ROYAL UNIVERSITY FOR WOMEN

Memorandum for CLAIMANT

On behalf of: 
Wright Ltd., Equatoriana
“CLAIMANT”

Against: 
SantosD KG, Mediterraneo
“RESPONDENT”

SARA JASSIM ABDULLA • FATEMA AHMED ALARAJ • NOOR SAMI ALALAWI
ISRA ABDULKARIM ALARADI • HAYA ZAAL ALBUFLASA • FATEMA FADHEL ALMEDAIFA
REEM HASSAN EL-ASAAD • NAYLA MOHAMED RAMADHAN • AMINA ABDULJABBAR SALEH

RIFFA • KINGDOM OF BAHRAIN
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<td>CAM-CCBC</td>
<td>Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Rules</td>
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<td>CAM-CCBC</td>
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<td>COO</td>
<td>Chief Operating Officer</td>
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<td>DSA</td>
<td>Development and Sales Agreement</td>
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<td>EQB</td>
<td>Equatoriana National or Central Bank</td>
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<td>EQD or EQ Denars</td>
<td>Equatorian Denars</td>
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<td>Et al.</td>
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<td>R$</td>
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<td>US$</td>
<td>United States Dollar</td>
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# INDEX OF AUTHORITIES

**A. Fagbemi, Sunday**

The Doctrine of party autonomy in International Commercial Arbitration: Myth or Reality?
cited as: *Fagbemi*
in para. 11

**Baasch Andersen, Camilla et al.**

A Practitioner's Guide to the CISG
New York (2010)
cited as: *Andersen*
in para. 96

**Berger, Bernhard**

Arbitration Practice: Security for Costs: Trends and Developments
in: *Swiss Arbitral Case Law* Bern (2010)
cited as: *Berger*
in para. 21

**Bonell, Michael**

The Relevance of Courses of Dealing, Usages and Customs in the Interpretation of International Commercial Contracts
cited as: *Bonell*
in para. 90
Born, Gary B.        International Commercial Arbitration
                   cited as: Born
                   in para. 7-10, 21, 35, 37

Butler, Allison      A Practice Guide to the CISG: Negotiations
                   through Litigations (2007)
                   cited as: Allison
                   in para. 65

Hartley C., Trevor   International Commercial Litigation: Text, Cases and
                   Materials on Private International Law
                   London (2015)
                   cited as: Hartley
                   in para. 87

N/A                  CISG Advisory Council Opinion No. 13, Inclusion of
                   Standard Terms Under the CISG
                   cited as: CISG-AC Opinion No. 13
                   in para. 77

Chatterjee C., Sharmila  The Reality of The Party Autonomy Rule In International
                        Arbitration
                        cited as: Chatterjee
                        in para. 8
Chovancová, Katarína  
Arbitration proceedings – Extract  
The Slovak Republic (2011)  
Cited as: Chovancová  
in para. 57

Joonas, Seppälä  
The Responsibilities and Rights of Both Buyer  
and Seller in International Trade Concerning  
the Conformity of the Goods and Additional  
Contractual Requirements  
available at:  
https://core.ac.uk/download/pdf/29575313.pdf  
cited as: Joonas  
in para. 119, 124

N/A  
International Arbitration Center Guideline, Application of  
for Interim Measures  
London (2015)  
cited as: Chartered Institute of Arbitrators  
in para. 14, 19, 20, 36, 40

Eörsi, Gyula  
Uniform Sales Law - The UN Convention on Contracts  
for International Sale of Goods  
Vienna (1986)  
cited as: Eörsi  
in para. 88
<table>
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<th>Volume/Publication details</th>
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<tr>
<td>N/A</td>
<td>International Bar Association, Guidelines for Drafting International Arbitration Clauses</td>
<td>London (2013)</td>
<td>cited as: <em>IBA Guidelines for Drafting International Arbitration Clauses</em> in para. 27</td>
</tr>
<tr>
<td>Farnsworth, E. Allan</td>
<td>Article 8</td>
<td>In: Bianca-Bonell Commentary on the International Sales Law</td>
<td>Cited as: <em>Farnsworth</em> in para: 89, 92</td>
</tr>
<tr>
<td>José Straube, Frederico Finkelstein, Claudio et al.</td>
<td>The CAM-CCBC Arbitration Rules 2012 : a commentary</td>
<td>The Hague (2016)</td>
<td>cited as: <em>Straube; Finkelstein; Filho</em> in para 12, 13, 46, 48</td>
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<td>Bout, Patrick X.</td>
<td>Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods</td>
<td>CISG Online-Data Base</td>
<td>Cited as: Bout In para: 89</td>
</tr>
<tr>
<td></td>
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<td>Available at: <a href="http://www.cisg.law.pace.edu/cisg/biblio/bout.html">http://www.cisg.law.pace.edu/cisg/biblio/bout.html</a></td>
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<tr>
<td><strong>Mittenthal, Richard</strong></td>
<td>Past Practice and the Administration of Collective Bargaining Agreements</td>
<td></td>
<td>Mittenthal</td>
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<tr>
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<td>Wietrzykowski, Koarlie</td>
<td></td>
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</tr>
<tr>
<td>Pessey, Jean</td>
<td>When to Grant Security for Costs in International Commercial Arbitration: The Complex Quest for a Uniform Test. in: International Institute for Conflict Prevention and Resolution (2011)</td>
<td>cited as: <em>Pessey</em> in para: 8, 10, 30, 32</td>
<td></td>
</tr>
<tr>
<td>Perillo, Joseph</td>
<td>Remarks on the manner in which the UNIDROIT Principles may be used to interpret or supplement Article 8 CISG</td>
<td>cited as: <em>Joseph</em> in para: 84</td>
<td></td>
</tr>
<tr>
<td>Poudret, Jean-François</td>
<td>Comparative Law of International Arbitration</td>
<td>cited as: <em>Poudret &amp; Besson</em> in para: 51</td>
<td></td>
</tr>
<tr>
<td>Redfern, Alan</td>
<td>Redfern and Hunter on international arbitration</td>
<td>cited as: <em>Redfern &amp; Hunter</em> in para: 26</td>
<td></td>
</tr>
</tbody>
</table>
Rubins, Noah

In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration

cited as: Rubins

in para. 8, 10, 22

Schlechtriem, Peter

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

cited as: Schlechtriem & Schwenzer

in para. 64

Schlechtriem, Peter

Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods

Vienna (1986)
cite as: Peter

in para. 114

Tirado, Joe

Security for costs in international arbitration

Stein, Max

Yearbook on International Arbitration, Volume III

et al.

Vienna (2013)
cited as: Tirado et alii

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<table>
<thead>
<tr>
<th>Author, Title/Work</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tunc, Andre</strong> Commentary on the Hague Conventions of 1st of July 1964</td>
<td>Available at: <a href="http://www.cisg.law.pace.edu/cisg/biblio/tunc.html">http://www.cisg.law.pace.edu/cisg/biblio/tunc.html</a> cited as: <em>Tunc</em> in para. 88</td>
</tr>
<tr>
<td><strong>Wagner, Stephan</strong> Supply Chain Management</td>
<td>ETC Zürich (2015) Available at: <a href="https://static1.squarespace.com/static/55646113e4b0c0ea1b075ef0/t/56615238e4b0a5d92690402/1449218616940/SCM_2015_III_AFO_ohne_Kontakte_151203_web.pdf">https://static1.squarespace.com/static/55646113e4b0c0ea1b075ef0/t/56615238e4b0a5d92690402/1449218616940/SCM_2015_III_AFO_ohne_Kontakte_151203_web.pdf</a> cited as: <em>Baur</em> in para: 100</td>
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<tr>
<td><strong>Baur, Stephan</strong></td>
<td></td>
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<tr>
<td><strong>Waincymer, Jeffrey</strong> Procedure and Evidence in International Arbitration</td>
<td>Alphen aan den rijn (2012) cited as: <em>Waincymer, 2012</em> in para. 62</td>
</tr>
</tbody>
</table>
Whittington, Nicholas  
Comment on Professor Schwenzer’s Paper (2005)  
in: 36 VUWLR  
cited as: Whittington  
in para. 124

Ziegel, Jacob  
Report to the Uniform Law Conference of Canada on

Samson, Claude  
Claude Convention on Contracts for the International Sale  
cited as: Ziegel & Samson  
in para. 114
INDEX OF CASES

Austria
Oberster Gerichtshof
21 March 2000
Case No. 10 Ob 344/99g
CISG-online
 cited as: Wood Case
in para. 97

Oberster Gerichtshof
31 August 2005
Case No. 750
CISG-online
 cited as: Metal Powder Case
in para. 89

Europe
Europe Court of Justice
20 February 1997
Cited as: Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL
Available in:
in para: 89
Finland
Turku Court of Appeal
12 April 2002
Case Name: Forestry Equipment Case
CISG-online
Cited as: *Turku Court of Appeal*
In para: 96

Germany
Bundesgerichtshof
8 March 1995
Case No. VIII ZR 159/94
http://cisgw3.law.pace.edu/cases/950308g3.html
Cited as: *Mussels Case*
In para: 124

Landgericht
18 June 2003
Case No. 21-0-11/03
Cited as: *Case No. 21-0-11/03*
In para: 64
Spain
Cáceres Provincial High Court
26 April 2010
Case No. 1034
CISG-online
cited as: Case No. 1034
in para. 80

Ukraine
The Commercial Court of Donetsk Region
13 April 2007
Case No. 1406
http://www.uncitral.org/clout/
cited as: Press Case
in para. 64

United States of America
United States Court of Appeals, Second Circuit.
8 August 2008
Case No. 06-3340 CV
Cited as: NetsJets Aviation, Inc
in para. 50
Supreme Court New York County
April 28 2013
Case No. 651720/2011
Law.Justia.Com
cited as: Thomas v. Meyer store Inc.
in para. 27

U.S Court of Appeals for the District of Columbia Circuit
8 January 1954
Case No.
Law.justia.com
cited as: Watford v. Evening Star News Paper
in para. 28

United States Court of Federal Claims
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Case No. 12–209C
Westlaw
cited as: Housing Authority of the County of Santa Clara v. United States
in para. 106

United States Court of Federal Claims
25 February 2014
Case No. 11–682 C
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cited as: Ensley, Inc. v. United States
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ICSID Awards
The International Centre for Settlement of Investment Disputes
23 June 2015
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Practicallaw.com
Cited as: Peppard & Co Limited v. Bogoff
in para. 38

The International Centre for Settlement of Investment Disputes
3 March 2010
Case No. ARB/05/18 and ARB/07/15
Cited as: ICSID Case Nos ARB/05/18
in para. 30

ICC Awards
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http://cisgw3.law.pace.edu/cases/978611i1.html
cited as: Industrial Equipment Case
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**CIETAC Awards**  
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cited as: *CIETAC, 3 Dec 2003*  
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<td>The purchase price per fan blade</td>
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<td>The total purchase price for clamps</td>
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<td>Wrong invoiced amount for fan blades</td>
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<td>Correct amount that should be invoiced for fan blades</td>
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<td>For fan blades</td>
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<td>For Clamps</td>
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STATEMENT OF FACTS

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

CLAIMANT is a highly specialized manufacturer of fan blades for jet engines incorporated in Equatoriana.

