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WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

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MEMORANDUM FOR RESPONDENT

UNIVERSITÄT HAMBURG

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

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INDEX OF ABBREVIATIONS

A.S.	Anonim Sirket (*Turkish joint stock company*)
AC	Advisory Council
AIAC	Asian International Arbitration Centre
Art.	Article/Articles
AUS	Australia
AUT	Austria
B.V.	Besloten vennootschap met beperkte aansprakelijkheid (*Dutch capital company with limited liability*)
BEL	Belgium
BGH	Bundesgerichtshof (*German Federal Court of Justice*)
CA	Cour d'appel (*French Appellate Court*)
CAN	Canada
cf.	compare
CHE	Switzerland
CHN	People's Republic of China
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
COO	Chief Operating Officer
Corp.	Corporation
CS	Chihō Saibansho (*Japanese District Court*)
DNK	Denmark
d.o.o.	Društvo s ograničenom odgovornošću (*Limited Company*)
e.g.	exampli gratia (*for example*)
ESP	Spain

et al.	et alia (*and others*)
et seq.	et sequor (*following*)
EWCA	Court of Appeal of England and Wales
Ex. C	Exhibit Claimant
Ex. R	Exhibit Respondent
FRA	France
GBR	United Kingdom of Great Britain and Northern Ireland
GER	Germany
GH	Gerechtshof (*Dutch Court of Appeal*)
GmbH	Gesellschaft mit beschränkter Haftung (*Limited Company*)
GmbH & Co. KG	Gesellschaft mit beschränkter Haftung & Compagnie Kommanditgesellschaft (*limited partnership*)
GRC	Greece
HCCH	Hague Conference on Private International Law Conférence de La Haye de droit international privé
HövR	Hovrätt (*Swedish Court of Appeal*)
i.e.	id est (*that is*)
ibid.	ibidem (*in the same place*)
ICC	International Chamber of Commerce
Inc.	Incorporated
IND	India
Int'l	International
Intro.	Introduction
ITA	Italy
JPN	Japan
LG	Landgericht (*German District Court)*

LLC	Limited Liability Company
Ltd.	Limited
Ltda.	Limitada (*Limited Company*)
Mr	Mister
Ms	Miss
NAI	Netherlands Arbitration Institution
NLD	Netherlands
No.	Number
Notice	Notice of Arbitration
NYC	New York Convention
OGH	Oberster Gerichtshof (*Austrian Federal Court of Justice*)
OLG	Oberlandesgericht (*German High Court*)
p.	page/pages
PP	Polimeles Protodikio (*Greek District Court*)
para.	paragraph/paragraphs
PICC	Principles of International Commercial Contracts
plc.	Public limited company
PO1	Procedural Order No. 1 (8 October 2021)
PO2	Procedural Order No. 2 (8 November 2021)
Pte Ltd.	Private Limited Company
Pty	Proprietary Company
RB	Rechtsbank (*Dutch District Court*)
Response	Response to Notice of Arbitration
RSPO	Roundtable on Sustainable Palm Oil
RvK	Rechtbank van Koophandel (*Belgian Commercial Court*)
S.A.	Société Anonyme (*Joint-Stock Company*)

S.A.S	Société par actions simplifiée (*Simplified Joint-Stock Company*)
S.À.R.L	Société à responsabilité limitée (*Limited Company*)
S.p.A.	Società per azioni (*Joint-Stock Company*)
SC	Southern Commodities
SDN BHD	Sendirian Berhad (*Limited Company)*
SGP	Singapore
SWE	Sweden
t	tons
Tech	Technologies
TF	Tribunal Fédéral (*Swiss Supreme Court)*
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	Institut international pour l'unification du droit privé (*International Institute for Unification of Private Law*)
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts
USA	United States of America
USD	United States Dollars
v	versus (*against*)
V.O.F.	Vennootschap Onder Firma (*General partnership*)
Vol.	Volume
ZG	Zivilgericht Schweiz (*Court of First Instance Switzerland*)

STATEMENT OF FACTS

1 JAJA Biofuel Ltd. ('**RESPONDENT**') is a well-established producer of biofuel located in Equatoriana. ElGuP plc. ('**CLAIMANT**', together '**the Parties**') is a Mediterraneo-based company engaged in the production and trade of palm kernel oil and palm oil certified by the Roundtable on Sustainable Palm Oil ('**RSPO**'). RSPO-certificates guarantee a sustainable and fair production of palm oil.

The Backstory

2 In January 2020, one of CLAIMANT's biggest customers terminated a long-term supply contract for palm oil. It reasoned the termination with CLAIMANT's fraudulent involvement in granting false RSPO-certificates. In order to not be stuck with its annual ration of oil, CLAIMANT was in urgent need to find a new main customer.

The Negotiations at the Palm Oil Summit

3 In March 2020, CLAIMANT's COO Mr Chandra approached Ms Bupati, RESPONDENT's newly appointed Head of Purchase, at the Palm Oil Summit ('**Summit**'). They started negotiating a potential long-term contract on the purchase of RSPO-certified palm oil and agreed that Mediterranean Law should govern such sales contract. Ms Bupati and Mr Chandra knew each other from Ms Bupati's time at her former employer Southern Commodities ('**SC**'), which had recently acquired RESPONDENT. Back when Ms Bupati was working at SC, CLAIMANT and SC concluded several contracts. However, the meeting at the Summit was the first encounter of Ms Bupati and Mr Chandra in her new position.

4 In the course of this, Ms Bupati emphasised that RESPONDENT operates in an entirely different political environment than SC. At RESPONDENT's place of business, Equatoriana, environmental issues play a crucial role. Ms Bupati pointed out the utmost importance of the palm oil's RSPO-certification. After settling on the commercial terms, she stated that further terms – especially the dispute resolution mechanism – still needed to be discussed. Ms Bupati stressed that she had to confirm with the management before entering a long-term contract.

The Negotiations after the Summit

5 After the Summit, Ms Bupati got back to Mr Chandra via email. She summarised the previously discussed commercial terms but voiced concerns. In particular, Ms Bupati expressed that the submission of any dispute to arbitration would be problematic and requested transparency rules to

be applied. Without further correspondence, CLAIMANT emailed contractual documents to RESPONDENT which contained a reference to CLAIMANT's general conditions of sale ('**General Conditions**'). An old version of the General Conditions had been sent to SC in 2011. CLAIMANT changed its General Conditions in 2016 and informed Ms Bupati about the changes via phone. However, CLAIMANT never sent its General Conditions to RESPONDENT. Against RESPONDENT's requests, the General Conditions contained an arbitration clause and did not provide for any transparency rules.

6 RESPONDENT never sent back a signed version of the contractual documents. Rather, the Parties kept negotiating the terms of the contract. This included a phone call between Ms Bupati's and Mr Chandra's assistants. Ms Bupati's assistant stressed that she would have to check with their lawyers before she could agree to the terms of the contract. This was the last contact between the Parties.

The Dispute

7 In June 2020, a documentary film exposing ecological misconduct in the palm oil industry was released in Equatoriana. The film revealed that CLAIMANT had failed to implement the requested control systems to ensure that its palm oil met RSPO-requirements. When RESPONDENT learned that an employee of CLAIMANT's had been bribed and falsely issued RSPO-certificates, it officially ended any negotiations as a precaution. However, CLAIMANT now alleges that the Parties concluded a contract and thus, after unsuccessful mediation, initiated arbitration at the Asian International Arbitration Centre ('**AIAC**') on 15 July 2021.

SUMMARY OF ARGUMENTS

"The single biggest problem in communication is the illusion that it has taken place"

Bernard Shaw

8 No matter how sophisticated the parties, communication can be tough. Pitfalls are plenty – listening, understanding, responding. CLAIMANT's case rests on shortfalls in all of these steps.

9 On the presumptive arbitration agreement, CLAIMANT did not listen. RESPONDENT communicated that it does not want to arbitrate.

10 On the contract, CLAIMANT did not understand. RESPONDENT resigned from the negotiations due to unmet concerns. Unfortunately, the end of negotiations does not always equal the starting point of a contract.

11 On the inclusion of the General Conditions, CLAIMANT failed to respond accordingly. It omitted the most essential part of communicating: the content.

12 Many misunderstandings do not add up to legal obligations. It is now time to face reality.

13 **The Parties did not validly agree on the jurisdiction of the arbitral tribunal [Part I].** Mediterranean Law governs the formation of the arbitration agreement. Within Mediterranean Law, the CISG applies to the arbitration agreement. Under the CISG, the Parties did not conclude the arbitration agreement. Even if the CISG was not applicable, the Parties would not have concluded the arbitration agreement under the non-harmonised Mediterranean Contract Law either. Further, the Parties did not conclude the arbitration agreement under Danubian Law. Additionally, an award rendered on the basis of the arbitration agreement would neither be recognised nor enforceable.

14 **The Parties did not conclude a sales contract in 2020 [Part II].** The Parties did not enter into a contract under the CISG. RESPONDENT neither made an offer nor accepted any offer. Even if the CISG was not applicable, the Parties would not have concluded a contract either.

15 **Even if the Parties had concluded a contract, the General Conditions would not have been included [Part III].** The General Conditions were not validly included under both the CISG and the non-harmonised Mediterranean Contract Law. CLAIMANT did not make the General Conditions available to RESPONDENT.

PART I: THE PARTIES DID NOT VALIDLY AGREE ON THE JURISDICTION OF THE ARBITRAL TRIBUNAL

16 Arbitration is no game for one. The parties' autonomy to mutually agree on a dispute resolution mechanism is a corner stone of the freedom in international business. To resolve this dispute is to illuminate what the Parties did agree on and what they did not agree on.

17 The Parties did not agree to arbitrate. RESPONDENT's reservations to arbitration have not been addressed until this day. RESPONDENT never signed off on arbitration. Still, CLAIMANT initiated these proceedings based on an alleged arbitration agreement contained in its General Conditions ('**Arbitration Agreement**').

18 The Parties did agree on the sales contract to be governed by the law of Mediterraneo (*Ex. C2, p. 12*). This encompasses an implied choice for the Arbitration Agreement. To honour the Parties' choice of law is a vote for party autonomy. Yet, CLAIMANT intends to elbow its way into arbitration in reliance on Danubian Law. Under Danubian Law, the incorporation of the General Conditions which contain the Arbitration Agreement is subject to more lenient requirements. This interest driven attempt leads nowhere.

19 The Parties did not conclude the Arbitration Agreement under the Mediterranean Law including the CISG [**A.**]. Even if the CISG was not applicable, the Parties would not have concluded the Arbitration Agreement under the non-harmonised Mediterranean Contract Law either [**B.**]. Under Danubian Law, the Parties would still not have concluded the Arbitration Agreement [**C.**]. Additionally, an award based on the Arbitration Agreement would neither be recognised nor enforceable [**D.**].

A. THE PARTIES DID NOT CONCLUDE THE ARBITRATION AGREEMENT UNDER MEDITERRANEAN LAW INCLUDING THE CISG

20 Under the applicable Mediterranean Law including the CISG, the Parties did not conclude the Arbitration Agreement. Contrary to CLAIMANT's assertions (*Cla. Memo., para. 4 et seq.*), the question whether the Parties concluded the Arbitration Agreement is to be answered under Mediterranean Law and not Danubian Law [**I.**]. Within the Mediterranean Law, the CISG governs the conclusion of the Arbitration Agreement [**II.**]. Under the CISG, the Parties did not conclude the Arbitration Agreement [**III.**].

