral Tribunal to declare that the PARTIES did not agree to arbitrate.

11. Party autonomy is the cornerstone of arbitration [*Redfern/Hunter, paras. 2.42, 5.91; Flecke-Giammarco/Grimm, p. 42; Girsberger/Voser, p. 77; Lau/Horlach, p. 121; Born, p. 275*]. Accordingly, it must be ensured "that one is not deprived of the right to have disputes resolved by court unless and until he has consciously and deliberately agreed to do so" [*Korale/Weddikkara, p. 204*]. Therefore, the arbitral tribunal only has jurisdiction if, and insofar, both parties agreed to it [*Redfern/Hunter, paras. 2.42, 5.91; Girsberger/Voser, p. 77; Lau/Horlach, p. 121; Born, p. 275; Ferrari/Rosenfeld, p. 21; Stürner/Wedelstein, p. 473*].

12. Regardless of whether this agreement exists, an arbitral tribunal has 'competence-competence' and may, therefore, rule on its own jurisdiction [*Born, p. 1141*]. The principle of competence-competence is even explicitly codified in both Art. 16(1) Danubian Arbitration Law ("**DAL**"), and Rule 20.1 of the 2021 Arbitration Rules of the AIAC ("**AIAC Arbitration Rules**"). The DAL, a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments ("**Model Law**") [*PO1, III, para. 3*], governs the proceedings as *lex arbitri*. The AIAC Arbitration Rules are the applicable institutional rules [*ibid.*].

13. Our client accepts the Arbitral Tribunals' competence to rule on its jurisdiction over the present dispute and, therefore, took the necessary steps to commence these proceedings. Yet, this does not constitute a tacit acceptance of the Arbitral Tribunal's jurisdiction to decide the merits of this case [*contra Cl. Memo., paras. 40 et seqq.*]. The principle of competence-competence only serves to determine whether the Arbitral Tribunal has jurisdiction but does not automatically grant it [*cf. Girsberger/Voser, para. 555*]. Therefore, the mere acceptance of competence-competence does not in itself amount to an acceptance of an Arbitral Tribunal's jurisdiction.

14. Instead, an agreement to arbitrate only exists when it complies with the prerequisites of the substantive and formal validity [*Berger, Applicable Law, p. 303; Lew, p. 119; Born, pp. 699, 893*].

15. In this case, any agreement to arbitrate between the PARTIES is not valid as to substance (**A.**). Even if the Arbitral Tribunal finds that the PARTIES did agree, such agreement would not meet the form requirements (**B.**).

A. Any agreement to arbitrate is not valid as to substance

16. There is no substantively valid agreement to arbitrate, as there is no such agreement [*contra Cl. Memo., para. 36*]. The substantive validity of an agreement to arbitrate is determined by

the law that would govern of the purported arbitration agreement ("**the governing law**") [*Enka, para. 31; Kabab-Ji, para. 27; Born, pp. 623, 637*].

17. The PARTIES are not only in dispute about whether an agreement to arbitrate was concluded but also as to which law is the governing law.
18. The purported arbitration agreement is contained in Art. 9 GCoS [*Cl. Memo., para. 35*].
19. Art. 9 GCoS states:

> "Any dispute, controversy or claim arising out of or relating to this contract, or breach, termination or invalidity thereof shall be settled by arbitration in accordance with the AIAC Arbitration Rules.
> The seat of arbitration shall be Danubia.
> The language to be used in the arbitral proceedings shall be English.
> This contract shall be governed by the substantive law of Danubia.
> Before referring the dispute to arbitration, the parties shall seek an amicable settlement of that dispute by mediation in accordance with the AIAC Mediation Rules as in force on the date of the commencement of mediation."

20. CLAIMANT informed our client that it recently changed the substantive law from Danubian to Mediterranean law [*NoA, para. 7; RNoA, para. 10*]. Therefore, Art. 9 GCoS is to be read as: "This contract shall be governed by the substantive law of [Mediterraneo]."
21. Art. 9 CISG does not explicitly determine the governing law but only contains a choice of the seat of arbitration and the substantive law ("***lex contractus***").
22. CLAIMANT states that it "can confidently say that Danubian contract law is what governs this entire issue", [*Cl. Memo., para. 49*] as the law of the seat [*NoA, para. 16*].
23. The governing law of any agreement to arbitrate is Mediterranean law as the *lex contractus* (**I.**). The PARTIES did not agree to arbitrate, under Mediterranean law, (**II.**). Even if Danubian law applies, the PARTIES did not agree to arbitrate (**III.**). Therefore, CLAIMANT cannot rely on the *in favorem validitatis* principle for an arbitration agreement to exist (**IV.**).

I. The substantive validity of any agreement to arbitrate is determined by Mediterranean law

24. The purported arbitration agreement is governed by Mediterranean law.
25. The law governing the formation of any agreement to arbitrate is determined by the pertinent conflict of laws rules [*Lew, p. 129*].
26. The conflict of laws rule CLAIMANT applies is Art. 35 of the 2018 AIAC Arbitration Rules of the AIAC [*Cl. Memo., para. 59*]. However, as "both PARTIES agreed to conduct the proceedings on the

basis of the 2021 AIAC Rules – Global Solution" [*PO1, II*], this is misguided. Under the 2021 AIAC Arbitration Rules, Rule 13.5(a) is the pertinent provision.

27. Rule 13.5(a) AIAC Arbitration Rules empowers the Arbitral Tribunal to determine "the law governing the arbitration agreement in the absence of any agreement by the Parties".

28. In the present case, the PARTIES implicitly chose Mediterranean law as the governing law (**1.**). Even in the absence of the PARTIES' choice, Mediterranean law is the governing law as per Rule 13.5(a) AIAC Arbitration Rules (**2.**).

1. The PARTIES implicitly chose Mediterranean law to apply to any agreement to arbitrate

29. The parties implicitly chose Mediterranean law as the governing law.

30. As per Rule 13.5(a) AIAC Arbitration Rules, the parties can choose the governing law explicitly or implicitly [*cf. Stürner/Wendelstein, p. 478*]. There is a general presumption that an explicit choice of the *lex contractus* is also the governing law [*Sulamérica, para. 11; Enka, paras. 40, 212; Kabab-Ji, para. 35; Arsanovia, para. 10; Plavec, p. 99; Redfern/Hunter, para. 3.12; Bantekas, p. 2; Lew, p. 143*].

31. The PARTIES only explicitly chose the *lex contractus* but not the governing law [*cf. Ex. R4*]. Accordingly, it is presumed to govern any agreement to arbitrate (**a.**). Irrespective of the presumption, the PARTIES specifically intended Mediterranean law to be the governing law (**b.**).

a. As the PARTIES explicitly chose Mediterranean law as the *lex contractus* it is presumed that it governs any agreement to arbitrate

32. It is presumed that Mediterranean law is the governing law as the PARTIES explicitly chose the *lex contractus*.

33. There is a rebuttable presumption that the governing law is the *lex contractus*. This presumption is based on the idea that the parties intend for their entire contractual relationship to be governed by the same law [*Sulamérica, para. 11; Enka, paras. 40, 212; Kabab-Ji, para. 35; Arsanovia, para. 10; Plavec, p. 99; Redfern/Hunter, para. 3.12; Bantekas, p. 2; Lew, p. 143*].

34. An arbitration agreement and an underlying contract tend to originate from the same agreement. This follows from them usually being concluded at the same time through and the same conduct [*Redfern/Hunter, para. 3.13*]. Especially commercial parties do not consider the legal distinctions and technicalities between these agreements [*Feehily, p. 358; Lew/Mistelis/Kröll, para. 6-24; Berger, PDR, para. 16-1*]. Rather, "for them a contract is a contract" [*Enka, para. 53*]. Considering this, it would be incongruent for the same agreement to be governed by two different laws [*Redfern/Hunter, para. 3.12*]. Consequently, unless there are extraordinary factors to the contrary, the parties intend for the *lex contractus* to govern their *entire* contractual relationship [*Sulamérica, para. 26*]. Thus, there is a rebuttable presumption that the *lex contractus* is the governing law.

35. This presumption does not conflict with the doctrine of separability which is codified in Art. 16(1) DAL, that states:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. *For that purpose*, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract." [*emph. added*]

36. The wording demonstrates that the doctrine of separability must always be considered in conjunction with the principle of competence-competence [*Sulamérica, para. 26; Enka, para. 63*]. Consequently, the doctrine of separability only intends to insulate the arbitration agreement to ensure that the arbitral tribunal has competence-competence [*Kröll, IHK, p. 180*]. Therefore, the legal fiction of the doctrine of separability, does not extend to further purposes. Consequently, the presumption does not conflict with the doctrine of separability [*Enka, paras. 61, 233*].
37. Thus, there is a rebuttable presumption that the *lex contractus* is the governing law [*Enka, paras. 226, 229; Sulamérica, para. 11*].
38. In this case, there are no factors that rebut the presumption.
39. Consequently, it is presumed that Mediterranean law as the *lex contractus* is the governing law.

b. Irrespective of the presumption, the PARTIES specifically intended Mediterranean law to govern any agreement to arbitrate

40. Irrespective of the presumption, the PARTIES intend Mediterranean law to govern any agreement to arbitrate.
41. Whether the parties implicitly chose a governing law is determined by the general rules of contract interpretation [*Austrian Supreme Court, Judgment 15 May 2019; Plavec, p. 98; Steingruber, para. 7.28; Lew/Mistelis/Kröll, paras. 7-59 et seq.; Girsberger/Voser, para. 284*]. Under these general rules, the parties' choice of a governing law can be deduced from their intent [*Plavec, p. 104*]. This intent can be demonstrated by the wording of the arbitration clause and the surrounding circumstances [*ibid.*].
42. The placement of the substantive law clause, its content and the wording of Art. 9 GCoS demonstrate that the PARTIES intended for Mediterranean law as the governing law.
43. First, CLAIMANT consciously chose to include the substantive law clause in Art. 9 GCoS. CLAIMANT's GCoS used to contain a substantive law clause and a separate arbitration clause. However, it decided to merge these clauses in 2016 [*PO2, para. 24*]. This conscious decision demonstrates CLAIMANT's intent for the *lex contractus* to also govern any agreement to arbitrate.
44. Second, CLAIMANT had the option to include a clause specifically determining the governing law but chose not to do so. In Art. 9 GCoS, CLAIMANT determined the arbitral institution, seat of

arbitration, the *lex contractus* and language and even included an escalation clause. Consequently, it specified almost all key aspects of a potential arbitration except for the governing law [*cf. AIAC Commentary, AR. 31 et seqq.*]. CLAIMANT's omission shows that the *lex contractus* was intended to govern both the alleged contract and the purported arbitration agreement.