RESPONDENT is a medium sized manufacturer of jet engines based in Mediterraneo.

Both Parties were subsidiaries of Engineering International SA until 2010, when CLAIMANT was sold to Wright Holding PLC, and RESPONDENT was sold to SpeedRun, as consequence of a financial restructuring.

1 August 2010

After negotiations started at the time of their sale, CLAIMANT and RESPONDENT (hereafter the “Parties”) concluded the Development and Sales Agreement (hereafter “DSA”) for the joint development of a new version of CLAIMANT’s fan blade (TRF 192-I) to be included into RESPONDENT’s high-spec jet engines. Under the DSA RESPONDENT undertook to purchase a minimum of 2,000 fan blades, but insisted on a price in US Dollars (hereafter “US$”) though CLAIMANT’s production costs are in EQ Denars (hereafter “EQD”). The Parties agreed upon a purchase price per blade ranging from US$ 9,975 to 13,125 depending on a cost estimate per blade.

26 October 2010

The Parties signed an Addendum to the DSA for the production and delivery of 2,000 clamps, and agreed on a fixed exchange rate of US$ 1=EQD 2.01 to be applied for the purchase of such clamps.

14 January 2015

CLAIMANT delivered 2,000 fan blades and 2,000 clamps to RESPONDENT with invoices attached for US$ 20,438,560”. RESPONDENT accepted the delivery and, after proper inspection, confirmed the conformity of the goods with the contract.

15 January 2015

RESPONDENT paid the invoiced amount. Mr. Cyril Lindbergh, RESPONDENT’s CFO, notified Ms. Amelia Beinhorn, CLAIMANT’s COO, via email that he sent the payment of US$ 20,438,560 for the fan blades and US$ 183,343.28 for the clamps to CLAIMANT’s
account at the Equatoriana National Bank (hereafter “EQB”). Ms. Beinhorn contacted Mr. Lindbergh to clarify that there was a mistake in the calculation of the purchase price for the fan blades, and that consequently the overall purchase price was US$ 22,723,800, and not US$ 20,438,560.

29 January 2015
US$ 20,336,367.20 was credited to the CLAIMANT’s account at the EQB.

9 February 2015
Ms. Beinhorn notified Mr. Lindbergh that CLAIMANT was demanding the outstanding payment of US$ 2,387,432.80 by 4th of March 2015.

10 February 2015
Mr. Lindbergh denied that any additional payment was due, and insisted on the application of the fixed exchange rate set out in the Addendum for converting EQD in US$ to both fan blades and clamps. In addition, he stated that RESPONDENT was not aware of the reason why US$ 102,192.80 was deducted from the transfer amount.

12 February 2015
An inquiry at the EQB by Ms. Beinhorn, revealed that the inspection fees were deducted from the amount transferred by RESPONDENT in application of a money laundering (hereafter “ML”) Regulation in force in Equatoriana.

31 May 2016
CLAIMANT initiated arbitration proceedings at the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (hereafter “CAM-CCBC”).

7 June 2016
In application of the order issued by the President of the CAM-CCBC, CLAIMANT submitted an amended version of the power of attorney and payed the outstanding Registration Fee.
INTRODUCTION

1 In 2010 CLAIMANT and RESPONDENT, following longstanding negotiations, concluded the DSA for the development of a new fan blade to be incorporated in RESPONDENT’s next generation of jet engines and used in the line of business jets produced by Earhart SP, a global aircraft manufacturer. Unexpectedly, while CLAIMANT was fully engaged in providing RESPONDENT with innovative fan blades, RESPONDENT boarded to the sky leaving CLAIMANT down on earth.

2 The content of the deal was fully shaped as per RESPONDENT’s desires. The Parties fixed a minimum and a maximum price in US$ to be paid for the fan blades, as the production costs were unknown at the time of the conclusion of the DSA. Afterwards, the Parties signed an Addendum where they agreed that CLAIMANT would deliver 2,000 clamps to RESPONDENT on a cost basis. Upon Respondent’s persistence, and deviating from the rules applicable to the price calculation for the fan blades, a fixed exchange rate of US$ 1=EQD 2.01 was set.

3 CLAIMANT wholly fulfilled its obligations, but as consequence of a clerical and obvious mistake in its accounting department the invoices delivered with fan blades and clamps were wrong. Although the mistake was easily detectable, RESPONDENT immediately paid the purchase price, taking unfair advantage of the mistake. Moreover, a lower amount of money was credited to CLAIMANT’s account due to investigation fees for ML deducted by the EQB.

4 CLAIMANT tried more than once to settle the dispute amicably, whereas RESPONDENT, rather than attempting to find a solution in good faith, stubbornly refused to pay any additional amount and simply chose to exploit the situation. Having exhausted all attempts to settle the dispute, CLAIMANT had no choice but to resort to arbitration.

5 In its defense, RESPONDENT requested the Tribunal to reject the opposing claims as belated and groundless, and demanded an order for Security for Costs (hereafter “SFC”). CLAIMANT respectfully invites the Tribunal to dismiss such claims because: (1) the Parties did not agree on SFC, measure which is not even regulated by the Lex arbitri, and there is no proof that CLAIMANT will not implement the final award; (2) CLAIMANT’s request for arbitration is admissible, as the arbitral proceedings was initiated in compliance with the Lex arbitri and the DSA. As consequence, CLAIMANT requests the Tribunal to rule in its favor with regard to the outstanding contractual payment (3), and the fees deducted by the EQB in dispute (4).
ARGUMENT

ISSUE 1: THE TRIBUNAL SHOULD NOT ORDER CLAIMANT TO PROVIDE SECURITY FOR RESPONDENT’S COSTS

6 Notwithstanding the breach of its obligations under the DSA, RESPONDENT requests the Tribunal to order CLAIMANT to provide security for the hypothetical costs it might incur in the amount of US$ 200,000. Hereby CLAIMANT respectfully demands that RESPONDENT’S Claim is rejected, due to the fact that the Tribunal lacks authority to grant such measure (A). Nonetheless, even if the Tribunal has the power to award RESPONDENT with the SFC it should not, as there is no risk that CLAIMANT will not enforce the final award (B). Therefore, ordering security for RESPONDENT’s costs hinders the principle of due process (C).

A. The Tribunal Does Not Have the Power to Order Security for RESPONDENT’s Costs

7 In order for the Tribunal to grant the security it must first ensure that there is a legal basis for issuing this order, and that both Parties agreed on this measure. Most UNCITRAL Model Law jurisdictions courts interpreted Art. 17 that it does not grant the arbitral tribunal the power to order SFC [Born]. Moreover, in the present case the applicable law does not recognize similar power to the Tribunal and the contract is silent on the matter, therefore there is no room for the adoption of such a measure. In deciding whether to award SFC, “the arbitral tribunal should pay regard to the general rule of most arbitration rules according to which the proceedings shall be conducted in a time and cost efficient manner and requests for SFC mechanically lead to an increase in costs and duration of arbitration, due to additional submissions, hearings” [Pessey]. The arbitrators must take into consideration their rule in preserving the attractiveness of international commercial arbitration, since awarding SFC may have an unfortunate effect on the efficiency and flexibility of resolving the dispute process [Pessey].

8 “The party autonomy rule is considered to be a pillar of the arbitration system”, thus it is generally assumptive that the Tribunal can only exercise the powers conferred by the applicable law and by the Parties to the dispute [Chatterjee]. Moreover, as the Parties did not agree to SFC, granting such measure will undermine the contractual nature of the arbitral system. “To assert that arbitrators or courts should impose security for costs, or any procedural rule, for that matter, in flagrant disregard of the parties expressed intentions, would be to undermine the contractual nature of the arbitral system” [Rubins]. Accordingly, the Tribunal does not have the power to order security for RESPONDENT’S costs.
I. The Tribunal May Not Base its Power Neither, on the Development and Sales Agreement, nor the *Lex Arbitri*

9 The DSA and *Lex arbitri* do not entrust the Tribunal with the authority to award SFC. In the Arbitration Agreement the Parties simply agreed that “the arbitration shall be conducted under the Rules of CAM-CCBC and in line with international arbitration practices”\([R., \text{Pg. 11, Exh. C2}].\) Indeed, the and the DSA is silent in this regard.

1. **The Parties Did Not Agree on Security for Costs**

10 The Parties’ have broad autonomy to establish procedures tailored and appropriate to their needs is a key element of the arbitral process \([\text{Born}].\) “Parties autonomy are freedoms that are permitted in arbitration agreement that focuses on dispute resolution in international arbitration agreement between parties to a contractual dispute” \([\text{Odoe}].\) Basing on the principle of party autonomy, the Tribunal shall not order CLAIMANT to provide RESPONDENT SFC because the Parties have not agreed to the measure in Section 21 DSA \([R., \text{Pg. 11, Exh. C2}].\) The explicit agreement of the Parties determines the ability to request SFC and the appropriate forum where the Parties may file such request in the arbitration proceedings \([\text{Pessey}].\) Accordingly, because the Parties autonomy prevails on all the laws agreed upon, the Parties must agree on such measure. Additionally, if the Parties were silent on SFC in the DSA “on the matter in their agreement must mean that they did not intend for the arbitrator to order security” \([\text{Rubins}].\) Therefore, the Tribunal cannot order CLAIMANT such measure as it is not explicitly stated in the DSA.

11 The principle of party autonomy is represented in Art. 19.1 UML which establishes that “the Parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting the proceedings”. Such provisions contain rules and one of the main rules is that the parties are free to agree on the arbitral procedure to be followed, subject to the mandatory provisions of the Model Law \([\text{Holtzmann & Neuhaus}].\) Consequently, the Tribunal does not have the authority to order CLAIMANT to provide SFC, because the DSA is silent on such matter \([\text{Fagbemi}].\)

2. **The CAM-CCBC Rules Do Not Grant the Tribunal the Authority to Order Such Measure**

12 RESPONDENT is not entitled to SFC under the CAM-CCBC Rules. Art. 8.1 states that “unless the Parties have otherwise agreed, the Arbitral Tribunal can grant provisional measures, both injunctive and anticipatory, that can, at the discretion of the Arbitral Tribunal, be subject to the provision of guarantees by the requesting party”. Although this provision stipulates that the Tribunal has the authority to grant such measures, the Tribunal also has the authority to reconsider
the request of the Party, whether it was necessary or not. In the case at hand the Tribunal shall not grant RESPONDENT SFC because RESPONDENT’s concern on CLAIMANT’s compliance with the Arbitral Award is inconsistent and merely alleged. Competent arbitrators have the power to order interim measures, but in order to do so they must evaluate the facts of the case since this the criterion which determines whether it is necessary to order the interim measure or not. [Straube et al.]. By applying such a principle to the case at hand, it is obvious that the element of necessity is absent.

13 “The prudent arbitrator will necessarily have in mind such interrelation between the powers he is given to grant or revoke interim and provisional” measures and the intensity of the negative effect of the arbitration agreement regarding the judge of urgencies in each national legal system [Straube et al.]. Therefore, RESPONDENT’s request for such measure has no basis.