I. THE CONCLUSION OF THE ARBITRATION AGREEMENT IS GOVERNED BY MEDITERRANEAN LAW INSTEAD OF DANUBIAN LAW

21 Mediterranean Law and not Danubian Law governs the conclusion of the Arbitration Agreement.

22 Presently, finding the proper law is key. CLAIMANT correctly states that there are no specific conflict of law rules to determine the law applicable to arbitration agreements (*Cla. Memo., para. 15*). Therefore, CLAIMANT turns to Art. V (1) (a) of the New York Convention ('**NYC**'). This provision stipulates that recognition and enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it". According to CLAIMANT's allegations, Art. V (1) (a) NYC has been interpreted "to mean that if there was no express choice of law agreed between the parties, the law of the seat of arbitration […] will be deemed to be the law applicable to the arbitration agreement" (*Cla. Memo., para. 16*). CLAIMANT bases its assertions on the recent verdict of the UK Supreme Court in *Enka v Chubb* (*ibid.*). However, CLAIMANT deduces incorrect legal conclusions from *Enka v Chubb* and Art. V (1) (a) NYC. In both a three-step-test applies, upholding the premise of party autonomy:

23 In *Enka v Chubb*, the UK Supreme Court addressed the question of the law applicable to the arbitration agreement [*Enka v Chubb (GBR, 2020)*]. The court first assessed whether the parties had expressly chosen the applicable law [*Enka v Chubb (GBR, 2020), para. 227 et seq.*]. In absence of such express choice, it then considered a potential implied choice [*ibid.*]. Lastly, without any choice of law, the court applied the law to which the arbitration agreement is most closely connected [*ibid.*]. In doing so, the UK Supreme Court drew on earlier judgements [*BNA v BNB (SGP, 2019), para. 45 et seq.; FirstLink v GT Payment (SGP, 2014); Sulamérica v Enesa (GBR, 2012); National Thermal v Singer (IND, 1992), para. 4; Tunisienne v d'Armement' Martitime (GBR, 1970)*].

24 This in line with Art. V (1) (a) NYC. Contrary to CLAIMANT's assertions (*Cla. Memo., para.* 16), Art. V (1) (a) NYC requires that any potential expressed or implied choice by the parties must be considered [*Born, p. 529; Kronke et al., p. 224; Lew et al., para. 6-54 et seq.; Wolff, Art. V para. 114*].

25 Applying this three-step test in the case at hand leads to the application of Mediterranean Law to the conclusion of the Arbitration Agreement: The Parties did not expressly choose the law applicable to the Arbitration Agreement [**1.**]. Rather, the Parties impliedly chose Mediterranean Law [**2.**]. In any case, Mediterranean Law is most closely connected to the Arbitration Agreement [**3.**].

1. THE PARTIES DID NOT EXPRESSLY CHOOSE THE LAW APPLICABLE TO THE FORMATION OF THE ARBITRATION AGREEMENT

26 Contrary to CLAIMANT's assertion (*Cla. Memo., para. 7 et seq.*), the Parties did not expressly choose a law to govern the Arbitration Agreement. While it holds true that an express choice should be given effect by the arbitral tribunal (*Cla. Memo., para. 9*), CLAIMANT takes an

undifferentiated shortcut when asserting that such choice was made by the Parties. In fact, there is no express choice of law for the Arbitration Agreement.

27 An express choice of law must explicitly refer to an arbitration agreement [*HövR Svea (SWE, 2019), para. 156; Sulamérica v Enesa (GBR, 2012), para. 27; Ashford 2019, p. 292; Dicey et al., para. 32-047*]. Accordingly, an ICC-Tribunal held that an arbitration clause stating "[t]his Agreement is governed by French Law" does not constitute an express choice of law for the arbitration agreement [*ICC (FRA, 2011), para. 398*]. Instead, such choice of law clause only expressly determines the law applicable to the main contract [*ICC (FRA, 2011), para. 398; PP Rodopi (GRC, 2005), p. 553; Westbrook Int'l v Westbrook Tech (USA, 1998), p. 4; National Thermal v Singer (IND, 1992), para. 4; Born, p. 527; Kronke et al., p. 224*].

28 CLAIMANT submits that the Parties made an express choice for Danubian Law in the Arbitration Agreement (*Cla. Memo., para. 9*). However, CLAIMANT fails to cite the express choice because there is none. The wording of the Arbitration Agreement merely reads: "This contract shall be governed by the substantive law of Danubia" (*Ex. R4, p. 32*). Therefore, the Arbitration Agreement is comparable to the one in the above-mentioned ICC-Award and does not contain an express choice.

29 Furthermore, CLAIMANT overlooks the Parties' individually agreed upon choice of law. An individually agreed clause prevails over general conditions [*CISG AC-Opinion No. 13 Rule 8*]. Contrary to the wording of the Arbitration Agreement, the Parties agreed that a potential contract should be governed by Mediterranean Law (*PO2, p. 49 para. 13*). This change was not reflected in the General Conditions since CLAIMANT's inhouse counsel forgot to amend the choice of law (*PO2, p. 50 para. 15*). The Parties' individual agreement prevails. The Arbitration Agreement must be read to the effect that it states: 'This contract shall be governed by the substantive law of Mediterraneo'.

30 Consequently, the Parties did not expressly choose Danubian Law to govern the Arbitration Agreement.

2. THE PARTIES IMPLIEDLY AGREED ON MEDITERRANEAN LAW TO GOVERN THE CONCLUSION OF THE ARBITRATION AGREEMENT

31 The Parties impliedly agreed on Mediterranean Law to apply to the formation of the Arbitration Agreement. CLAIMANT argues that Danubian Law as the *lex loci arbitri* applies by default (*Cla. Memo., para. 14*). By doing so, CLAIMANT overlooks the Parties' implied choice for Mediterranean Law. However, in light of the gravitas of party autonomy, an implied choice must

be assessed before relying on any default rule [*National Thermal v Singer (IND, 1992), para. 4; Ashford, p. 19; Dicey et al., para. 16-006; Frick, p. 45; Grover, p. 238*].

32 The Parties intended to choose Mediterranean Law as the law applicable to their Arbitration Agreement: They expected their choice of law for the sales contract to govern their whole agreement [**a.**]. This result is not contradicted by the *Doctrine of Separability* [**b.**].

a. THE PARTIES EXPECTED THEIR CHOICE OF LAW FOR THE SALES CONTRACT TO APPLY TO THEIR WHOLE AGREEMENT

33 The Parties intended their choice of Mediterranean Law for the sales contract to govern the entire agreement.

34 As to an international perspective, applying the law of the underlying contract to the arbitration agreement is widely recognised by arbitral tribunals, courts in civil and common law jurisdictions as well as scholars [*ICC (AUT, 2011); ICC (FRA, January 1992), para. 4, 7; ICC (FRA, 1991), para. 3*; *Tokyo CS (JPN, 2007); TF (CHE, 2003), para. 2.3; GH Den Haag (NLD, 1993), para. 11*; *BNA v BNB (SGP, 2020); Sulamérica v Enesa (GBR, 2012); Aastha v Thaicom (IND, 2011), para. 7; Recyclers of Australia v Hettinga Equipment (AUS, 2000)*; *Bantekas, p. 1 et seq.; Choi, p. 108 et seq.; Grover, p. 255; Lew et al., para. 6-24*].

35 Drawing on this, the UK Supreme Court in *Enka v Chubb* recently discussed what law the parties impliedly had chosen to be applicable to the arbitration agreement [*Enka v Chubb (GBR, 2020)*]. The court held that a choice of law for the main contract is an implied choice for the arbitration agreement [*Enka v Chubb (GBR, 2020), para. 101*]. The underlying dispute arose from a contract concerning the construction of a power plant in Russia. The contract contained a dispute resolution clause providing for ICC arbitration in London. The arbitration clause did not contain any express choice of law. It was therefore up to the court to decide if the parties had made an implied choice for the substantive law governing the arbitration agreement [*Enka v Chubb (GBR, 2020), para. 7 et seq.*]. The court ruled that the law explicitly chosen for the main contract is "a strong indicator" for the parties' intent to apply that same law to their arbitration agreement [*Enka v Chubb (GBR, 2020), para. 224*]. This was reasoned as follows:

36 First, commercial parties reasonably expect that their choice of law applies to all aspects of the contract [*Enka v Chubb (GBR, 2020), para. 53*]. An experienced arbitration practitioner is accustomed to and familiar with the role of different laws in arbitration. Commercial parties, however, might not have such foresight and simply choose one applicable law, unbeknownst any

distinction [*ibid.*]. "For them a contract is a contract; not a contract with an ancillary or collateral or interior arbitration agreement" [*ibid.*].

37 Second, the application of two separate laws to one contract provokes complexities and uncertainties [*Enka v Chubb (GBR, 2020), para. 162*]. Yet, parties aspire to ensure simplicity and consistency [*Enka v Chubb (GBR, 2020), para. 53*]. Nowadays, arbitration clauses are getting more distinguished and multifaceted [*Enka v Chubb (GBR, 2020), para. 168*]. When applying the law of the seat, a party might be faced with a plethora of complex questions [*Enka v Chubb (GBR, 2020), para. 53*]: Which law applies to a preceding mediation process [*ibid.*]? What law is applicable to stipulated negotiations [*ibid.*]? What law would rule a prior expert determination [*ibid.*]? Questions left unanswered when applying the *lex loci arbitri*.

38 The court's conclusions need to be put into practice. Ms Bupati and Mr Chandra chose one law to govern their whole contract [**aa.**]. Furthermore, the Parties intended consistency [**bb.**].

aa. MS BUPATI AND MR CHANDRA INTENDED ONE LAW TO APPLY TO THEIR ENTIRE CONTRACT

39 Ms Bupati and Mr Chandra intended and expected Mediterranean Law to govern the entire contract. Both Mr Chandra and Ms Bupati are commercial parties: Mr Chandra is an economist and agriculturist (*Ex. C1, p. 9 para. 1*). Ms Bupati as RESPONDENT's Head of Purchase is responsible for the purchase of palm oil (*Ex. R3, p. 31 para. 4*). Ms Bupati and Mr Chandra did not expressly specify the law governing the Arbitration Agreement (*see para. 26*). However, they agreed on Mediterranean Law to govern their sales contract (*PO2, p. 52 para. 33*). Beyond that, they never talked about any law applicable to the Arbitration Agreement during their negotiations. Therefore, in accordance with *Enka v Chubb*, it is to assume that Ms Bupati and Mr Chandra, not being arbitration lawyers, did neither expect nor foresee differentiations between the law applicable to the Arbitration Agreement and the sales contract.

40 Consequently, Ms Bupati and Mr Chandra intended and expected Mediterranean Law to govern the entire contract.

bb. THE PARTIES ASPIRED TO ENSURE CONSISTENCY

41 The Parties impliedly agreed on Mediterranean Law as the proper law of the Arbitration Agreement since they aspired to ensure consistency. Applying Danubian Law, the *lex loci arbitri*, like CLAIMANT alleges (*Cla. Memo., para. 14*) would lead to inconsistency. This cannot be of any interest.