45. Third, the wording of Art. 9 GCoS states: "This contract shall be governed by the substantive law of [Mediterraneo]" [*supra paras. 19 et seq.*]. Art. 9 GCoS refers to 'this contract' and, therefore, to the entire contractual relationship including any agreement to arbitrate.
46. Consequently, the history of Art. 9 GCoS and its wording demonstrate that the PARTIES intend Mediterranean law as the governing law.

2. Even in the absence of the PARTIES' choice, Mediterranean law governs any agreement to arbitrate as per Rule 13.5(a) AIAC Arbitration Rules

47. Even in the absence of the PARTIES' choice, Mediterranean law is the governing law as per Rule 13.5(a) AIAC Arbitration Rules.
48. In the absence of parties' choice of the governing law, the arbitral tribunal may determine it as per Rule 13.5(a) AIAC Arbitration Rules. Art. 13.5(a) AIAC Arbitration Rules contains a broad discretion for the arbitral tribunal to determine the governing law. In exercising its discretion, the arbitral tribunal should apply the transnational principle of closest connection [*BGH, Judgment of 8 June 2010; Sulamérica, para. 25; BNA v. BNB, Scherer/Jensen, p. 4; Flecke-Giammarco/Grimm, p. 44; Schmidt-Ahrendts/Höttler, p. 274; cf. Redfern/Hunter, para. 3.209; Gaillard, para. 425; trans-lex/139621*].
49. It follows from the principle of party autonomy that the law with closest connection to an arbitration agreement is the *lex contractus* [*Enka, para. 286*]. Where the parties have explicitly chosen the *lex contractus*, the whole contractual relationship should be governed by that law in order to provide uniformity. This is also not in contradiction to the conflict of laws rules contained in the NYC and the DAL. Though the NYC and the DAL contain conflict of laws rules in Art. V(1)(a) NYC and Art. 36(1)(a)(i) DAL, they only apply in the enforcement stage [*Wilske/Fox in Wolff, pp. 279, 281*]. In accordance with the principle of party autonomy, the NYC and the DAL also prioritise the parties' choice of law. Therefore, the provisions give legal effect to the parties' actual intent and should only be applied.
50. The PARTIES' explicit choice of Mediterranean law as *lex contractus* is, therefore, the governing law.
51. In conclusion, Mediterranean law is the governing law.

II. The PARTIES did not agree to arbitrate under Mediterranean law

52. The PARTIES did not agree to subject any dispute to arbitration under Mediterranean law [*contra Cl. Memo., para. 52*].

53. Under Mediterranean law, there are no specific provisions for the formation and interpretation of arbitration agreements [*Schwenzer/Tebel, p. 747*]. Therefore, the formation of an agreement to arbitrate is governed by the general rules of contract formation [*Born, p. 895; Girsberger/Voser, p. 82*]. Consequently, the relevant rules are the Mediterranean Civil Code ("**MCC**") and the CISG as Mediterraneo is a contracting state of the Convention [*PO1, III, para. 3*].

54. The CISG governs any agreement to arbitrate (**1.**) and the PARTIES did not agree to arbitrate under the CISG (**2.**). Even if the MCC and not the CISG applies, the PARTIES did not agree to arbitrate (**3.**).

1. The CISG governs any agreement to arbitrate

55. The CISG governs any agreement to arbitrate [*contra Cl. Memo., paras. 52 et seq.*].

56. The agreement to arbitrate ought to be governed by the same law as the underlying contract [*supra para. xxx*]. Therefore, whenever the underlying contract is governed by the CISG, it should also apply to the arbitration agreement [*Filanto v. Chilewich; Schwenzer/Hachem in Schlechtrim/Schwenzer, Art. 4, para. 11; Magnus in Staudinger, Intro Artt. 14 et seqq., para. 8*; *Schroeter, p. 121*]. The fact that the CISG is a convention governing the sale of goods has no bearing.

57. The CISG contains provisions that explicitly refer to dispute resolution, *e.g.* Artt. 19(3), 81(1) CISG. Art. 81(1) CISG states that the provisions on avoidance are not applicable to any dispute resolution clauses, including arbitration clauses [*Schwenzer/Tebel, p. 746*]. This suggests that where a provision is not intended to apply to arbitration agreements, it is explicitly stated in the Convention. As other provisions do not exclude the application, the CISG generally applies to arbitration agreements [*Schwenzer/Jaeger, p. 320*].

58. In addition, Art. 19(3) CISG even demonstrates the CISG intended to apply to arbitration agreements. As per Art. 19(3) CISG an arbitration clause is a material alteration of an offer to contract]. This being the case, for a contract to be concluded, the other party must accept the material alteration and, therefore, also the arbitration clause [*Ferrari in Kröll et al., Art. 19, para. 9; Schwenzer/Tebel, p. 746*]. Hence, there may be cases where the formation of a contract is dependent on the acceptance of the dispute resolution clause [*Schwenzer/Tebel, p. 746*]. Consequently, the arbitration clause can be the decisive factor for the formation of a sales contract [*ibid.*]. This causal relationship demonstrates that the CISG is intended to also govern the formation of an agreement to arbitrate [*ibid.*].

59. Consequently, the CISG is intended to govern arbitration agreements, unless the parties agreed on excluding its application [*Huber, in MüKo-BGB, CISG, Art. 6, para. 3*].

60. In this case, the PARTIES explicitly agreed that the alleged contract would be governed by the CISG [*PO2, para. 33*]. Consequently, any agreement to arbitrate is governed by the CISG as well.

61. CLAIMANT asserts that "the inclusion of the [arbitration] clause would still not be governed by the CISG (as was stated in the contract and is consistent with previous practices)" [*Cl. Memo, para. 52*]. However, at no point do the contractual documents state the exclusion of the CISG [*cf. Ex. R4; NoA, para. 7; Ex. C1, para. 13; Ex. C4; Ex. C5, para. 2*]. Such an exclusion also did not arise in 'previous practices' as the PARTIES had no prior commercial relationship [*PO2, para. 3*]. In any case, CLAIMANT declared Danubian law applicable in all of its contract templates [*PO2, para. 11*]. Since Danubia is not a signatory of the CISG [*PO1 III para. 3*], under these templates the application of the Convention was never a concern. Hence, there could not have been a 'previous practice' under these templates, even if such previous practice existed. Therefore, an exclusion of the CISG was neither explicitly stated nor does it result from any 'previous practice'.

62. Consequently, the CISG governs any agreement to arbitrate.

2. The PARTIES did not agree to arbitrate under the CISG

63. The PARTIES did not agree to arbitrate under the CISG [*contra. Cl. Memo., para. 53*].

64. Under the CISG, the formation of contracts is governed by Artt. 14 *et seqq.* CISG. Pursuant to Artt. 14, 18 CISG, an agreement is formed through offer and acceptance [*Brunner/Pfisterer/Kösterer in Brunner/Gottlieb, Intro Artt. 14–24, para. 1*]. In accordance with these provisions, an arbitration agreement can be concluded through the incorporation of an arbitration clause into an underlying contract [*R.J. O'Brien v. Pipkin; Born, pp. 883 et seq.*]. The arbitration clause can also be agreed upon independently from such incorporation [*Kröll, IHR, p. 181*].

65. CLAIMANT asserts that the arbitration clause in Art. 9 GCoS was validly incorporated into the alleged contract [*Cl. Memo., paras. 71 et seqq.*]. However, no arbitration clause was incorporated into the alleged contract (**a.**). The PARTIES did not agree to arbitrate in any other way (**b.**).

a. The arbitration clause in Art. 9 GCoS was not incorporated into the alleged contract under the CISG

66. Under the CISG, the reference to CLAIMANT's GCoS was not sufficient to incorporate the arbitration clause into the alleged contract.

67. The CISG does not contain any provisions concerning the incorporation of individual clauses into the underlying contract. It is, however, generally recognised that clauses contained in a separate document can be incorporated via reference [*Sea Trade v. the Athena; Girsberger/Voser, para. 290; Born, p. 877*]. In order to incorporate an arbitration clause, the parties must show an intent to resolve any potential dispute by arbitration [*Schramm/Geisinger/Pinsolle in Kronke/Nacimiento, pp. 88 et seqq.*]. Therefore, the reference must specifically refer to the arbitration clause [*Born, p. 887; Gaillard, para. 496*]. A general reference is only sufficient where the offeree knew or where it can be presumed that it knows the content of the arbitration clause [*Société Bomar Oil v. Entreprise;*

Sea Trade v. The Athena; Born, pp. 879 et seq.; Berger, PDR, p. 438; Schramm/Geisinger/Pinsolle in Kronke/Nacimiento, p. 91]. Such knowledge can be presumed where the clause is part of an established practice, a common business practice or was made available to the offeree [*Société Bomar Oil v. Entreprise; Tradax Export v. Iran Oil Company; Steingruber, para. 8.21*].

68. In the alleged contract, there is only an accidental reference to arbitration in general [*Ex. C3*]. There is no reference to CLAIMANT's specific arbitration clause [*PO2, para. 25; Ex. C3*].

69. This general reference was insufficient to incorporate the arbitration clause into the alleged contract. RESPONDENT did not know the content of the clause (**aa.**) and the clause was not part of an established practice (**bb.**) or common business practice (**cc.**). CLAIMANT also did not make the clause available to RESPONDENT (**dd.**).

aa. RESPONDENT did not have positive knowledge of the content of CLAIMANT'S arbitration clause

70. RESPONDENT did not have positive knowledge of the content of CLAIMANT's arbitration clause.

71. A mere reference to the general conditions is only sufficient where the offeree has positive knowledge of the entire content of the arbitration clause [*cf. Schroeter in Schlechtriem/Schwenzer, Art. 14, para. 46; Gruber in MüKo-BGB, Art. 14, para. 32*].