14 The UML sets conditions that RESPONDENT must satisfy in order for the Tribunal to grant an interim measure. Since the general principles on applications for interim measures are equally applicable to applications for security for costs [Chartered Institute of Arbitrators], the following requirements must be met:

1) The harm caused by not granting the relief are non-compensatory damages, and the harm caused to the requesting party outweighs the harm caused to the party that the measure will be invoked against it; 2) The likelihood that the requesting party will succeed on the merits of the claim, yet this should not affect the discretion of the Arbitral Tribunal in making any succeeding decision; 3) Tribunal may ask requesting party to provide security when seeking an interim measure; 4) The requesting party should disclose to the Tribunal all circumstances that are admissible to the Tribunal decision to grant the measure or not [Art. 17A.1 UML].

Since RESPONDENT has not fulfilled the requirements to obtain the SFC (a), it is not entitled with SFC.

a. RESPONDENT Did Not Meet the Test for Obtaining Security for Costs

15 RESPONDENT has failed to meet the above requirements for SFC (3) under Art. 17A.1 UML, and must prove that if the security is not granted, RESPONDENT will not be able to recover its costs, and the damages that RESPONDENT will encounter in case of non-recovery of costs are higher than the amount requested for security.
Additionally, RESPONDENT should be certain that CLAIMANT’s request will be rejected and the award will be in his favor as stated in Art 17A 1.b. Yet it is foreseeable that RESPONDENT will have to pay the outstanding balance of the invoice to CLAIMANT, as it is in the right of the latter to be paid in full. Furthermore, the Tribunal may request the party who is seeking an interim measure to provide security, and is obliged to provide it as RESPONDENT is seeking a preliminary order.

Finally, RESPONDENT should disclose all information regarding the case and give comprehensive and complete facts of the case. In the dispute at hand, RESPONDENT failed to do so where it did not disclose to the Tribunal that the fixed exchange rate was only applicable to the Addendum and not to the whole DSA. Therefore, RESPONDENT failed to meet the test for obtaining SFC, as there were no any exceptional circumstances to provide SFC as CLAIMANT objected previously [R., Pg. 49].

Furthermore, under UML Art. 17.E CLAIMANT has the right to request RESPONDENT to pay SFC. Under Art. 17.E.2 UML, the Tribunal shall require the requesting party to provide appropriate security in connection with such preliminary order of an award unless, the arbitral tribunal considers it inappropriate or unnecessary to do so [Holtzmann & Neuhaus].

Panels of Arbitrators may consider appropriate to subordinate the granting of interim measures upon the applicant providing security for any damages that may be suffered by the opposing party as a consequence of the measure being granted. [Chartered Institute of Arbitrators]. Hence, in the remote circumstance that the Tribunal will decide to award RESPONDENT with security for its alleged costs, it should as well provide CLAIMANT with such measure.

4. Authority of the Tribunal to Grant Security for Costs is Not Clearly Recognized in International Arbitration Practice

“The general power is considered to be sufficiently wide to include the power to require a party to provide security for costs in appropriate situations and with appropriate safeguards. Consequently, security for costs is considered to be widely available in international arbitration but in practice it is only ordered in very particular circumstances” [Chartered institutions of arbitrators]. However those particular circumstances were not met in the case at hand.

Nevertheless, in spite of the increased interest that the SFC has attracted in international arbitration over the last two decades, a traditional reluctance – sometimes even outright refusal – to deal with it and especially awarding it has remained. The availability of SFC in international arbitration is specific and limited, not least due to the inherent increased risks in cross-border trade and
commerce as compared with mere domestic transactions [Berger]. Generally Arbitral tribunals have been hesitant to make security for costs orders [Born].

Moreover, one of the most prestigious arbitration chamber the ICC states that “arbitrators appear rarely to have honored requests for security for costs”. In addition to the ICC, the AAA limits the award for SFC [Rubins]. Therefore, the authority of the Tribunal to order SFC is not clearly recognized in the international practice, and such an order is only issued in a few special circumstances.

II. RESPONDENT Submitted Its Request After the Parties Have Agreed on the Terms of Reference

The Terms of Reference provide a framework for arbitration and reflect the parties’ agreement regarding its conduct [Mistelis]. The Tribunal is bound by the Terms of Reference and their violation may constitute a ground for setting aside the award. The courts will deny recognition and enforcement of the arbitral award when the procedure followed was not in accordance with the agreement of the parties [Poudret & Besson].

Since the Tribunal derives its powers from the Terms of Reference, it may not act in contrast to it. The Parties agreed that each one shall bear its fees during the proceedings, and later the final award shall establish who is responsible for the payment of all costs and fees [R., Pg. 43]. This clearly implies that the Tribunal is not entitled to issue decisions related to the payment of cost such as an order to provide SFC, unless upon rendering the final award.

B. Even if the Tribunal Has the Power to Award RESPONDENT with Security for Costs It Should Not, as There is No Risk that CLAIMANT Will Not Enforce the Final Award

When RESPONDENT submits an application for SFC, it must provide an evidence that persuades the Tribunal that CLAIMANT would not be able to pay RESPONDENT’s costs if the award is rendered in his favor. Hence, RESPONDENT is not entitled to such costs, as it did not fulfill its obligation to submit a prima facie evidence that makes it qualified to be granted with SFC. Nevertheless, even in the case where CLAIMANT chooses to not comply with the final award voluntarily (which is unforeseen), Equatorianian courts would oblige CLAIMANT to fulfill its obligation, since both Equatoriana and Danubia are parties to the NYC. As a consequence, the award will be enforced in any case and there is no reason for requiring SFC. CLAIMANT does not have any financial difficulties, and if any, RESPONDENT did not meet the burden of proof.
26 There is no justifiable reason that entails RESPONDENT to dispute CLAIMANT’s ability to pay the award if it will be issued in favor of RESPONDENT, since CLAIMANT does not have any financial difficulties as alleged by RESPONDENT. Indeed, the financial situation of CLAIMANT has not changed between the conclusion of the DSA and the initiation of these arbitral proceedings, and it is not foreseeable that it will change in the near future [R., Pg. 50, Exh. C9].

27 RESPONDENT did not submit prima facie evidence that supports its claims. “The Prima facie evidence is a proof which, standing alone and unexplained, maintains the proposition and warrants the conclusion to support which it is introduced” [Thomas v. Meyer store, Inc.]. Hence, RESPONDENT did not provide the ultimate proof that confirms its allegations of CLAIMANT’s inability to fulfill the award. Therefore, its request must be rejected for several reasons.

28 To start with, RESPONDENT relied on a newspaper article to prove that CLAIMANT has serious financial issues which would make it unable to fulfill its obligations [R., Pg. 47, Exh. R6]. In this respect, courts and scholars frequently held that newspapers offered in evidence as proof of facts are generally inadmissible under the hearsay rule [Watford v. Evening Star Newspaper Co.].

29 Moreover, RESPONDENT refers that CLAIMANT has not complied with a previous tribunal award which ordered it to pay US$ 2,500,000. In response to this allegation, CLAIMANT emphasizes that it has not complied with the award in the other CAM-CCBC proceedings because the award creditor owes an even larger amount to CLAIMANT’s parent company as damages for the delivery of nonconforming goods [R., Pg.50, Exh. C9]. Consequently, CLAIMANT met all its obligations of the past Arbitral Awards.

30 In addition, CLAIMANT does not deny that it had received funding’s from third parties in previous arbitral proceedings and also had approached funders in this current proceedings but its requests have been rejected. However, the principle is that third party funding’s should not be taken into account when assessing an application for SFC. Final awards on costs against unsuccessful claimants have ruled that third-party funding is not a factor in their assessment, it is therefore logical that third-party funding should not be a factor at the earlier stage of determining security for costs [Kirtley & Wietrzykowski]. In the ICSID arbitration, Ron Fuchs v. Republic of Georgia. In this case and its sister case, Ioannis Kardassopoulos v. Republic of Georgia, the tribunal stated that it knew “of no principle why any such third party financing arrangement should be taken into consideration in determining the amount of recovery by the Claimants of their costs” [ICSID Case Nos. ARB/05/18] & [ICSID Case Nos. ARB/07/15].
Finally, CLAIMANT has already made a payment of the amount of the registration fees, which in contrast with RESPONDENT’s allegations indicates the adequate financial health of the company. Therefore, the Tribunal should not award SFC as in [ICC Case No. 7047], where ICC tribunal refused SFC requested by Respondent as security against the incapability of claimant to pay any costs award.

I. The Final Award Will Be Enforced by the New York Convention in any Case

32 The NYC imposes a strict obligation on signatory States to recognize arbitral awards made in other countries, subject to procedural requirements no more onerous than those applicable to domestic awards [Mistelis]. Since Equatoriana and Danubia are both signatories to the NYC, the Equatorianian courts are obliged to recognize and enforce the arbitral awards issued from Danubia in compliance with Art. III of the Convention [Kronke, Waincymer].

33 RESPONDENT alleges that there is a possibility of CLAIMANT not complying with the award if it is rendered in favor of RESPONDENT, because it did not implement a former award. CLAIMANT made it clear that it had legitimate reasons for not obeying the award in the precedent, and if the Respondent in that case has the right to the awarded amount it would have requested enforcement of the award by the Equatorianian courts, and thus, CLAIMANT would be compelled to fulfill its obligations towards Respondent.

34 By applying the above mentioned principles, if CLAIMANT will not comply with the award willingly, which is unforeseen, RESPONDENT is entitled to seek the enforcement of the award in the Equatorianian courts. Hence, the award will be enforced in any case.

C. Ordering Security for RESPONDENT’s Costs Hinders the Principle of Due Process

35 RESPONDENT requests that the Tribunal order CLAIMANT to provide security for its costs, however CLAIMANT believes that it will conflict with the principle of due process to award such measure in the present case, as RESPONDENT has failed to pay the outstanding amount of the price. Art. 18 UML define the boundaries of the principle of due process by stating that “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case” [Olefirenko]. In this respect, tribunals not infrequently conclude that the burden imposed by a SFC order on a party may interfere unduly with its opportunity to be heard [Born]. Furthermore, ordering a SFC will constitute an unjustifiable prejudgment on the merits of the case.
I. RESPONDENT Did Not Fulfill Its Obligations Under the Development and Sales Agreement, thus Granting Security for Costs Conflicts the Principle of Due Process

Ordering CLAIMANT to provide security for RESPONDENT’s costs is in contrast with the principle of due process, as Respondent not only failed to perform its obligation to pay the full purchase price agreed upon by the Parties in the DSA but it is even requesting to secure its rights. “Arbitrators should consider and be satisfied that, in light of all of the surrounding circumstances, it would be fair to make an order requiring one party to provide security for the costs of the other party” [Chartered Institute of Arbitrators]. By applying such a principle, one of the requirements for awarding SFC is taking into consideration all the facts of the present case before issuing any interim measure.

It is a violation of the principles of fairness and neutrality to order security for RESPONDENT’s costs in the circumstances where it is delaying the payment of sums due or failing to perform its contractual obligations. Moreover, SFC sometimes may deprive a party with limited financial means of the opportunity to pursue its claim [Born]. Therefore, where RESPONDENT failed to perform its contractual obligation to pay the full price set out in the contract, it is not fair to provide it with SFC. As RESPONDENT is responsible for claimant’s financial condition, it is therefore not entitled to protection against that condition [Born], [R., Exh. C6, Pg. 15].