42 First, when applying Danubian Law, different laws would apply to the inclusion of the General Conditions. The Arbitration Agreement is part of the General Conditions (*Ex. R4, p. 32*).

Therefore, the question whether the Parties have concluded an Arbitration Agreement depends on the inclusion of the General Conditions in the contract (*see para. 56*). If one were to follow CLAIMANT's line of argumentation, the inclusion of the Arbitration Agreement in the contract would be governed by Danubian Contract Law (*Cla. Memo., para. 4*). However, the Parties chose Mediterranean Law as the applicable law to their sales contract (*PO2, p. 52 para. 33*). Hence, the inclusion of all other provisions of the General Conditions is governed by Mediterranean Contract Law (*see para. 127*). Danubian Contract Law and Mediterranean Contract Law are verbatim adoptions of the UNIDROIT Principles (*PO1, p. 47 III. 3.*). While Mediterraneo is a Contracting State of the CISG, Danubia is not (*ibid.*). The CISG and Danubian Contract Law have vastly different provisions when it comes to the inclusion of general conditions (*see para. 58, 134*). Hence, the inclusion of the Arbitration Agreement and the inclusion of the remainder of the General Conditions would be subject to different standards. Consequently, the Arbitration Agreement would be singled out from the General Conditions. It was the intention of the Parties to minimise the risk of dispute. Why else would they choose a law for the sales contract and negotiate the terms in their finest detail? It is therefore not the intention of the Parties to maximise the risk of conflict by complicating the applicable law. They want all rights and obligations to be consistently governed by the same law, the law they explicitly found a consensus on – Mediterranean Law.

43 Second, applying Danubian Law as the *lex loci arbitri* would raise the question of the applicable law to the present mediation clause. On the one hand, the mediation clause is contained within the Arbitration Agreement (*Ex. R4, p. 32*). Therefore, one might consider Danubian Law as the law at the seat of arbitration to govern the mediation clause. On the other hand, the mediation in the case at hand should resolve disputes before going to arbitration (*ibid.*). Thus, the law of the seat of arbitration cannot simply be applied to this primary stage of dispute resolution. The mediation has nothing to do with the law or the place of the arbitration. Consequently, applying Danubian Law would lead to complex questions regarding the law governing the mediation. In contrast, when applying Mediterranean Law harmoniously to the entire contract such questions would not arise. It would be clear that all provisions of the Arbitration Agreement, *i.e.* also the mediation clause, would be governed by the one and the same law – Mediterranean Law.

44 Hence, the Parties expected Mediterranean Law as the law of the sales contract to govern their entire contract.

b. THIS RESULT IS NOT CONTRADICTED BY THE *DOCTRINE OF SEPARABILITY*

45 Applying Mediterranean Law as the law of the sales contract to the Arbitration Agreement is not contradicted by the *Doctrine of Separability*. CLAIMANT states that the validity of the sales contract and the Arbitration Agreement must be assessed separately according to the *Doctrine of Separability* as the Parties "entered into two separate agreements" (*Cla. Memo., para. 17, 24*).

46 The *Doctrine of Separability* serves the purpose of upholding the effectiveness of the arbitration agreement in case of substantive ineffectiveness of the underlying contract [*Sulamérica v Enesa (GBR, 2012), para. 26; Ashford 2019, p. 289; Blackaby et al., p. 158; Grover, p. 233*; *Kaplan/Moser, p. 132; Lew et al., para. 6-9*]. Therefore, the validity of the main contract and the arbitration agreement must be evaluated separately [*ICC (FRA, 1996), para. 4; ICC (FRA, 1994), para. 10; Born, p. 432*]. However, an arbitration agreement is not wholly independent and separate from the underlying contract [*Born, p. 433; Kaplan/Moser, p. 139; Mayer, p. 262*]. For instance, in cases where an underlying contract was never concluded, serious questions as to whether the associated arbitration agreement was ever formed arise [*ICC (DNK, 1982), p. 102; Born, p. 433 et seq.; Grover, p. 251*]. The *Doctrine of Separability* should not be interpreted in a legal vacuum but rather in the context of what it is purposed to do [*Grover, p. 234*]. Therefore, the *Doctrine of Separability* does not preclude the tribunal from finding that the arbitration agreement and the main contract are governed by the same law [*ICC (USA, 2015), para. 158*].

47 CLAIMANT cannot hold up the *Doctrine of Separability* as an omnipresent remedy for all legal issues since it does not contradict the Parties' implied choice for Mediterranean Law to govern the Arbitration Agreement.

3. MEDITERRANEAN LAW HAS THE CLOSEST CONNECTION TO THE ARBITRATION AGREEMENT

48 In any event, Mediterranean Law is most closely connected to the Arbitration Agreement. CLAIMANT asserts that the Arbitration Agreement is governed by Danubian Law (*Cla. Memo., para. 4 et seq.*). Thereby, CLAIMANT falls back onto the default rule found in Art. V (1) (a) NYC (*Cla. Memo., para. 15, 16*). In absence of any choice by the parties, this provision generally calls for the application of "the law of the country where the award was made", *i.e.* the law of the seat.

49 However, before applying any general default rule, the law with the closest connection must be determined [*BGH (GER, 2010), p. 550; Dicey et al., para. 16-016; van den Berg 1996, p. 412*]. In order

to do so, the term 'closest connection' must be filled with meaning by providing a concrete connecting factor [*Scherer/Jensen*, *p. 8*].

50 Presently, the contract provides such a connecting factor. It is closely intertwined with the Arbitration Agreement. The Arbitration Agreement in CLAIMANT's General Conditions sets the general scope of "disputes" which shall be resolved by arbitration (*Ex. R4, p. 32*). In CLAIMANT's contractual documents, the word "dispute" is concretised in the last part of Section 7 (*Ex. C3, p. 16*). According to this provision, such dispute arises if the payment is delayed by more than 21 days (*ibid.*). Hence, the sales contract describes one specific instance which falls under the broad term of "dispute" and may be referred to arbitration (*ibid.*). This shows that the sales contract and the Arbitration Agreement exist in unison. Therefore, the Arbitration Agreement is not a hermetically sealed document but rather closely connected to the contractual documents.

51 Having the closest connection, Mediterranean Law as the law governing the sales contract must apply to the Arbitration Agreement.

II. THE CISG APPLIES TO THE FORMATION OF THE ARBITRATION AGREEMENT

52 The CISG is applicable to the conclusion of the Arbitration Agreement. CLAIMANT argues that the Arbitration Agreement is not governed by the CISG because it is not explicitly mentioned therein (*Cla. Memo., para. 40 et seq.*). It further argues that neither party demonstrated any intention to apply the CISG (*Cla. Memo., para. 45 et seq.*). However, it is uncontested that Mediterranean Law including the CISG applies to the sales contract (*PO2, p. 52 para. 33*). As the Parties intended the law of the sales contract to also govern the Arbitration Agreement (*see para. 31*), Mediterranean Law including the CISG should also apply to said agreement.

53 Regarding the applicability of the CISG to arbitration agreements, CLAIMANT solely states that "arbitration agreements typically fall outside the scope of the CISG as the procedural characteristics thereof do not contain any sales contract characteristics" (*Cla. Memo., para. 43*). However, arbitration agreements may very well be governed by the CISG. The CISG is not only suitable but also intended to apply to dispute resolution clauses [*ICC (FRA, 2021), p. 95; Château Des Charmes v Sabate (CAN, 2005), para. 13; Filanto v Chilewich (USA, 1992), para. 30; Born, p. 543 et seq.*]. The CISG provides rules for the formation of contracts in Art. 14-24 CISG. The formation of an arbitration agreement is no different than the formation of a sales contract since both require offer and acceptance [*ICC (FRA, 2021), p. 95; BGH (GER, 2020), para. 38; TS (ESP, 1998), para. 19 et seq.; Schwenzer, Intro to Art. 14-24 para. 17 et seq.*].

54 Moreover, the CISG's applicability to arbitration agreements is shown by Art. 19 (3) CISG and Art. 81 (1) CISG, which explicitly refer to the "settlement of disputes" [*BGH (GER, 2020), para. 35; Perales Viscasillas/Ramos Muñoz, p. 73; Shaughnessy/Tung, p. 320*]. According to Art. 19 (3) CISG, adding a dispute resolution clause to an offer constitutes a material alteration of that offer. Characterising such addition as a material alteration demonstrates that the dispute resolution clause is considered part of the contract and thus governed by the CISG's provisions on contract formation [*Schwenzer/Tebel, p. 746*]. Art. 81 (1) CISG stipulates that "[a]voidance does not affect any provision of the contract for the settlement of disputes". If an arbitration agreement was not part of the contract, Art. 81 (1) CISG would not be required [*BGH (GER, 2020), para. 35; Walker, p. 163*]. This provision shows that an arbitration agreement is part of the contract and as such subject to the CISG [*Schwenzer/Tebel, p. 746; cf. Walker, p. 163*]. Both provisions suggest that the other articles of the Convention should also apply to dispute resolution agreements, including those for an arbitration [*Schwenzer/Tebel, p. 746; Walker, p. 163*].

55 To summarise, the CISG is applicable to the Arbitration Agreement.

III. THE PARTIES DID NOT CONCLUDE THE ARBITRATION AGREEMENT UNDER MEDITERRANEAN LAW INCLUDING THE CISG

56 Under the CISG, the Parties did not conclude the Arbitration Agreement. In cases general conditions contain an arbitration clause, the conclusion of the arbitration agreement depends on whether the general conditions were included into the contract [*NAI (NLD, 2005), para. 14*]. The Arbitration Agreement is contained within Article 9 of CLAIMANT's General Conditions (*Ex. R4, p. 32*). Therefore, the Arbitration Agreement would have been concluded by incorporating the General Conditions into the sales contract. However, the Parties did not conclude a sales contract (*see para. 74, 117*). Even if the Parties had entered into a contract, the General Conditions would not have been validly included under the CISG (*see para. 126*). Therefore, the Parties did not conclude the Arbitration Agreement.

B. THE PARTIES WOULD NOT HAVE CONCLUDED THE ARBITRATION AGREEMENT UNDER THE NON-HARMONISED MEDITERRANEAN CONTRACT LAW

57 Even if the CISG was not applicable, the Parties would not have concluded the Arbitration Agreement under the non-harmonised Mediterranean Contract Law. The Parties did not conclude a contract (*see para. 74, 117*). Even if the Parties had entered into a contract, the General Conditions would not have been validly included under the non-harmonised Mediterranean Contract Law (*see para. 155*).

C. THE PARTIES WOULD NOT HAVE CONCLUDED THE ARBITRATION AGREEMENT UNDER DANUBIAN LAW

58 Even if Danubian Law was applicable, the Parties would not have concluded the Arbitration Agreement. According to Danubian Law, the inclusion of general conditions into an existing contract requires a clear statement that such conditions are to be applied (*PO1, p. 47 III. 3.*). However, the Parties have already not concluded a contract (*see para. 74; 117*) into which the General Conditions could have been included. Hence, the Parties did not conclude the Arbitration Agreement under Danubian Law.