72. In 2011, Mr. Chandra sent Ms. Bupati a copy of CLAIMANT's GCoS which contained its now outdated arbitration clause [*Ex. C1, para. 4*]. In a phone call in 2016, Ms. Bupati was informed that CLAIMANT had entirely redrafted its arbitration clause [*PO2, paras. 7, 18; Ex. C1, para. 4; Ex. R4*]. There is, however, no evidence that Mr. Chandra had ever sent a copy of the new clause to Ms. Bupati [*PO2, para. 18*]. Consequently, she was never given the opportunity to actually read the arbitration clause. Further there are no indications that Mr. Chandra and Ms. Bupati ever discussed the terms of the arbitration clause again. The only term that was readdressed was the substantive law clause as there was a change in the applicable law [*Ex. C4*]. Therefore, CLAIMANT is expecting Ms. Bupati to remember the content of a clause that was only discussed once in a short phone call in 2016.

73. This unrealistic expectation also does not mirror Ms. Bupati's actual knowledge. This is exemplified by Ms. Bupati referring to an outdated arbitration clause in her email dated 1 April 2020 [*Ex. C2*]. In the email, Ms. Bupati refers to the institution that was contained in CLAIMANT previous arbitration clause [*Ex. C2; Ex. R4*]. Therefore, Ms. Bupati did not know the content of the current arbitration clause contained in CLAIMANT's GCoS.

74. The only other person potentially involved in the negotiation is Ms. Fauconnier, Ms. Bupati's assistant. She was, however, not even aware that CLAIMANT had changed its arbitration clause in

2016 [*PO2, para. 25*]. Therefore, she thought CLAIMANT was still using the pre-2016 version of its arbitration clause [*cf. PO2, para. 25*].

75. Consequently, RESPONDENT did not have knowledge of the content of CLAIMANT's arbitration clause.

bb. RESPONDENT's knowledge of the arbitration clause cannot be presumed as it was part of a practice only between Southern Commodities and CLAIMANT

76. RESPONDENT's knowledge of the arbitration clause cannot be presumed because it was part of a practice only between CLAIMANT and Southern Commodities [*contra Cl. Memo., paras. 46, 53*].

77. It appears that CLAIMANT equates RESPONDENT with Southern Commodities and disregards the fact that our client is an independent legal entity [*PO2, para. 4*]. However, an established practice between CLAIMANT and Southern Commodities, has no bearing on our client.

78. As per Art. 9(1) CISG, the parties are bound by any practices which they have established *between themselves*. Therefore, a practice established between any of the parties and others is not binding [*Mankowski in Mankowski, Art. 9, para. 18; Bonell in Bianca/Bonell, Art. 9, para. 2.1.1*].

79. The question arises whether there is an exception from this bilateral effect, under which a parent company automatically binds its subsidiaries. Such an exception is considered where related companies employ the same personnel or are only distinguished by an additional 'international' in the name [*Mankowski in Mankowski, Art. 9, para. 19*]. This indicates that the legal relationship between the companies by itself is insufficient to bind a subsidiary upon a practice it has not established. Companies cannot be expected to consistently be aware of previous and recently established practices of all of their related companies, units and employees with all of their contracting partners. In these cases, a binding effect of an established practice would lead to immense legal and practical uncertainties. Consequently, binding a subsidiary by a practice it has not established itself can only be justified where additional factors are present.

80. The employment of a former employee of the parent company cannot be considered as such an additional factor. As per Art. 9(1) CISG, a practice is established *between the parties* and not their individual *employees*. An established practice can lead to the derogation of all of the CISG's provisions and can, therefore, be of major legal consequences for the subsidiary. Binding these undesired legal consequences upon one single employee, who often will not be aware of the legal effect past practices might have, is unfeasible in practice.

81. RESPONDENT cannot be equated with Sothern Commodities, as it is a separate legal entity independent from Southern [*PO2, para. 4*]. This legal independence is particularly shown by the fact that RESPONDENT is acting under its own name "JAJA Biofuel Ltd" [*Ex. C3*].

82. It should also be taken into account, that Southern Commodities and RESPONDENT pursue different company policies with respect to arbitration. Ms. Bupati had stressed that RESPONDENT would not want to agree to arbitration [*Ex. C2*], which on the contrary had never been an issue for Southern Commodities [*cf. Ex. C1, paras. 10 et seq.*]. Therefore, any practice concerning arbitration established between Southern Commodities' and CLAIMANT would represent a violation of RESPONDENT's company policy.
83. Lastly, binding RESPONDENT by practices Southern Commodities had established even prior to the acquisition would lead to considerable legal uncertainties. It would be not feasible for the companies to go through every contract they have ever concluded and then discuss specific details on its formation and performance.
84. All these factors cannot be disregarded simply because RESPONDENT employs Ms. Bupati, one of Southern Commodities' former employees.
85. Therefore, RESPONDENT is not bound by any practice established between Southern Commodities and CLAIMANT. Consequently, RESPONDENT's knowledge of the arbitration clause cannot be presumed.

cc. An arbitration clause was not incorporated into the alleged contract as there was no pertinent common business practice in the industry

86. RESPONDENT cannot be presumed to know the content of the arbitration clause due to a common business practice in the industry [*contra Cl. Memo., para. 76*].
87. The offeree's knowledge of an arbitration clause can be presumed if it is part of a common business practice in the sense of Art. 9(2) CISG [*Girsberger/Voser, para. 391*]. This sets forth that the arbitration clause is usual in the industry and that the parties are regularly active in this specific industry [*BGH Judgement 3 Dec 1992; Schroeter in Schlechtriem/Schwenzer, Art. 14, para. 61*].
88. In the palm oil industry, it is usual to incorporate arbitration clauses into general conditions that provide for a specialised commodity arbitration institution [*PO2, para. 11*]. However, the arbitration clause in Art. 9 GCoS provides for the AIAC that is a non-specialised arbitration institution [*PO2, para. 11; Ex. C1, para. 4; Ex. R4*]. Therefore, Art. 9 GCoS is not a common arbitration clause in the industry.
89. Further, RESPONDENT was a newcomer in the palm oil industry, as it had just founded its palm oil unit months prior to the negotiations [*NoA, para. 4; PO2, para. 5*]. Previously, it had only produced its biofuel from other vegetable oils such as corn and rapeseed oil [*Ex. R3, para. 4; RNoA, para. 2*]. Therefore, RESPONDENT was not regularly active in the palm oil industry.
90. Consequently, RESPONDENT cannot be presumed to know the content of the arbitration clause due to a common business practice in the industry.

dd. The current arbitration clause was not made available to RESPONDENT

91. CLAIMANT did not make its current version of the arbitration clause available to RESPONDENT [*contra Cl. Memo., paras. 45, 74 et seq.*].

92. The current arbitration clause itself or CLAIMANT's GCoS containing the clause were not made available to RESPONDENT [*infra ISSUE C*].

93. In conclusion, RESPONDENT did not have knowledge of the content of CLAIMANT's arbitration clause and can also not be presumed to have such knowledge. The arbitration clause was not part of an established practice or common business practice and was also not made available to RESPONDENT. Therefore, the general reference was not sufficient to incorporate the arbitration clause into the alleged contract.

94. Consequently, no arbitration clause was incorporated into the alleged contract under the CISG.

b. The PARTIES did not agree to arbitrate in any other way under the CISG

95. Even if there was no incorporation by reference, the PARTIES did not agree to arbitrate under the CISG.

96. In accordance with Artt. 14 *et seqq.* CISG, the formation of an arbitration agreement depends on the parties' meeting of the minds [*Steingruber, para. 6.56; Berger, Applicable Law, p. 303*]. The parties' corresponding intent to arbitrate is to be assessed in accordance with the interpretation rules contained in Art. 8 CISG [*Brunner/Pfisterer/Köster in Brunner/Gottlieb, Art. 14, paras. 3 et seqq.*]. Under the subjective approach of Art. 8(1) CISG, a party's statement is "to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was". Where such intent is unclear, the objective approach of Art. 8(2) CISG is to be applied. This objective approach is the understanding that a reasonable third person of the same kind as the other party would have had in the same circumstances. When identifying the party's intent and the understanding of a reasonable third person, "due consideration is to be given to all relevant circumstances of the case" pursuant to Art. 8(3) CISG.

97. Throughout the negotiations, Ms. Bupati continuously expressed RESPONDENT's concerns on subjecting any dispute to arbitration [*Ex. C2*]. These concerns particularly arose from the widespread hostility against arbitration in Equatoriana [*Ex. C1, para. 11; Ex. C2*]. Given this anti-arbitration climate, Ms. Bupati explained that arbitration would only be possible if there was a mechanism that provided for transparency. She suggested that the UNCITRAL Transparency Rules could be this mechanism. However, CLAIMANT rejected the application of these rules and did not suggest any other way of addressing RESPONDENT's concerns [*Ex. C5, para. 5*]. Therefore, CLAIMANT and RESPONDENT did not agree on any transparency mechanism that our client had

explicitly requested. Thus, the minimum requirement RESPONDENT had set for it to agree to arbitrate was not met.

98. In addition, CLAIMANT and RESPONDENT were referring to different arbitration clauses throughout their negotiations. As previously stated, RESPONDENT believed that the PARTIES were negotiating over the pre-2016 arbitration clause [*supra para. 73*]. Therefore, the PARTIES had two vastly different arbitration clauses in mind [*Ex. R4*]. Consequently, they were not even negotiating over the same clause.
99. There was no meeting of the minds between the PARTIES that would express their intent to arbitrate.
100. Therefore, the PARTIES did not agree to arbitrate under the CISG.
101. In conclusion, the PARTIES did not incorporate an arbitration clause into the alleged contract and did not agree to arbitrate regardless. Consequently, the PARTIES did not agree to arbitrate under the CISG.