Therefore, the request for SFC should be rejected as the financial situation of CLAIMANT is due to the actions of RESPONDENT for not fulfilling their obligations as it is the subject of arbitration [Peppard & Co Limited v. Bogoff]. Therefore, it is not fair to order CLAIMANT to pay SFC.

II. Ordering Security for Costs Will Constitute an Unjustifiable Prejudgment on the Merits of the Case

An order for CLAIMANT to provide security for RESPONDENT’s costs would basically have a similar consequence of a binding award, and issuing such measure before hearing the case and in the absence of certainty over the legal requirements for SFC would constitute a presumption that CLAIMANT would lose the case without taking its merits into consideration.

Provisional measures must not prejudge the merits of the parties underlying dispute [Born]. Arbitrators must take into consideration that it will not constitute a prejudgment to the case, as they should be careful not to prejudge or predetermine the dispute itself. The Tribunal should not decide any issue in the dispute based on the evidence and argument in support of, or in opposition to, an application for interim measures [Chartered Institute for Arbitrators].
CONCLUSION OF THE FIRST ISSUE

41 The Tribunal does not have the power to order CLAIMANT to provide Security for RESPONDENT’s costs, since neither Section 21 DSA, nor the Lex arbitri authorize the Tribunal to do so. Nevertheless, even if the Tribunal finds itself to have the required authority, it should not order such measure, firstly, because RESPONDENT did not meet the test for the issue of SFC; and secondly, because granting security for RESPONDENT’s costs will violate the due process.

ISSUE 2: CLAIMANT SUBMITTED THE REQUEST FOR ARBITRATION ON TIME, THEREFORE ITS CLAIMS ARE ADMISSIBLE

42 CLAIMANT has complied with the Lex arbitri requirements with regard to the initiation of the Arbitral Proceedings (A), and the deadline agreed upon in Section 21 DSA [R., Exh. C2, Pg. 11] (B) and submitted its request on time. However, RESPONDENT alleges that CLAIMANT’s request for arbitration should be rejected on false allegation that it was belated. As a response, CLAIMANT respectfully demands the Tribunal to reject RESPONDENT’S claims because its request has fulfilled all the requirements for commencement of arbitration.

A. CLAIMANT’s Request and Supporting Documents Fulfilled the Requirements for Initiating Arbitration Under the CAM-CCBC Rules

43 The arbitration request with the supporting documents that CLAIMANT has submitted met all the requirements set by CAM-CCBC rules for the commencement of arbitration. In addition, the first POA was valid as it was signed by Wright Holding Plc which is the parent company of Wright Ltd that holds 88% of the company’s shares. Moreover, the payment of wrong amount for the registration fees was the result of an excusable mistake which does not constitute a valid reason for rejecting the request of arbitration. Consequently, CLAIMANT has satisfied such requirements and its request must be deemed valid.

I. The Request for Arbitration Satisfied the Criteria Set Out in Art. 4.1 and Art. 4.2 CAM-CCBC Rules

44 The request that CLAIMANT has submitted to the administration of CAM-CCBC satisfied all the requirement set out by the CAM-CCBC rules of arbitration under Art 4.1 and 4.2.

45 Art 4.1 of CAM-CCBC Rules sets certain requirements for the initiation of arbitration. Such requirements are providing the arbitration agreement, providing for choice of the CAM-CCBC to administer the proceedings, providing the Power of Attorney, a Statement of the matter of the Subject of Arbitration, estimated amount in dispute, full name and details of the parties, the seat,
language, law or rules of law applicable to the arbitration. Whenever a dispute arises out of a contractual relationship, the damaged party should notify the CAM-CCBC President, requesting the commencement of arbitration. The set of requirements has already been met by CLAIMANT in its request [R., Pg. 20].

46 Under Art. 4.1(c), CLAIMANT may determine and describe the scope of the dispute at his own will. However, deference must be given to the minimum level of the information that CLAIMANT must provide to ensure the validity of his notification [Straube et. al]. Such notification must clearly inform all the parties involved in the dispute that a specific dispute is being submitted to arbitration.

47 The request for arbitration must also contain a copy of the arbitration agreement specifically appointing CAM-CCBC as the Arbitral Institution responsible for administration and management of the procedure. This is of paramount importance since, without such evidence, the CAM-CCBC will not be able to take the measures needed to commence Arbitration.

48 Under Art. 4.2 “the party will attach proof of payment of the Registration Fee together with the notice”, in accordance to Art. 12.5 of the Rules. The CAM-CCBC Rules establish that CLAIMANT must attach proof of payment of the registration fee to the notice that is to be sent to the President of the CAM-CCBC, according to the terms of Art. 4.1 of the rules, requesting commencement of the arbitration proceedings. Payment of the registration fee must be made in accordance with Art. 12.5 of the rules and the table of expenses [Straube et al.]. CLAIMANT attached the proof of payment of the registration fees to the notice sent to the President of the CAM-CCBC. Therefore, the CLAIMANT’S request and documents submitted satisfy the requirements of initiating the Arbitration.

1. The Power of Attorney Submitted by CLAIMANT Is Valid

49 The first POA submitted on 31 May 2016 is valid since it was signed by Wright Holding Plc the parent company of Wright Ltd. [R, Pg18]. According to the “Veil Piercing and Alter Ego” the theory of parent company is no longer alter ego is when “the status is said to exist when there is such unity of interest and ownership that the separate personalities of the corporation and owners cease to exist” [Dietel v Day]. Therefore, the parent company becomes bound to the arbitration agreement and consequently, it has the right to raise claims by taking all the necessary steps to initiate arbitral proceedings such as signing POA to request for arbitration on behalf of its subsidiary if it is proven that:
1- The owner [Parent] exercised complete control over the [subsidiary] corporation with respect to the transaction at issue [Moses]; and 2- “overall element of injustice or unfairness.” [NetsJets Aviation, Inc.]. Consequently, Wright Holding PLC is bound by the arbitration agreement and has the right to initiate arbitral proceedings, hence the power of attorney submitted by CLAIMANT is valid and the arbitration request was submitted on time.

2. The Minor Error in the Registration Fee Has Been Rectified

The amount of R$ 400.00 paid instead of R$ 4,000.00 was a minor and temporary mistake of the secretary [R., Pg. 20]. The outstanding amount was immediately paid on 7 June 2016 by CLAIMANT. The situation was that of a temporary minor error which was quickly remedied by CLAIMANT action.

Furthermore, the general practice is that since RESPONDENT has been notified of the claim, the non-fulfilment of additional requirements does not prevent the valid commencement of an arbitration. The missing parts can be remedied at a later stage [Mistelis].

B. CLAIMANT Initiated the Arbitral Proceedings in Accordance with Section 21 of the Development and Sales Agreement

According to Section 21 DSA [R., Exh. C2, Pg. 11], the Parties have set the rules governing the arbitration and added a clause setting out requirements the Parties must meet in order to initiate arbitration. Therefore, since the dies a quo for initiating arbitration agreed in the DSA is sixty days after the failure of negotiations (I), the request was submitted on time as Respondent did not prove that the negotiations failed on the 1st of April (1). Even if the negotiations failed on that particular date, CLAIMANT’s request has been submitted within the agreed time frame in the view of the fact that it was sent and received by the CAM-CCBC administration on that date [R., Pg.2] (2). Hence, CLAIMANT’s claims are admissible as arbitration proceeding was initiated on time and in accordance with the DSA.

I. The Dies A Quo for Initiating Arbitration Agreed in the DSA Is Sixty Days After the Failure of Negotiations

According to the DSA [R., Pg. 11] the time limit for initiating arbitration is within sixty days from the failure of negotiations. Therefore, the initiation of arbitration on the 31 May 2016 is valid and in time.
1. **Negotiations Did Not Fail on the 1st of April 2016, and RESPONDENT Did Not Prove so**

It is generally accepted that the party, which makes an allegation, holds the burden of proving that particular factual allegation. Article 27(1) of the UNCITRAL Rules states that “Each party will have the burden of proving the facts relied on to support its claim or defense” [Redfern & Hunter]. RESPONDENT claims that the negotiations between the Parties were declared failed on the 1st of April 2015. However, RESPONDENT did not provide any evidence that supports its claim on the failure of negotiations on that particular date.

The Parties agreed in DSA [R., Section 21, Pg. 11] that “the arbitration shall be conducted under the Rules of the CAM-CCBC and in line with international arbitration practice”. Therefore, IBA Guidelines are applicable to the dispute. According to the IBA Guidelines for Drafting International Arbitration Clauses it recommended that “any such dispute which remains unresolved [30] days after either party requests in writing negotiation under this clause or within such other period as the parties may agree in writing, shall be finally settled under the [designated set of arbitration rules] by [one or three] arbitrator[s] appointed in accordance with the said Rules”. Therefore, the 60 days’ period for initiating arbitral proceedings starts on 1st of May; consequently the last day for CLAIMANT to initiate arbitral proceedings is 30 June 2016. Hence, CLAIMANT initiated arbitral proceedings within the agreed timeframe.

2. **Even if the Negotiations failed on the 1st April 2016, CLAIMANT’s Request was submitted within the Agreed Time Frame.**

Even if the negotiations failed on 1st of April, CLAIMANT successfully submitted request for arbitration on the agreed time frame, which is 60 days [R., Section 2, Pg.11] where the claim was submitted on 31 May 2016. Moreover, CLAIMANT has successfully submitted all three required documents to initiate arbitration even though only one requirement is sufficient to do so. The three requirements are: directly, by submitting their arbitration to certain arbitration rules or, the initiating document must inform the other parties that a specific dispute is being referred to arbitration [Chovancová].

The CLAIMANT has informed the RESPONDENT directly that they will take “necessary steps to initiate arbitration proceedings” [R., Exh R3, Pg.29]. Additionally, CLAIMANT submitted the arbitration to CAM-CCBC on 31 May 2016 [R., Pg. 2] so it has submitted the arbitration to certain arbitration rules. Furthermore, the notice for commencement of arbitration proceeding sent by
CAM-CCBC to CLAIMANT \( [R., \text{Pg.19}] \) has attached the request for arbitration by CLAIMANT the issues disputed \( [R., \text{Pg. 7}] \). Therefore, CLAIMANT has submitted its request for arbitration on time.

As CAM-CCBC has set that 31 May 2016 is day that CLAIMANT submitted the request for arbitration “on 31 May 2016, Wright Ltd (“Claimant”) presented a request for arbitration at CAM-CCBC against SantosD KG (“Respondent”)” \( [R., \text{Pg.40}] \). Therefore, CLAIMANT’s claims are admissible as they are submitted within the time-bar.

**CONCLUSION OF THE SECOND ISSUE**

For the foregoing reasons, CLAIMANT’s requests are admissible and RESPONDENT’s allegations should be dismissed, since CLAIMANT has submitted all the requested documents and initiated arbitration within the timeframe specified in the arbitration agreement, so that RESPONDENT’s request is only a misleading attempt to escape from the performance of its obligations under the DSA.