D. ADDITIONALLY, AN AWARD BASED ON THIS ARBITRATION AGREEMENT WOULD NEITHER BE RECOGNISED NOR ENFORCEABLE

59 An award based on the Arbitration Agreement would neither be recognised nor enforceable since the Arbitration Agreement is formally invalid.

60 Recognition and enforcement can be sought anywhere the other party has its assets [*Blackaby et al., p. 615 para. 11-34*]. RESPONDENT has its assets in Equatoriana (*PO1, p. 47 III. 4.*). Equatoriana is a Contracting State of the NYC (*PO1, p. 48 III. 3.*). As CLAIMANT is based in Mediterraneo (*PO1, p. 47 III. 4.*), an award rendered by the tribunal would be considered foreign in the sense of Art. I NYC. Therefore, the NYC would apply to the recognition and enforcement of the award.

61 The recognition and enforcement of the arbitral award requires that the arbitration agreement is formally valid within the meaning of Art. II NYC [*Ukrnafta v Carpatsky (USA, 2017); van den Berg, p. 284-287; Born, p. 3780 et seq.*]. Pursuant to Art. II (1) NYC, a valid arbitration agreement must be in writing. The present Arbitration Agreement does not meet this requirement since it was neither signed nor contained in an exchange of letters in the sense of Art. II (2) NYC (*cf. Ex. C1, p. 9 para. 4; cf. Ex. C3, p. 16*).

62 In the further course of the proceedings, CLAIMANT might draw on Art. VII (1) NYC, which introduces a *most favourable principle*. This principle offers the party seeking enforcement the right to avail himself of more favourable regulations. According to Art. VII (1) NYC, such regulations are other treaties or national laws where such award is sought to be relied upon. The national law at the place of enforcement would be Equatorian Arbitration Law ('**EAL**'). Equatorian Arbitration Law is a verbatim adoption of the UNCITRAL Model Law (*PO1, p. 47 III. 3.*). Equatoriana has adopted Option I of Article 7 of the UNCITRAL Model Law (*ibid.*). Art. 7 EAL regulates "the definition and form of arbitration agreement[s]". CLAIMANT alleges that the Arbitration Agreement is formally valid

since it fulfils the requirements of Art. 7 (2) EAL in combination with Art. 7 (3) EAL and those of Art. 7 (6) EAL (*Cla. Memo., para. 28 et seq.*).

63 However, neither the requirements of Art. 7 (3) EAL [**I.**] nor the requirements of Art. 7 (6) EAL [**II.**] are met.

I. THE REQUIREMENTS OF ART. 7 (3) EAL ARE NOT MET

64 The Arbitration Agreement does not satisfy the prerequisites of Art. 7 (3) EAL.

65 Art. 7 (2) EAL stipulates that "[t]he arbitration agreement shall be in writing". Art. 7 (3) EAL specifies that "[a]n arbitration agreement is in writing if its content is recorded in any form". This includes for instance an exchange of emails [*Bantekas et al., p. 132; Binder, p. 138; Holtzmann et al., p. 33 et seq.*]. However, Art. 7 (3) EAL cannot be interpreted literally [*Wolff, Art. II para. 119*]. If any written piece constituted an agreement in writing, a party could satisfy the formal prerequisites by simply producing an internal file note without the opposing party's knowledge [*ibid.*]. This would "render the 'in writing' requirement meaningless" [*ibid.*]. For example, Art. 7 (5) EAL states that an arbitration agreement is "in writing if it is contained in an exchange of claim and defence". If an internal file note sufficed, so would just the statement of claim. The statement of defence would be irrelevant for the 'in writing' requirement. Rather, Art. 7 (3) EAL is to be restricted: Unless both parties have the documented arbitration agreement at hand, it needs to be timely sent to the other party [*ibid.*].

66 In the case at hand, CLAIMANT contained the Arbitration Agreement in its General Conditions (*Ex. R4, p. 32*) but never sent them to RESPONDENT (*PO2, p. 50 para. 18*). The Parties' last negotiations date back to May 2020 (*Ex. C5, p. 18 para. 4 et seq.*). After this, the Parties remained silent for six months during which CLAIMANT did not make any attempts to send the documented contents of the Arbitration Agreement to RESPONDENT. CLAIMANT now tries to argue that RESPONDENT obtained the documented content through an employee it had hired in June 2020 (*Cla. Memo., para. 28*), after the negotiations between the Parties had already ended (*Ex. C5, p. 18 para. 4 et seq.*). Working at a different company, this employee – Mr Dosep – had concluded contracts with CLAIMANT and obtained CLAIMANT's General Conditions including the arbitration clause (*PO2, p. 50 para. 19*). However, it stands to reason that this coincidence does not change the fact that CLAIMANT never duly transmitted the recorded contents of the Arbitration Agreement.

67 Therefore, the requirements of Art. 7 (3) EAL are not fulfilled.

II. THE REQUIREMENTS OF ART. 7 (6) EAL ARE NOT MET

68 The Arbitration Agreement also does not meet the requirements of Art. 7 (6) EAL. According to Art. 7 (6) EAL, "[t]he 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". This presupposes the inclusion of the general conditions in which the arbitration agreement is contained [*BGH (GER, 2020), para. 31*]. Under all laws in question, a contract is required for the inclusion of General Conditions (*see para. 56 et seq.*). However, the Parties did not conclude a contract (*see para. 74, 117*). Thus, the requirements of Art. 7 (6) EAL are not met.

69 To summarise, an award based on this Arbitration Agreement would neither be recognised nor enforceable since the Arbitration Agreement is formally invalid.

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70 To conclude, the Parties impliedly agreed on Mediterranean Law to govern the Arbitration Agreement. As the General Conditions were neither included under the CISG nor the non-harmonised Mediterranean Contract Law, the Parties never formed an Arbitration Agreement. Additionally, an award rendered on this basis would not be recognisable or enforceable under the NYC. The Parties did not conclude a valid Arbitration Agreement. Sometimes, to honour the Parties' autonomy is to honour what the Parties did not agree on.

PART II: THE PARTIES DID NOT CONCLUDE A SALES CONTRACT IN 2020

71 No contract. No performance. No foundation for a claim. In business, high expectations do not necessarily lead to tangible results.

72 CLAIMANT is a producer of RSPO-certified palm oil. It appeared to be a strong match for RESPONDENT, a company that values high environmental standards. The Parties negotiated for some time, unable to arrive at a joint denominator on key issues, *e.g.* the dispute resolution mechanism. While the negotiations were already fizzling out, RESPONDENT additionally had to learn that all that glitters is not gold: It got public that CLAIMANT sold palm oil with fake RSPO-certificates (*Ex. C1, p. 9 para. 5*).

73 Up to that point, the Parties did not enter into a contract, neither under the CISG [**A**.] nor under the non-harmonised Mediterranean Contract Law [**B**.]. Beyond, and contrary to CLAIMANT's assertion, there is no pre-contractual relationship that would create any binding legal consequences for RESPONDENT similar to a contract conclusion [**C.**].

A. THE PARTIES DID NOT CONCLUDE A CONTRACT UNDER THE CISG

74 The Parties did not enter into a contract under the CISG.

75 RESPONDENT agrees with CLAIMANT (*Cla. Memo., para. 61 et seq.*) that the law applicable to the formation of the alleged contract between the Parties is the Mediterranean Law including the CISG (*PO2, p. 52 para. 33*). Since both Mediterraneo and Equatoriana are Contracting States of the CISG (*PO1, p. 46 III. 3.*), the CISG applies to the formation of contracts in accordance with Art. 1 (1) (a) CISG and Art. 4 CISG.

76 Contrary to CLAIMANT's assumption (*Cla. Memo., para. 68 et seq.*), the Parties did not fulfil the requirements of contract formation under the CISG. The conclusion of a contract under the CISG requires offer and acceptance in accordance with Art. 14, Art. 18 and Art. 23 CISG [*CIETAC (CHN, 2002); Magellan v Salzgitter (USA, 1999), p. 4; Vural, p. 129 et seq.*].

77 RESPONDENT did not make an offer [**I.**]. Even if RESPONDENT had made an offer, CLAIMANT would not have accepted but made a counteroffer [**II.**]. RESPONDENT did not accept said counteroffer [**III.**].

I. RESPONDENT DID NOT MAKE AN OFFER

78 Contrary to CLAIMANT's view (*Cla. Memo., para. 69 et seq.*), the email sent by Ms Bupati on 1 April 2020 does not constitute an offer since RESPONDENT had no intention to be bound.

79 Pursuant to Art. 14 (1) CISG, an offer is a "proposal for concluding a contract […] if it is sufficiently definite". In order to be sufficiently definite, the offer must determine the minimum requirements, namely goods, price and quantity [*Secretariat Commentary, Art. 12 (now Art. 14) para. 8; Brunner/Gottlieb, Art. 14 p. 124; Ferrari/Torsello, p. 136*]. Furthermore, according to Art. 14 (1) CISG, it is necessary that the offer indicates the intention to be bound in case of acceptance.

80 CLAIMANT was correct to assume that RESPONDENT's email was sufficiently definite, entailing price, good and quantity, as agreed on at the Summit (*Cla. Memo., para. 70*). The Parties agreed on 20.000t of RSPO-certified palm oil for 900 USD/t for five years and after that minus five percent of the market price (*Ex. C2, p. 12*).

81 However, CLAIMANT wrongfully asserts that RESPONDENT's intention to be bound can be derived from RESPONDENT's conduct (*Cla. Memo., para. 85 et seq.*). Such an intent is shown by interpretation of a statement or conduct in accordance with Art. 8 CISG [*UNCITRAL Digest, p. 86*]. Art. 8 (1) CISG states that "statements made by and other conduct of a party are to be interpreted according to his intent". If a subjective intent cannot be determined, Art. 8 (2) CISG requires an objective interpretation "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances". Pursuant to Art. 8 (3) CISG, all relevant circumstances including business practices and prior negotiations must be considered.

82 CLAIMANT might not be aware of RESPONDENT's subjective intent in light of Art. 8 (1) CISG. Yet, a reasonable person according to Art. 8 (2) CISG would see that the Parties never took it a step further than negotiating. There are several circumstances leading to this conclusion: RESPONDENT still wanted to discuss further terms [**1.**]. Moreover, RESPONDENT stayed at a preparational level by requesting contractual documents [**2.**]. This result is not contradicted by the subject line of RESPONDENT's email [**3.**].

1. RESPONDENT WANTED TO NEGOTIATE FURTHER TERMS

83 RESPONDENT still wanted to negotiate terms before entering into a contract. Therefore, a reasonable person in the shoes of CLAIMANT would conclude that RESPONDENT had no intention to be bound by its email. The wording is the starting point in determining the intent of a party [*Secretariat Commentary, Art. 7 (now Art. 8) para. 5*]. The concerns voiced in the email were the dispute resolution mechanism and the application of transparency rules (*Ex. C2, p. 12*).

84 In her email from 1 April 2020, Ms Bupati pointed out that arbitration as the dispute resolution mechanism is problematic for RESPONDENT (*Ex. C2, p. 12*).