3. Even if the Mediterranean Civil Code applies, the PARTIES did not agree to arbitrate

102. Even if the governing law was the MCC and not the CISG, there would still not be any agreement to arbitrate.
103. The MCC is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts ("**UNIDROIT Principles**") [*PO1, III, para. 3*]. Under the MCC, the formation of contracts is governed by Artt. 2.1.1 *et seqq.* Pursuant to Art. 2.1.1 MCC, an agreement is formed through offer and acceptance or through conduct. These general provisions on contract formation also apply to the formation of arbitration agreements [*Born, p. 895*].
104. An arbitration agreement can be concluded through the incorporation of an arbitration clause into an underlying contract pursuant to Art. 2.1.19(1) MCC. The same clause could also be agreed upon independent from the incorporation.
105. Under the MCC, the arbitration clause in Art. 9 GCoS was not incorporated into the alleged contract (**a.**). The PARTIES did not agree to arbitrate in any other way (**b.**).

a. The arbitration clause in Art. 9 GCoS was not validly incorporated into the alleged contract under the Mediterranean Civil Code

106. Under the MCC, the arbitration clause in Art. 9 GCoS was not validly incorporated into the alleged contract.
107. According to Art. 2.1.19(1) MCC, the general rules on contract formation also apply to the incorporation of individual clauses contained in a separate document. The general rules on contract formation contained in Artt. 2.1.1 *et seqq.* MCC set the same requirements for incorporation as the CISG [*cf. Magnus in Vogenauer, Art. 2.1.19, paras. 12 et seqq.*].

108. As established above, these requirements were not met [*supra para. 94*].
109. Therefore, the arbitration clause in Art. 9 GCoS was not validly incorporated into the alleged contract under MCC.

b. The PARTIES did not agree to arbitrate in any other way under Mediterranean Civil Code

110. Even if there was no incorporation by reference, the PARTIES did not agree to arbitrate.
111. The parties' intent to arbitrate instead of going to a national court is the essential minimum content of any agreement to arbitrate [*Weigand/Baumann, para. 1.10; Lew/Mistelis/Kröll, para. 8-10*]. This intent to arbitrate is to be assessed in accordance with Artt. 4.2(2) and 4.3 MCC [*Brambles Holdings v. Bathurst*; *Brödermann, p. 39; Nottage in Vogenauer, Art. 2.1.1, para. 8; Vogenauer in Vogenauer, Art. 4.2, para. 8*]. Under Art. 4.2(2) MCC, the parties' conduct is to be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances. When determining this meaning, regard is to be given to all relevant surrounding circumstances pursuant to Art. 4.3 MCC.
112. There was no meeting of the minds between the PARTIES that would express their intent to arbitrate.
113. Throughout their negotiations the PARTIES each referred to two completely different arbitration clauses [*supra para. 98*]. Further, our client continuously expressed its restraint concerning arbitration towards CLAIMANT [*supra para. 82*].
114. Therefore, the PARTIES did not express their common intent to arbitrate. Consequently, the essential minimum content of any agreement to arbitrate was not fulfilled.
115. Consequently, the PARTIES did not agree to arbitrate under the MCC.

III. Even if Danubian law applies, the PARTIES did not agree to arbitrate

116. Even in the event that Danubian law applies, the PARTIES did not agree to arbitrate under the Danubian Civil Code ("**DCC**").
117. Under the DCC, the arbitration clause in Art 9 GCoS was not validly incorporated into the alleged contract (**1.**). The PARTIES did not agree to arbitrate in any other way (**2.**).

1. The arbitration clause in Art. 9 GCoS was not validly incorporated into the alleged contract under the Danubian Civil Code

118. Under the DCC, the arbitration clause contained in Art. 9 GCoS was not validly incorporated into the alleged contract.
119. Under the DCC, the incorporation of arbitration clauses contained in general conditions into an *existing* contract requires a clear statement that such conditions are to be applied [*PO1, III, para. 3*]. The wording of 'existing' implies that the contract must be undisputed between the parties, as otherwise the existence of the contract is unclear.

120. In this case, regardless of whether the standard of incorporation under the DCC was met, the existence of the underlying contract is in dispute. Therefore, a prerequisite for incorporation is not met and is not possible.
121. In addition, the PARTIES did not conclude the alleged contract [*infra ISSUE B*].
122. Consequently, the arbitration clause contained in Art. 9 GCoS was not validly incorporated into the alleged contract under the DCC.

2. The PARTIES did not agree to arbitrate in any other way under the Danubian Civil Code

123. Even if there was no incorporation by reference, the PARTIES did not agree to arbitrate DCC.
124. Since the rules on the formation of contracts under the DCC are "based on the UNIDROIT Principles" [*PO2, para. 35*], they are similar to those of the MCC [*supra paras. 103 et seq.*]. Consequently, the legal conclusions drawn under the MCC can be transferred.
125. Therefore, the PARTIES did not show any legal intent to be bound by any agreement to arbitrate under the DCC [*supra paras. 112 et seqq.*]. Consequently, the PARTIES did not agree to arbitrate under DCC.

IV. Claimant cannot rely on the *in favorem validitatis* principle for an arbitration agreement to exist

126. Although "an international arbitration agreement must be construed with a view to preserve its validity and to uphold the will of the parties expressed therein […] correspondent to the in *favorem validatis* [sic] principle" [*Cl. Memo, para. 47*], this does not require a different result.
127. The *in favorem validitatis* principle applies where multiple laws can potentially govern an arbitration agreement [*Enka, para. 96; Sulamérica, para. 7*]. The purpose of this principle is to give effect to the parties' real intent to subject their dispute to arbitration [*Born, Law Governing Arbitration Agreements, p. 835*]. Therefore, out of multiple potentially applicable laws, the law validating the arbitration agreement should prevail [*ibid.*].
128. In the present case, the PARTIES did not conclude any agreement to arbitrate, irrespective of which law applies [*supra paras. 101, 115, 125*]. Consequently, an intent to arbitrate which could be upheld in accordance with the *in favorem validitatis* principle does not exist at all. As a result, the *in favorem validitatis* principle does not lead to a different conclusion.

B. Assuming *arguendo* that the arbitration agreement is valid as to substance, it is not valid as to form

129. Assuming *arguendo* that the arbitration agreement is valid as to substance, it is not valid as to form.
130. Only once the substantive validity has been established, an arbitral tribunal then assesses the formal validity [*Berger, Applicable Law, p. 303; Lew/Mistelis/Kröll, para. 6-37; Wolff in Wolff, p. 118; Lew, p. 119*]. The CISG establishes the principle of freedom as to form. However, this principle

does not apply to arbitration agreements [*Schwenzer/Jaeger, Arbitration, p. 321; Janssen/Spilker, p. 157*]. Instead, the formal validity is regulated by the *lex arbitri* and the NYC [*Lew, p. 129; Berger, Applicable Law, pp. 324 et seqq.*], as Danubia, Ruritania, Mediterraneo and Equatoriana are all Member States of the NYC [*PO1, III, para. 2*].

131. Though the DAL is the *lex arbitri*, Art. II NYC is the international maximum standard that is applied in the enforcement proceedings [*Born, p. 708*]. Consequently, if Art. II NYC is met, there is no need to consider the form requirement of the *lex arbitri*.

132. The arbitration agreement does not meet the form requirements of Art. II NYC (**I.**) and Art. 7 DAL (**II.**).

I. The arbitration agreement does not meet the written form requirement of Art. II NYC

133. Contrary to CLAIMANT's allegations [*Cl. Memo., paras. 85 et seq.*], an arbitration agreement would not comply with the writing requirement set forth in Art. II NYC.

134. There are two alternative form requirements in Art. II NYC. Either both parties sign the arbitration agreement or the underlying contract containing the arbitration clause [*BGH, Judgment of 8 June 2010*] or the arbitration clause must be contained in an exchange of letters or telegrams.

135. In this case, no arbitration agreement was signed by both PARTIES (**1.**) and no letters or telegrams were exchanged (**2.**).

1. The PARTIES did not sign an arbitration agreement in the sense of Art. II(2) NYC

136. The PARTIES did not sign an arbitration agreement as per Art. I(2) NYC.

137. CLAIMANT argues that an arbitration agreement "was created and signed with the consent of both contracting parties" [*Cl. Memo., para. 50*]. Yet, our client never signed any document sent by CLAIMANT [*NoA, para. 17; Ex C1, para. 14*].

138. Thus, the first option of the form requirement in Art. II(2) NYC is not met.

2. The PARTIES did not exchange any letters or telegrams in the sense of Art. II(2) NYC

139. The PARTIES did not exchange any letters or telegrams in the sense of Art. II(2) NYC.

140. Under the second option of Art. II(2) NYC, an arbitration clause must be contained in an exchange of letters or telegrams. Accordingly, there must be a written proposal to arbitrate which must then be accepted and communicated in writing [*van den Berg, p. 199*]. This is also fulfilled where the proposal only references a separate document which contains the arbitration clause [*Born, p. 878; Wolff in Wolff, p. 141 et seq.*].

141. The latter requires that both parties knew, or ought to have known, the content of the arbitration clause [*van den Berg, p. 171*]. A party ought to have known the content if it had the reasonable opportunity to take note of it. A reasonable opportunity is given where a copy of the arbitration clause was made available or where it was part of an established practice or common business

practice in the pertinent industry [*Tradax Export v. Iran Oil Company; di Pietro, p. 442; Gaillard, para. 494; van den Berg, pp. 218 et seqq.*; *Wolff in Wolff, pp. 141 et seqq.*].

142. RESPONDENT did not know the content of the arbitration clause contained therein [*supra para. 75*] and was never sent a copy of the GCoS [*Ex. C1, para. 4; RNoA, para. 13*]. The clause was also not part of an established practice between the PARTIES [*supra para. 84*] or a common business practice in the palm oil industry [*supra para. 90*].

143. Given these facts, any agreement to arbitrate does not comply with the form requirement of Art. II(2) NYC.

II. The arbitration agreement does not meet the written form requirement of the Danubian Arbitration Law

144. The arbitration agreement does not meet the form requirements of the DAL.

145. The relevant provision in the DAL is Art. 7. Since Danubia adopted Option 1 of Art. 7 Model Law [*PO1, III, para. 3*], an arbitration agreement must be in writing as per Art. 7(2) DAL. Artt. 7(3)-(6) DAL define this writing requirement [*Wolff in Wolff, p. 129*].

146. The arbitration agreement does not meet the form requirements of Art. 7(3), (4) DAL (**1.**) and Art. 7(6) DAL (**2.**).

1. The arbitration agreement does not meet the written form requirement of Art. 7(3), (4) DAL

147. CLAIMANT argues that the written form requirement is fulfilled as per Art. 7(3), (4) DAL [*Cl. Memo., para. 86*]. Art. 7(3) DAL states:

> "An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."