**ISSUE 3: CLAIMANT IS ENTITLED TO THE RESIDUAL PURCHASE PRICE FOR THE FAN BLADES, US$ 2,285,240, BASED ON THE CURRENT EXCHANGE RATE**

CLAIMANT fulfilled its obligations under the DSA, since it delivered the goods to RESPONDENT and RESPONDENT accepted the delivery since in conformity with the contract. However, due to a mistake in calculation, the invoices attached were wrong and RESPONDENT, taking advantage from the obvious clerical mistake, paid immediately the price. When informed on the mistake, it refused to pay the residual amount of the purchase price and left Claimant with no choice but to commence the arbitral proceedings.

The Tribunal should award CLAIMANT with the remaining amount of the price since RESPONDENT is obliged to pay the full purchase price according to the CISG (A). Moreover, the Tribunal should base its order on the agreement of the Parties (B) and, lastly, in compliance with the *contra proferentem* rule (C).

**A. Under Art. 53 and 62 CISG RESPONDENT Shall Pay the Full Price Which Is US$ 22,273,800.00**

CLAIMANT is entitled to the full purchase price of US$ 22,273,800, calculated on a cost-plus basis using the current exchange rate subject to Section 4 DSA \( [R., \text{Pg. 6, Para. 21}] \). Due to a mere mistake in calculation in CLAIMANT’s accounting department, the invoices attached to the fan blades were wrong since the price was calculated by applying the fixed exchange rate agreed upon
by the Parties only for the clamps. Consequently, since RESPONDENT paid the wrong amount for the fan blades, to ensure CLAIMANT’s right, Art. 53 and Art. 62 CISG must be applied.

Art. 53 CISG states that “the buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention”. Following, Art. 62 CISG outlines the rights of CLAIMANT to demand performance, by stating that “the seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement”. In interpreting Art. 62, a tribunal found that the seller had delivered the goods as agreed but the buyer had failed to pay the full amount according to the contract. Subsequently the tribunal, by applying Art. 62, stated that the buyer is always obliged to pay the full price and, if it does not, the seller has the right to request such payment [Tyres Case]. Further, another court held that the buyer’s failure to pay the complete purchase price constituted a breach of Art. 62, which establishes the same rule of Art. 53 CISG [Press Case]. Additionally, the Landgericht Court, after the seller argued that it had fulfilled the contract of sale by delivering conforming goods and that it did not deliver less than what was contracted for, ruled that the seller’s claims are admissible and well-founded [Case No. 21-0-11/03].

Moreover, CIETAC issued an Award in a case between a Chinese buyer and a Belgian seller stating that the seller delivered the goods to the buyers, the buyer didn’t fulfill his part of the agreement to make payment, the Arbitral Tribunal ruled that the Buyer shall make payment in arrears to the Seller [Case No. CISG/2006/02]. According to Art. 53, the essential obligation of the buyer is paying the price agreed by the parties upon the delivery of goods [Gabriel]. If the seller delivers on the due date, the buyer has the obligation to take delivery of the goods as well as to pay the price for them as required by the contract and the CISG [Butler]. RESPONDENT breached its obligation by not paying the full purchase price of US$ 22,273,800. Moreover, Art. 62 mirrors the buyer’s obligation as set forth in Art. 53 on the remedies side. This results from the drafting decision to state all the buyer obligations and then all remedies available to the seller in case of breach of contract by the buyer. Nevertheless, the legal principle pacta sunt servanda reflects “the legal concept that the obligee has the right to require the obligor to perform the agreed obligation” [Schlechriem & Schwenzer].

The idea of forcing the parties to perform their respective promise is more strictly followed in the Civil law systems, whereas Common Law systems have certain restrictions and limitations to such principle. However, the CISG refrain from adopting the common law approach and follows
more closely the civil law system [Schlechtriem & Schwenzer]. In 1997, the ICC Court of Arbitration ruled in accordance with Art. 53 CISG as to the merits, the Arbitral Tribunal held that the buyer was obliged to pay the price of sale of the goods, when a Rumanian seller and an Italian buyer entered into a contract for the sale of glass commodities [Glass Case]. Further, A Chinese seller and a United States buyer signed three contracts for the sale of handicraft items. The seller performed all its obligations to deliver the goods in accordance with the contract, but the buyer delayed part of the payment for the goods despite repeated reminders from the seller. The seller applied for arbitration and requested the arbitral tribunal to order the buyer to pay the sum owed, with interest, the arbitration fees and other related fee. The Tribunal held that, under Art. 53 and 62 the seller had a right to demand that the buyer pay the sum owed. [CIETAC, 9 Apr 2004].

According to the above-mentioned principles, RESPONDENT is obligated to pay the full amount of the purchase price US$ 22,273,800.

1. The Price for the Fan Blades Must Be Calculated According to Section 4 of the Development and Sales Agreement

Obligations arising from Art. 53 and Art. 62 are primary which have to be fulfilled in the normal performance of the contract. As such, RESPONDENT is obligated to pay the purchase price as agreed upon and cannot claim that it was not aware of the mistake since the method of calculation has been clearly stated in Section 4 DSA. However, RESPONDENT is insisting on applying the exchange rate agreed upon in the Addendum only for the clamps and claiming that the exchange rate is the one applicable for the whole Agreement. Indeed, in the letter sent to Ms. Beinhorn, Mr. Paul Romario, RESPONDENT’s CEO, clearly stated that RESPONDENT wants to enter into “separate” contract for the Clamps, which means that what is agreed upon in the Addendum is only applicable to the Clamps and does not include the fan blades [R., Exh. R2, Pg. 28]. Accordingly, failing to pay the full amount of the purchase price agreed upon in section 4 DSA, RESPONDENT breached its obligation.

Relying on the DSA, CLAIMANT may also claim a defense for unbearable hardship, as it has been agreed by the parties that if the cost for the production of the fan blades were above the maximum price of US$ 13,125 CLAIMANT would bear the risk that the production cost would be above that maximum price, subject to ordinary hardship defense, is a remedy to be used by the party who is to perform the non-monetary obligation. Hardship is defined in Art. 6.2.2 UNIDROIT where it states that “There is hardship where the occurrence of events fundamentally alters the equilibrium
of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished and . . . the events occur or become known to the disadvantaged party after the conclusion of the contract. . . .”.

70 However, in Section 4 DSA, it’s clearly mentioned that “due to extraordinary unforeseeable circumstances and result in unbearable hardship for the seller the parties will enter into good faith negotiations to determine a price which is financially acceptable to both parties” [R., Pg. 10, Exh. C2]. The unbearable hardship is suffered by CLAIMANT when RESPONDENT adopted the fixed exchange rate to calculate the amount per blade. RESPONDENT paid US$ 9,774.28 instead of US$ 10,941.90, triggering a loss of profit to CLAIMANT as its production costs have increased whilst its revenues decrease.

71 The Parties in DSA agreed that delivery was to be made by CLAIMANT and that RESPONDENT would pay the amount agreed upon in Section 3 and 4 DSA [R., Exh. C2, Pg. 10] and the Addendum. The fan blade price would be US$ 22,723,800 considering the current exchange agreed upon between the parties, and a fixed exchange rate in the Addendum for the clamps.

1. The Invoice for the Fan Blades Was Wrong Due to an Obvious Mistake in CLAIMANT’s Accounting Department

72 On 14 January 2015, CLAIMANT successfully delivered the fan blades along with the clamps to RESPONDENT and attached an invoice for both. RESPONDENT accepted the delivery and confirmed that the goods were in conformity with the contract [R., Exh. C3, Pg. 12]. Yet, the issue arose when Mr. Lee, as delegated by Ms. Kwang in CLAIMANT’s accounting department, prepared an invoice for the clamps to be sent to RESPONDENT. Mr Lee did not have knowledge about the whole transaction, thus in calculating the price for the clamps and the fan blades, he relied on a note that had been on top of Ms. Kwang’s binder, suggesting that the fixed exchange rate is to be applied [R., Exh. C4, Pg. 13]. Mr. Lee proceeded with his calculation and sent the invoices, but the invoices sent were incorrect and cannot be relied upon to alter the agreement of the parties in applying the current exchange rate for the fan blades and the fixed exchange rate for the clamps. CLAIMANT is thus entitled to the full amount agreed upon.

73 However, to rectify this mistake, Ms. Beinhorn, CLAIMANT’s COO reached out to Mr. Lindbergh, CFO of RESPONDENT only one day after the delivery (15th of January 2015); the day in which the payment was due, explaining the mistake of the payment calculations. In her email, she pointed out that the basis of the formula agreed upon in the contract was US$ 10,941.90, resulting in
overall price of US$ 22,723,800 [R., Exh. C5, Pg. 14]. Since CLAIMANT was quick to realize and remedy the mistake, RESPONDENT in good faith must rely on such mistake and pay the remaining amount due to CLAIMANT in order to fulfill his contractual obligations.

a. RESPONDENT Demonstrated Its Bad Faith in Taking Advantage of CLAIMANT’s Mistake

As previously mentioned, CLAIMANT’s COO was quick to realize the mistake and sought to clarify it in its email to Mr. Lindbergh. Thus, it is unreasonable that RESPONDENT would alter his motives and deny such mistake and not pay the actual amount due to Claimant. Indeed, on the 15th of January 2015, RESPONDENT took advantage of the mistake and immediately paid the amount invoiced, effecting a payment of US$ 20,438,560 and US$ 183,343.28 to Claimant’s account at the EQB for the fan blades and clamps, respectively [R., Exh. C3, Pg. 12].

There is no reason that RESPONDENT should be allowed to rely on the obvious clerical mistake and take advantage of the lower price for the fan blades. RESPONDENT should have been aware of the clear mistake because the Parties did not agree to use a fixed exchange rate for the fan blades in the DSA but instead, agreed on an actual cost plus profit basis. The calculation formula for the price of the fan blades the blades, using the current exchange rate of the time of production of US$ 1 = EQD 1.79 which amounts to US$ 10,941.90 per blade. Thus, the remaining purchase price for the 2,000 blades amounts to US$ 2,285,240. Notwithstanding the clear error in the price calculation RESPONDENT denied any additional payment, claiming that the fixed exchange rate agreed upon should also be applied for the fan blades [R. Exh. C7, Pg. 16].

Considering the fact that the Addendum incorporated onto the DSA is in full legal force, its provisions are valid and only regulate the purchase of the clamps. Addendums, which are commonly adopted to contracts to cover aspects relating to the main agreement but not exclusively mentioned, are an addition to the rights of the parties established by the underlying Agreement and take their effects upon execution. The Addendum was added to the contract because delivery of fan blades and clamps should be done together [PO.2, Pg. 57, Para. 16]. By no means was it adopted to amend the provisions of the DSA. Since the Addendum was signed on 26 October 2010, it cannot be argued in 2015, that RESPONDENT took it that its provisions pertained to the fan blades, which are already regulated by DSA. Parties in the Addendum agreed upon a fixed exchange rate for the purchase of the clamps only. In an email sent to Ms. Beinhorn, Mr. Romario suggested that an Addendum be added to DSA to regulate the purchase of the clamps using a fixed exchange rate [R., Exh. R2, Pg. 28].
Claimant agreed to and signed the Addendum exactly as he had Verbatim to the clause drafted by him, CLAIMANT agreed and signed the Addendum. The fan blades were by no means a subject in the Addendum as they were regulated by the DSA. Additionally, to ensure the objective of CLAIMANT, it must be noted that at that time the exchange rate was dropping [PO.2, p. 56 para 12]. Thus, CLAIMANT would have never agreed to a fixed exchange rate for the blades. As such, it is irrational to assume that such an intention ever existed and thereby unreasonable for RESPONDENT to make such a mistaken assumption and rely on it.