Art. 19 (3) CISG sheds a light on the importance of dispute resolution mechanisms when stating that terms amending "the settlement of disputes are considered to alter the terms of the offer materially". Ms Bupati stated that the submission to arbitration in general and the submission to an arbitration institution exclusively dealing with palm oil is not in line with RESPONDENT's expectations (*ibid.*). Hence, even if CLAIMANT had argued that it changed to a non-industry related arbitration institution, this amendment would still not have met RESPONDENT's idea of dispute resolution. Already at the Summit, RESPONDENT had voiced concerns regarding the submission to arbitration because of the "wide-spread hostility to arbitration in Equatoriana" (*Ex. C1, p. 10 para. 11*). In light of this, CLAIMANT's email can only be understood to the effect that it underlines RESPONDENT's general disapproval of submitting to arbitration.

85 The choice for a dispute settlement mechanism not only mattered to RESPONDENT but was also relevant for CLAIMANT (*Ex. C1, p. 10 para. 11*). From the beginning of the negotiations, CLAIMANT had emphasised that "agreeing on anything but arbitration would be very difficult" (*ibid.*). Up until now, CLAIMANT has not changed its mind (*Cla. Memo., para. 1*). Following this disagreement, it would be unreasonable to impute an intention to be bound to RESPONDENT.

86 Additionally, RESPONDENT expressed the importance of transparency since it asked for the application of transparency rules (*Ex. C2, p. 12*). Ms Bupati proposed the application of the UNCITRAL Transparency Rules to the dispute settlement in her email (*ibid.*). In any case, she insisted on "some sort of transparency" (*ibid.*). From the point of view of a reasonable person in the position of CLAIMANT, RESPONDENT gave CLAIMANT an idea of what is necessary to be added as a term for a contract conclusion.

87 Since RESPONDENT still wanted to negotiate terms, a reasonable person in the shoes of CLAIMANT would conclude that RESPONDENT had no intention to be bound by its email.

2. RESPONDENT STAYED AT A PREPARATIONAL LEVEL BY REQUESTING CONTRACTUAL DOCUMENTS

88 Contrary to CLAIMANT's view (*Cla. Memo., para. 70, 88*), RESPONDENT did not demonstrate its intention to be bound by requesting contractual documents from CLAIMANT. Rather, a reasonable person in the shoes of CLAIMANT would interpret the request as a mere preparational step. Until then, the terms had only been discussed orally at the Summit (*Ex. C1, p. 10 para. 11*). By requesting the contractual documents (*Ex. C2, p. 12*), RESPONDENT only took action to get a hold of the terms for a possible contract in black and white. At the same time, Ms Bupati referred Mr Chandra to her assistant for further discussions on the contract (*ibid.*). The contractual

documents provided a basis for future negotiations. Thus, RESPONDENT did not demonstrate an intention to be bound by requesting contractual documents.

3. THE LACK OF INTENTION TO BE BOUND IS NOT CONTRADICTED BY THE SUBJECT LINE OF THE EMAIL

89 In contrast to CLAIMANT's argumentation (*Cla. Memo., para. 69, 71*), the lack of intention to be bound is not contradicted by the subject line of RESPONDENT's email. CLAIMANT constructs a contract based on two words: "purchase offer" (*ibid.*). However, a reasonable person would conclude that the previous remarks have shown that RESPONDENT at no point was ready to finalise a contract with CLAIMANT. The subject line only makes up two words within an email counting numerous characters (*Ex. C2, p. 12*). Additionally, the email was written by Ms Bupati, who – as RESPONDENT's Head of Purchase (*Ex. R3, p. 31 para. 4*) – is more concerned with trade than with law. Therefore, a reasonable person from CLAIMANT's point of view would not expect her to use the term 'offer' in a legally binding way. CLAIMANT cannot judge a book by its cover, even if the cover seems more appealing.

90 To summarise, RESPONDENT had no intention to be bound when sending its email on 1 April 2020. Thus, RESPONDENT did not make an offer.

II. CLAIMANT WOULD NOT HAVE ACCEPTED THE ALLEGED OFFER BUT MADE A COUNTEROFFER

91 Even if one considered Ms Bupati's email as an offer, CLAIMANT would not have accepted it by sending the contractual documents via email on 9 April 2020. Rather, CLAIMANT got back to RESPONDENT with a counteroffer. Against RESPONDENT's wishes, the contractual documents called for arbitration and did not provide for any transparency.

92 CLAIMANT, however, interprets its email as an acceptance and not a counteroffer (*Cla. Memo., para. 73, 74*). It makes its case by relying on the following argumentation: CLAIMANT's contractual documents entailed a reference to an arbitration clause allegedly known by Ms Bupati from the time when she was working for SC (*Cla. Memo., para. 77*). Therefore, CLAIMANT is of the opinion that its email did not contain any material alterations (*Cla. Memo., para. 75*).

93 Art. 18 (1) Sentence 1 CISG stipulates that "[a] statement made by or other conduct of the offeree indicating assent to an offer is an acceptance". An acceptance is supposed to mirror the offer [*Huber/Mullis, p. 89; Schwenzer et al., p. 151*]. According to Art. 19 (1) and (2) CISG, an acceptance is considered a counteroffer if it materially alters the terms of the original offer. Art. 19 (3) CISG enumerates examples for terms that materially alter the offer, such as the settlement of disputes.

94 An alleged offer by RESPONDENT's email would entail the following terms: Firstly, the previously agreed upon commercial terms (*Ex. C2, p. 12*). Secondly, an exclusion of arbitration as the dispute resolution mechanism (*ibid.*). Thirdly, the application of transparency rules (*ibid.*).

95 However, CLAIMANT's email and the attached contractual documents referred to its General Conditions (*Ex. C3, p. 13*). Against RESPONDENT's wishes, these General Conditions entailed the Arbitration Agreement (*Ex. R4, p. 32*). By setting arbitration as the dispute settlement mechanism, CLAIMANT made a modification on this term. This led to a material alteration in accordance with Art. 19 (2) and (3) CISG and constituted a rejection of the offer. Therefore, CLAIMANT's arguments are irreconcilable with Art. 19 CISG. This provision relies solely on the content of offer and acceptance. It is not relevant whether Ms Bupati is familiar with the Arbitration Agreement from previous contracts. Rather, it is of key importance that the terms of Ms Bupati's offer are mirrored in the acceptance. Presently, they are not.

96 Additionally, against RESPONDENT's request, CLAIMANT did not provide for any transparency of the arbitral proceedings. RESPONDENT had called for the application of transparency rules comparable to the UNCITRAL Transparency Rules (*Ex. C2, p. 12*). According to Art. 6 (1) of the UNCITRAL Transparency Rules, hearings "shall be public" (*emphasis added*). However, CLAIMANT proposed the application of the AIAC Arbitration Rules (*Ex. R4, p. 32*). Rule 28.5. of the AIAC Arbitration Rules stipulates that "[h]earings shall be held in private unless otherwise agreed to by the Parties" (*emphasis added*). CLAIMANT did not make any attempts to derogate from this provision. The arbitral hearings were supposed to be held behind closed doors. Thus, CLAIMANT did not mirror the terms of the offer.

97 Both of RESPONDENT's requests were not complied with in CLAIMANT's alleged acceptance. Consequently, CLAIMANT made a counteroffer.

III. RESPONDENT DID NOT ACCEPT CLAIMANT'S COUNTEROFFER

98 Contrary to CLAIMANT's allegations (*Cla. Memo., para. 85 et seq.*), RESPONDENT did not accept CLAIMANT's counteroffer by remaining silent.

99 Art. 18 (1) Sentence 1 CISG stipulates that "[a] statement made by or other conduct of the offeree indicating assent to an offer is an acceptance". This indication of assent can occur expressly or impliedly [*RvK Tongeren (BEL, 2005), p. 6; Kröll et al., Art. 18 para. 7*]. Further, Art. 18 (1) Sentence 2 CISG clarifies that "[s]ilence or inactivity does not in itself amount to [an] acceptance". Accordingly, silence can only amount to an acceptance when surrounding circumstances lead to such [*CA Grenoble (FRA, 1999); OLG Köln (GER, 1994), para. 37*].

Circumstances may include a respective business practice but only if those reasonably led the other party to expect that a contract would be concluded [*Secretariat Commentary, Art. 16 (now Art. 18) para. 4; TF (CHE, 2005), para. 13; Filanto v Chilewich (USA, 1992), para. 38*].

100 In the present case, there are no such circumstances speaking for an acceptance through silence. Quite to the contrary, the facts speak a different language: The absence of RESPONDENT's signature illustrates its lack of assent [**1.**]. Further, RESPONDENT is not bound by any business practice [**2.**].

1. THE ABSENCE OF RESPONDENT'S SIGNATURE SHOWS ITS LACK OF ASSENT

101 The absence of RESPONDENT's signature on the contractual documents demonstrates its lack of assent. Contrary, CLAIMANT argues that RESPONDENT sufficiently expressed its assent regardless of a documentation by signature (*Cla. Memo., para. 85*). CLAIMANT also states that the formation of the contract is not conditional upon the signature (*Cla. Memo., para. 91*). Rather, the signature would only be required for administrative purposes (*ibid.*).

102 The CISG provides for the freedom of form in Art. 11 CISG. Still, RESPONDENT's signature on the contractual documents became a prerequisite to certify a consent between the Parties. Ms Bupati had explicitly asked for the preparation of the contractual documents "for signature" (*emphasis added*) (*Ex. C2, p. 12*). Therefore, a reasonable person in CLAIMANT's position would have understood Ms Bupati's statement to the extent that she intended to sign the contract in case of assent. Accordingly, RESPONDENT's signature cannot be seen to merely serve an administrative function. A signature by RESPONDENT is missing (*Ex. C3, p. 16*). RESPONDENT did not sign the contract, remained silent, and hence did not accept CLAIMANT's offer.

2. RESPONDENT IS NOT BOUND BY ANY BUSINESS PRACTICE

103 Contrary to CLAIMANT's assertions (*Cla. Memo., para. 89 et seq.*), no business practice led to an acceptance of RESPONDENT. CLAIMANT argues that the Parties had concluded a contract by taking into account a business practice on the grounds of Art. 9 (1) and (2) CISG (*Cla. Memo., para. 89, 94*). Art. 9 (2) CISG refers to trade usages, of which there are none in the case at hand (*PO2, p. 53 para. 37*). This shifts the focus to Art. 9 (1) CISG stipulating that the parties are bound "by any practices which they have established between themselves".

104 The Parties, however, never concluded any prior contracts – never established any practice between themselves. It is a fact that there has never been any previous commercial relationship between CLAIMANT and RESPONDENT (*PO2, p. 48 para. 3*).

105 Nonetheless, RESPONDENT acknowledges that CLAIMANT and SC had a business practice drawn up by Mr Chandra and Ms Bupati back when she worked at SC. However, this business practice does not extend to RESPONDENT [**a.**]. In any case, the business practice does not entail an acceptance solely through silence [**b.**].

a. THE BUSINESS PRACTICE BETWEEN CLAIMANT AND SC DOES NOT EXTEND TO RESPONDENT

106 The business practice established between CLAIMANT and SC cannot be attributed to RESPONDENT. CLAIMANT argues that "RESPONDENT did not make any mention of the need to disregard the business practice" (*Cla. Memo., para. 93*). Only regarding the inclusion of the General Conditions, CLAIMANT asserts that RESPONDENT and SC "should be treated as a single corporate entity when interpreting whether there is an established practice between the Parties" (*Cla. Memo., para. 127*).