148. This writing requirement is also met if the content is recorded in any retrievable form of electronic communication as per Art. 7(4) DAL [*Bantekas, p. 134*].

149. In order to not render Art. 7 DAL meaningless, Art. 7(3) DAL needs to be restricted by an additional requirement if only one party recorded the content [*Wolff in Wolff, p. 132*]. This additional requirement is the timely transmission of the record to the other party [*Wolff in Wolff, p. 132*]. The transmission is timely if it occurred without undue delay [*Wolff in Wolff, p. 132*].

150. The arbitration clause in question is contained in CLAIMANT's GCoS [*Ex. R4*]. It is undisputed that CLAIMANT never sent a copy of its GCoS or any other documentation of the arbitration clause to RESPONDENT [*NoA, para. 7; RNoA, para. 13*].

151. Consequently, the arbitration agreement is not in writing in the sense of Art. 7(3), (4) DAL.

2. The arbitration agreement does not meet the form requirement of Art. 7(6) DAL

152. The arbitration agreement does not meet the requirement of Art. 7(6) DAL.

153. Art. 7(6) DAL explicitly regulates the incorporation of arbitration clauses by reference. It states:

> "The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of *the contract*." [*emph. added*]

154. The wording of Art. 7(6) DAL suggests that it only applies if the contract is indisputably concluded. This is supported by Art. 7(3) DAL which explicitly lists multiple different types of contract conclusion. Art. 7(6) DAL, however, does not state that a hypothetical or alleged contract is sufficient. This is in line with the drafters' intent as the explanatory note of the Secretariat explicitly refers to the conclusion of a contract [*UN Doc. A/CN.9/606, para. 17*]. Consequently, the existence of the contract must be undisputed for the provision to apply.

155. In this case, the existence of the contract is disputed. Therefore, the arbitration agreement cannot meet the prerequisites of Art. 7(6) DAL.

156. In conclusion, the arbitration agreement does not meet the form requirements of Art. 7(3), (6) DAL.

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157. The Arbitral Tribunal does not have jurisdiction over the present dispute. The PARTIES did not agree on the jurisdiction of the Arbitral Tribunal as they have never formed an agreement to arbitrate. The existence of an agreement to arbitrate is determined under Mediterranean law, as the *lex contractus* and not Danubian law, the law of the seat. Within Mediterranean law, the CISG, and not the Mediterranean Civil Code is applicable. However, under any potentially applicable laws, the arbitration clause in Art. 9 GCoS was not incorporated into the alleged contract and there was no intent to be legally bound to any agreement to arbitrate. Should the Arbitral Tribunal, nonetheless, find that the PARTIES formed an agreement to arbitrate, it would not comply with the pertinent form requirement of the NYC or the *lex arbitri*. Therefore, regardless of which law applies to the purported agreement to arbitrate, the PARTIES never consented to subject any of their dispute to arbitration.

ISSUE B: THE PARTIES DID NOT ENTER INTO A CONTRACT

158. RESPONDENT respectfully requests the Arbitral Tribunal to declare that the PARTIES did not enter into a contract.

159. CLAIMANT states that it "is entitled to the requested declaration that the contract was validly entered into" [*Cl. Memo., para. 56*]. Yet, said contract was never entered into. CLAIMANT is simply trying to turn the PARTIES' preliminary negotiations into an already existing contract.

160. CLAIMANT and RESPONDENT did not enter into the alleged contract, as the agreed-upon form requirement was not fulfilled (**A.**) and the PARTIES were only in preliminary negotiations (**B.**).

A. The agreed-upon form requirement between the PARTIES was not fulfilled

161. The agreed-upon form requirement for contract formation was not met.

162. The PARTIES agreed that the formation of the contract would require a document signed by both PARTIES (**I.**). RESPONDENT, however, never signed any contractual documents (**II.**).

I. The PARTIES agreed that the formation of the contract required a document signed by both PARTIES

163. The PARTIES agreed that the formation of the contract would require a document signed by both CLAIMANT and RESPONDENT. Yet, CLAIMANT asserts that the alleged contract was not subject to any form requirements [*Cl. Memo., para. 95; NoA, paras. 18, 19*].

164. Pursuant to Art. 11 CISG, a contract is not subject to any form requirements. However, Art. 6 CISG determines that the parties may explicitly or implicitly agree to derogate from Art. 11 CISG [*Mistelis in Kröll et al., Art. 6, para. 15*]. Such derogation requires that the parties agree on a specific form requirement [*Bonell in Bianca/Bonell, Art. 11 para. 3.1*]. The agreed-upon form requirement is assumed to be a prerequisite for the formation of the contract [*Brunner/Pfisterer/Kösterer in Brunner/Gottlieb, Art. 11, para. 4*]. Whether the parties agreed on a form requirement is assessed under the interpretation rules contained in Art. 8 CISG [*ibid.*].

165. Throughout their negotiations, the PARTIES agreed that the formation of a potential contract requires a document signed by both PARTIES.

166. Already at the Summit, it was agreed that in the event of contract formation, contractual documents would need to be prepared [*NoA, para. 5*]. Consequently, the PARTIES established a requirement of written form.

167. Subsequent to the Summit, Ms. Bupati and Mr. Chandra agreed that said document also needed to be signed by both PARTIES. In her email dated 9 April 2020, Ms. Bupati specifically asked Mr. Chandra to "prepare the necessary contractual documents for signature and send them to my assistant" [*Ex. C2*]. In turn, Mr. Chandra's assistant sent the contractual documents to Ms. Bupati's assistant and "specifically asked for a signed version of the content to be returned" [*Cl. Memo., para. 101; cf. Ex. C4*]. Therefore, the PARTIES agreed that any potential contract would require a signature.

168. The surrounding circumstances exemplify that the PARTIES regarded the form requirements to be a prerequisite for contract formation and not merely for evidentiary purposes. When Mr. Rain asked for a signed copy of the contract, he had stated that said copy was also necessary for the shipping documents. This, however, was not the main reason why Mr. Rain asked Ms. Bupati to return a signed copy of the contractual documents. Mr. Rain's enquiry was seven months before any palm oil would be shipped [*cf. PO2, para. 23; NoA, para. 6*]. Therefore, there was no need to prepare any shipping documents at this time. Mr. Rain demonstrated that he regarded the signed copy of the contract to be of particular importance, when he again enquired about the outstanding copy in a subsequent telephone conversation [*NoA, para. 8; Ex. C5, para. 6*]. Even at this point, any potential shipment was still not due for another six months. Consequently, the enquiry demonstrates that CLAIMANT considered the form requirement necessary for contract formation as well.

169. In conclusion, the PARTIES had established two form requirements. At the Summit, the PARTIES agreed that the formation of the alleged contract required a written document. Thereafter, it was agreed that a contract could only be formed through a document signed by both PARTIES.

II. The alleged contract does not comply with the established form requirement

170. At no point was the established form requirement met.

171. CLAIMANT alleges that the contract was formed at the Summit or in the communication thereafter [*Cl. Memo., paras. 54, 95*]. At neither of those points in time was the agreed-upon form requirement met.

172. At the Summit, no contractual documents had been prepared [*cf. NoA, para. 5, Ex. C2*].

173. After the Summit, no contractual documents were signed by RESPONDENT [*Ex. C3*]. Therefore, CLAIMANT's allegation that there was an "agreement which was created and signed with the consent of both contracting parties" [*Cl. Memo., para. 50*] is incorrect.

174. In conclusion, the PARTIES did not enter into the alleged contract as the agreed-upon form requirements were not met.

B. The PARTIES' negotiations at no point amounted to contract formation

175. The PARTIES negotiations at no point amounted to contract formation.

176. The CISG contains two mechanisms for the formation of a contract. First, a contract can be formed through corresponding statements of offer and acceptance as per Artt. 14, 18 CISG [*Brunner/Pfisterer/Kösterer in Brunner/Gottlieb, Intro Artt. 14–24, para. 1*]. Second, a contract can also be formed through an established practice between the parties as per Art. 9(1) CISG.

177. In this case, the PARTIES neither formed a contract through offer and acceptance pursuant to Artt. 14 *et seqq.* CISG (**I.**), nor under an established practice pursuant to Art. 9(1) CISG (**II.**).

I. The PARTIES did not enter into the alleged contract through offer and acceptance pursuant to Artt. 14 *et seqq.* CISG

178. The PARTIES did not enter into a contract through offer and acceptance under Artt. 14 *et seqq.* CISG.

179. Foremost, CLAIMANT relies on Art. 2.1.1 UNIDROIT Principles when proving contract formation through offer and acceptance. However, the formation of contracts through offer and acceptance is exhaustively regulated in Artt. 14, 18 CISG. Whenever the CISG exhaustively regulates an issue in one of its provisions, the provision cannot be substituted by the UNIDROIT Principles [*Brunner/Wagner in Brunner/Gottlieb Art. 7, para. 2, 11*].

180. The PARTIES agreed that the alleged contract was governed by the CISG [*PO2, para. 33*]. Therefore any application of Art. 2.1.1 UNIDROIT Principles is precluded.

181. When proving contract formation, CLAIMANT provides two conflicting accounts. First, it states that the PARTIES already entered into a contract at the Summit [*Cl. Memo., para. 54*]. Second, it alleges that, as RESPONDENT had not accepted any offer at the Summit [*Cl. Memo., para. 96*], the alleged contract was formed in the subsequent correspondence [*Cl. Memo., para. 97*]. Yet, neither of these allegations have any merit.

182. Under the CISG, CLAIMANT and RESPONDENT did not enter into the alleged contract at the Summit (**1.**) or thereafter (**2.**).