II. Under Art. 8.1 CISG, RESPONDENT Was Not and Could Not Have Been Unaware of CLAIMANT’s Intent to Apply the Fixed Exchange Rate Only to the Clamps

RESPONDENT alleges that it was unaware of CLAIMANT’s intention to apply the fixed exchange rate only to the clamps [R., Exh. C7, Pg. 17], [R., Exh. R5, Pg. 31]. However, in the present case the intention of the parties must be investigated by using Article 8 CISG.

Such provision systematically sets out criteria by which statements and other conduct of a party need to be interpreted. Such statements and conducts are classified according to the knowledge that the other party has or ought to have. If a party knows or ought to know the intent of the other party, Art. 8(1) is applicable. If that is not the case, the courts will attempt to define such intent using the "reasonable person" test, which is described in Article 8(2) [Zeller]. Moreover, Art. 8(1) cannot be applied if the party who made the statement or engaged in the conduct had no intention on the point in question or if the other party did not know and had no reason to know what that intent was. In determining the intent of a party or the intent a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or conduct even if they appear to give a clear answer to the question. It is common experience that a person may dissimulate or make an error and the process of interpretation set forth in this article is to be used to determine the true content of the communication.

Additionally, the Cáceres Provincial High Court ruled that, in view of the communications exchanged by the parties, it could not be concluded that the buyer “did not know or was unaware of the seller’s intent, given that the latter had expressed the unequivocal intention” [Cáceres High Court, 26 April 2010].

In the case at hand, the actual intention of Claimant can be proven by the statements used in its acceptance to the terms suggested by RESPONDENT’s email to CLAIMANT regarding the Addendum.
[R., Exh. R2, Pg. 28], [R., Exh. R4, Pg. 30]. CLAIMANT’s written statements in its email denotes a clear intention to apply the fixed exchange rate only to the clamps. Thus, RESPONDENT cannot claim that he was unaware of CLAIMANT’s intention.

Furthermore, RESPONDENT is to rely on the unequivocal intention of Claimant which cannot be dismissed nor denied as an expression of the actual intent of Claimant. RESPONDENT thus, has no substantive basis to proceed with his allegation and the ruling provided by the Cáceres Provincial High Court is to be.

III. Under Art. 8.2 CISG and Art. 4.1 UNIDROIT Principles, a Reasonable Person Would Interpret the Fixed Exchange Rate Clause Not to Be Applied to the Price for the Fan Blades

CLAIMANT requests the Tribunal to interpret the fixed exchange rate clause in the Addendum according to the reasonable person standard, provided for in Art. 8.2 CISG and Art. 4.1 UNIDROIT Principles. A reasonable person would interpret the fixed exchange rate clause in the Addendum to be applicable only for the Clamps excluding the fan blades. Indeed, according to both Art. 8.2 of the CISG and Art. 4.1 of the UNIDROIT, the statements and other conduct of a party shall be interpreted in tune with the understanding that a reasonable person of that same kind as the other party would have had in the same circumstances.

UNIDROIT Principles apply an objective test to determine the meaning of the contract itself since such principles fill all the gaps possible in the CISG. The objective test in this part of the law is that the interpretation should be “the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.” The primary standard is the subjective intention of the party whose statement or conduct is in issue, provided that the other party knows or should know of that intent. If that standard cannot be attained, for example, the other party has no reason to know the first party's intent, then the standard is that of the reasonable person in the position of the other party [Joseph].

As mentioned above the most convenient way to agree on the sale of the clamps for both parties was to add an Addendum to the DSA [R., Exh. R4, Pg.30], thus the exchanges rate of the blades was already set forth and agreed upon by both parties even though it was not mentioned in the DSA. In this case, a reasonable person would interpret the fixed exchange rate clause not to be applied to the price for the blades, because the fixed exchange rate was only agreed upon in the
Addendum for the clamps, as agreed between both parties in the meeting at Wright Ltd. \([R., \text{ Exh } R2, \text{ Pg. 28}]\).

**IV. Under Both Art. 8.3 and 9.1 CISG, the Parties’ Intent Is Determined by Their Previous Course of Dealings and Practice**

86 Where **RESPONDENT** is unaware or dismissive of **CLAIMANT** actual intent, the tools in which intent can be revealed are provided for in Art. 8.3 And 9.1, by assessing their previous course of dealings and practice. In light of these articles, statements and conducts of the parties leading up to and including the conclusion of the contract must be taken into account and interpreted accordingly \([\text{CISG-AC Opinion No. 13}]\).

87 Since **CLAIMANT** and **RESPONDENT** are operating in the same field and have a commercial relation, it is reasonable to establish that throughout their cooperation, they have established practices which are binding to them and such practices constitute an actual or presumptive awareness of the Parties \([\text{Hartley, p. 188}]\). Therefore, what is usually practiced, such as the application of a current exchange rate, is common to the Parties and should not stir any controversy for **RESPONDENT**.

88 Firstly, Art. 8.3 CISG states that "in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to practices and usages, among other things". The intent of the reasonable man can be assessed according to the situation of the other party, which refers to both the character, and the factual situation that the person is in \([\text{Tunc}]\). As far as logic, fairness and party autonomy would suffice, the reasonable person or the other party in the same situation would not act as if a conduct never existed nor insisted upon. Fairness, is a necessary constituent which cannot be imagined without good faith \([\text{Van der Velden}]\). In this consideration, unless **RESPONDENT** is willingly acting with a bad intent as a result of withholding his intention and understanding of the applicable exchange rate, it is rational to presume that his good intention rests on the reliance of common practice on usage which is familiar to the parties. Relying on previous usage is a representation of good faith because no intention to the contrary was established by **RESPONDENT**, explicitly or implicitly on any occasion, therefore it is unreasonable to rely on any other method of applying the exchange rate.

89 Secondly, Art. 9.1 CISG states that, “the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.” As such, it is evident that usages and practice between parties have a binding effect on them. Usages, are determined by the
parties [Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL] and the application of exchange rate has always been subject to Parties agreement and what they have been practicing in previous situations in the particular branch of trade. Usages can only be applicable if parties have agreed to them and are seen as part of the contract. Usages unknown to either party can never be applicable under this theory [Bout]. Consequently, RESPONDENT cannot rely on a usage that was never agreed upon in the DSA. On the other hand, practices are established by a course of conduct that creates an expectation that this conduct will be continued. [Farnsworth]. In an ICC Arbitration case, the arbitral panel found that a seller was required to deliver replacement parts promptly because that had become "normal practice" between the parties [Industrial equipment case]. In a like manner, Cour d’Appel de Grenoble ruled that a seller could not invoke the rule in CISG Art. 18 which provides that silence does not amount to acceptance because the parties had established a practice in which the seller filled the buyer’s orders without expressly accepting them [UNCITRAL DIGEST 2016]. Thus, the practices of the parties prevail, as confirmed by Art. 9.1. In another case, a buyer ordered metal powder from a seller, with its place of business in Hong Kong. The general terms and conditions were in German, a language not spoken in Hong Kong. The forms had been used several times before. The Supreme Court decided that the German general terms and conditions were part of the contract, because the use of these terms and conditions had been a practice which the parties had established between themselves, according to Art. 9.1 CISG [Metal Powder Case].

In the case at hand, the Parties have amongst themselves a binding course of conduct. RESPONDENT, established the practice of applying a fixed exchange rate to the clamps by expressly agreeing to it in writing of the Addendum. Similarly, in his agreement to DSA, the practice established by the Parties is applying the current exchange rate for the fan blades. Additionally, in Mr. Romario’s Witness Statement in reference to past practice, he mentioned that “In calculating the price for the fan blades developed under these two contracts the Parties always applied the exchange rate at the time the contract was concluded” [R., Exh. R5, Pg. 21]. This is sufficient proof that the Parties had a practice amongst themselves to apply the current exchange rate for the fan blades. Thus, RESPONDENT is bound to such practice to preserve the relationship between him and CLAIMANT and to serve the principle of party autonomy where the binding power of usages was derived [Bonnel].
91 In light of Art. 9.1 and the cases, practices can be used to determine the parties’ intent and state of awareness. Such practices constitute the actual or presumptive awareness of RESPONDENT since for him to be aware, he must have in particular, had previously had trade or commercial relations between themselves or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract, with the result that it may be regarded as being a consolidated practice. [Hartley]. RESPONDENT cannot dispute that there was a justified expectation to consolidate such practices since Claimant, operating in its currency in a State with considerable exchange rate fluctuation, would disadvantage itself from the possibility of profit gaining where the current exchange rate was applied. Furthermore, CLAIMANT’s calculations of the price for the fan blades correctly apply the current exchange rate during the production time of US$1=1.79 EQD.

92 Moreover, RESPONDENT is attempting to justify his breach of contract by diverging to a practice not common and frequent to the parties which is the application of a fixed exchange rate, dismissing a common practice known to both parties. The application of a fixed exchange rate was enforced as an exception, to regulate the purchase of the clamps. This, it is unreasonable to assume that the same will be applicable to the remainder of the DSA. The usual course of dealing is automatically applicable except where the parties expressly agree, "to exclude their application for the future" [Bonell]. The Parties have not expressed the intention to substitute a usual course of dealing with an exception. Neither RESPONDENT nor his association should take it as ipso facto that such usage is no longer applicable, where no express agreement or intent to the contrary had been made to or by CLAIMANT. “Except for the case [when] a party expressly excludes their application for the future, courses of dealing are automatically applicable” [Farnsworth].

93 Finally, RESPONDENT overlooked the *venire contra factum proprium* principle; that no one may set himself in contradiction to his own previous conduct. By diverging from the practice common to the Parties, Respondent is imposing a practice on CLAIMANT without consent and consequently, breaching Art. 8.3 and 9.1. This is a clear deviation into bad faith which greatly inflicts the contractual relation between the parties. The Tribunal is requested to rely on the usage and practices established between the Parties to determine Respondent’s actual intent.
B. In Any Case, CLAIMANT Would Have Never Agreed Upon a Fixed Exchange Rate for the Full Development and Sales Agreement Since It Is Bearing All the Expenses in EQ Denars

94 Exchange rate movements cannot be predicted and currencies are likely to drop and rise at any time. Therefore, Respondent cannot assume that CLAIMANT signed the Agreement with no intention to agree upon a fixed exchange rate for the full DSA \([R., \text{Exh. C1, Pg. 8}]\). RESPONDENT insisted on pricing in US$, whereas CLAIMANT bears his expenses in EQD. Additionally, apart from the Addendum, DSA contains no clause to regulate a fixed exchange rate to be applied \([R., \text{Exh. C2, Pg. 9}]\) and according to that CLAIMANT never agreed upon a fixed exchange rate for the full DSA.