107 According to Art. 9 (1) CISG, "parties are bound […] by any practices which they have established between themselves" (*emphasis added*). There is no reference as to who the parties are or who ought to have established the business practice. Any uncertainties in the understanding of the wording of the CISG are to be interpreted according to Art. 7 (1) CISG [*BP Oil v Empresa (USA, 2003); GH 's-Hertogenbosch (NLD, 2002); Brunner/Gottlieb, Art. 7 p. 85*]. Art. 7 (1) CISG stipulates that in the interpretation of the CISG "regard is to be had to […] the observance of good faith in international trade". What exactly good faith entails is not regulated in the CISG but is to be understood as a discretionary standard [*Hanwha v Petrochemicals (USA, 2011), p. 3, 4; Keily, p. 18*]. Good faith under the CISG establishes an objective standard that constitutes fairness, fair conduct and a spirit of solidarity [*ICC (CHE, 1997); RB Zwolle (NLD, 1997); Keily, p. 18*]. In this case, it would not be in line with good faith to extend the ambit of the provision in Art. 9 (1) CISG to RESPONDENT. The circumstances demonstrate that the practice established between CLAIMANT and SC does not bind RESPONDENT:

108 First, SC does not equal RESPONDENT. CLAIMANT, however, argues that there would be no "complete separation between the RESPONDENT and its parent company" (*Cla. Memo., para. 127*). It bases the argumentation on the fact that SC centralised its palm oil business at RESPONDENT and 26 of the former employees became employees of RESPONDENT's subsidiary (*ibid.*). As CLAIMANT itself acknowledges, the palm kernel oil unit and the employees were only transferred to RESPONDENT's subsidiary and not RESPONDENT itself (*PO2, p. 48 para. 4, 5*). This subsidiary is located in Ruritania, where SC has its place of business (*PO2, p. 48 para. 5*). RESPONDENT is located in

Equatoriana (*Notice, p. 4 para. 2*). Overall, RESPONDENT remains an independent legal entity (*PO2, p. 48 para. 4*).

109 Second, CLAIMANT could not reasonably expect the business practice to apply to RESPONDENT after Ms Bupati's statements. For the business practice to be applied the circumstances of the case must be the same as previously [*OGH (AUT, 2005), para. 15*]. If the circumstances of a case are not the same, the parties cannot trust that the business practice will apply again [*ibid.*]. Circumstances change when the underlying conditions and surroundings are different from prior dealings [*Schwenzer, Art. 9 para. 10*]. Ms Bupati stated that she is now operating in a different setting working at RESPONDENT's. Nowadays, she wants to get confirmation from her management before concluding contracts (*Notice, p. 5 para. 5*). Further, she communicated to CLAIMANT that she is working in a different legal, commercial and political environment (*Ex. C1, p. 10 para. 10; Ex. C2, p. 12*). Additionally, a new assistant is involved who is not familiar with the previous proceedings of Ms Bupati and Mr Chandra (*Ex. C2, p. 12*). Furthermore, Ms Bupati is now navigating at a larger scale. The contract would be worth a staggering 100 million USD and deals with considerably larger quantities than the previous contracts (*Ex. C3, p. 13*): Back when Ms Bupati worked at SC, the annual quantity delivered was no more than 7.000t of non-certified palm kernel oil (*PO2, p. 48 para. 1*). The present contact concerns an annual quantity of 20.000t of RSPO-certified palm oil, which is much more expensive than regular palm oil (*Ex. C3, p. 13; Ex. R1, p. 29*). Therefore, CLAIMANT could not reasonably expect the business practice to apply to RESPONDENT due to the changed circumstances.

110 That said, CLAIMANT grasps a last straw, the *Group of Companies Doctrine* (*Cla. Memo., para. 128*). The doctrine is misplaced. Its purpose is to allow the extension of an arbitration agreement within a group of companies [*Ferrario, p. 647*]. If the arbitration agreement is signed by one company of a group, the agreement extends to the non-signatory companies of the same group [*ibid.*]. To justify the extension of the business practice to RESPONDENT with the *Group of Companies Doctrine*, CLAIMANT draws on the scholarly opinion of *Stavros Brekoulakis* (*Cla. Memo., para. 128*). However, *Brekoulakis* concedes that "[a]rbitration tribunals and national courts outside France, especially in common law jurisdictions, never accepted the idea that separate legal entities can be treated as an [*sic*] corporate group, whether for substantive or jurisdictional purposes" [*Brekoulakis, p. 8*]. This underlines that the substantive issue of the extension of the business practice is not solved by the doctrine. It is not possible to extend the business practice to RESPONDENT by invoking the *Group of Companies Doctrine*.

111 To conclude, the business practice established between CLAIMANT and SC cannot be attributed to RESPONDENT.

b. THE BUSINESS PRACTICE WOULD NOT ENTAIL AN ACCEPTANCE ONLY THROUGH SILENCE

112 Even if there was a business practice between the Parties, it would not encompass pure silence as an acceptance. CLAIMANT asserts that unless Ms Bupati objected to the terms of the contractual documents within a week, she accepted them by staying silent (*Cla. Memo., para. 92, 122*). Contrary to CLAIMANT's allegations, the business practice included either an objection within a week or, instead of pure silence, a contract performance.

113 Indeed, there were five contracts where Ms Bupati did not return a signed copy of the contractual documents (*Ex. R3, p. 31 para. 3*). Yet, those five contracts only constituted an exception. Out of 40 contracts, 35 were signed or objected to (*Ex. R3, p. 31 para. 2, 3*). If such case appeared, Ms Bupati never only remained silent. She always initiated performance (*Ex. C1, p. 11 para. 14; Ex. R3, p. 31 para. 3*). RESPONDENT cannot accept through mere silence within the business practice. Therefore, in the present case it is decisive that RESPONDENT did not perform.

114 One might allege that the request for acceptable banks for a letter of credit is an act of performance and constitutes an acceptance in line with the established business practice. Establishing a letter of credit can be an act of performance [*UNCITRAL Digest, Art. 54 para. 4; Osuna-González, p. 303*].

115 However, this is not the case. None of the Parties established a letter of credit (*PO2, p. 51 para. 23*). RESPONDENT merely inquired about acceptable banks for the letter of credit (*Ex. C5, p. 18 para. 4*). CLAIMANT buries the fact that a simple request for a letter of credit does not equal an actual performance. There is a difference between collecting relevant information and entering into legally binding obligations by establishing a letter of credit. The actual letter would create obligations for RESPONDENT towards the bank. A letter of credit is a payment mechanism which provides an economic guarantee by a bank to the buyer [*ICC (FRA, 1992); Downs v Perwaja (AUS, 2000), para. 20; Niepmann/Schmidt-Eisenlohr, p. 6*]. A phone call between two assistants, as in the case at hand (*Ex. C5, p. 18 para. 4*), only serves the process of settling the paperwork possibly leading to a contract conclusion. RESPONDENT took no act of performance. Therefore, even if there was a business practice, there was no acceptance in line with it.

116 Consequently, the Parties did not conclude a contract under the CISG.

B. THE PARTIES WOULD ALSO NOT HAVE CONCLUDED A CONTRACT UNDER THE NON-HARMONISED MEDITERRANEAN CONTRACT LAW

117 The Parties would not have entered into a contract under the non-harmonised Mediterranean Contract Law either. CLAIMANT interprets the Response to the Notice of Arbitration to the extent that RESPONDENT would propose the application of the non-harmonised Mediterranean Contract Law to the formation of the contract (*Cla. Memo., para. 95*). Quite to the contrary, the application of the CISG to the contract formation was never up for dispute (*PO2, p. 52 para. 33*). The Response to the Notice of Arbitration only refers to the issue of avoidance of the contract for mistake (*Response, p. 28 para. 19*). Even if one applied the non-harmonised Mediterranean Contract Law, the Parties would not have concluded a contract. The non-harmonised Mediterranean Contract Law is a verbatim adoption of the UNIDROIT Principles (*PO1, p. 47 III. 3.*). These derive their provisions for contract formation mostly from those in the CISG [*Vogenauer, Art. 2.1.1 para. 2*]. Art. 2.1.1 of the non-harmonised Mediterranean Contract Law regulates the formation of contracts and states that "[a] contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement". Therefore, it does not require less prerequisites than those set out in the CISG. Consequently, no contract was concluded under the non-harmonised Mediterranean Contract Law for the reasons outlined above.

C. NO LEGAL OBLIGATION ARISES OUT OF A PRE-CONTRACTUAL RELATIONSHIP DUE TO THE *ESTOPPEL PRINCIPLE*

118 Contrary to CLAIMANT's allegations (*Cla. Memo., para. 96*), there is no pre-contractual relationship between the Parties that created any binding legal consequences for RESPONDENT due to the *estoppel principle*.

119 First and foremost, the Parties agreed that at this stage of the dispute the issue ought to be addressed is the conclusion of a possible contract and no further claims (*PO1, p. 46 II., III. 1.*). Nonetheless, CLAIMANT addresses a pre-contractual relationship (*Cla. Memo., para. 96 et seq.*).

120 Beyond that, CLAIMANT does not provide a legal basis that gives ground for its assertions. CLAIMANT bases its allegations on Art. 16 (2) UNCITRAL Model Law and Art. 2.1.4 (2) UNIDROIT Principles (*Cla. Memo., para. 97*). Both provisions are not applicable. Art. 16 (2) UNCITRAL Model Law handles the competence of an arbitral tribunal to rule on its own jurisdiction. It does not touch upon the formation of contracts. Moreover, the UNIDROIT Principles equal the non-harmonised Mediterranean Contract Law (*PO1, p. 47 III. 3.*). However, the Parties agreed on applying the Mediterranean Law including the CISG to their

contract (*PO2, p. 53 para. 33*). The provisions of the CISG prevail over the national non-harmonised contract law [*Kröll et al., Intro. para. 12*]. Art. 2.1.4 (2) UNIDROIT Principles is therefore not applicable. The further cases CLAIMANT cites to support its allegations (*Cla. Memo., para. 96 et seq.*) are not concerned with the CISG but the respective national law [*cf. Mobile Oil v Wellcome International (AUS, 1998); cf. Waltons v Maher (AUS, 1988); cf. Teachers v Tribune (USA, 1987)*]. Thus, CLAIMANT's allegations lack a legal basis.

121 However, even though CLAMAINT fails to point out the right legal foundation, it is correct that the *estoppel principle* can be derived from the CISG [*Uçaryilmaz, p. 162 et seq.*]. The *estoppel principle* describes the prohibition of contradictory behaviour conflicting with previous manifestations of intent [*Sombra, p. 29, 40; Robertson, p. 807*]. However, RESPONDENT never behaved contradictorily. CLAIMANT could not seriously and reasonably expect the existence of a legal relationship between the Parties. As previously shown, the Parties were still at the stage of negotiating (*see para. 74, 117*). RESPONDENT stated that relevant terms were still not in line with their expectations and needed to be discussed (*see para. 83 et seq.*). It simply ended the negotiations after learning about CLAIMANT's involvement in granting false RSPO-certificates (*Ex. C7, p. 20*).