1. The PARTIES did not enter into the alleged contract at the Summit

183. At the Summit, no contract was formed between CLAIMANT and RESPONDENT.

184. Neither PARTY made an offer pursuant to Art. 14(1) CISG (**a.**). Even if either CLAIMANT or RESPONDENT had made an offer at the Summit, such offer was never accepted pursuant to Art. 18 CISG (**b.**).

a. At the Summit, neither PARTY made an offer pursuant to Art. 14(1) CISG

185. At the Summit, neither PARTY made an offer pursuant to Art. 14(1) CISG.

186. As per Art. 14(1) CISG, an offer requires a sufficiently definite proposal that indicates the intent of the offeror to be bound in case of an acceptance. This intent is the pertinent distinction between non-binding negotiations on contractual terms and the formation of a binding agreement [*Brunner/Pfisterer/Köster in Brunner/Gottlieb, Art. 14, para. 5*]. Negotiations are still ongoing if the parties have not yet agreed on material terms or conditions [*Toluene Case; Gas Turbine Case*]. These material terms and conditions are partly specified in Art. 19(3) CISG. It states that different terms relating to "the settlement of disputes are considered to alter the terms of the offer materially". This is exemplified by the *Toluene Case* and the *Gas Turbine Case.* In these cases, it was found that no contract had been formed, as the parties had not agreed on the dispute settlement terms.

187. Irrespective of whether the contractual terms Mr. Chandra suggested at the Summit are sufficiently definite, neither PARTY made an offer. Though Ms. Bupati and Mr. Chandra both showed an interest in contracting, they lacked an intent to be bound by the suggested terms.

188. This became apparent when the PARTIES agreed that Mr. Chandra would only start preparing the contractual documents once Ms. Bupati consulted her management [*NoA, para. 5*]. Only then the discussion on the terms of a potential contract could continue [*cf. NoA, para. 5*]. Therefore, Mr. Chandra and Ms. Bupati had no intent to bind their employers by an offer at that time.

189. In addition, the PARTIES did not reach an agreement on the dispute resolution mechanism. In the discussions, Ms. Bupati raised concerns over subjecting potential disputes to arbitration, that followed from the "wide-spread hostility to arbitration in Equatoriana" [*Ex. C1, para. 11; cf. Ex. C2*]. Thus, the mere agreement to arbitrate could harm our client's business and reputation [*cf. Ex. C1, para. 11; Ex. C2*]. In turn, Mr. Chandra, however, explained that "agreeing on anything but arbitration would be very difficult" [*Ex. C1, para. 11*]. Therefore, the PARTIES were in disagreement on the dispute resolution mechanism they would subject a potential contract to. Terms concerning the dispute resolution, however, are material terms of a contract and the PARTIES had even demonstrated that they regarded this matter as particularly important. Therefore, they did not intend to be bound by the commercial terms without having agreed on a dispute resolution mechanism.

190. Consequently, no offer was made pursuant to Art. 14(1) CISG.

b. Even if either CLAIMANT or RESPONDENT had made an offer at the Summit, such offer was never accepted pursuant to Art. 18 CISG

191. Even if either CLAIMANT or RESPONDENT had made an offer at the Summit, such offer was never accepted pursuant to Art. 18 CISG.

192. Art. 18(1) CISG determines that an acceptance is a statement made by or conduct of the offeree that indicates assent to an offer. Art. 18(2) CISG specifies that an acceptance is effective if it reaches the offeror within the set time limit. As per Art. 21(1) CISG, an acceptance submitted after the time limit is only effective if the offeror informs the offeree that they approve of the late acceptance without delay. As a general rule, an approval is only without delay if it is communicated to the offeree within two days [*Rothe in Saenger et al, 3, para. 72; Dornis in Honsell, Art. 21, para. 14; Gruber in MüKoBGB, Art. 21, para. 7*].

193. There was no timely acceptance of any offer made at the Summit. CLAIMANT's statement that the offer was "accepted by the RESPONDENT within the discussed 3-day deadline" [*Cl. Memo. para. 97*] is incorrect. The Summit was on 28 March 2020 [*NoA, para. 4*]. Therefore, in order for it to be

timely, an offer would have to be accepted by 31 March 2020. However, RESPONDENT only reached out to CLAIMANT on 1 April 2020 [*Ex. C2*]. Therefore, there was no timely acceptance.

194. There was also no effective late acceptance of any offer. Though RESPONDENT reached out to CLAIMANT with an email dated 1 April 2020 [*ibid.*], it took CLAIMANT until 9 April 2020 to reply [*Ex. C4*]. Therefore, even if the email contained a late acceptance, it would not have been approved without delay. Thus, it would not have been effective.

195. Hence, even if an offer would have been made at the Summit, it was not accepted pursuant to Art. 18(1) CISG.

196. In conclusion, the PARTIES did not enter into the alleged contract at the Summit.

2. The PARTIES did not enter into a contract subsequent to the Summit

197. The PARTIES also did also not enter into a contract after the Summit.

198. After the Summit, the PARTIES corresponded predominately over email. RESPONDENT emailed CLAIMANT first. However, RESPONDENT's email does not constitute an offer (**a.**). Even if this email constituted an offer, the email CLAIMANT sent in response at most constitutes a counter-offer (**b.**). Lastly, said counter-offer was not accepted by RESPONDENT (**c.**).

a. The email RESPONDENT sent on 1 April 2020 does not constitute an offer as per Art. 14(1) CISG

199. The email sent by Ms. Bupati on 1 April 2020 does not constitute an offer as per Art. 14(1) CISG.

200. Irrespective of whether the contractual terms stipulated in the email are sufficiently definite, RESPONDENT did not intend to be bound by these terms.

201. In the email, Ms. Bupati continued to address the concern of going to arbitration that she had already addressed at the Summit [*Ex. C2*]. She reiterated the possibility that the mere agreement to arbitrate could harm RESPONDENT's business and reputation [*cf. Ex. C1, para. 11; Ex. C2; supra para. 189*]. Therefore, Ms. Bupati suggested that "at least we should select a non-industry related arbitration institution and provide for some sort of transparency" [*Ex. C2*]. The reiteration and suggestion demonstrate that she regarded the question of arbitration as unresolved and further negotiations on the dispute resolution mechanism necessary.

202. Further, Ms. Bupati requested that Mr. Chandra prepared the contractual documents for signature [*ibid.*]. This shows that she wanted to obtain a copy of the specific contractual terms before she would bind RESPONDENT. This is supported by the fact that after having received a draft of the contractual documents, Ms. Fauconnier then contacted CLAIMANT to "suggest changes to the existing terms of the contractual documents" [*Ex. R2*]. She even asked for a meeting to "negotiate open issues in person" [*ibid.*]. This shows that, Ms. Bupati had asked for a draft of contractual

documents as she wanted to take a look at the specific terms CLAIMANT would suggest before she would enter into a contract.

203. Furthermore, it should be taken into consideration that RESPONDENT was a newcomer in the palm oil industry [*supra para. 89*] and in negotiations with multiple palm oil producers at the same time [*PO2, para. 28*]. Though the availability of RSPO-certified palm oil is rather limited [*Ex. C1*], RESPONDENT found itself in a good bargaining position. The EU had recently announced that it would start phasing out the use of palm-oil based biofuel [*NoA, para. 3*], which had let to considerable repercussion on all market players [*cf. Ex. C6*]. As RESPONDENT could choose between multiple producers, it was merely scouting the market and did not intend to contract with every one of these [*PO2, para. 28; cf. Ex. R2*].

204. Therefore, it wanted to obtain the specific terms CLAIMANT would be willing to contract as it could then compare them to the terms of other producers. Consequently, RESPONDENT did not intend to enter into a contract with CLAIMANT solely based on the commercial terms Mr. Chandra had suggested at the Summit.

205. Hence, RESPONDENT did not intend to be bound by the email sent on 1 April 2020.

206. Thus, the email does not constitute an offer pursuant to Art. 14(1) CISG.

b. Even if RESPONDENT's email were to constitute an offer, the email CLAIMANT sent in response at most constitutes a counter-offer as per Art. 19(1) CISG

207. CLAIMANT's email from 9 April 2020 is at most a counter-offer in the sense of Art. 19(1) CISG.

208. Pursuant to Art. 19(1) CISG, a reply to an offer that contains material alterations thereof is a rejection and can at most constitute a counter-offer. As per Art. 19(3) CISG, material alterations of an offer can, *inter alia,* concern the quality and quantity of the goods, place and time of delivery, or the settlement of disputes.

209. Though CLAIMANT stated that it had "inserted the terms of [RESPONDENT's] offer into the Contract, which we accept" [*Ex. C4*], it had not taken any account of the concerns raised by Ms. Bupati. The email indicates that CLAIMANT did not accept all of RESPONDENT's terms but only the ones included in the attached contractual documents. CLAIMANT even explicitly disregarded RESPONDENT's concerns against arbitration, as the contractual documents referred to its GCoS which contained an arbitration clause [*Ex. C3; Ex. C4; Ex. R4*]. This demonstrates that CLAIMANT's intent to be bound was conditioned on a material alteration of the terms of Ms. Bupati's email.

210. Consequently, the email and attached documents CLAIMANT sent are insufficient for an acceptance as per Art. 18 CISG and at most constitute a counter-offer as per Art. 19(1) CISG.

c. The alleged counter-offer was not accepted by RESPONDENT

211. RESPONDENT did not accept the alleged counter-offer through conduct.

212. The offeree may also accept an offer by conduct that indicates assent to the terms of the offer [*Brunner/Pfisterer/Köster in Brunner/Gottlieb, Art. 18, para. 6*]. In order to constitute an acceptance, the conduct must show a clear indication that the offeree intended to be bound by the proposed terms.

213. In May 2020, Ms. Fauconnier enquired which banks would be suitable to open a letter of credit [*Ex. C1, para.15; Ex. R2*]. However, she only made this enquiry for two reasons. As RESPONDENT had informed CLAIMANT, the biennial discussion with its bank was upcoming [*Ex. R2*]. Therefore, it was convenient for RESPONDENT to discuss a letter of credit during a prearranged meeting. Additionally, even in the event of contract formation, a letter of credit would not be needed until November [*cf. PO2, para. 23*]. Thus, enquiring about a letter of credit as early as May merely indicates thorough preparation from our client. Consequently, the enquiry was not intended as contract implementation.

214. Moreover, RESPONDENT recently had problems with one of its suppliers. This supplier had tried to get out of its contract, alleging that RESPONDENT had issued its letter of credit at a wrong bank [*PO2, para. 22*]. Therefore, RESPONDENT was particularly cautious in regard to the letter of credit. This supports the conclusion that the enquiry was a mere preparation in case of contract formation.