95 RESPONDENT is aware of the exchange rate fluctuations, since at the time of the conclusion of the DSA, the exchange rate dropped due to an unexpected resignation of the Equatorianian Prime Minister of which the exchange rate went down to US$ 1 = 1.98 EQD \([PO.2, \text{Pg.56, Para 12}]\). With such knowledge, RESPONDENT cannot assume that CLAIMANT intended to apply the fixed exchange rate for the blades.

I. Pursuant to Art. 9.2 CISG, the Parties Are Bound by the Usage in the Trade Sector Concerned

96 Exclusive to cost-plus contracts in the aircraft industry, the agreement constitutes usage which is regulated by domestic law. When referring to trade usages, contract rules do not apply. Instead, trade usages within the meaning of the CISG can be defined as the rules of commerce which are regularly observed by those involved in a particular industry or marketplace \([Andersen]\). However, any applicable practice or usage has the same effect as a contract \([Turku Court of Appeal]\).

97 Under Art. 9.2 CISG, “The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.” Consequently, only those usages that are both known and regularly observed can be binding and that intent can be proven through the necessary knowledge of the trade usage concerned. According to the Oberster
Gerichtshof Supreme Court, trade usages have a role in determining the parties' intention in contracts and takes precedence over conflicting positive provisions of the CISG [Wood Case].

In the aircraft industry there is no fixed usage for cost-plus contracts such as DSA. This usage is known or ought to have been known by RESPONDENT since he is a manufacturer of jet engines. The agreement depends on the bargaining power and which party either has a better opportunity to hedge the risk or is willing to take the risk [PO.2, P. 56, Para 13]. The applicable domestic law will regulate the validity of usages in this regard as the CISG only governs the applicability of these usages [Supreme Court]. As such, if a usage is valid, it prevails over the provisions of the Convention, regardless of whether the usage is governed under Art. 9.1 and 9.2 [UNCITRAL Digest 2012].

Therefore, it is irrational for RESPONDENT to believe that CLAIMANT would agree to fix a fixed exchange rate and deviate completely from the trade sector concerned.

II. In the Aircraft Industry Joint Development Projects with a Certain Degree of Risk Sharing Are Normal

According to the agreed risk-sharing structure of DSA, CLAIMANT had to bear the risk that the production cost would be actually above the maximum price, subject to the ordinary hardship defense [Claimant’s Request for Arbitration, Pg. 4, Para 6]. Yet, in the global aircraft industry, contractual parties adopt a risk-sharing mechanism to ensure that each party is gaining revenue. To them when performing their obligations, in accordance with Section 4 DSA. In the global aircraft industry, the demand for large commercial and regional aircraft entices risk-sharing partnerships is an attempt to reduce investments and, consequently, the dependence on loans. This methodology aims to mitigate the risks associated to products. As a result, the risks are shared between the buyer and the supplier, especially in joint development projects [Baur].

Since the Parties have equal bargaining power and since risk-sharing is a method adopted in the industry of the Parties, it is unreasonable RESPONDENT is attempting to apply a fixed exchange to the entire DSA and consequently to ask CLAIMANT to bear the risk of losing revenues. By fixing the exchange rate, CLAIMANT loses the advantage of a potential gain in revenue if the exchange rate ever increases and alternatively, suffers revenue loss if the exchange rate drops. To ensure revenue, the risk-sharing method must be enforced for Parties to be in a condition financially acceptable to them, in accordance with the DSA. The Tribunal is thus requested to demand RESPONDENT to compensate CLAIMANT for its losses.
C. Alternatively, RESPONDENT Is Obliged to Pay the Outstanding Part of the Purchase Price Under the Contra Proferentem Rule

102 According to the contra proferentem rule, an ambiguous clause must be construed against the draftsman. Since RESPONDENT drafted the Addendum and the Parties have conflicting interpretations on the exchange rate clause, the interpretation provided by CLAIMANT is ought to prevail. As such, RESPONDENT is obligated to pay the outstanding purchase price of US $2,285,240.

I. The Contra Proferentem Rule Establishes That Ambiguities in Contracts Must Be Interpreted Against the Person Who Drafted It

103 There are two elements that must be met to seek the enforcement based on the contra proferentem rule: ambiguity and the necessity for one party drafting the contract. RESPONDENT drafted the Addendum and ambiguity was suffered by CLAIMANT when RESPONDENT sought an alternative interpretation of the Addendum and failed to effect the payment due to CLAIMANT. Since RESPONDENT drafted the Addendum, the clause on the rate exchange must be interpreted in favor of CLAIMANT, as suggested by UNIDROIT Principle 4.6.

104 The contra proferentem rule’s applicability rests on whether or not the parties of a contract have negotiated and/or jointly drafted an ambiguous contractual provision [Leib;Thel, p. 781]. The Parties neither negotiated nor jointly drafted the Addendum. It was added to the DSA, following using the exact wording of RESPONDENT drafted in an email sent to Ms. Beinhorn, COO of CLAIMANT by Mr. Romario, CEO of SantosD KG [R., Exh R2, Pg. 28]. In his email, he proposes the inclusion of an Addendum with a fixed exchange rate regulating the purchase of the clamps, but not the fan blades [R., Exh R2, Pg. 29].

105 Furthermore, the Addendum attached to DSA contains the word “agreement” with a lowercase ‘a’ in referring to the Addendum and “Agreement” with a capital ‘A’ to refer to DSA. Thus, ambiguity is a present factor in this case and in turn the first requirement of the contra proferentem principle has been realized. UNIDROIT Principle 4.5 suggests that “if contract terms supplied by one party are unclear, an interpretation against that party is preferred.” To identify ambiguity correctly, we refer to the interpretation of a contract term.

106 When a contract term is susceptible to more than one reasonable interpretation, it is “ambiguous” [Housing Authority of the County of Santa Clara v. United States]. This conflict between the DSA and the Addendum, whether intended or not, requires a remedy that settles at one reliable
interpretation. And where there are two competing interpretations of an ambiguous contract provision, the *contra proferentem* rules should be applied which requires ambiguities to be construed against the drafter [*Ensley, Inc. v. United States*].

107 The reliable remedy provided by the *contra proferentem* rule is the right of CLAIMANT in good faith. It cannot be disputed that Claimant’s interpretation of the Addendum is reasonable. The Addendum was only signed after CLAIMANT understood from Mr. Romario’s email that the exchange rate provision only pertained to the clamps. It is unconventional to strip the obligations set forth in the DSA, the original agreement, due to RESPONDENT’s discrepancy and non-conformance in his intention to enforce a provision in the Addendum to the entire contract.

108 Consequently, since *contra proferentem* is only triggered upon a legal finding of ambiguity and that the clause is drafted by one Party and an ambiguity has been found, the Addendum must be construed against the RESPONDENT [*Leib;Thel, p. 774*].

**CONCLUSION OF THE THIRD ISSUE**

109 CLAIMANT is entitled to the remaining purchase price for the fan blades based on the current exchange rate, in accordance with Art. 53 and 62 CISG and the intention of the Parties, whereas the Parties did not intend to apply the fixed exchange rate agreed upon in the Addendum to the price for the fan blades but only to the price for the clamps. Indeed, CLAIMANT would have never agreed upon a fixed exchange rate for the full DSA since it is bearing all the expenses in EQD and the exchange rate fluctuation is not in its favour. Therefore, RESPONDENT shall pay the outstanding amount of the purchase price.

**ISSUE 4: CLAIMANT IS ENTITLED TO REIMBURSEMENT OF THE INSPECTION FEES DEDUCTED BY THE CENTRAL BANK**

110 In addition to the non-payment of the full purchase price for the fan blades and the clamps, RESPONDENT dismissed the administrative regulations in force in Equatoriana relating to the ML investigation to be undertaken by the EQB for payments above US$ 2,000,000, and is therefore obligated to reimburse CLAIMANT the amount of the inspection fees deducted. This obligation derives not only from CISG and UNIDROIT Principles (A), but also from the DSA where the Parties agreed that all the bank charges must be borne by Respondent (B).
A. RESPONDENT Is Obliged to the Additional Payment of US$ 102,192.80 According to the CISG and UNIDROIT Principles

111 Once CLAIMANT informed RESPONDENT that the full amount was not received at the time of transfer [R., Exh. C6, Pg.15], RESPONDENT claimed that he did not know why there was an amount deducted from the full price paid by the EQB [R., Exh. C7, Pg.16]. On that same day, directly after the email from RESPONDENT [R., PO.2, Pg.56, 11], CLAIMANT approached the EQB and it received a communication from the EQB [R., Exh. C8, Pg.17] stating that RESPONDENT has transferred the full amount of US$ 20,438,560 and that the bank’s Financial Investigation Unit investigated the payment in regard to money laundering because the amount exceeded US$ 2 million, resulting in a deduction of a 0.5% inspection fee from the full transferred amount by the bank subject to Section 5 of Regulation ML/2010C.

112 RESPONDENT stated that the 0.5% inspection fee must be borne by CLAIMANT. Yet, Section 4.3 DSA specifically states that “The buyer will deposit the purchase price in full to the Seller’s account at the EQB. The bank charges for the transfer of the amount are to be borne by the Buyer” [R., Exh.C2, Pg.10]. This is a clear obligation on RESPONDENT to bear the charges for the transfer of the money. RESPONDENT, upon signing the DSA, was fully aware about his obligations, thus he cannot contest the merit of the request since he agreed on such payment. Consequently, CLAIMANT has the right to receive the reimbursement of the inspection fees deducted by the bank.

I. Art. 54 CISG and Art. 6.1.11 UNIDROIT Principles Establishes that RESPONDENT Must Take the Proper Steps to Enable the Payment of the Price

113 RESPONDENT did not meet his obligation in paying the bank charges required for transferring the purchase price to CLAIMANT, even after he has been contacted twice by CLAIMANT’s accounting department requesting him to do [Exh., C5, Pg. 14, Exh. C6, Pg. 15]. RESPONDENT’s conduct breached Art. 54 CISG which obligates the buyer to take the proper steps to enable the payment to the Seller.

114 Art. 54 CISG states that “the buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made”. “The article provides that the buyer should take the steps which were required under the contract, and by the laws and regulations in force or with usage, in order to enable the price to be paid, these steps to enable payment clearly falls within the buyer’s control; thus failure to comply with them would be buyer’s sole responsibility, and would
constitute a fundamental breach.” [González]. This includes any costs associated any administrative regulations. In this regard, “the buyer's obligation to pay includes all of the measures agreed upon in the contract to enable payment to be made, such as the duties to provide a letter of credit and to comply with relevant (domestic) laws, in particular currency-exchange regulations. The parties may specify the currency in which the payment is to be made” [Peter]. Moreover, “Art. 54 has no counterpart in the provincial Acts, but it is a sensible and obvious provision in an international context and should find ready acceptance [Ziegel and Samson]. Furthermore, the obligation to take steps and comply with formalities required to enable payment to be made is in all respects comparable to the obligation to pay the price [UNCITRAL Digest 2016].