122 In conclusion, CLAIMANT bases its entire point not only on an incorrect legal foundation but also draws it from falsely applied articles to argue a principle of which the prerequisite is not met.

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123 No offer. No acceptance. No matter how hard one tries to twist the facts: Two legally independent entities negotiated for the first time and failed. The first encounter of the Parties neither led to any contract nor to pre-contractual obligations. A recourse to a business practice between the two executives remains unsuccessful. The Parties did not conclude a contract under any law.

PART III: THE GENERAL CONDITIONS WERE NOT VALIDLY INCLUDED INTO THE CONTRACT

124 The General Conditions remain hidden in the depths of CLAIMANT's drawer. RESPONDENT is yet to receive them. RESPONDENT never had the opportunity to familiarise itself with the content of the General Conditions, some of which might have stark effects on this dispute, should the tribunal consider the Parties to have concluded a contract: Article 4 of its General Conditions gives CLAIMANT two additional months before RESPONDENT can terminate the contract. RESPONDENT would be stuck with CLAIMANT, which lost credibility inadvertently reflecting on RESPONDENT.

125 It takes two to include general conditions. One cannot agree on something that one is not aware of. Therefore, even if the Parties concluded a contract, the General Conditions would neither have been included under the CISG [**A.**] nor under the non-harmonised Mediterranean Contract Law [**B.**].

A. CLAIMANT DID NOT SATISFY THE REQUIREMENTS OF THE CISG

126 CLAIMANT did not meet the requirements of the CISG to include its General Conditions into the contract.

127 CLAIMANT correctly states that the CISG as the law of the contract applies to the incorporation of the General Conditions (*Cla. Memo., para. 105*). Although the CISG does not contain specific provisions for the inclusion of general conditions, the general rules of contract formation and interpretation of statements apply [*RB Rotterdam (NLD, 2021); Golden Valley v Centrisys (USA, 2010), p. 4; Trib Rovereto (ITA, 2006), p. 19; DiMatteo et al., p. 247; Kröll, p. 46; Piltz, p. 234*]. In accordance with the general rules on contract formation, "[s]tandard terms are included in the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract" [*CISG AC-Opinion No. 13 Rule 2*].

128 Presently, the General Conditions were not included into the contract as part of CLAIMANT's acceptance [**I.**]. Even if CLAIMANT made a counteroffer by sending the contractual documents, the General Conditions would not have been part of the offer [**II.**].

I. THE GENERAL CONDITIONS WERE NOT INCLUDED INTO THE CONTRACT AS PART OF AN ACCEPTANCE OF CLAIMANT

129 If one were to follow CLAIMANT's argumentation (*Cla. Memo, para. 109*), the General Conditions would not have been incorporated into the contract since they cannot be part of CLAIMANT's acceptance. CLAIMANT alleges that the Parties concluded a contract (*Cla. Memo., para. 68*). According to CLAIMANT, RESPONDENT made an offer by its email from 1 April 2020, which

CLAIMANT accepted by sending the contractual documents (*Cla. Memo., para. 68 et seq.*). CLAIMANT submits two legal considerations regarding the incorporation of the General Conditions. Both are incorrect:

130 First, CLAIMANT argues that the General Conditions were included as it referred to them in its acceptance when sending the contractual documents (*Cla. Memo., para. 112*). It is common ground that in order to incorporate general conditions, they must be part of the offer [*CISG AC-Opinion No. 13 Rule 4; Nucap v Bosch (USA, 2017), p. 29 et seq.; RB Rotterdam (NLD, 2016), para. 3.8; OGH (AUT, 2005), para. 11; Huber/Mullis, p. 31; Piltz, p. 234; Schwenzer/Spagnolo, p. 110*]. As to the timing, general conditions must be part of the offer before the other party accepts such offer [*CISG AC-Opinion No. 13 Rule 4; Château Des Charmes v Sabate (USA, 2003); Eiselen, p. 18; Schwenzer, Art. 14 para. 66*]. If the user refers to its general conditions after the offer, the general conditions are not included into the contract [*Andersen/Schroeter, p. 323; Schwenzer, Art. 14 para. 52*]. CLAIMANT asserts that the General Conditions were part of its "acceptance email" and not part of any offer (*Cla. Memo., para. 112*). Hence, following CLAIMANT's own argumentation, the General Conditions could not have been included into the contract.

131 Second, CLAIMANT is of the opinion that its acceptance email containing the contractual documents was a "confirmation letter" (*Cla. Memo, para. 124*). According to CLAIMANT, the General Conditions were included in the contract since RESPONDENT remained silent after receiving the "confirmation letter" (*Cla. Memo., para. 126*). There is only one exception under which general conditions can be included in the contract after its conclusion: A party sends a confirmation letter to include its general conditions immediately after the formation of the contract while the other party remains silent [*CISG AC-Opinion No. 13 Comment 4.4; Marxen, p. 18*]. In the case at hand, at the time CLAIMANT sent the contractual documents, no contract had been concluded yet (*see para. 74, 117*). Even CLAIMANT itself assumes that a contract was concluded when it sent the contractual documents and not before (*Cla. Memo., para. 124*). Therefore, according to CLAIMANT, the 'confirmation letter' was not sent after the conclusion of the contract but to conclude a contract. Hence, CLAIMANT's justifications are contradictory. A confirmation letter must be sent after the formation of the contract and can therefore not constitute an acceptance at the same time.

132 CLAIMANT's argumentation is inconsistent and based on erroneous legal considerations. If one were to follow CLAIMANT's argumentation, the General Conditions could not have been incorporated into the contract since they were neither part of an offer nor of a confirmation letter.

II. THE GENERAL CONDITIONS WERE NOT PART OF CLAIMANT'S COUNTEROFFER

133 Even if CLAIMANT argues the conclusion of the contract through CLAIMANT's counteroffer by sending the contractual documents which RESPONDENT accepted, the General Conditions were not part of CLAIMANT's offer.

134 CLAIMANT was correct to assume (*Cla. Memo., para. 111*) that the question whether general conditions are part of an offer is to be determined by an interpretation of the offer according to Art. 8 CISG [*NAI (NLD, 2005), para. 25; Allied Dynamics v Kennametal (USA, 2014), p. 6; BGH (GER, 2001), para. 14; Eiselen, p. 5; Huber/Mullis, p. 31*]. It must be ascertained that a reasonable person in the shoes of the addressee would have understood the offeror's intention to incorporate the general conditions pursuant to Art. 8 (2) CISG [*RB Utrecht (NLD, 2009), para. 4.3; OGH (AUT, 2003), p. 10; Schwenzer, Art. 14 para. 43; UNCITRAL Digest, p. 80*]. General conditions are part of the offer under two requirements: First, the offeror must make a clear reference to the general conditions [*CISG AC-Opinion No. 13 Rule 4; CA Paris (FRA, 1995); Mankowski, Art. 14 para. 16*]. Second, the addressee must be aware of the general conditions' content [*CISG AC-Opinion No. 13 Rule 3; OGH (AUT, 2017), para. 18; GH Den Haag (NLD, 2014), para. 17; Trib Rovereto (ITA, 2007); Kröll, p. 46; UNCITRAL Digest, p. 80*].

135 RESPONDENT does not contest that CLAIMANT made a clear reference to its General Conditions (*Cla. Memo., para. 111; Ex. C4, p. 17*). However, for RESPONDENT to be aware of the General Conditions, CLAIMANT had to make them available to RESPONDENT [**1.**]. Yet, CLAIMANT did not [**2.**].

1. CLAIMANT HAD TO MAKE THE GENERAL CONDITIONS AVAILABLE TO RESPONDENT

136 Contrary to CLAIMANT's assertions (*Cla. Memo., para. 113*), CLAIMANT had to make the General Conditions available to RESPONDENT to be aware of their content. Presently, CLAIMANT is of the opinion that RESPONDENT was aware since CLAIMANT made a reference to the General Conditions (*Cla. Memo., para. 126*). Accordingly, CLAIMANT alleges that RESPONDENT was obliged to object to the inclusion of the General Conditions (*Cla. Memo., para. 113*). Yet, CLAIMANT's allegations are neither in line with current case law nor the facts of the present case.

137 In the *Machinery Case*, the German Federal Court of Justice specified the instances in which the addressee of general conditions had a reasonable opportunity to become aware [*BGH (GER, 2001)*]. The question was whether the user must make the general conditions available to the contracting partner under the CISG [*BGH (GER, 2001), para. 15*]. In the case, a German seller and a Spanish buyer had concluded a sales contract about a gear hobbing

machine [*BGH (GER, 2001), para. 1*]. The parties were in dispute as to whether the general conditions had been included into the contract [*BGH (GER, 2001), para. 6*]. The general conditions were never sent to the Spanish buyer [*ibid.*]. The court ruled that the addressee can either become aware of the content if the user of the general conditions sends a copy of the text or makes them available in another way [*BGH (GER, 2001), para. 15*]. According to the court, an obligation for the addressee of general conditions to object to their inclusion would violate the principle of good faith pursuant to Art. 7 (1) CISG and the duty of the parties to cooperate and inform each other [*BGH (GER, 2001), para. 16*]. The court reasoned that sending the general conditions requires minimal effort of its user [*ibid.*]. Especially in modern times when writing emails, it is no trouble for the user to simply attach the general conditions [*ibid.*]. Furthermore, an obligation for the addressee to inquire about the content of the general conditions would make international business slower, more complicated and ineffective [*ibid.*]. This cost of time is not in the interest of any party [*ibid.*]. Additionally, general conditions are typically beneficial for its user [*BGH (GER, 2001), para. 15*].

138 The reasoning of the *Machinery Case* provides a legal frame into which the picture of the present case fits perfectly: CLAIMANT insists on the incorporation to invoke Article 4 of the General Conditions (*Notice, p. 7 para. 21*). The clause stipulates that "[i]n any case of breach of contract, in particular concerning the conformity of the goods, the seller is given two months after being notified by the buyer to remedy such breach" (*PO2, p. 52 para. 31*). Therefore, the General Conditions allow CLAIMANT additional time to remedy before RESPONDENT can terminate the contract. Hence, the General Conditions are beneficial to CLAIMANT. Attaching the General Conditions to its email would have cost CLAIMANT a single click. An obligation to inquire about the content of the General Conditions would shift the whole responsibility to RESPONDENT. CLAIMANT drew up beneficial General Conditions. Those are lying on CLAIMANT's table. Thus, it seems particularly unreasonable to oblige RESPONDENT to inquire about General Conditions. Rather, it is on CLAIMANT to make the General Conditions available to RESPONDENT.