215. Therefore, RESPONDENT's conduct never amounted to an acceptance.

216. In conclusion, the PARTIES did not enter into a contract pursuant to Artt. 14 *et seqq.* CISG.

II. The PARTIES did not enter into a contract through an established practice pursuant to Art. 9(1) CISG

217. CLAIMANT and RESPONDENT did not enter into a contract through an established practice per Art. 9(1) CISG.

218. Art. 9(1) CISG provides that "the parties are bound by any practices which they have established between themselves". The establishment of such a practice requires a certain frequency and duration consisting of at least three repetitions of that practice [*Pizza Boxes Case; Bulgarian White Urea Case; Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 9, para. 8*].

219. CLAIMANT argues that "the contract complies with the contractual principles and the practice established between the Parties prior to this contract" [*Cl. Memo. para. 94*]. Yet, it is uncontested that CLAIMANT and RESPONDENT never even considered to contract prior to the Summit [*PO2, para. 3*]. RESPONDENT acknowledges that CLAIMANT had established a practice for the formation of one-year palm kernel oil contracts with Southern Commodities [*RNoA, para. 10*]. However,

CLAIMANT incorrectly relies on this practice to establish that the PARTIES entered into the alleged five-year contract on palm oil with RESPONDENT.

220. Foremost, the practice between Southern Commodities and CLAIMANT does not bind RESPONDENT (**1.**). In any event, the established practice could not have led to contract formation in this case (**2.**).

1. The practice established between Southern Commodities and CLAIMANT does not bind RESPONDENT

221. The established practice between Southern Commodities and CLAIMANT does not bind our client.

222. The two companies are completely separate as well as independent legal entities [*PO2, para. 4*]. Though RESPONDENT employs Ms. Bupati, a former employee of Southern Commodities, there is no other factor that would justify the attribution of any established practice between Southern Commodities and CLAIMANT [*supra para. 84*]. Consequently, the practice Southern Commodities and CLAIMANT established does not bind RESPONDENT [*supra para. 85*].

2. Even if RESPONDENT was bound by CLAIMANT's established practice, it did not lead to contract formation

223. Even if RESPONDENT was bound by CLAIMANT's established practice, the PARTIES did not enter into a contract through practice.

224. The practice does not apply in this case (**a.**) and even if it did, the PARTIES did not comply with it (**b.**).

a. CLAIMANT's established practice does not apply in this particular case

225. The established practice does not apply to the type of contract that CLAIMANT and RESPONDENT were negotiating.

226. An established practice only applies to the type of contracts that established the practice. This is exemplified by the *Lycra-type Fabric Case*. In the case, the Paris Court of Appeals held that an established practice did not apply when the contract concerned a different type of. Consequently, the established practice is specifically tailored to the essential characteristics of the prior contracts and especially the particular good.

227. CLAIMANT's practice was established through contracts that are not comparable to the alleged contract.

228. First, Southern Commodities had always purchased non-certified palm kernel oil from CLAIMANT. In contrast, CLAIMANT and RESPONDENT were negotiating the purchase of fully segregated RSPO-certified palm oil [*Ex. C1, para. 10; Ex. C3; Ex. R3, para. 5*]. Though both oils are produced from palm trees, they are considerably different. While palm kernel oil is used for the manufacture of foodstuff, palm oil is primarily used to produce biofuel or industrial application [*PO2, para. 2*].

Another difference also lies in the RSPO-certification of the oil. RSPO-certified palm oil as opposed to standard non-certified palm oil is produced in line with specific RSPO guidelines [*cf. NoA, para. 6; Ex. C6*]. Therefore, making the RSPO-certification a prerequisite calls for specific provisions on the certification and monitoring process [*Ex. C6*]. Consequently, the goods of the contracts are not comparable.

229. Second, the duration of Southern Commodities' contracts with CLAIMANT was significantly shorter than the contract that the PARTIES were negotiating. Between 2010 and 2018, Southern Commodities and CLAIMANT were continuously renewing their contractual relationship on a yearly basis [*Ex. C1, para. 2*]. Therefore, Southern Commodities and CLAIMANT always entered into contracts that at most lasted *a year*. In contrast, RESPONDENT and CLAIMANT were negotiating a single *five-year* contract [*NoA, para. 6; Ex. C1, para.11*].

230. Third, the quantities sold under the alleged contract are greater than of the previous contracts between Southern Commodities and CLAIMANT. Under the alleged contract, RESPONDENT would annually obtain 20,000t of RSPO-certified palm oil [*NoA, para. 5*]. In total, RESPONDENT would obtain 100,000t. In contrast, CLAIMANT's annual production of palm kernel oil was only 7,000t [*PO2, para. 1*]. The contract is, thus, for more than twice the yearly amount.

231. Hence, the alleged contract is not comparable to the contracts formed under the established practice.

232. Consequently, the practice did not apply to the alleged contract.

b. The PARTIES did not comply with the established practice

233. CLAIMANT and RESPONDENT did not comply with CLAIMANT's established practice.

234. CLAIMANT argues that the established practice entails that a contract is formed where CLAIMANT prepared and sent contractual documents to Southern Commodities, regardless of whether they were signed [*Cl. Memo., para. 105*]. This stems from the fact that five out of the 40 contracts formed by Southern Commodities and CLAIMANT lacked Southern Commodities' signature [*Ex. R3, para. 2 et seq.; PO2, para. 10*]. However, in each of these five cases, Southern Commodities opened a letter of credit and performed its contractual obligations [*PO2, para. 10*]. Therefore, in the absence of a signed contract, a contract is only formed once a letter of credit was opened and the contract was subsequently performed.

235. In the present case, neither was the alleged contract signed by RESPONDENT [*supra para. 172*] nor did RESPONDENT open a letter of credit and perform the contract [*PO2, para. 23*]. Consequently, even if the established practice bound RESPONDENT, it would not suffice to lead the formation of the alleged contract.

236. Therefore, the PARTIES did not form a contract through an established practice.

237. Hence, the PARTIES' negotiations did not amount to contract formation.

238. In conclusion, the PARTIES did not enter into a contract.

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239. In CLAIMANT's desperation to sell off its palm oil surplus, it assumes a contract where there is none. The PARTIES did not enter into the alleged contract. First, the alleged contract does not comply with the form requirement, the PARTIES had agreed on. Second, at no point did the negotiations between CLAIMANT and RESPONDENT amount to contract formation. At the Summit, neither PARTY intended to enter into a contract. Subsequently, CLAIMANT and RESPONDENT had only been negotiating and did not enter into any binding agreement. Lastly, CLAIMANT can also not draw the formation of an entire contract from a practice CLAIMANT has established with Southern Commodities. Consequently, the PARTIES did not enter into a contract.

ISSUE C: CLAIMANT'S GENERAL CONDITIONS OF SALE WERE NOT VALIDLY INCORPORATED INTO THE ALLEGED CONTRACT

240. Assuming *arguendo* that the PARTIES formed a contract, RESPONDENT submits that CLAIMANT's GCoS were not validly incorporated into this contract.

241. Though there are no specific provisions on general conditions in the CISG, the Convention governs their incorporation where it also applies to the main contract [*Machinery Case; Schroeter in Schlechtriem/Schwenzer, Art. 14, para. 40*]. Under the CISG, the incorporation of general conditions is governed by the general provisions on contract formation and interpretation, namely Artt. 8, 9, 14 *et seqq.* CISG [*Propane Gas Case*; *Ferrari in Kröll et al., Intro Art. 14, para. 5; Magnus in DiMatteo et al., Chapter 9, para. 10*]. In accordance with these provisions, general conditions can be incorporated via reference [*Brewing Tanks Case; Piltz, para. 3-82*] or through a practice established between the parties [*Synthetic Fibres Case; Schroeter in Schlechtriem/Schwenzer, Art. 14, para. 76*].

242. The incorporation via reference has two prerequisites. First, the reference must show the offeror's intent to incorporate the general conditions [*Ferrari in Kröll et al., Art. 14, para. 39*]. Second, unless the offeree knows the content of the general conditions, it must have been given a reasonable opportunity to become aware of this content [*Vine Wax Case; Balancers Case; Spagnolo in Mankowski, Art. 14, para. 18*].

243. Though CLAIMANT had referenced its GCoS [*Ex. C3*], they were not validly incorporated into the contract. CLAIMANT's GCoS could not have been incorporated through any practice established between CLAIMANT and Southern Commodities, since RESPONDENT is not bound by any such

practice [*supra para. 222*]. The reference was also insufficient as RESPONDENT did not know (**A.**) and could not have become reasonably aware of the content of CLAIMANT's GCoS (**B.**).

A. RESPONDENT did not know the content of CLAIMANT's General Conditions of Sale

244. RESPONDENT did not know the content of CLAIMANT's GCoS [*contra Cl. Memo., paras. 45, 71, 75, 76*].

245. Where the offeree has knowledge of the entirety of the general conditions, a mere reference is sufficient for their incorporation [*Schroeter in Schlechtriem/Schwenzer, Art. 14, para. 46; Huber, p. 128*]. The offeree's knowledge may be presumed where the general conditions are part of a common business practice [*Spagnolo in Mankowski, Art. 14, para. 27*].

246. RESPONDENT did not have positive knowledge of the content of CLAIMANT's GCoS (**I.**). Further, there is no common business practice under which such knowledge is presumed (**II.**).

I. RESPONDENT did not have positive knowledge of the content of CLAIMANT's General Conditions of Sale

247. RESPONDENT did not positively know the content of CLAIMANT's GCoS.

248. The relevant time for determining the offeree's knowledge of the content of the general conditions is the time of their incorporation, *i.e.* contract formation [*Schroeter in Schlechtriem/Schwenzer, Art. 14, para. 46*].

249. CLAIMANT alleges that RESPONDENT knew the content of the GCoS as Ms. Bupati would have had knowledge of the content of the arbitration clause contained therein [*Cl. Memo., paras. 45, 71, 74*].

250. Yet, Ms. Bupati, did not obtain any knowledge of the content of the GCoS while working for RESPONDENT as they were not discussed in detail [*PO2, para. 13*]. Therefore, she could only have obtained such knowledge during her previous employment at Southern Commodities. However, Ms. Bupati cannot be expected to and did not remember the arbitration clause contained in CLAIMANT's GCoS from her previous employment [*supra para. 73*]. Therefore, CLAIMANT's allegation has no merit. Moreover, she does not have any knowledge of the other provisions of CLAIMANT's GCoS. While working for Southern Commodities, Ms. Bupati had only once read a now-outdated version of the GCoS in 2014 [*PO2, para. 18*]. She cannot be expected to remember the content of the GCoS from a single reading six years prior to contract formation while working for a different company.