115 Additionally, Art. 6.1.11 stipulates that, “each party shall bear the costs of performance of its obligations”. Such costs include bank commission in making a monetary transfer. The article applies where the parties have already agreed on such obligation in the contract. In Mr. Lindbergh’s email to Ms. Beinhorn, he denied any additional payment, stating that he was not aware of the reason for the deduction of US$ 102,192.80 from the amount transferred for the purpose of investigation for the money laundering [R., Exh. C7, Pg.16]. Nevertheless, under Art. 54 RESPONDENT is obliged to take the proper steps and comply with the formalities set out in DSA, laws and regulations, in order to enable the payment. RESPONDENT, claimed that the ML is to be borne by Claimant since “No comparable rule exists in Mediterraneo or any other country known to RESPONDENT” [Answer to Request for Arbitration, Pg. 26 Para 18]. Yet, contrary to RESPONDENT’s claim, Art. 54 establishes the buyer’s obligation to follow and implement the required steps of the payment even under domestic laws and regulations. Moreover, the buyer must take all the proper steps required to enable the payment as well as the Administrative requirements which are those where the buyer must comply with something ordered in a statute, or with a governmental or administrative ordinance, such as applying for authorization to purchase foreign currency or transfer funds abroad. The type of obligation will have an effect on the degree of severity on the assumption of the buyer’s contractual obligation.

116 Different from what occurs in a commercial setting, obtaining an administrative authorization is not completely within the buyer’s control. It is well known that government authorities in some states act with a greater degree of discretion than others, and often times refuse to grant or issue a license, such as an authorization to purchase foreign currency or to transfer funds abroad Still,
the buyer must make his best reasonable effort to pursue compliance with the legal requirements full heartedly. As such the buyer is obligated to take all appropriate measures to persuade the relevant government authorities to make the funds available and cannot rely on a refusal by those authorities unless he has taken such measures [González].

117 As such, the Cantonal Court of the Canton of Valais, on several occasions, ruled in favour of the national law applicable by virtue of the rules of private international law, which led it to apply the domestic law governing the contract of sale on matters not covered by the Vienna Convention [CLOUT Case 1980].

118 By applying the aforementioned principle to the case at hand, RESPONDENT is obliged to pay the remaining amount, including all formalities subject to any laws and regulations to enable payment to be made, as agreed upon in DSA. RESPONDENT breached its obligations under DSA and Art. 54 CISG by failing to pay the inspection fee necessary for the price transfer.

II. Claimant Fulfilled Its Obligation Under Art. 35.2 CISG, thus Respondent Is Obliged to the Payment of the Inspection Fees

119 Except where the parties have agreed otherwise, Art. 35.2 CISG sets out the criteria for assessing the conformity of the goods with the contract in terms of type, quantity, quality, and packaging. Upon successful delivery and inspection of the goods by RESPONDENT, CLAIMANT satisfied its obligations in delivering the goods in conformity with the contract. This has been confirmed by an email sent by Mr. Lindbergh to Ms. Beinhorn [R., Exh. C3, Pg. 12]. Furthermore, the majority of court decisions and arbitral awards resort to Art. 35.2 where the Seller fails to deliver goods in appropriate conditions, yet in this case, CLAIMANT is in absolute conformity. The concept of conformity encompasses the respect of public law regulations and since Respondent did not raise any claims for lack of conformity at the time of the delivery, the Tribunal should not dismiss Claimant’s request for the reimbursement of the inspection fees since no breach of obligations has been made by Claimant. In any case, if Claimant did not fulfill its obligations to provide information on the laws and regulations enforced in Equatoriana, Respondent has the burden to prove such breach [Joonas].

120 In a case by a Chinese seller and a United States buyer, the Parties signed a contract for the sale of wigs. The buyer, after the goods have been delivered did not pay the Seller. The Seller, after initiating arbitration, ordered the China International Economic & Trade Arbitration Commission (CIETAC) to order the buyer to pay the sum for the goods. The Tribunal held that under Art.
54, the buyer did not have due reasons to refuse to pay and that this was a breach of contract for which the buyer should bear. [CIETAC 3 Dec 2003]. In light of the past ruling on Art. 54, the buyer must pay the seller the full sum including interest. Thus, the Tribunal is requested to oblige RESPONDENT to the payment of the fees in full.

B. Section 4.3 Development and Sales Agreement Clearly Required RESPONDENT to Pay the Bank Charges for the Transfer of the Price Which Encompasses the Inspection Fees

121 The Parties in DSA agreed that “the Buyer will deposit the purchase price in full into the Seller’s account at the EQB. The bank charges for the transfer of the amount are to be borne by the Buyer” [R., Exh. C2, Pg. 10, Para. 4.3]. The binding force of the contracts dictates and requires all contract parties to perform their obligations. This was agreed upon by both parties in DSA under a clear provision and by not performing his obligations, RESPONDENT breached the contract.

I. CLAIMANT Was Not Obliged to Inform RESPONDENT on Its National Legislation on Money Laundering

122 The Parties agreed that all the bank charges for the transfer of the amount are to be borne by RESPONDENT, without making any distinction between ordinary or extraordinary bank charges as alleged by Respondent in its answer to the request for arbitration [R., Para. 18, Pg. 26]. Indeed, the bank charges include the inspection fee, and any amount deducted by the bank for allowing RESPONDENT’s transfer to CLAIMANT’s account. As the buyer, RESPONDENT is obligated to be aware of the banking laws and regulations [Gonzalez].

123 Furthermore, the inspection fee for ML was adopted in 2010 after considerable coverage in December 2009 that the government was implementing extensive legislation based on the UN-Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime [R., PO.2, p. 55 para 7]. Thus, RESPONDENT was under the obligation to discover the money laundering regulation on his own as it is a regulation under the scope of its obligations under bank charges and not of CLAIMANT’s [Exh. C2, Pg. 10]. Thus, RESPONDENT should have been aware that an amount exceeding two million is subject to money laundering inspection fees. RESPONDENT cannot claim that the inspection fee be borne by CLAIMANT even if its domestic regulations on the matter differ from that of RESPONDENT. In Art. 35 CISG, the Seller’s obligations are outlined and under such provision there is no obligation for CLAIMANT to inform Respondent of the inspection fee.
As the buyer, RESPONDENT cannot expect that that the regulations of the seller's country be the same as its own country. In the Mussels case, an issue arose between the difference of the seller and buyer's place of business in regards to mussels and differing health regulations [Mussels Case]. The issue was on whether the public law regulations of the seller's place of business or the buyer's place of business prevailed. The Bundesgerichtshof, German Supreme Court decided for the seller's place of business since Article 35.2 “did not, on the facts of this case, require the seller to deliver goods that complied with the "specialized" public regulations of the buyer's jurisdiction.” Contrary to the buyer’s claims, the Court stated that the seller should not be held responsible for ascertaining the relevant public law standards when those standards are different from those in the seller’s place of business [Joonas]. In the court’s reasoning, the seller cannot normally be expected to be familiar with the buyer’s country requirements and, thus, should not be liable for failure to meet those standards [Fletchner], however it must be noted that public law regulations affect the conformity of goods and Bundesgerichts of held that the buyer ordinarily has the burden of proving the lack of conformity [Whittington]. Since Respondent accepted the goods and declared their conformity [R., Exh. C3, Pg. 12], he may not claim that Claimant is obligated to inform him on its public law regulations regarding money laundry. Furthermore, in light of the reasoning by the highest German court with jurisdiction in CISG, CLAIMANT is under no obligation to inform RESPONDENT on public law regulations as claimed by him on his Answer to Statement of Claim.

II. Previous Practices Followed by CLAIMANT in Its Relationships with Third Parties Cannot Overrule the Explicit Language of the Development and Sales Agreement

It is recognized that past practices between the parties is used to modify, amend or even contradict a clear and unambiguous provision of the contract [Richard Mittenthal]. The DSA clearly indicates that the bank charges are to be borne by RESPONDENT. Thus, past practice of CLAIMANT in bearing bank charges cannot change, contradict or amend the clear provisions in DSA according to ‘the majority of arbitrators that have found that past practice cannot modify, amend or contradict the contract’ [Richard Mittenthal]. This principle does not apply where the parties explicitly agreed upon a certain and clear provision. Therefore, past practice can only be used where there is a vague and an ambiguous provision and cannot be applied to overrule the DSA.

As previously articulated in the Request for Arbitration, both parties were subsidiaries of Engineering International SA where in their past dealings they used the same comparable
provisions where an agreement was made upon a formula fulfilling three objectives, which started with ensuring RESPONDENT would basically not pay more than US$ 13,125 per blade, and that CLAIMANT would at least cover its costs as low as possible and make and increase in profits [R., Pg. 7, Para 21]. The intention of both parties was to agree upon certain provisions for the settlement of the payment, where no party would be left in disadvantage.

127 RESPONDENT is requesting that claimant pays the bank inspection fee charge since it had done so in its earlier cooperation with JumboFly. However, it must be noted that the previous dealing was favorable for Claimant, which made him gain 8% of profit. Thus, Claimant bore the charges where no provisions were agreed upon stating which party would bear the bank charges [R., PO.2, Pg.55, Para.9]. However, in the DSA, “the bank charges for the transfer of the amount are to be borne by the buyer” [R., Pg.10, Section 4, Para.3]. The past conduct proves why no past dealings of Claimant with third parties can be applied to the current dealing with RESPONDENT.

CONCLUSION OF THE FOURTH ISSUE

128 CLAIMANT is entitled to the reimbursement of the inspection fees deducted by the Central Bank because CLAIMANT fulfilled its obligations by delivering the goods to RESPONDENT under Art. 35.2 of the CISG, thus RESPONDENT must take proper steps to enable payment of the price under Art. 54 of the CISG and Art. 6.1.11 of the UNIDROIT and consequently fulfilled its obligations. Moreover, since the Parties agreed in Section 4.3 of the DSA that RESPONDENT would bear the bank charges, CLAIMANT cannot dismiss its obligations.

REQUEST FOR RELIEF

In response to the Tribunal’s Procedural Orders, Counsel makes the above submissions on behalf of Claimant. For the reasons stated in this Memorandum, Counsel respectfully requests the Arbitral Tribunal to find that:

- The Arbitral Tribunal Should not order CLAIMANT to provide security for Respondent’s costs [Issue 1].
- CLAIMANT submitted the request for arbitration on time, therefore its claims are admissible [Issue 2].
- CLAIMANT is entitled to the residual price for the fan blades based on the current exchange rate [Issue 3].
- CLAIMANT is entitled to the reimbursement of the inspection fees deducted by the Equatoriana Central bank [Issue 4].
CERTIFICATE

Riffa - Kingdom Of Bahrain, 08 December 2016

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

(signed)  (signed)
Sara Jassim Abdulla  Fatema Ahmed Alaraij

(signed)  (signed)
Noor Sami Alalawi  Isra Abdulkarim Alaradi

(signed)  (signed)
Haya Zaal Albuflasa  Fatema Fadhel Almedaifa

(signed)  (signed)
Reem Hassan El-Asaad  Nayla Mohamed Ramadhan

(signed)
Amina Abduljabbar Saleh