139 This result is not called into question by CLAIMANT's allegations. CLAIMANT argues that the approach taken in the *Machinery Case* is "found to be obstructive" (*Cla. Memo., para. 126*). As a source for its allegations CLAIMANT cites two judgements of the Austrian Supreme Court (*ibid.*). These judgements do not substantiate its claim. It holds true that the Austrian Supreme Court recognised in the *Cooling Machine Case* and in the *Propane Gas Case* that the user of general conditions solely has to make a reference to include them into the contract [*OGH (AUT, 2002); OGH (AUT, 1996)*]. However, the Austrian Supreme Court

overturned this old jurisprudence in 2017 and now invokes the requirements determined in the *Machinery Case* [*OGH (AUT, 2017), para. 18 et seq.*]. As a matter of fact, also courts in the Netherlands, Italy, Canada and the United States as well as tribunals and scholars have adopted the approach taken in the *Machinery Case* [*CISG AC-Opinion No. 13 Comment 2.2 et seq.; NAI (NLD, 2005), para. 32; RB Midden-Nederland (NLD, 2016); RB Rotterdam (NLD, 2015); GH Den Haag (NLD, 2014), para. 17; Roser v Carl Schreiber (USA, 2013); Trib Rovereto (ITA, 2007); Masonville v Kurtz (CAN, 2003), para. 72; Kröll et al., Art. 14 para. 39; Mankowski, Art. 14 para. 19; Schwenzer, Art. 14 para. 48*].

140 Consequently, in line with the *Machinery Case*, RESPONDENT was not obliged to inquire about the content of the General Conditions. Rather, CLAIMANT had to make the General Conditions available to RESPONDENT.

2. CLAIMANT DID NOT MAKE THE GENERAL CONDITIONS AVAILABLE TO RESPONDENT

141 The General Conditions were not made available to RESPONDENT. CLAIMANT neither sent the text of the General Conditions nor made them available in another way.

142 It is undisputed between the Parties that CLAIMANT did not send the text of the General Conditions to RESPONDENT (*Cla. Memo., para. 112; Response, p. 27 para. 13*).

143 CLAIMANT never made the General Conditions available to RESPONDENT in another way. General conditions are available in another way, for instance, if the parties have concluded prior contracts subject to the same general conditions or if the general conditions' text was handed over within prior negotiations [*CISG AC-Opinion No. 13 Rule 3.2, 3.3, 3.4; NAI (NLD, 2005), para. 25; Huber/Mullis, p. 32; Mankowski, Art. 14 para. 21 et seq.; Schwenzer, Art. 14 para. 58*]. Therefore, in line with CLAIMANT's affirmation (*Cla. Memo., para. 122*), in cases of prior dealings, the user does not necessarily have to send the general conditions at every following contract conclusion [*DiMatteo et al., Chapter 9 para. 15; Schwenzer, Art. 14 para. 58*]. However, this requires that the same general conditions were included into previous contracts [*CISG AC-Opinion No. 13 Comment 3.6; NAI (NLD, 2005), para. 25; LG Neubrandenburg (GER, 2005), p. 4*].

144 Presently, the General Conditions in their current version were not included into previous contracts of the Parties [**a.**]. In any case, Ms Bupati cannot be held aware of the content of CLAIMANT's General Conditions at the contract conclusion [**b.**].

a. THE PARTIES DID NOT CONCLUDE PREVIOUS CONTRACTS SUBJECT TO THE GENERAL CONDITIONS

145 The Parties did not conclude any contracts including the current version of the General Conditions.

146 The Parties had not had prior dealings. CLAIMANT argues that "[t]he Parties negotiated and concluded several contracts in their past business dealings" (*Cla. Memo., para. 125*). Just to the opposite, the contract in question would have been the first contract concluded between CLAIMANT and RESPONDENT (*PO2, p. 48 para. 3*). CLAIMANT further asserts that the prior dealings between CLAIMANT and SC should apply to RESPONDENT (*Cla. Memo., para. 130*). This is not the case. Already the established business practice between CLAIMANT and SC cannot be extended to RESPONDENT (*see para. 106*). Therefore, any prior dealings between CLAIMANT and SC cannot be transferred to RESPONDENT.

147 In any case, the current version of the General Conditions was not even incorporated into former contracts between CLAIMANT and SC. If the user of general conditions modifies their text within a business relationship, it is necessary to make the modified text available again [*Mankowski, Art. 14 para. 28; Schwenzer, Art. 14 para. 65*]. Furthermore, the user bears the burden of proof that the general conditions were included into the contract [*Kruisinga, p. 80; Schwenzer, Art. 14 para. 76*].

148 CLAIMANT cannot present facts to discharge its burden of proof. CLAIMANT and SC concluded several contracts from 2010-2018 (*Ex. C1, p. 9 para. 2*). In 2016, CLAIMANT amended its arbitration clause in the General Conditions (*Ex. C1, p. 9 para. 4*). CLAIMANT correctly states that it informed SC about the change of the General Conditions in 2016 during a phone call (*Cla. Memo., para. 130*). The contracts concluded between CLAIMANT and SC before the amendment in 2016 were subject to the old version of CLAIMANT's General Conditions (*Response, p. 27 para. 11*). CLAIMANT cannot prove whether it has provided SC with the text of the current version of the General Conditions since 2016 (*Ex. C1, p. 9 para. 4*). Considering the burden of proof at the expense of CLAIMANT, it must be assumed that the amendment was solely communicated orally and the amended text was not made available to SC.

149 CLAIMANT points out that there was "only one alteration on the General Conditions" (*Cla. Memo., para. 130*). However, the number of alterations is not decisive. After every amendment the text of general conditions must be made available again [*Mankowski, Art. 14 para. 28; Schwenzer, Art. 14 para. 65*]. Beyond that, the present amendment was crucial. Pursuant to Art. 19 (2) and (3) CISG the change of the dispute resolution mechanism is regarded as a material alteration hampering the conclusion of a contract.

150 Hence, it cannot be sufficient to communicate the amendment of the General Conditions merely through a phone call. The current version of the General Conditions was not included into any previous contract between the Parties.

b. IN ANY CASE, MS BUPATI CANNOT BE HELD AWARE OF THE GENERAL CONDITIONS' CONTENT AT THE TIME OF THE CONTRACT CONCLUSION

151 In any case, one cannot assume that Ms Bupati was still aware of the General Conditions' content during the contract conclusion in 2020.

152 First, the routine of regular contract conclusions was broken. In order to determine whether the addressee's awareness can be assumed, all circumstances of the case have to be taken into account [*Schwenzer, Art. 14 para. 59*]. Such circumstances include the duration and frequency of the business dealings [*ibid.*]. Ms Bupati and Mr Chandra used to negotiate four to five times annually from 2010-2018 (*Ex. C1, p. 9 para. 2*). This routine ended in 2018. Between 2018 and 2020, Ms Bupati and Mr Chandra did not correspond at all (*PO2, p. 49 para. 9*). Their frequency of contract conclusion was reduced to zero (*PO2, p. 48 para. 7*). Hence, Ms Bupati did not deal with CLAIMANT's General Conditions anymore.

153 Second, the last contract subject to CLAIMANT's General Conditions dates back almost two years. An upper time limit of the availability of general conditions within a business relationship can be derived from the legal concept of Art. 39 (2) CISG [*Schwenzer, Art. 14 para. 59*]. Art. 39 (2) CISG stipulates that "the buyer loses the right to rely on a lack of conformity of goods if he does not give the seller notice thereof at the latest within a period of two years". The provision's intention is to enable the parties to consider the transaction as finally settled after two years [*Kröll, Art. 39 para. 7 et seq.; Mankowski, Art. 39 para. 3 UNCITRAL Digest, p. 179*]. This legal concept can be applied to the availability of general conditions within prior dealings [*Schwenzer, Art. 14 para. 59*]. Therefore, a party can at most be held aware of the general conditions for two years [*ibid.*]. The last contract negotiated between Ms Bupati and Mr Chandra was concluded in June 2018 (*PO2, p. 48 para. 8*). The alleged contract would have been concluded in April 2020 (*see para. 91*). It has been 22 months since the last contract between Ms Bupati and Mr Chandra. Considering the disruption of the regular rhythm of contract conclusions, Ms Bupati cannot be reasonably held aware of General Conditions after such a long period of time.

154 To summarise, even if the Parties concluded a contract, the General Conditions would not have been made available to RESPONDENT. The General Conditions were not included into the contract under the CISG.

B. CLAIMANT DID NOT SATISFY THE REQUIREMENTS UNDER THE NON-HARMONISED MEDITERRANEAN CONTRACT LAW

155 CLAIMANT did not include the General Conditions under the non-harmonised Mediterranean Contract Law.

156 CLAIMANT alleges that RESPONDENT intends to apply non-harmonised Mediterranean Contract Law to the inclusion of the General Conditions (*Cla. Memo., para. 106*). There seems to be a misunderstanding. RESPONDENT never intended to apply said law to the inclusion of the General Conditions (*Response, p. 28 para. 19, 20*). In fact, the non-harmonised Mediterranean Contract Law is presently not applicable to the incorporation of the General Conditions. The Parties agreed that Mediterranean Law including the CISG governs all provisions concerning the sales contract (*PO2, p. 52 para. 32*). In such cases, the application of national contract law to the inclusion of general conditions is neither required nor suitable [*LG Fulda (GER, 2015); GH 's-Hertogenbosch (NLD, 2002), para. 2.7; Kröll et al., Art. 14 para. 38; Schwenzer, Art. 14 para. 40*] Hence, the non-harmonised Mediterranean Contract Law does not govern the incorporation of the General Conditions.

157 In any case, the General Conditions would not have been included into the contract under the non-harmonised Mediterranean Contract Law. Its provisions for the incorporation of general conditions are substantively identical to the requirements of the CISG [*cf. UNCITRAL Legal Guide, para. 395; Vogenauer, Intro. Art. 2.1.19, 2.1.22 para. 3*]. Similarly to the CISG, general conditions must be part of the offer [*Brödermann, Art. 2.1.20 para. 3; Mankowski, Art. 2.1.19 para. 3; Vogenauer, Art. 2.1.19 para. 6*]. This also requires a clear reference and the user needs to make the general conditions available [*Official Commentary on the UNIDROIT Principles, p. 68; Brödermann, Art. 2.1.20 para. 3; Mankowski, Art. 2.1.20 para. 4*]. CLAIMANT made a clear reference but did not make the General Conditions available to RESPONDENT (*see para. 141*). Hence, CLAIMANT did not include the General Conditions under the non-harmonised Mediterranean Contract Law.

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158 Mr Chandra himself said: "I am not certain whether we sent a copy of the revised 2016 version [of the General Conditions] to Ms Bupati" (*Ex. C1, p. 9 para. 4*). While CLAIMANT's COO scrambles for forgotten memories, RESPONDENT sheds a light on the course of events. CLAIMANT never presented the text of the General Conditions to Ms Bupati. Not when she worked at SC and certainly not during her position at RESPONDENT's. RESPONDENT cannot accept terms that it has never seen. Therefore, even if the Parties concluded a contract, the General Conditions would not be included.

REQUEST FOR RELIEF

In light of the submissions above, on behalf of RESPONDENT, we herewith respectfully request the tribunal to grant the following relief:

(1) the tribunal does not have jurisdiction;

(2) the Parties did not conclude a contract;

(3) CLAIMANT's General Conditions were not validly included into the contract.

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UNIVERSITÄT HAMBURG

CERTIFICATE

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

Hamburg, 27 January 2022

Frieda Brink

Mathis de la Motte

Sophia Döcke

Eva Sophia Gott

Toni Meiswinkel

Lara Schmidt