251. Therefore, RESPONDENT did not know the content of CLAIMANT's GCoS.

II. RESPONDENT's knowledge of the content of the General Conditions of Sale cannot be presumed based on a common practice in the palm oil industry

252. There is no common business practice under which RESPONDENT's knowledge of the content of CLAIMANT's GCoS could be presumed [*contra Cl. Memo., para. 76*]

253. The offeree's knowledge of the general conditions' content can be presumed if they are part of a common business practice as per Art. 9(2) CISG [*Spagnolo in Mankowski, Art. 14, para. 27*]. This requires that the general conditions are usual in the industry and the parties are regularly active in this specific industry [*Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 9, paras. 17, 20*].

254. CLAIMANT asserts that RESPONDENT's knowledge of CLAIMANT's GCoS can be presumed as there is "a common practice in the palm oil industry to include arbitration clauses in the general conditions" [*Cl. Memo., para. 76*]. However, this practice only concerns arbitration clauses and not the entirety of the GCoS [*PO2, para. 11*]. Consequently, it does not allow for the presumption that RESPONDENT knows the entirety of the GCoS. In any case, as a newcomer to the industry, RESPONDENT is not bound by any common business practice of the palm oil industry [*supra para. 89*].

255. Thus, RESPONDENT's knowledge of the content of the GCoS cannot be presumed based on a common business practice concerning arbitration clauses.

256. In conclusion, RESPONDENT did not know the content of CLAIMANT's GCoS.

B. RESPONDENT was not given a reasonable opportunity to become aware of the content of CLAIMANT's General Conditions of Sale

257. RESPONDENT was not given a reasonable opportunity to become aware of the content of CLAIMANT's GCoS [*contra Cl. Memo., paras. 71 et seqq.*].

258. A reasonable opportunity to become aware is only given if the general conditions were made available to the offeree [*CISG-AC No. 13, Comment 2.4*; *Machinery Case; Rubber Sealing Members Case; Huber/Kröll, p. 311*]. Consequently, the offeree does not have to enquire into the content of the general conditions [*Machinery Case; Brunner/Murmann/Stucki in Brunner/Gottlieb, Art. 4, para. 39*].

259. It is undisputed that CLAIMANT never sent its GCoS to RESPONDENT [*NoA, para. 7; RNoA, para. 13*]. CLAIMANT did also not make its GCoS available throughout the negotiations (**I.**). In addition, CLAIMANT's GCoS were also made available through its previous contractual relationship with Southern Commodities (**II.**).

I. Throughout the negotiations, the General Conditions of Sale were not made available

260. CLAIMANT did not make its GCoS available to RESPONDENT throughout the negotiations [*contra Cl. Memo., paras. 71 et seq.*].

261. General conditions are only made available during negotiations if the offeree is presented with the opportunity to read the general conditions [*CISG-AC No. 13, Comment 3.3; Propane Gas Case; Magnus in Staudinger, Art. 14, para. 41b*]. Such opportunity is given, *e.g.*, where the general conditions are easily accessible on the offeror's website [*CISG-AC No. 13, Comment 3.4;*

Copper Mold Plates Case; Piltz, para. 3-85]. A mere discussion of their applicability, however, is not sufficient [*CISG-AC No. 13, Comment 3.3; Propane Gas Case; Magnus in Staudinger, Art. 14, para. 41b*].

262. CLAIMANT alleges that the GCoS were "available for anyone to see" [*Cl. Memo., para. 72*]. However, they were "not easily accessible on CLAIMANT's website" [*PO2, para. 18*] and RESPONDENT was not given any other opportunity to read the GCoS before contract formation [*cf. PO2, para. 13; RNoA, para. 13*]. That Mr. Chandra had merely mentioned the applicability of CLAIMANT's GCoS [*PO2, para. 13*] is not sufficient.

263. Thus, CLAIMANT did not make its GCoS available to RESPONDENT throughout their negotiations.

II. The General Conditions of Sale were not made available to RESPONDENT through CLAIMANT's previous contracts with Southern Commodities

264. CLAIMANT states that its GCoS were made available through "the previous history between the parties" [*Cl. Memo., para. 72*]. Yet, CLAIMANT and RESPONDENT have no previous commercial relationship [*PO2, para. 3*]. CLAIMANT only sent a now outdated version of its GCoS to Southern Commodities in 2011 and never sent any copy to RESPONDENT [*PO2, para. 18; Ex. C1, para. 4; Ex. R4*]. Southern Commodities receiving said copy is insufficient to make the GCoS available to RESPONDENT.

265. First, that Southern Commodities received this copy cannot be attributed to RESPONDENT (**1.**). In any case, the copy of the old version is insufficient to make the new version available for any subsequent contract (**2.**).

1. That Southern Commodities received a copy of an old version of CLAIMANT's General Conditions of Sale cannot be attributed to RESPONDENT

266. That Southern Commodities received a copy of CLAIMANT's GCoS cannot be attributed to RESPONDENT [*contra Cl. Memo., paras. 71 et seq.*].

267. A copy of general conditions sent to an entirely separate legal entity cannot be considered available to the offeree. The same applies where it has not been provided to the department responsible for contract formation but another department within the offeree's company [*Karollus, p. 550; Huber/Kröll, p. 311*]. This should also apply where the copy was made available to an employee during its former employment at a different company. As there is no obligation to indefinitely retain a copy of general conditions [*Buchwitz in BeckOGK, Art. 14, para. 79; Karollus, p. 550; cf. Huber/Kröll, p. 311*], an employee should not be required and will often also not be allowed to retain copies received during a previous employment.

268. When Southern Commodities received the now outdated copy of CLAIMANT's GCoS in 2011, it did not have any contractual, legal or business relation to RESPONDENT [*Ex. R3, para. 4; RNoA,*

para. 11]. Though RESPONDENT eventually became Southern Commodities' subsidiary, our client remained an independent legal entity [*PO2, para. 4*].

269. Further, the GCoS were not sent to the responsible department. The department responsible for contract formation was RESPONDENT's newly founded palm oil unit [*PO2, paras. 2 et seqq.*]. The old version of the GCoS, however, had been sent to Southern Commodities' palm kernel oil unit [*ibid.*]. Consequently, the old version of CLAIMANT's GCoS was not sent to the department responsible for contract formation. In fact, they were not sent to our client at all [*NoA, para. 7; RNoA, para. 13*].
270. Lastly, it is irrelevant that Ms. Bupati had been involved in the negotiations, in the course of which Southern Commodities obtained the copy of CLAIMANT's GCoS. Ms. Bupati did not [*cf. PO2, para. 18*] and was not required to bring this copy to her new position at RESPONDENT.
271. Therefore, it cannot be attributed to RESPONDENT that Southern Commodities had received an old version of CLAIMANT's GCoS nine years prior to contract formation.

2. The copy of the old version of CLAIMANT's General Conditions of Sale is insufficient to make the new version available

272. The copy of the old version of the GCoS CLAIMANT had sent is insufficient to make the new version available [*contra Cl. Memo., paras. 45, 74 et seq.*].
273. Where the offeror has provided the offeree with a copy of its general conditions, the general conditions are sufficiently available for all subsequent contracts [*Mankowski in Ferrari et al., Intro Art. 14, para. 40; Buchwitz in BeckOGK, Art. 14, para. 78*]. If the general conditions are amended, a new copy must be given to the offeree [*Mankowski in Ferrari et al., Intro Art. 14, paras. 30, 40; Buchwitz in BeckOGK, Art. 14, para. 78; Magnus in DiMatteo et al., Chapter 9, para. 15*]. It is insufficient to orally inform the offeree of the change [*cf. Schroeter in Schlechtriem/Schwenzer, Art. 14, para. 65; Piltz, para. 3-85; Dornis in Honsell, Intro Art. 14, para. 13*]. Therefore, the offeree must always have a copy of the newest version of the general conditions.
274. When CLAIMANT sent a copy of its GCoS to Southern Commodities in 2011, it made that version available for all subsequent contracts. However, when it later amended the arbitration clause contained therein [*Ex. C1, para. 4*], this copy was no longer sufficient. Ms. Bupati was only informed of the amendments orally [*Cl. Memo., para. 74*]. There is also no evidence that CLAIMANT ever provided a copy of the amended GCoS to Southern Commodities [*Ex. C1, para. 4; PO2, para. 18*]. Therefore, the current version of CLAIMANT's GCoS was not sufficiently made available for any subsequent contracts.
275. Consequently, the GCoS were not made available to RESPONDENT through CLAIMANT's previous contracts with Southern Commodities.

276. Thus, CLAIMANT did not give our client a reasonable opportunity to become aware of the content of its GCoS.

277. In conclusion, CLAIMANT's GCoS were not incorporated into the alleged contract.

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278. CLAIMANT's GCoS were not incorporated into the alleged contract. CLAIMANT tried to incorporate its GCoS into the alleged contract without even giving RESPONDENT the possibility to become aware of their terms. RESPONDENT was also not already aware of the terms in any other way or could have been presumed to know them. Therefore, CLAIMANT was obligated to provide our client with a reasonable opportunity to become aware of the content of its GCoS. However, CLAIMANT failed to comply with this obligation as it never made its GCoS available to RESPONDENT. Consequently, CLAIMANT's GCoS were not incorporated into the alleged contract.

REQUEST FOR RELIEF

In light of the foregoing submissions, RESPONDENT respectfully requests the Arbitral Tribunal to adjudge and declare that:

- the PARTIES did not agree on the jurisdiction of the Arbitral Tribunal (**A**). Mediterranean law is the law governing the agreement to arbitrate (**ISSUE A.I**) including the CISG (**ISSUE A.II**).
- the PARTIES did not enter into a contract (**ISSUE B**).
- CLAIMANT's General Conditions of Sale were not incorporated into the alleged contract (**ISSUE C**).

CERTIFICATE OF VERIFICATION

We hereby confirm that only the persons whose names are listed below have written this memorandum.

Respectfully submitted on 27 January 2022 by

NOOMI HÖR JESI KIM JOEL OHLER LARA STÖTZER